

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 a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**AMICUS CURIAE BRIEF OF THE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PETITIONERS**

PETER FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
310 Cattell Street
Easton, PA 18042
610-438-5721
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR GRANTING THE PETITION..	6
I. THIS CASE PRESENTS ISSUES OF EXTRAORDINARY IMPORTANCE REGARDING THE LEGAL POWERS OF THE STATES TO AID TROUBLED ENFORCEMENT OF FEDERAL IMMIGRATION LAWS	6
II. THE NINTH CIRCUIT'S DECISION BELOW CREATES A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ...	9
III. THE DECISION OF THE NINTH CIRCUIT BELOW FLOUTS GOVERN- ING FEDERAL STATUTES AND PRECEDENTS	11
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
<i>Altria Group v. Good</i> , 129 S. Ct. 538 (2008).....	19, 21, 22
<i>Buquer v. City of Indianapolis</i> , (No. 1:11-cv-2011)	8
<i>California Coastal Commission v. Granite Rock Co.</i> , 480 U.S. 572, 579-80 (1987)	13
<i>Chamber of Commerce of the United States v. Whiting</i> , 131 S. Ct. 1968 (2011).....	<i>passim</i>
<i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363, 372 (2000).....	11, 12, 19
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976)	12
<i>Estrada v. Rhode Island</i> , 594 F.3d 56 (1st Cir. 2010).....	11
<i>Georgia Latino Alliance for Human Rights v. Deal</i> , No. 1:11-cv-1804-TWT (N.D. Ga. 2011).....	8
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	12
<i>Hispanic Interest Coalition of Alabama v. Bentley</i> , No. 5:11-cv-02484-SLB (N.D. Ala. 2011)	8
<i>Lynch v. Cannatella</i> , 810 F.2d 1363 (5th Cir. 1987).....	11
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	19, 21, 22
<i>Muehler v. Mena</i> , 544 U.S. 93 (2005).....	11
<i>National Center for Immigrants' Rights, Inc. v. INS</i> , 520 U.S. 183 (1990).....	20
<i>Parsley v. Bentley</i> , No. 5:11-cv-02736, (N.D. Ala.)	8
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	12, 15, 19, 21, 22

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Di Re</i> , 332 U.S. 581 (1948).....	12, 15, 19, 21, 22
<i>United States v. Rodriguez-Arreola</i> , 270 F.3d 611 (8th Cir. 2001).....	11
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	13
<i>United States v. Salinas-Calderon</i> , 728 F.2d 1298 (10th Cir. 1984).....	10
<i>United States v. Santana-Garcia</i> , 264 F.3d 1188 (10th Cir. 2001).....	10
<i>United States v. Soriano-Jarquín</i> , 492 F.3d 495 (4th Cir. 2007).....	11
<i>United States v. Soto-Cervantes</i> , 138 F.3d 1319 (10th Cir. 1998).....	10
<i>United States v. State of Alabama</i> , No. 2:11-cv-02746-WMA (N.D. Ala.).....	9
<i>United States v. Vasquez-Alvarez</i> , 176 F.3d 1294 (10th Cir. 1999).....	4, 9
<i>United States v. Villa-Velasquez</i> , 282 F.3d 553 (8th Cir. 2002).....	10
<i>Utah Coalition of La Raza v. Herbert</i> , No. 2:11-cv-401 CW (D. Utah).....	8
<i>Wyeth v. Levine</i> , 129 S. Ct. 1187, 1194-95 (2009).....	11, 16, 19, 20

STATUTES

8 U.S.C. Section 1304(e).....	18
8 U.S.C. Section 1306(a).....	18
8 U.S.C. Section 1324a(h)(2).....	16
8 U.S.C. Section 1357(g).....	10, 14, 17, 18
8 U.S.C. Section 1373(c).....	13, 17
Ariz. Rev. Stat. Sect. 11-1051 (Section 2B) .	10, 16
Ariz. Rev. Stat. Sect. 13-1509 (Section 3)....	10, 18

TABLE OF AUTHORITIES—Continued

	Page
Ariz. Rev. Stat. Sect. 13-2928(C) (Section 5C)	10, 20
Ariz. Rev. Stat. Sect. 13-3883(A)(5) (Section 6).....	10, 20
Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535	7
Co. Rev. Stat. 29-29-103(2)(a)(I)	8
Ga. Code Section 42-4-14(b) and (c).....	7
Ga. Code Sections 16-5-46, 17-5-100(b).....	8
Ind. Code Section 11-10-1-2(a).....	7
Ind. Code Sections 5-12-18.2(7)(2), 35-33-1-1(11) and (12).....	8
Miss. Code Section 71-11	8
Mo. Rev. Stat. Section 577.680(1).....	7
Okla. Stat. tit. 21, Section 446, tit 22 Section 171.2(A) and (B).....	8
Tenn. Code Section 40-7-123(a) and (b).....	8
S.C. Code Sections 16-9-460(c), 16-17-750(A), 17-13-170, 23-6-60, 23-3-1100	8
Utah Code Sections 17-22-9.5, 76-9-1003(1)(a)(i).....	8
Utah Stat. Ann. Section 76-10-2701.....	8
Va. Code Section 19.2-81.6.....	8

OTHER AUTHORITIES

David W. Chen and Kareem Fahim, <i>Immigration Checks Ordered in New Jersey</i> , N.Y. Times, August 22, 2007	8
Jeffrey S. Passel and D’Vera Cohn, <i>Unauthorized Immigrant Population: National and State Trends</i> , 2010	7

TABLE OF AUTHORITIES—Continued

	Page
Prince William Cnty., Va. Police Dept. Gen. Order 45.01, <i>Local Enforcement Response to Illegal Immigration</i> , http://www. pwcgov.org/docLibrary/PDF/008333.pdf ..	8
R.I. Exec. Order 08-01, ER 147-149.....	8
U.S. Constitution, Article IV, Clause 2 (Supremacy Clause	11
U.S. Immigration and Customs Enforce- ment, Law Enforcement Support Center, www.ice.gov/lesc/	14

INTEREST OF THE *AMICUS CURIAE*¹

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former

¹ Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because maintaining full recognition of and respect for the constitutional balance and policy of federalism is a top priority of our organization.

STATEMENT OF THE CASE

Arizona is ground zero for the illegal immigration tidal wave, with nearly half of all illegal border crossings in that state alone. 9th Cir. Excerpts of Record (“ER”) 380. This includes gang members in Mexican drug cartels and criminals fleeing their home countries south of the border.

Besides the physical safety and criminal threat concerns this poses to the citizens of Arizona, it costs the state hundreds of millions each year in incarceration and law enforcement costs, and in education and health care expenses for illegal aliens choosing to reside in the state. These are the reasons that former Governor Janet Napolitano, now Secretary for Homeland Security in the Obama Administration, declared a state of emergency in Arizona in 2005 regarding illegal immigration into the state.

For these reasons as well, current Governor Janice Brewer and the Arizona state legislature joined in enacting the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 70) on April 29, 2010. That legislation seeks to use state law

enforcement resources to promote more effective enforcement of federal immigration laws in Arizona. The legislation does that through cooperative law enforcement with federal agencies and sanctions expressly designed to parallel federal law.

Nevertheless, for possibly political reasons, the Obama Administration sued the state of Arizona to enjoin the duly enacted state law on its face before it even took effect. The suit alleged the law violated the Supremacy Clause of the U.S. Constitution because its provisions were preempted by the Immigration and Nationality Act (“INA”). But the INA and other federal immigration laws specifically authorize cooperative law enforcement between state and federal officials, as discussed further below.

On July 28, 2010, the District Court granted the preliminary injunction sought by the Obama Administration against the entire law in regard to the key provisions in Sections 2(B), 3, 5(C), and 6. Arizona appealed the injunction to the Ninth Circuit, but it was affirmed by a divided panel as to Sections 2(B) and 6, and unanimously as to Sections 3 and 5(C). Judge Bea argued in dissent that “the Executive’s desire to appease foreign governments’ complaints cannot override Congressionally mandated provisions,” which would give a “heckler’s veto” to “other nations’ foreign ministries.” App. 95a.

Arizona filed its petition for a writ of certiorari to review the Ninth Circuit’s decision on August 10, 2011.

SUMMARY OF ARGUMENT

Even President Obama tells us that the federal immigration system is broken. Arizona is at the forefront of states suffering the burden of that broken system, with 50% of all illegal aliens in the country crossing that state's borders. This presents serious threats to physical safety from violent crime, particularly involving human and drug smuggling. The resulting law enforcement costs and costs of providing education and health care to illegal aliens is costing Arizona hundreds of millions of dollars each year.

Moreover, the same issues are spreading to other states, who are taking similar actions to Arizona to counter the problem, resulting in similar litigation presenting ultimately the same questions of law. This case consequently presents issues of extraordinary importance regarding the legal powers of the states to aid troubled enforcement of federal immigration laws.

In addition, the Ninth Circuit's decision below creates a split among the Circuit Courts of Appeal. The Ninth Circuit openly admitted that its decision directly conflicts with the decision of the Tenth Circuit in *United States v. Vasquez-Alvarez*, 176 F. 3d 1294 (10th Cir. 1999). The decision directly conflicts with the decisions of at least four other circuits as well.

Finally, the decision of the Ninth Circuit below is egregiously erroneous, flouting governing federal statutes and precedents, including established

precedents of this Court. The challenged Arizona law authorizes state law enforcement officers to cooperate with federal law enforcement on immigration matters, and imposes sanctions for immigration violations that consciously parallel federal law. This cannot possibly result in a conflict with federal immigration laws, as those federal laws expressly authorize and provide for such cooperative law enforcement between federal and state officials.

Under the Constitution's framework of federalism, the states are sovereign governments, not creatures of the federal Congress dependent on federal statutes for authorization, like federal agencies. The states consequently retain inherent, plenary police powers and cooperative federal/state joint law enforcement is the norm not the exception.

Moreover, in such cooperative law enforcement, the states continue to supervise and govern their own law enforcement officers, rather than ceding such supervision and authority to federal officers, as this Court has repeatedly emphasized. In this system, it is commonplace for state and federal law to prohibit the same conduct.

Consequently, any Congressional intent to completely foreclose the states from helping to enforce federal immigration law or from enacting state laws that prohibit the same conduct made unlawful by Congress must be "clear and manifest" under this Court's preemption precedents. But here just the opposite is true. The federal immigration statutes expressly provide for joint state/federal immigration law enforcement cooperation and even

compel federal cooperation with state enforcement efforts.

For all of these reasons, the petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS ISSUES OF EXTRAORDINARY IMPORTANCE REGARDING THE LEGAL POWERS OF THE STATES TO AID TROUBLED ENFORCEMENT OF FEDERAL IMMIGRATION LAWS.

Even President Obama tells us that the federal immigration system is broken. ER 398. Arizona is at the forefront of states suffering the burden of that broken system. With 50% of all illegal aliens in the country crossing that state's borders, the dangers associated with human and drug smuggling has left large swaths of southern Arizona closed to the American people. ER 384. Federal agents have posted warning signs telling Americans to keep out of isolated desert areas because of these dangers as far north as 80 miles from the border, and just 30 miles south of the state's capitol city of Phoenix. ER 162, 165, 167.

Mexican drug cartels have issued death threats to police officers serving in the border town of Nogales, Arizona. ER 255-56. Americans living on ranches close to the border can do nothing about streams of violent human and drug smugglers continually crossing their property, at risk of their own lives. ER

223-31, 405. The federal government has effectively ceded control of this sovereign American land to foreign illegals, who are violating American immigration law duly adopted by Congress.

Roughly 7.5% of the entire workforce of Arizona is comprised of illegal aliens hired in violation of federal law. Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, p. 21, tbl. A1. Criminal aliens now comprise nearly 20% of Arizona's prison population, and over 20% of the felony defendants in Maricopa County, the state's most populous county by far. ER 264-74, 419. The costs to Arizona of such law enforcement, and publicly financed education and health care for illegal aliens living in the state, are now approaching a billion dollars a year. ER 429.

Yet, the decision of the Ninth Circuit below effectively ousts the people of Arizona from any legal authority to address this building sovereign disintegration of their state, while the faraway federal government only lets the problem fester, and worsen. Moreover, this is a skyrocketing issue for other border and interior states across the country as well.

A minimum of ten other states have started requiring their law enforcement officers to conduct immigration status checks relating to investigations, arrests, and jail bookings, similarly to the Arizona law. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535; Ga. Code Section 42-4-14(b) and (c); Ind. Code Section 11-10-1-2(a); Mo. Rev. Stat. Section 577.680(1); Okla. Stat. tit

22 Section 171.2(A) and (B); Tenn. Code Section 40-7-123(a) and (b); S.C. Code Sections 23-3-1100, 17-13-170; Utah Code Sections 17-22-9.5, 76-9-1003(1)(a)(i); R.I. Exec. Order 08-01, ER 147-149; David W. Chen and Kareem Fahim, *Immigration Checks Ordered in New Jersey*, N.Y. Times, August 22, 2007. See also Prince William Cnty., Va. Police Dept. Gen. Order 45.01, *Local Enforcement Response to Illegal Immigration*, <http://www.pwcgov.org/docLibrary/PDF/008333.pdf>.

A minimum of nine states have also authorized their officers to enforce federal immigration laws in other contexts as well, similarly to Arizona. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Sections 5(b),10(a); Miss. Code Section 71-11; Ga. Code Sections 16-5-46, 17-5-100(b); Ind. Code Sections 5-12-18.2(7)(2), 35-33-1-1(11) and (12); S.C. Code Sections 16-9-460(c), 16-17-750(A), 23-6-60; Utah Code Section 17-22-9.5(3)(b)(ii), Utah Stat. Ann. Section 76-10-2701; Va. Code Section 19.2-81.6; Co. Rev. Stat. 29-29-103(2)(a)(I); Okla. Stat. tit. 21, Section 446.

These statutes in other states have been subject to their own legal challenges. *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-cv-1804-TWT (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, No. 1:11-cv-2011; *Hispanic Interest Coalition of Alabama v. Bentley*, No. 5:11-cv-02484-SLB (N.D. Ala. 2011); *Parsley v. Bentley*, No. 5:11-cv-02736, (N.D. Ala.); *Utah Coalition of La Raza v. Herbert*, No. 2:11-cv-401 CW (D. Utah). Indeed, the Obama Administration has sued Alabama as well to enjoin its cooperative state law enforcement of federal

immigration laws. *United States v. State of Alabama*, No.2:11-cv-02746-WMA (N.D.Ala.).

The issues in this case consequently raise fundamental questions of extraordinary importance regarding the constitutional balance of federalism and the security of the states and our nation, clearly meriting this Court's review.

II. THE NINTH CIRCUIT'S DECISION BELOW CREATES A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS.

The Ninth Circuit below openly admitted that its decision directly conflicts with the decision of the Tenth Circuit in *United States v. Vasquez-Alvarez*, 176 F. 3d 1294 (10th Cir. 1999). App. 48a. The arrest in that case “was based solely on the fact that Vasquez was an illegal alien.” 176 F. 3d at 1295. The court there recognized the well established legal principle “that state and local law enforcement officers are empowered to arrest for violations of federal law,” which gives them “the general authority to investigate and make arrests for violations of federal immigration laws.” 176 F. 3d at 1296. The court also recognized 8 U.S.C. Section 1357(g)(10) as “a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.” 176 F. 3d at 1300.

In the present case, by contrast, the Ninth Circuit held that the states have no inherent power to make arrests for violations of federal law such as the immigration laws. The Ninth Circuit here held that state and local officers are not authorized to enforce

“the civil provisions of the INA regulating authorized entry, length of stay, residence status and deportation.” App. 46a. Rather than seeing Section 1357(g) as inviting state participation in enforcement of federal immigration law as the Tenth Circuit did, the Ninth Circuit ruled that “8 U.S.C. Section 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement only under the close supervision of the Attorney General.” App. 17a.

Consequently, the Ninth Circuit ruled that Sections 2(B) and 6 of the Arizona law were preempted because there was no federal authorization for state enforcement. It ruled that Section 5(C) of the Arizona law was preempted because the IRCA did not expressly authorize state enforcement of federal work authorization rules. It ruled Section 3 of the Arizona law to be preempted because federal law did not expressly authorize states to provide for enforcement of federal criminal alien-registration requirements in their own criminal codes, even though courts have long held that states may enforce and make arrests for federal crimes including immigration related crimes. *E.g. United States v. Villa-Velasquez*, 282 F.3d 553 (8th Cir. 2002).

The Ninth Circuit’s ruling below directly conflicts with other Tenth Circuit decisions as well. *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001); *United States v. Soto-Cervantes*, 138 F.3d 1319 (10th Cir. 1998). It also directly conflicts with the decisions of at least four

other circuits. *Estrada v. Rhode Island*, 594 F.3d 56 (1st Cir. 2010); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001); *United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007); *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987).

See also Muehler v. Mena, 544 U.S. 93 (2005) (No independent justification required under the Fourth Amendment for a state officer to question an arrested suspect regarding her immigration status).

III. THE DECISION OF THE NINTH CIRCUIT BELOW FLOUTS GOVERNING FEDERAL STATUTES AND PRECEDENTS.

The Supremacy Clause of the U.S. Constitution provides in Article IV, Clause 2 that the Constitution, treaties, and federal statutes “shall be the supreme law of the land,...anything in the constitution or laws of any state to the contrary notwithstanding.” This Court consequently recognized “the fundamental principle of the Constitution [] that Congress has the power to preempt state law.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

In *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009), this Court explained that analysis of pre-emption claims,

“must be guided by two cornerstones of pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case....Second, in all pre-emption cases,

and particularly in those in which Congress has legislated...in a field which the states have traditionally occupied,...[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Even where Congress has not expressly stated in a statute that state laws are preempted, courts will find preemption “[w]hen Congress intends federal law to occupy the field,” meaning it intends the federal law to displace all state laws on the same subject. *Crosby*, 530 U.S. at 372. Secondly, “even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.” *Id.*

This Court has consistently concluded that the federal immigration laws do not preempt the field, *De Canas v. Bica*, 424 U.S. 351 (1976), *Hines v. Davidowitz*, 312 U.S. 52 (1941), *Plyler v. Doe*, 457 U.S. 202 (1982), *United States v. Di Re*, 332 U.S. 581 (1948), *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011), and the Ninth Circuit below did not contend that they do. So the only question in this case is whether the Arizona law conflicts with federal immigration laws.

Moreover, this case involves a facial challenge to the Arizona law, as it was enjoined before it even became effective. The standard of this Court in such facial challenges is that the plaintiff “must establish that no set of circumstances exists under which the Act would be valid.” App. 65a; *United States v.*

Salerno, 481 U.S. 739 (1987). That means in this case Arizona’s law cannot be facially preempted unless “there is no possible set of conditions” under which the authority the law grants to the state’s law enforcement officers could be exercised “that would not conflict with federal law.” *California Coastal Commission v, Granite Rock Co.*, 480 U.S. 572, 579-80 (1987).

As discussed further below, the challenged Arizona law authorizes state law enforcement officers to cooperate with federal law enforcement on immigration matters, and imposes sanctions for immigration violations that consciously parallel federal law. This cannot possibly result in a conflict with federal immigration laws, as those federal laws expressly authorize and provide for such cooperative law enforcement between federal and state officials.

8 U.S.C. Section 1373(c) requires federal officials to provide immigration information requested by state and local law enforcement, stating that federal officials

“shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.”

Further promoting state and federal cooperation on immigration enforcement, Section 1373(a) bars any restriction on the authority of state and local

governments to send or receive from “the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”

For more than 10 years, the federal government has staffed and financed the Law Enforcement Support Center (LESC) to provide a centralized database and response service 24 hours a day, 365 days a year, to comply with the above statutory mandates. This LESL “provides timely customs information and immigration status and identity information and real time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity.” U.S. Immigration and Customs Enforcement, *Law Enforcement Support Center*, www.ice.gov/lesc/.

8 U.S.C. Section 1357(g) provides for states to enter into agreements with the U.S. Attorney General deputizing state law enforcement officers to perform the functions of federal immigration officers. Moreover, Section 1357(g)(10) provides,

“Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or a political subdivision of a State (A) to communicate with the Attorney General regarding the immigration status of any individual...; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”

So federal law expressly acknowledges that state cooperative law enforcement on federal immigration matters does not require federal statutory authorization.

Under the Constitution's framework of federalism, the states are sovereign governments, not creatures of the federal Congress dependent on federal statutes for authorization, like federal agencies. The states consequently retain inherent, plenary police powers and cooperative federal/state joint law enforcement is the norm not the exception. *Whiting, supra*. That is why in *Plyler, supra*, this Court upheld states' "authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." 457 U.S. at 225. *See also Di Re, supra*, 332 U.S. at 589-90.

Moreover, in such cooperative law enforcement, the states continue to supervise and govern their own law enforcement officers, rather than ceding such supervision and authority to federal officers, as this Court has repeatedly emphasized. In this system, it is commonplace for state and federal law to prohibit the same conduct.

That is why in *Whiting*, this Court upheld another Arizona law that suspended or revoked the state and local licenses of any business that knowingly employed unauthorized aliens, in violation of federal law. The Court did that even though the governing federal statute there, The Immigration Reform and Control Act (IRCA), expressly preempted "any State

or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. Section 1324a(h)(2). The Court concluded “that Arizona’s licensing law falls well within the confines of the authority Congress chose to leave to the States [the licensing exception] and therefore is not expressly preempted.” 131 S. Ct. at 1981.

Consequently, any Congressional intent to completely foreclose the states from helping to enforce federal immigration law or from enacting state laws that prohibit the same conduct made unlawful by Congress must be “clear and manifest” under this Court’s preemption precedents. *E.g. Wyeth*, 129 S. Ct. at 1194-95. But here just the opposite is true. The federal immigration statutes expressly provide for joint state/federal immigration law enforcement cooperation and even compel federal cooperation with state enforcement efforts.

That provides the same federal statutory foundation for the Arizona law in this case that this Court found to uphold the state law in *Whiting*. The Court added there that because “Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.” 131 S. Ct. at 1981.

Section 2(B) of the Arizona law specifically provides that “[f]or any lawful stop, detention or arrest made” by Arizona law enforcement officers “where reasonable suspicion exists that the person is

an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person.” The Section further provides that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.” Arizona was careful to provide that the Section must be implemented “in a matter consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”

This Section cannot possibly conflict with federal immigration law. It merely mandates state assistance in the enforcement of federal law. Indeed, as discussed above, federal law specifically contemplates and welcomes such state assistance at 8 U.S.C. Section 1357(g)(10), and even mandates that federal officers cooperate with states seeking to provide such assistance at 8 U.S.C. Section 1373(c), funding, indeed, a 24/7 federal operation to provide such assistance. Rather than a clear and manifest Congressional purpose and intent to preempt such state assistance, what we have here is a clear and manifest Congressional purpose and intent to encourage and welcome such state assistance. Indeed, federal encouragement and welcome for the state assistance is much stronger here than in *Whiting*.

Consequently, the Ninth Circuit majority below erred egregiously in finding this section preempted, all the more so because this is a facial challenge, where the court is supposed to uphold the law if there are any circumstances where it would be

constitutional. The court's error arose from inverting the meaning of Section 1357g(10). Instead of recognizing that the section plainly says states do not have to have an agreement with the U.S. Attorney General to help enforce federal immigration laws, the Ninth Circuit misread the section as saying that states could help federal immigration law enforcement only under such an agreement, the opposite of what it says. App. 15a.

Contrary to the imagination of the Ninth Circuit majority below, nothing in the Arizona law undermines Presidential or Executive Branch authority. There is no direction of any sort in the Arizona law to the Executive Branch of the federal government. The Arizona law does not interfere with Executive discretion in any way. If the President does not want to enforce federal immigration law, nothing in the Arizona law could force him to do so.

Section 3 of the Arizona law reinforces the federal alien registration statute by providing that “[i]n addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. Sections 1304(e) or 1306(a).” The Section imposes the same maximum penalties for violations that federal law imposes for violating 8 U.S.C. Section 1304(e), which are less than the penalties federal law imposes for violating Section 1306(a). Moreover, the Arizona law expressly does not apply to anyone authorized to be in the United States, while the federal law and its penalties for failing to carry alien registration do.

This section again cannot possibly be in conflict with federal law. It carefully defines the violation exactly the same as federal law does, and imposes the lesser of the applicable *federal* penalties. *Whiting* (“Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects,” 131 S.Ct. at 1981). It also carefully leaves alone anyone authorized under federal law to be present in the United States. Here the state was simply exercising its sovereign authority and police powers to again help enforce federal law with its own law enforcement resources.

The Ninth Circuit below simply failed to recognize the sovereign authority and plenary police power of the State of Arizona, holding the state law provision unconstitutional because there was no federal authorization of it. But Arizona does not need federal authorization to exercise its own sovereign police powers. *Plyler*; *Whiting*; *Di Re*; Since doing so to jointly enforce federally defined law does not involve a conflict with that law, the state’s provision cannot be preempted as defined by this Court’s precedents. *E.g. Crosby*, 530 U.S. at 372; *Whiting*; *Plyler*; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 481, 495 (1996); *Wyeth*, 127 S. Ct. at 1187; *Altria Group v. Good*, 129 S. Ct. 538, 541 (2008); *Di Re*. The lack of any federal authorization for the exercise by a state of its own police powers does not evidence a “clear and manifest” Congressional purpose and intent to preempt the exercise of those police powers. *Wyeth*.

Section 5(C) of the Arizona law provides that it shall be a misdemeanor under state law for “a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in the state.” Federal law applies penalties only on employers who knowingly hire such unauthorized aliens. While federal law does not provide for federal penalties on unauthorized aliens working illegally in the U.S., as the Ninth Circuit below emphasized, federal law is silent as to any state penalties for such employment on the unauthorized aliens themselves.

Consequently, the Arizona law is not in conflict with federal law here either. The silence in federal law regarding possible state sanctions for illegal work on the illegal aliens themselves does not provide the “clear and manifest” expression of Congressional intent required by this Court’s precedents to preempt state law regarding the sovereign exercise of its own police powers. *Wyeth*. Indeed, the only expression of applicable Congressional intent was that it intended “to preserve jobs for American workers,” as recognized by this Court in *National Center for Immigrants’ Rights, Inc. v. INS*, 520 U.S. 183, 194 & n. 8 (1990). Rather than conflicting with that Congressional intent, Section 5(C) of the Arizona law advanced it.

Finally, Section 6 of the Arizona law authorizes warrantless arrests when “the officer has probable cause to believe ... [t]he person to be arrested has committed any public offense that makes the person removable from the United States.” This again

cannot conflict with federal law which must have been violated if the person has committed a public offense that makes him or her removable, as defined under federal law.

Here again the state was simply exercising its sovereign authority and police powers to help enforce federal law with its own law enforcement resources. *Whiting; Plyler; Medtronic, Inc.; Altria Group; Di Re*. This again cannot be preempted under this Court's precedents without "clear and manifest" Congressional intent to do so. *Wyeth*. But there is no indication of any such Congressional intent at all. To the contrary, all indications are that Congress welcomes such state assistance.

Indeed, 8 U.S.C. Section 1252c expressly provides for state law enforcement authorities to arrest aliens who are unlawfully present in the United States. The Ninth Circuit majority below argued that Section 6 of the Arizona law could allow some arrests beyond what is covered by federal Section 1252c. But, again, there is no clear and manifest Congressional intent to preempt any such broader arrests, which, again, just involve the exercise of Arizona's sovereign police power to assist in enforcement of federal law, for which no express federal authorization is needed. *Whiting; Plyler; Medtronic, Inc.; Altria Group; Di Re*. In light of Section 1252c, it is even more egregious to hold Section 6 of the Arizona law preempted on a facial challenge before any arrests are even made.

The Ninth Circuit majority simply held erroneously regarding Section 6 that "states do not

have the inherent authority to enforce the civil provisions of federal immigration law.” App. 45a. The majority below consequently again just failed to recognize the sovereign authority and plenary police power inherent in each state, in violation of the constitutional framework of federalism. *Whiting; Plyler; Medtronic, Inc.; Altria Group; Di Re, supra.*

The Ninth Circuit below consequently erred egregiously in finding each of the key provisions of the Arizona law to be preempted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER FERRARA

Counsel of Record

AMERICAN CIVIL RIGHTS UNION

310 Cattell Street

Easton, PA 18042

610-438-5721

peterferrara@msn.com

Counsel for Amicus Curiae

American Civil Rights Union