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 Individual Capacity,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief with the consent of the parties. Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures

[1] This *amicus* brief is filed with written consent of all parties; the written letters of consent from petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. Finally, the members of Eagle Forum's Arizona chapter face elevated exposure to criminal activity and bear heavy economic burdens that the challenged Arizona law seeks to redress. For these reasons, Eagle Forum has a direct and vital interest in the issues presented here.

STATEMENT OF THE CASE

This section outlines the legal and factual background of this federal challenge to Arizona's exercise of its police power to defend its citizens from the public-safety and economic impacts of the federal government's failure to control illegal immigration.

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Courts rely on two presumptions to assess preemption claims. First, the analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of

statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Congress has plenary power to regulate immigration. U.S. CONST. art. I, §8, cl. 4. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration").

For its part, the Executive Branch has the duty to take care that the laws are faithfully executed. U.S. CONST. art. II, §3. Except where Congress has delegated rulemaking authority to the Executive Branch, "All legislative Powers [are vested] in [the] Congress." U.S. CONST. art. I, §1.

Statutory Background

This litigation involves the interplay between four discrete sections of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, enacted on April 23, 2010, and clarified and amended a week later by 2010 Ariz. Sess. Laws ch. 211 (collectively, hereinafter, "S.B. 1070"), and the federal Immigration and Naturalization Act ("INA").

In addition to setting federal immigration policies, INA includes various roles for state and

local immigration enforcement. *See, e.g.,* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements either to communicate with the federal government about immigration status or "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §§1373, 1644.

The Immigration Reform & Control Act of 1986 ("IRCA") amended the INA to provide federal civil and criminal procedures and sanctions for employing or recruiting "unauthorized aliens" and expressly preempts state and local employer-based sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Its legislative history states that:

> [IRCA was] not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation … [or] licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

S.B. 1070 §2(B) requires "a reasonable attempt …, when practicable, to determine the immigration status" in "any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." ARIZ. REV. STAT. §11-1051(B). In addition to providing for "verif[ication] with the federal government pursuant to 8 [U.S.C. §]1373(c)," *id.*, the "section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." *Id.* §11-1051(L).

S.B. 1070 §6 permissively authorizes Arizona law enforcement officers to make warrantless arrests of persons whom the officers have probable cause to believe are removable from the United States by reason of having committed a crime. ARIZ. REV. STAT. §13-3883(A)(5).

S.B. 1070 §3 penalizes an alien's "[w]illful failure to complete or carry an alien registration document," "in violation of [8 U.S.C. §§]1304(e) or 1306(a)." ARIZ. REV. STAT. §13-1509. The maximum penalties are within the penalties provided by federal law.

S.B. 1070 §5(C) penalizes illegal aliens for "knowingly apply[ing] for work, solicit[ing] work in a public place or perform[ing] work" in Arizona. ARIZ. REV. STAT. §13-2928(C).

Factual Background

As the petitioners Arizona and its Governor (collectively, "Arizona") explain, S.B. 1070 represents Arizona's measured response to protect itself and its citizens from the negative effects of illegal immigration, including heavily armed criminal enterprises "more sophisticated and dangerous than any other organized criminal enterprise." Arizona Br. at 3-4. In addition to the direct public-safety burdens, Arizona also bears hundreds of millions of dollars in costs to respond to the burdens placed on it by illegal immigration. *Id.* at 6-7. Rather than seeking to ameliorate the impacts of its failure to enforce federal immigration laws, the Executive Branch commenced this litigation in the name of the United States (hereinafter, the "Administration").

SUMMARY OF ARGUMENT

This Court must evaluate the preemption issues under the "presumption against preemption," particularly for those issues related to traditional state and local concerns (Section II.A). Further, to succeed in its facial challenge, the Administration must negate S.B. 1070's as-yet unapplied, discretionary enforcement provisions (Sections II.B, III.C.1). Although the panel did not address it, this Court should recognize that actions taken on the basis of illegal-alien status do not discriminate on the basis of race or national origin under the Equal Protection Clause (Section II.C).

Conflict preemption is the Administration's only viable argument (Sections III.A-III.C), and the Administration's own preferences and inaction cannot preempt state law (Section III.C). Further, the Administration cannot succeed where Arizona has simply adopted federal standards in a parallel

state enforcement mechanism (Section III.C.2). Finally, as the state and local authority recognized in DeCanas and not even touched with respect to employee-based sanctions in IRCA, the Administration and panel confuse the failure to regulate with an affirmative legislative finding for non-regulation (Section III.C.3).

ARGUMENT

I. EVEN THE FEDERAL GOVERNMENT MUST ESTABLISH STANDING TO SUE IN FEDERAL COURT

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, §2, which must be actual or imminent. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, caused by the defendants, and redressable by a court. *Id.* at 561-62. Because it goes to the Article III "power of the court to entertain the suit," standing "is the threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Moreover, plaintiffs bear the burden of establishing their standing, and federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Finally, to challenge the four provisions of S.B. 1070 at issue here, the Administration must establish its standing separately against each: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). Notwithstanding that the Administration bears the burden of establishing its standing, the courts below did not address the issue.

The failure to address this issue below is immaterial: the parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). While *amicus* Eagle Forum expresses no view on whether the Administration *can* establish standing for this pre-enforcement facial challenge, it does not appear that the Administration *did* establish its standing.

II. THE FEDERAL GOVERNMENT DOES NOT SATISFY ANY OF THE THRESHOLD REQUIREMENTS FOR PREVAILING

Before considering the merits, this Court must consider several threshold issues related to statutory interpretation. First, the Court must address the presumption against preemption for fields traditionally occupied by the states, which requires a "clear and manifest" congressional intent for preemption. Second, this Court must consider the *Salerno* requirement that pre-enforcement facial challenges negate the statute's application in all circumstances. Third, to ensure itself that S.B. 1070 does not violate Equal Protection principles, this Court must recognize that S.B. 1070 does not discriminate on an impermissible basis. All of these canons favor Arizona and therefore support reversal.

A. A Presumption against Preemption Applies to S.B. 1070

In all fields – and especially ones traditionally occupied by state and local government – courts apply a presumption against preemption. *Wyeth v. Levine,* 555 U.S. 555, 565 (2009); *Santa Fe Elevator,* 331 U.S. at 230. When this "presumption against

preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Santa Fe Elevator,* 331 U.S. at 230 (emphasis added); *Wyeth,* 555 U.S. at 565. Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates,* 544 U.S. at 449). Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

Here, INA and S.B. 1070 intersect in several areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, and the state fisc. *DeCanas,* 424 U.S. at 354-55. The authority to combat illegality is central to the states' traditional police power: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905). Indeed, suppressing crime "has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House*

Cases, 83 U.S. (16 Wall.) 36, 62 (1873) (holding that the states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). The Administration's view would deny Arizona the "right to protect itself" against not only the unlawful taking up of residency and all of the resulting economic ills but also the rampant criminality associated with the smuggling of humans and narcotics across Arizona's southern border. The lawlessness that follows is predictable and, if a community's "right to protect itself" is recognized, entirely preventable.

Although one could question whether conflict preemption has a presumption against preemption, *Wyeth,* 555 U.S. at 589 n.2 (Thomas, J., dissenting), that would not matter here because numerous alternate rules of construction lead to the same conclusion. *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (state law remains applicable where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it"); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 646 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is]

clear and manifest") (interior quotations omitted, alteration in original). There is simply no basis for believing that Congress intended to overturn the non-preemption found in *DeCanas*.

B. The Administration's Facial Challenge Does Not Meet the *Salerno* Test

The panel held – and the Administration does not dispute – that this is a facial challenge to S.B. 1070. Under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), and its progeny, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Moreover, "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). Although *Salerno* requires facial challenges to meet a high burden of proof, the Ninth Circuit failed to address the issue adequately.

As this Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *cf. New York v. Ferber,* 458 U.S. 747, 767 (1982). Because S.B. 1070 is within Arizona's police power and inherent authority, the Administration cannot satisfy *Salerno* here.

Under well-known standards of statutory construction, courts may construe statutes to avoid unconstitutionality by adopting constructions that avoid absurd or unlawful consequences. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 574 n.8 (1942); *Hayes v. Continental Ins. Co.,* 178 Ariz. 264, 272-73, 872 P.2d 668, 676-77 (Ariz. 1994). Unfortunately for the Administration, its chosen forum lacks the authority to adopt such narrowing constructions of *state* law: "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted, alterations in original); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972); *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450 (2008). If the Administration wanted to resolve its legal concerns about S.B. 1070's scope, it chose the wrong forum for its facial challenge.

C. S.B. 1070 Is Not Discriminatory

Although the panel did not address the question of discrimination, *amicus* Eagle Forum anticipates that the Administration's *amici* may do so, based on arguments in similar litigation in other courts. Targeted against those popularly known as "illegal aliens," S.B 1070 "discriminates" based on illegality, not on race or national origin. *Plyler v. Doe,* 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Where, as here, a state or local law does not "discriminate[] against aliens *lawfully admitted* to this country," it

is constitutional. *DeCanas,* 424 U.S. at 358 n.6 (emphasis added); *INS v. Nat'l Ctr. for Immigrants' Rights,* Inc., 502 U.S. 183, 196 n.11 (1991). To avoid the issue of illegality, the defenders of illegal aliens often claim discrimination on the basis of race or national origin.

The Fourteenth Amendment – not federal immigration law – prohibits Arizona's discriminating on those bases. This familiar standard applies to action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added). Even assuming *arguendo* that the impact of S.B 1070 fell disproportionately on Hispanics, that disproportion would not be discriminatory.

In *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Because women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney.* Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Like Massachusetts, Arizona acted *because of* permissible criteria, which is not unlawful discrimination.

III. FEDERAL LAW DOES NOT PREEMPT S.B. 1070

The Administration or its *amici* will cite *DeCanas,* 424 U.S. at 354-55, for the obvious point that the "[p]ower to regulate immigration is

unquestionably exclusively a federal power." That is as undeniably true as it is undeniably irrelevant. The question is not whether Congress *could have* preempted S.B. 1070. The question is whether Congress *did* preempt S.B. 1070.

Indeed, this Court has recognized that the states retain their inherent power to deter the influx of illegal aliens in self-defense against the obvious impacts that illegal immigration can impose:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are 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.

Plyler, 457 U.S. at 229. In any event, S.B. 1070 simply does not regulate "immigration" in the sense of "determin[ing] who should or should not be admitted into the country." *DeCanas,* 424 U.S. at 355. Arizona defers to the federal standards in all relevant ways and simply seeks to defend itself.

The following sections demonstrate that the Administration cannot succeed generally under express or field preemption and likewise cannot succeed specifically against any facet of S.B. 1070 under conflict preemption.

A. Federal Law Does Not Expressly Preempt S.B. 1070

Nothing in INA expressly preempts state and local enforcement. Quite the contrary, INA preserves state and local authority in several savings clauses. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-

(c), 1644. No one credibly argues for express preemption.

B. Federal Law Does Not Occupy the Field of Regulating Illegal Aliens

In place of an ostensibly door-shutting congressional determination that federal regulation must occupy the relevant immigration-enforcement fields, INA includes door-opening savings clauses. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), 1644, Given these numerous clauses that expressly *save* state and local authority over immigration-related enforcement, INA cannot *field preempt* state and local involvement.[2]

C. Federal Law Does Not Conflict Preempt S.B. 1070

Under this Court's precedents, conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal law and S.B. 1070, the Administration necessarily invokes conflict preemption's "prevent-or-frustrate" prong.

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[2] "[T]he categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)). If INA does not conflict preempt S.B. 1070, INA plainly does not field preempt it, either.

At the outset, *amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring). Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 555 U.S. at 583 (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere

"fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to "prevent-or-frustrate" preemption, the Administration cannot conflate its own administrative inaction with *congressional* intent. Even if Congress in the INA had not saved state and local enforcement authority, the Administration's non-enforcement could not preempt state and local enforcement. *Wyeth,* 555 U.S. at 576-81 (Federal Register preamble statement cannot preempt state law); *see also* Arizona Br. at 28 (collecting cases). Moreover, because S.B. 1070 tracks the federal guidelines, it cannot frustrate congressional purpose in the INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1981 (2011) (emphasis added).

"Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," which – if allowed – "would undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting,* 131 S.Ct. at 1985 (internal quotations and citations omitted). In areas of dual federal-state concern and particularly in ones of traditional state and local concern, the Administration's arguments do not rise to the level of preemption.

1. Federal Law Does Not Conflict Preempt the Law Enforcement Provisions of Sections 2(B) and 6

S.B. 1070 §2(B) and §6 both relate to law enforcement officers' handling of illegal aliens. The first requires "a reasonable attempt …, when

practicable, to determine the immigration status of the person" in "any lawful stop, detention or arrest made," "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." ARIZ. REV. STAT. §11-1051(B). The second authorizes – but does not require – Arizona law enforcement officers to make warrantless arrests of persons whom the officers have probable cause to believe are removable from the United States by reason of having committed a crime. ARIZ. REV. STAT. §13-3883(A)(5). Neither provision is preempted – and *a fortiori* facially preempted – by the INA.

The Administration considers its enforcement priorities to preempt Arizona's enforcement. Under the Constitution, however, the Executive Branch must faithfully execute the laws (which it has not), U.S. CONST. art. II, §3, not make laws (as it seeks to do). *Id.* art. I, §1. As explained in connection with field preemption, INA expressly contemplates state enforcement of federal immigration law, 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), 1644, and the Administration's views are simply not preemptive. *Wyeth,* 555 U.S. at 576-81; *see also* Arizona Br. at 28 (collecting cases). Arizona is merely using the tools that Congress has made available to it. If the Administration disfavors those tools, it should take the issue up with Congress, not the courts.

As explained more fully in connection with S.B. 1070 §3, federal law generally does not preempt the states' adopting state enforcement provisions that parallel federal law. *See* Section III.C.2, *infra; see also Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 447-48 (2005) ("[t]o be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements

imposed on them under state and federal law do not differ"); *Lohr,* 518 U.S. at 495; *Riegel v. Medtronic, Inc.,* 552 U.S. 312, 330 (2008). Significantly, *Bates, Lohr,* and *Riegel* all involved express preemption, but nonetheless allowed parallel state proceedings that imposed federal standards. Conflict preemption provides an even more tenuous basis for the Administration to argue that IRCA preempts state provisions that parallel the federal standards.

Although the foregoing should suffice for Arizona to prevail on the law-enforcement provisions of S.B. 1070 §2(B) and §6, these two sections raise three issues with regard to facial pre-enforcement challenges to state laws in federal courts. *See* Section II.B, *supra* (discussing *Salerno* test for facial challenges). Each of these issues provides a basis to reject the Administration's position.

First, at least some applications of these two sections are not preempted. As such, if the *Salerno* test applies, the Court should order the dismissal of this action with respect to these sections. *Id.*

Second, the panel rejected Arizona's interpretation of a new state law, then found that new law facially preempted under the panel's interpretations, before state courts could interpret and apply the new law. *Id.* This short-circuits the appropriate role that state courts play in interpreting state law. *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) ("[a]s-applied challenges are the basic building blocks of constitutional adjudication").

Third, the panel's interpretations leave Arizona – the defendant here – scrambling to imagine the "likely … quite small" group, separate from "the vast majority of unlawfully present aliens," who fit within the panel's construct of Arizona law.

See Arizona Br. at 45-46. In addition to the prior issue, this presents an Article III issue: the plaintiff has not identified an actual or imminent invasion of a legally protected interest, even accepting *arguendo* the Ninth Circuit's crabbed interpretation of the legally protected interest.

2. Federal Law Does Not Conflict Preempt Section 3's Registration Provisions

Because S.B. 1070 §3 merely adopts federal standards for registration and applies them to a new state prohibition punishable within the punishment imposed by the analogous federal law, ARIZ. REV. STAT. §13-1509, there is no conflict with federal law. Simply put, "there is no conflict … and no possibility of … conflict" when "the state statute makes federal law its own." *People of State of California v. Zook,* 336 U.S. 725, 735 (1949). As Arizona explains, only one decision of this Court stands against the long line of decisions that recognize the states' authority to prohibit under state law the same conduct prohibited by federal law. *See* Arizona Br. at 49-50 & n.34. That one decision – *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.,* 475 U.S. 282, 286 (1986) – arose under labor law, which is inapposite to preemption of state laws outside labor law. Indeed, as this Court recently recognized with respect to another Arizona law related to illegal-immigrant status, conflict preemption does not arise when "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects." *Whiting,* 131 S. Ct. at 1981. The panel's contrary arguments are misplaced.

As indicated, the panel relies on a decision under the National Labor Relations Act ("NLRA"),

App. 26a, which plainly is inapposite. Regardless of how this Court resolves the presumption *against* preemption here, NLRA cases are unique in relying on "a presumption *of federal pre-emption*" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54,* 468 U.S. 491, 502 (1984) (emphasis added). In invoking NLRB cases, the Administration and panel "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* (emphasis added). While Congress undoubtedly *could have* written immigration law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n,* 470 U.S. at 128. At least with respect to saddling Arizona with NLRA-style preemption, this Court must show the same reluctance.[3]

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[3] Similarly, this Court found the IRCA's "comprehensive scheme" relevant to impliedly displacing the National Labor Relations Board ("NLRB") from disputes involving illegal aliens. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002). But the question whether federal law is sufficiently comprehensive to remove the NLRB from a sphere, as a matter of statutory interpretation, is an inherently different question from whether Congress intended to remove state sovereigns from that sphere: "where [NLRB's] chosen remedy trenches upon a federal statute or policy outside [NLRB's] competence to administer, [NLRB's] remedy may be

(Footnote cont'd on next page)

In addition, the panel relies on the doctrinally similar – but factually different – case of *Hines v. Davidowitz,* 312 U.S. 52 (1941). *See* App. 29a-30a. In *Hines,* Pennsylvania sought to require aliens to register, but the state registration requirements differed substantively from the federal requirements. *See Hines,* 312 U.S. at 59-61 (cataloging differences between federal and state standards). The panel raises the prospect of "50 states layering their own immigration enforcement rules on top of the INA," App. 26a, which is puzzling because the federal and state programs do not differ substantively. Like the Arizona statute in *Whiting,* S.B. 1070 mirrors federal standards. Accordingly, unlike the inconsistent Pennsylvania statute in *Hines,* S.B. 1070 does not conflict with federal law.

3. Federal Law Does Not Conflict Preempt Section 5(C)'s Employee Restrictions

S.B. 1070 §5(C) regulates the employment relationship – a subject of traditional state concern – from what Arizona calls the "supply side" of the employment relationship. Arizona Br. at 17; ARIZ. REV. STAT. §13-2928(C). Where illegal immigration intersects with employment, the states have had (and continue to have) a role in enforcing both state and federal law. The seminal precedent is this Court's unanimous *DeCanas* decision, which upheld

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required to yield." *Id.* It is consistent for IRCA comprehensively to remove NLRB as a federal actor without comprehensively removing the states as distinct sovereigns.

a state law penalizing the employment of illegal aliens.

Our system of dual sovereignties provides ample room for federal, state, and local government to address the various impacts of illegal aliens. Indeed, *DeCanas* upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *DeCanas,* 424 U.S. at 357 (emphasis added). Nothing in IRCA or any other law in any way limits that authority or suggests that illegal entry and residency are to be protected, respected, or tolerated.

Prior to IRCA's enactment, Arizona "possess[ed] broad authority under [its] police powers to regulate the employment relationship to protect workers within [Arizona]." *DeCanas,* 424 U.S. at 356. Similarly, prior to IRCA, federal law did not limit that "broad authority."

> [Courts] will not presume that Congress, in enacting [federal immigration law], intended to oust state authority to regulate the employment relationship … in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion.

DeCanas, 424 U.S. at 357 (interior quotations and citations omitted). Far from finding congressional intent to preempt state regulation of alien employment practices, *DeCanas* "rejected the pre-emption claim … because Congress *intended* that the States be allowed, to the extent consistent with federal law, [to] regulate the employment of illegal

aliens." *Toll v. Moreno,* 458 U.S. 1, 13 n.18 (1982) (citing *DeCanas,* 424 U.S. at 361) (interior quotations omitted, emphasis and second alteration in original). Thus, prior to IRCA's enactment, it is indisputable that Arizona's police power included the authority to adopt S.B. 1070 §5(C) for employees within Arizona.

By its terms, §1324a(h)(2)'s plain language preempts only *employer-based* sanctions, except to the extent that §1324a(h)(2)'s savings clause allows such sanctions. 8 U.S.C. §1324a(h)(2). The section says absolutely nothing about employee-based sanctions. Given that state and local government historically has occupied the regulation of employment, §1324a(h)(2) clearly does not preempt §5(C). *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history"); *Lohr,* 518 U.S. at 485 (presumption against preemption applies to determining statute's preemptive scope). This Court can begin and end its inquiry with §1324a(h)(2)'s plain language.

Should the Court analyze the legislative history, however, the available history does not alter the outcome. The House report expressly enumerates certain preempted actions (namely, civil and criminal employer-based sanctions for employment and recruitment) while also enumerating non-preempted actions (namely, denying licenses to those found to have violated immigration laws and "fitness to do business laws"). H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662. Although the House report does not expressly authorize enforcement of a state or local ordinance prior to federal enforcement of immigration laws, the House report does not expressly preempt that either. *Id.*

Given the presumption against preemption, even in interpreting expressly preemptive statutes, *Lohr, supra,* the House report does not provide a "clear and manifest" congressional intent to preempt that which *DeCanas* allowed. *Chemical Mfrs. Ass'n,* 470 U.S. at 128 (Congress would not "ignore the thrust of an important decision" *sub silentio*). In short, nothing suggests that Congress ever intended to preempt state and local actions like S.B. 1070 §5(C).

The Administration's and panel's contrary argument relies on the negative implication of §1324a(h)(2)'s preempting employer-based sanctions with an employer-based savings clause. In that, they are not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier,* 529 U.S. at 881, Congress has not done so merely by declining even to address employee-based sanctions in IRCA.

To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. *See, e.g., Sprietsma,* 537 U.S. at 67 (*Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car") (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans.*

Ass'n, 552 U.S. 364, 367, 373 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). Here, state and local government traditionally have occupied the employment field, this Court unanimously affirmed that exercise of the police power in *DeCanas* (notwithstanding the nexus with immigration law), and Congress expressly saved that exercise of the police power in IRCA for employer-based sanctions and did not even address employee-based sanctions. Under the circumstances, the Administration cannot cite "clear and manifest" congressional intent to displace states' historic police power over employee-based regulations.

IV. FOREIGN OPPOSITION TO S.B. 1070 IS IRRELEVANT TO PREEMPTION

The Administration and the panel argue that foreign governments' opposition to S.B. 1070 is relevant to the preemption analysis. App. 23a-26a. While foreign opposition may be relevant to whether the political branches of government should amend federal law, federal courts cannot consider foreign opposition in determining the rights of the parties under current federal law.

As Judge Bea correctly and colorfully noted in dissent, the majority's accommodation of foreign governments' and United Nations experts' pique gives "other nations' foreign ministries a 'heckler's veto.'" App. 95a. While foreign concerns are potentially relevant to U.S. policies and laws, they are only relevant to the extent that the political branches decide to make them relevant. Accordingly, concerns in this litigation about foreign governments'

views are "directed to the wrong forum." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298, 328 (1994). Until the political branches amend federal law *in the future,* in response to foreign opinion, the federal courts have the duty to apply federal law as it stands *today.*

While it is true that foreign policy represents an area where the federal power is at its zenith, *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 449 (1979), that nonetheless requires Congress to write a preemptive law before foreign-policy concerns will affect the outcome in federal court. The cases cited below (App. 22a), however, involved different issues. In *American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 427 (2003), California sought to regulate international insurers, which conflicted with executive agreements with foreign governments that the President lawfully may enter without ratification by the Senate. Here, by contrast, there is no extra-territorial or foreign nexus (*i.e.,* the dispute takes place in Arizona). Similarly, in *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 380 (2000), the Massachusetts law on Burma sanctions conflicted with a federal law on the same subject. Here, again by contrast, there is no conflict between state and federal law.

CONCLUSION

For the foregoing reasons and those argued by Arizona, this Court should reverse the Ninth Circuit and remand with instructions to dismiss this action.

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