No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, IN HER OFFICIAL CAPACITY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF MEMBERS OF CONGRESS AND THE COMMITTEE TO PROTECT AMERICA'S BORDER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

Amici, United States Members of Congress Brian Bilbray, Trent Franks, Senator John Barrasso, Senator Jim DeMint, Senator James Inhofe, Senator David Vitter, Rodney Alexander, Michele Bachmann, Roscoe Bartlett, Rob Bishop, Kevin Brady, Mo Brooks, Paul Broun, Dan Burton, Ken Calvert, John Campbell, John Culberson, John Duncan, John Fleming, Randy Forbes, Virginia Foxx, Scott Garrett, Phil Gingrey, Louie Gohmert, Tom Graves, Ralph Hall, Wally Herger, Lynn Jenkins, Walter Jones, Jim Jordan, Mike Kelly, Steve King, Adam Kinzinger, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Jerry Lewis, Cynthia Lummis, Don Manzullo, Michael McCaul, Tom McClintock, Thaddeus McCotter, Gary Miller, Jeff Miller, Tim Murphy, Sue Myrick, Alan Nunnelee, Joe Pitts, Ted Poe, Mike Pompeo, Bill Posey, Phil Roe, Dana Rohrabacher, Ed Royce, Jean Schmidt, Bill Shuster, and Lamar Smith are

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* Petitioner, the State of Arizona, has filed with the Court its written consent to the filing of all briefs amicus curiae in this case. Respondent, the United States, has consented to the filing of this brief and a copy of the consent letter is filed herewith. Attorneys for the Parties were notified ten days prior to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ and IRLI, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. Neither the ACLJ nor the IRLI has a parent corporation, and no publicly held company owns 10% or more of either organization's stock.

currently serving in the One Hundred Twelfth Congress.

Amicus, Committee to Protect America's Border, consists of 57,521 Americans nationwide.

Amici are committed to the constitutional principles of federalism and separation of powers, both of which are jeopardized by the Administration's attack on Arizona's immigration law, S.B. 1070.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Administration's preemption challenge presents a profoundly important question of federal law and implicates fundamental principles of federalism and separation of powers.

First, this case reveals a clash between the Administration and Congressionally-enacted laws over the states' role in immigration law enforcement. For the past quarter century, Congress has welcomed, and in fact highly depends on, state and local assistance in enforcing federal immigration laws. National immigration policy, as codified in Congressional Acts, provides for concurrent federal/state authority to enforce federal immigration laws. Many states across the country are enacting laws like Arizona's S.B. 1070. In keeping with Congress's intent, most of these state laws, including S.B. 1070, mirror federal immigration provisions and incorporate federal standards. The legitimacy of state efforts to promote national policy as embodied in federal statutes is an important issue that requires this Court's resolution.

Second, the Ninth Circuit's decision undermines federalist and separation of powers principles by permitting the Administration's policy preferences to trump Congress's statutory acknowledgement that states have inherent authority to enforce laws that profoundly affect their citizens' welfare. The Ninth Circuit's decision effectively leaves the states powerless over unchecked illegal immigration and the associated social and economic costs that their citizens must bear.

Finally, this Court should grant certiorari because the Ninth Circuit's decision conflicts with this Court's decision in *Chamber of Commerce v. Whiting*, that a state immigration enforcement law which, like S.B. 1070, incorporated federal standards, did not impede federal objectives, and therefore was not preempted. 131 S.Ct. 1968, 1987 (2011).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT INCORRECTLY READ CONGRESS'S INTENT AND SUBORDINATED THAT INTENT TO THE ADMINISTRATION'S POLICY OBJECTIVES.

This Court should grant certiorari to resolve a significant conflict between the Executive and Legislative branches of the federal government over the states' role in immigration enforcement. The Administration's primary grievance is that S.B. 1070 independently and impermissibly enforces federal immigration provisions. The court of appeals purported to apply the cardinal rule that Congress's

intent is the touchstone of preemption analysis but then distorted the plain language of federal statutes and gave undue weight to the Administration's asserted enforcement "discretion" and "priorities," many of which conflicted with federal statutes. *United States v. Arizona*, 641 F.3d 339, 351-52, 365 (9th Cir. 2011). The result was a decision that is at odds with Congress's intent.

Congress has passed numerous laws demonstrating its intent that states exercise their inherent authority to concurrently enforce federal immigration laws. Congress has manifested its intent not to preempt state cooperation by (1) expressly reserving with the states their inherent authority in immigration law enforcement (8 U.S.C. § 1357(g)(10) (2006)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§ 1373(a)-(b), 1644 (2006)), (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) prohibiting Federal, State and local government agencies and officials from restricting state and local officers in making those inquiries (8 U.S.C. § 1373(a)-(b), (5) simplifying the process for making such inquiries (Law Enforcement Support Center ("LESC")), (6) deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1)), and (7) compensating states that assist (8 U.S.C. § 1103(a)(11) (2006)).

To ensure cooperation by federal officials, Congress *required* immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual . . . ." 8 U.S.C. § 1373(c). Congress did

not establish a hierarchy of inquiries according to national security considerations. Instead, 8 U.S.C. § 1373(c) requires LESC staff to answer all inquiries about immigration status. If the Administration thinks Congress should establish priorities for LESC inquiries, it can ask Congress to do so. The Administration does not have the authority to do so itself and then claim that exercising that authority preempts state laws. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (agency cannot pursue its own priorities in defiance of statutory commands); *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 717 (1985) (Ascribing preemptive force to administrative decision-making absent Congressional authorization "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence").

The Ninth Circuit's reading of §1357(g)(10) essentially eviscerates that subsection's meaning. The court collapses subsection (g)(10) into the preceding subsections (g)(1) through (9), conferring upon the Attorney General authority to exercise a sort of (logistically impossible) hyper control over all state participation in federal immigration law enforcement. This was not Congress's intent, as evidenced by the following language: "*Nothing* in [§1357(g)] shall be construed to require an agreement . . . to communicate with the Attorney General regarding the immigration status of any individual" 8 U.S.C. § 1357(g)(10) (emphasis added).

By ignoring the clear import of §§ 1357(g)(10) and 1373(c), the panel's decision converts Congress's command to U.S. Immigration and Customs

Enforcement to provide state and local authorities with information about an alien's status at the state and local authorities' request into a "[d]on't call us, we'll call you" relationship. 641 F.3d at 377 (Bea, J., dissenting).

Because the Administration's preemption claims reveal fundamental incompatibility between Congress's will and the Administration's policy goals about the states' role in immigration law enforcement, the Administration's claims must be scrutinized with great caution. *See Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637-38 (1952). *Youngstown* established that where the Executive asserts a claim of authority (here, preemption authority) that is

> incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive *must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added) (footnote omitted). *See also Medellin v. Texas*, 552 U.S. 491, 524 (2008)

(Justice Jackson's concurrence in *Youngstown* sets forth the "accepted framework" for evaluating claims of presidential power); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (noting that if the case had presented a conflict between federal law and presidential foreign policy objectives, *Youngstown* would control). Simply stated, "[i]t is Congress – not the [Executive Branch]– that has the power to preempt otherwise valid state laws, and there is no language in the relevant statute[s] that either preempts . . . or delegates to the [Executive Branch] the power to pre-empt such state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990).

Because Presidential policy in this case conflicts with Acts of Congress, *Youngstown* supports the grant of certiorari to reverse the court of appeal's holding that the Administration's enforcement priorities are of equal or greater significance than Congress's intent in resolving the preemption issues in this case. As the dissent below observed, the Administration's prosecutorial discretion and foreign policy objectives have no preemptive force in this case. *United States v. Arizona*, 641 F.3d at 377, 382 (Bea, J., dissenting).

II. FEDERALISM PRINCIPLES SHOULD BE PARAMOUNT IN ANALYZING PREEMPTION CHALLENGES TO STATE LAWS THAT DO NO MORE THAN ENFORCE FEDERAL IMMIGRATION STANDARDS.

This Court recognized in *Plyler v. Doe* that "unchecked unlawful migration might impair the

State's economy generally, or the State's ability to provide some important service." 457 U.S. 202, 228 n.23 (1982). Thus, the states are not "without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Id.* at 229 n. 23. In the realm of illegal immigration control, preempting state laws that mirror federal standards but provide slightly different enforcement mechanisms eviscerates the states' ability to "make choices that are responsive to their residents' desires, to experiment, and to advance liberty and freedom within their boundaries." Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1326 (2004) ("[A] broad vision of inferred preemption invalidates beneficial state laws."). *See also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 697 (1991); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007).

The Constitution is structured so that "[s]tates possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases

> opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987)) (other citations omitted). The Founders established the federalist system so that states could "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011).

Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, confers "a decided advantage" to the federal government, the power to preempt state laws is "*an extraordinary power* . . . [that the Court] *assume[s] Congress does not exercise lightly*." *Gregory*, 501 U.S. at 460 (emphasis added). And, when the preemption claimed is one of implied conflict, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act." *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1055 (2011) (quotations omitted). Thus, "the true test of federalist principle[s]" comes in preemption cases. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

The states bear the overwhelming brunt of the social and economic costs resulting from unchecked illegal immigration. Although most tax revenues generated by illegal immigrants flow to the federal government, almost all the costs, including those borne by locally funded social services and those caused by illegal immigrant crime, accrue to the states. Schuck, *Taking Immigration Federalism Seriously*, *supra*, at 80. Of the net national illegal immigration cost of almost $100 billion, the federal government bears only $19.3 billion while state and local governments bear a net loss of $79.2 billion spent in services and benefits provided to illegal aliens. Jack Martin & Eric A. Ruark, Fed'n for Am. Immigration Reform, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* 79 (July 2010) [hereinafter *FAIR: The Fiscal Burden of Illegal Immigration*], *available at* http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

A 2007 report by United States/Mexico Border Counties Coalition and the University of Arizona showed that law enforcement activity involving illegal immigrants in four states (California, Arizona, New Mexico, and Texas) cost some 24 county governments on the border a combined total of $192 million in 2006 alone. University of Arizona and the U.S./Mexico Border Counties Coalition, *Undocumented Immigrants in U.S.-Mexico Border Counties: The costs of law enforcement and criminal justice services*, 1 (Sept. 2007) *available at* http://www.bordercounties.org/vertical/Sites/%7BB4A0F1FF-7823-4C95-8D7A-

F5E400063C73%7D/uploads/%7B690801CA-CEE6-413C-AC8B-A00DA765D96E%7D.PDF. The counties spent a cumulative $1.23 billion on "services to process criminal undocumented immigrants" from 1999 to 2006. *Id.*

Furthermore, the border states of California, Arizona, New Mexico, and Texas spend approximately $5.3 billion a year in uncompensated "medical services provided to illegal aliens and their U.S.-born children." *FAIR: The Fiscal Burden of Illegal Immigration*, at 55-63. Overall, the four border states spend $33.8 billion annually in government benefits for illegal aliens, while only receiving tax revenues of approximately $1.86 billion from these aliens. *Id.* at 77-78. This results in a net fiscal loss to the border states of over $31.9 billion annually due to illegal immigration. *Id.* Illegal immigrant households receive approximately $18 in government benefits for every dollar in taxes paid. *Id.*

The Office of Immigration Statistics estimated that in 2009, 460,000 illegal aliens resided in Arizona. Arizona State University, The Morrison Institute for Public Policy, *Illegal Immigration: Perceptions and Realities* 2 (2010), *available at* http://morrisoninstitute.asu.edu/publications-reports/2010-illegal-immigration-perceptions-and-realities1. In a 2004 study, the Federation for American Immigration Reform estimated that Arizona's illegal immigrant population was costing the state's taxpayers approximately $1.3 billion per year in education, medical care, and incarceration alone, or approximately $700 annually per Arizona taxpaying

household. Fed'n for Am. Immigration Reform, *The Costs of Illegal Immigration to Arizonans: Executive Summary* 1 (2004) [hereinafter *FAIR: The Cost of Illegal Immigration*], *available at* http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101. More recent figures by FAIR in 2010 suggest that the annual cost of illegal immigration in Arizona has risen to over $2.4 billion annually. *FAIR: The Fiscal Burden of Illegal Immigration*, at 78. This cost includes $1.6 billion for education costs and $320.3 million in health care services for illegal alien children. It also includes $340 million in law enforcement and court costs. *Id.* at 50, 64.

In addition to these and other quantifiable costs, Arizona also incurs a number of non-quantifiable costs that include: preventing and enforcing crimes committed by illegal aliens; providing an array of services in Spanish interpretation and translation, especially in the health care, law enforcement, and judicial systems; tuition subsidies to illegal immigrants who enroll in Arizona's higher education institutions; increased insurance rates associated with illegal immigration-related crimes; and lost earnings by U.S. citizens or legal residents. *FAIR: The Costs of Illegal Immigration*, at 4.

As of January 2011, while 6% of Arizona's population was illegal aliens, criminal aliens comprised 14.2% of the inmate population of the Arizona Department of Corrections facilities. Charles L. Ryan, Arizona Dep't of Corr., *Corrections at a Glance* (Jan. 2011), *available at* http://www.azcorrections.gov/adc/reports/CAG/CAGJan11.pdf; Pew Hispanic Ctr., *Unauthorized*

Immigrant Population: National and State Trends (Feb. 1, 2011), *available at* http://pewhispanic.org/files/reports/133.pdf.

In 2005, a Government Accountability Office study showed that most arrests of illegal aliens occurred in Arizona, California, and Texas, the three largest border states. *Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest*, FoxNews.com, http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests/ (last visited Sept. 7, 2011). Sampling a prison population of more than 55,000 illegal immigrants, the study found that 80% of the arrests occurred in those three states. *Id. See also* U.S. Gov't Accountability Office, *GAO-05-646R, Information on Certain Illegal Aliens Arrested in the United States* (2005), *available at* http://www.gao.gov/htext/d05646r.html (stating that Arizona was responsible for 8% of these arrests).

In Arizona's Maricopa County, although illegal aliens comprise only 10% of Maricopa County's adult population, the County Attorney's Office has found that illegal aliens committed 22% of all felonies in the county. Steven A. Camarota, Center for Immigration Studies, *Center for Immigration Studies on the New Arizona Immigration Law, SB1070* (Apr. 2010), http://www.cis.org/announcement/AZ-immigration-SB1070.

State sovereignty is most undermined when the states are left to "the mercy of the Federal Government," and deprived of "their opportunities to experiment and serve as 'laboratories.'" *Garcia* v. *San*

Antonio Metro. Transit Auth., 469 U.S. 528, 567 n.13 (1985) (Powell, J., dissenting). The Ninth Circuit's decision treads upon federalism by stripping the states of all sovereignty over problems that Congress and our federalist system have committed to the states. Senate Bill 1070 mirrors federal immigration provisions and in no way interferes with any Congressionally ordained federal objective. Senate Bill 1070 should not be preempted.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CHAMBER OF COMMERCE v. WHITING.*

The Ninth Circuit's decision holding that Sections 2B, 3, 5C, and 6 of S.B. 1070 are preempted conflicts with this Court's decision in *Chamber of Commerce v. Whiting,* 131 S. Ct. 1968 (2011). In *Whiting*, this Court rejected the assumption – an assumption which pervades the Ninth Circuit's analysis – that state immigration laws that trace federal provisions can still be impliedly preempted even though statutory language supports non-preemption. Where "Congress specifically preserved [enforcement] authority for the States, it stands to reason that Congress did not intend to prevent the States from using the appropriate tools to exercise that authority." *Id.* at 1971. Because in *Whiting* Arizona incorporated federal standards into its law revoking the licenses of businesses that knowingly hire illegal aliens, the Court held that "there can by definition be no conflict between state and federal law . . . ." *Id.* at 1981.

Each provision of S.B. 1070 mirrors federal immigration provisions and incorporates federal standards. To hold, as the Ninth Circuit did, that Sections 2B, 3, 5C, and 6 conflict with Congress's intent without any support from statutory language is to "undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting*, 131 St. Ct. at 1985 (quoting *Gade* v. *Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)). Untethered as it is from controlling statutory text, the Ninth Circuit's "free-wheeling judicial inquiry" into whether S.B. 1070 is "in tension with federal objectives" cannot stand. *Id.* at 1985.

Equally significant is this Court's holding in *Whiting* that where Congress has carved out a role for the states in immigration enforcement, preemption cases involving uniquely federal areas of regulation are inapposite. Specifically, the very cases the Ninth Circuit relied on, such as *American Insurance Association v. Garamendi*, 539 U.S. at 401, 405-06 (2003), *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-74 (2000), and *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001), were not relevant because in those cases, the "state actions . . . directly interfered with the operation of a federal program." 131 S. Ct. at 1972. Arizona's licensing law in *Whiting* did not interfere with the federal laws banning the employment of illegal aliens because those federal laws operated "unimpeded by the state law." *Id.* at 1984. Similarly, S.B. 1070 impedes no federal law precisely because Congress left the states' enforcement authority

undisturbed and because S.B. 1070 incorporates all key federal definitions and standards.[1]

Finally, with respect to Section 5 of S.B. 1070, the Ninth Circuit's decision conflicts with this Court's decisions in both *Whiting* and *De Canas v. Bica,* 424 U.S. 351 (1976) because the Ninth Circuit implied preemption where Congress was silent. The Ninth Circuit stated that "Congress' inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work." *Arizona*, 641 F.3d at 359. However, both *Whiting* and *De Canas* rejected that line of reasoning. Noting that statutory text "contain[ed] no language circumscribing state action," the *Whiting* Court repudiated the argument that Congress's choice to make E-Verify voluntary and prohibit the Secretary of DHS from mandating its use meant that Congress intended to preempt States from mandating E-Verify. 131 S. Ct. at 1972, 1985-86. Similarly, the *De Canas* Court dismissed the contention that a California state law criminalizing the employment of illegal aliens was impliedly preempted by a federal

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[1] Comparing Section 2B's text of with the Ninth Circuit's analysis demonstrates the extent to which the Ninth Circuit ignored governing preemption standards. Section 2B merely requires an officer to verify a detained individual's status with the federal government if the officer has a reasonable suspicion that the subject is an unlawfully present alien. Courts of appeal have consistently recognized the legitimacy of this state authority. *See* Cert. Pet. 25-28.

statute banning the harboring of illegal aliens but excluding "employment" from the definition of harboring. 424 U.S. at 360-61.

Whiting undercuts a significant portion of the Ninth Circuit's preemption analysis and, at a minimum, requires that the Ninth Circuit's decision be vacated and the case remanded to be reconsidered in light of *Whiting*. *See City of Hazleton v. Lozano*, 180 L. Ed. 2d 243 (2011).

CONCLUSION

Amici respectfully request this Court to grant the Petition for Writ of Certiorari.

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