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 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

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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

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[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 over one-third of all illegal border crossings in the nation in that state alone.[2] This includes gang members in Mexican drug cartels and criminals fleeing their home countries south of the border.[3] These heavily armed cartels even threaten the lives of state and federal law enforcement officers working in Arizona. JA 201-202. "Coyotes" paid to smuggle illegals across the border are also frequently more heavily armed than law enforcement. JA 242. The citizens of Phoenix suffer hundreds of reported kidnappings each year related to the drug trade and human smuggling.[4]

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[2] U.S. Dep't of Homeland Sec., 2010 Yearbook of Immigration Statistics 93 tbl. 35 (2011), http://www.dhs.gov/files/statistics/immigration.shtm.

[3] Majority Staff of House Comm. on Homeland Sec. Subcomm. on Investigations, A Line in the Sand: Confronting the Threat at the Southwest Border (2006), http://www.house.gov/sites/members/tx10_mccaul/pdf/Investigations-Border-Report.pdf.

[4] City of Phoenix Kidnapping Statistics Review Panel Report 5 (2011), http://phoenix.gov/webcms/groups/internet/@inter/@newsrel/documents/web_content/059403.pdf.

These invasions have deprived the Arizona public of access to their own land. The federal government has posted signs on public lands as far as 80 miles from the border and within 30 miles of Phoenix reading: "Danger – Public Warning – Travel Not Recommended" – "Active Drug and Human Smuggling Area" – "Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed."[5] Private ranchers living near the border suffer heavy property damage and loss of control over their own private property as well due to this smuggling activity. JA 174-178, 187-192, 311-313. 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.

Besides the physical safety and criminal threat concerns this poses to the citizens of Arizona, it costs the state several hundred million dollars each year in incarceration and law enforcement costs, and in education and health care expenses for illegal aliens living in the state.[6] These aliens account for roughly 20% of the state's prison population, and one-fifth of criminal defendants in Maricopa County, the state's most populous county by far. ER 264-274; JA 303-304. They also account for 7.4% of all Arizona

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[5] JA 167-170

[6] U.S. Immigration & Naturalization Serv., U.S. Dep't of Interior, U.S. Forest Serv., and U.S. Envtl. Prot. Agency, Report to the House of Representatives Committee on Appropriations on Impacts Caused by Undocumented Aliens Crossing Federal Lands in Southeast Arizona, http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/undoc_aliens/02_report.Par.82778.File.dat/SEAZ_REPORT2.pdf

workers, depriving American citizens of jobs and driving down their wages.[7]

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.[8] 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. 1070) 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

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[7] JA 36-37; Congressional Budget Office, The Role of Immigrants in the US Labor Market 23-24 (2005), http://www.cbo.gov/doc.cfm?index=6853 (wages of Americans without a high-school education drop by 9% as a result of illegal immigration); Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010,* p. 21, tbl. A1.

[8] Ralph Blumenthal, *Citing Border Violence, 2 Border States Declare a Crisis*, N.Y. Times (Aug. 17, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C0CE2DF133EF934A2575BC0A9639C8B63&pagewanted=all.

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.

This decision of the Ninth Circuit below effectively ousts the people of Arizona from any legal authority to address the building sovereign disintegration of their state, while the faraway federal government only lets the problem fester, and worsen. Arizona filed its petition for a writ of certiorari to review the Ninth Circuit's decision on August 10, 2011. That petition was granted on

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 over one-third 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 close to a billion dollars each year.

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. Such cooperative and parallel state law enforcement of federal laws has long been upheld by a long line of precedents of this Court, and other federal courts.

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.

ARGUMENT

I. RATHER THAN PREEMPTING THE ARIZONA LAW, FEDERAL IMMIGRATION LAW EXPRESSLY AUTHORIZES THE COOPERATIVE AND PARALLEL STATE LAW ENFORCEMENT OF THE ARIZONA LAW.

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." In *Wyeth v. Levine*,129 S. Ct. 1187, 1194-95 (2009), this Court explained that analysis of preemption 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 v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). 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. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)(congressional intent to preempt state law may

be inferred only "to the extent it [the state law] actually conflicts with federal law.").

This Court has also long held that there is no conflict justifying preemption when states merely provide for parallel enforcement of federal law, based on the same legal standards as provided in the federal law. *Whiting, supra; Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

The Tenth Circuit in *United States v. Vasquez-Alvarez*, 176 F. 3d 1294, 1296 (10th Cir. 1999) also 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." Many other courts have reiterated this fundamental principle as well. *E.g. United States v. Villa-Velasquez*, 282 F.3d 553 (8th Cir. 2002); *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); *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).

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).

In other words, if the state can interpret and enforce its law in a way that does not conflict with federal law, then it cannot be held preempted on a facial challenge. If and when the state does interpret and enforce its law in a way that conflicts with federal law, then that interpretation and enforcement can be struck down in an as applied challenge.

Every preemption case starts "with a presumption that the state statute is valid" with the party supporting preemption shouldering the burden of overcoming that presumption." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-662 (2003). That burden is all the greater in facial challenges before the law even takes effect.

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 LESC "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. The Tenth Circuit in *Vasquez-Alvarez* recognized 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.

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*, 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 penalize 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, while 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, 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.

II. THE ARIZONA LAW (S.B. 1070) IS CONSTITUTIONAL UNDER FEDERAL LAW AND THIS COURT'S PRECEDENTS.

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." Ariz. Rev. Stat. § 11-1051(B). The Section further provides that "[a]ny person who is

arrested shall have the person's immigration status determined before the person is released." The Section was careful to incorporate federal law in stating, "[t]he person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c)." Arizona was also 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." *Id.* § 11-1051(L).

This Section cannot possibly conflict with federal immigration law. It merely provides for state assistance of the state's own law enforcement officers 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. *See also,* 8 U.S.C. § 1357(g)(1)-(9), especially § 1357(g)(9) (States not required to enter into agreements with the Attorney General); 8 U.S.C. 1644. 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. Indeed, in 2010 the LESC fielded more than one million requests from state and local law enforcement officers seeking information about aliens, including from dozens of state and local jurisdictions that routinely do so, the great majority without any formal agreements under 1357(g)(1)-(9).[9]

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.

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[9] U.S. Immigration & Customs Enforcement, Law Enforcement Support Center, http://www.ice.gov/lesc/.

Moreover, it is Congressional intent that is determinative in regard to preemption under the Constitution and this Court's precedents, not Executive Branch intent. As this Court said in *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)), whether a state statute "is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' " If the Executive Branch wants to pursue lax enforcement of the nation's immigration laws, that does not preempt a state's vigorous enforcement of those laws. *North Dakota v. United States*, 495 U.S. 423, 442 (1990) ("It is Congress—not the DoD—that has the power to pre-empt otherwise valid state laws."); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994) ("Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.").

The Ninth Circuit's ruling in regard to Section 2B was even more egregious in that this is a facial challenge, and the court conceded that there were at least some applications of the Section that would be valid. This directly flouted the governing law and legal test in *United States v. Salerno*, 481 U.S. 739 (1987). Indeed, the Ninth Circuit dismissed Arizona's more limited interpretation of its own statute, which would have avoided condemnation under the majority's reasoning. That directly flouted this Court's caution in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442,

450 (2008) against finding a state statute facially invalid where "[t]he State has had no opportunity to implement [its statute], and its courts have had no occasion to construe the law in the context of actual disputes … or to accord the law a limiting construction to avoid constitutional questions."

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)." Ariz. Rev. Stat. § 13-1509. 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.*

Such parallel state enforcement of federal law has long been upheld. *People of State of Cal. v. Zook,* 336 U.S. 725, 735 (1949)("[t]he case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict in terms, and no possibility of such conflict, for the state statute makes federal law its own in this particular."); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Fox v. Ohio,* 46 U.S. 410 (1847); *Pennsylvania v. Nelson*, 350 U.S. 497, 500 (1956)(the States are not prevented "from prosecuting where the same act constitutes both a federal offense and a state offense under the police power."); *Gilbert v. Minnesota*, 254 U.S. 325, 329 (1920)("this country is one composed of many and must on occasions be animated as one, and

that the constituted and constituting sovereigns must have power of cooperation against the enemies of all"); *Bates*; *Riegel*. See as well the numerous Circuit Court rulings affirming the same in Section I above.

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." Ariz. Rev. Stat. § 13-2928(C). 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.* In *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) this Court expressly rejected the argument that a federal "decision not to adopt a regulation" is "the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation."

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). *Accord: Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)("IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"). Rather than conflicting with that Congressional intent, Section 5(C) of the Arizona law advanced it.

In Section 5(C), the state is merely exercising its traditional authority to regulate employment. As this Court just said in *Whiting*, 131 S. Ct. at 1974 (quoting *DeCanas*, 424 U.S. at 356) "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," and such regulations are "certainly within the mainstream of [the State's] police power."

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." Ariz. Rev. Stat. § 13-3883(A)(5). 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. As this Court announced over 100 years ago in *In re Quarles*, 158 U.S. 532, 535 (1895), "[i]t is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." *Accord: Sure-Tan, Inc. v. NLRB*, 467U.S. 883, 895 (1984). Judge Learned Hand added in *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928), when Congress forbids certain conduct, "[t]he purpose of such a system [is] to secure obedience as far as possible," and "it cannot be supposed that …such co-operation as [the States] extend must be rejected." See as well the numerous Circuit Court rulings affirming the same in Section I above.

Contrary to the Ninth Circuit majority below, such cooperative and parallel state law enforcement of federal law has been upheld without regard to whether it involved civil or criminal violations of law. *Estrada*; *Rodriguez-Arreola*; *Soriano-Jarquin*; *Lynch*; The Tenth Circuit has held that "state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws," including civil removability. *Vasquez-Alvarez*; *Salinas-Calderon*.

This state decision to assist in law enforcement 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, §1357(g)(10)(B) expressly authorizes states to cooperate in the "identification, apprehension, detention, or *removal* of aliens not lawfully present." (emphasis added). 8 U.S.C. Section 1252c expressly provides for state law enforcement authorities to arrest and detain for removability aliens who are unlawfully present in the United States in certain very narrow circumstances. The Ninth Circuit majority below held that that this specific authorization for removability arrests in these narrow circumstances preempted all other removability arrests. It consequently concluded that Section 6 of the Arizona law was preempted because it could allow some arrests beyond what is covered by federal Section 1252c.

But, again, this does not involve clear and manifest Congressional intent to preempt any such broader arrests. Rather, as the Tenth Circuit said in *Vasquez-Alvarez*, 176 F.3d at 1299, "th[e] legislative history [of Section 1252c] does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers," and nothing in the text does either.

Those broader arrests, again, all 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, as the precedents cited above make more than clear. Moreover, §1357(g)(10)(B) only indicates precisely to the contrary express Congressional intent to welcome such broader arrests. Finally, it is even more

egregious to hold Section 6 of the Arizona law preempted on a facial challenge before any arrests are even made, when even on the Ninth Circuits reasoning some arrests for removability would be valid.

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."

The Ninth Circuit below consequently erred egregiously in finding each of the key provisions of the Arizona law to be preempted. Their decision seems to be based more on politics than on law.

CONCLUSION

For all of the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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