No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, AND REV. GRADYE PARSONS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The religious organizations that join this brief all have strong interests in ensuring that state immigration laws do not undermine certain goals in the comprehensive federal immigration regime:

1. The United States Conference of Catholic Bishops (the "Conference") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, the rights of religious organizations and their adherents, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the value of human life from conception to natural death, and care for immigrants and refugees. When lawsuits have touched upon central Roman Catholic tenets like these, the Conference has filed *amicus curiae* briefs to make its view clear, particularly in this Court.

This is such a suit. The Catholic Bishops have repeatedly testified before Congress on immigration law and policy, and have been outspoken critics of certain provisions of current federal immigration laws, which are inconsistent with many Church teachings. *See, e.g.*, *Comprehensive Immigration Reform: Faith-Based Perspectives: Hearing Before*

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary (Oct. 8, 2009) (statement of Cardinal Theodore McCarrick) (hereinafter "McCarrick Statement"). But Arizona's S.B. 1070, 2010 Ariz. Sess. Laws, Ch. 113, is not a proper solution to the current problems in federal law. To the contrary, such state action actually causes more problems than it solves. In particular, the Conference is compelled to file this brief in support of the United States for two reasons.

First, the Conference has a strong interest in ensuring that courts adhere to two important goals of federal immigration law—the promotion of family unity and the protection of human dignity. The provisions of S.B. 1070 at issue in this case would hinder these critical federal objectives by replacing them with the single goal of reducing the number of undocumented immigrants in Arizona at all costs. That is flatly inconsistent with this country's longstanding holistic approach to immigration policy—which underscores why these decisions are properly made at the federal, rather than the state, level.

Second, and more generally, the Conference is acutely interested in protecting the religious liberty of Catholic and other religious institutions. The Catholic Church's religious faith, like that of many religious denominations including those who join the Conference in this brief, requires it to offer charity—ranging from soup kitchens to homeless shelters—to all in need, whether they are present in this country legally or not. Yet S.B. 1070 and related state immigration laws have provisions that could either criminalize this charity, criminalize those who provide or even permit it, or require the institutions that pro-

vide it to engage in costly (if not impossible) monitoring of the individuals they serve, and then to exclude from that charity all those whose presence Arizona and other states would criminalize. This in itself, as well as the proliferation of fifty different laws of this kind, would unnecessarily intrude on the Church's religious liberty.

2. The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has approximately 10,000 member congregations, which in turn have approximately 4.2 million individual members nationwide. Through partnerships with agencies, institutions and congregations, the ELCA and predecessor church bodies have a long history of providing welcome to refugees and migrants and supporting fair and generous immigration policies.

Through the adoption of social statements by the ELCA Churchwide Assembly, the Church's highest legislative body, the ELCA enacts policy positions on issues of public importance such as immigration, economic policy, and healthcare. The ELCA has a longstanding commitment to social justice for immigrants, made evident in these social policy statements including its 1998 "Message on Immigration," the 2009 social policy resolution, "Towards Compassionate, Wise, and Just Immigration Reform," and, most recently, in its 2011 resolution entitled, "Confronting Injustice in State Immigration Initiatives," which called for the Church, in partnership with Lutheran Immigration and Refugee Service, to continue to advocate for comprehensive immigration reform

and against harmful laws such as Arizona's S.B. 1070.

3. Founded in 1939, Lutheran Immigration and Refugee Service (LIRS) is a nationally recognized faith-based organization that serves refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration, and other vulnerable populations. It is LIRS's mission, in witness to God's love for all people, to stand with and advocate for migrants and refugees, transforming communities through ministries of service and justice.

Lutheran congregations have reported growing concerns about the impacts of S.B. 1070 and other state enforcement-only immigration laws, including the presence of government officials outside of churches before and after services, resulting in many congregants being afraid to attend worship services for fear that they will be detained and separated from their families. In response to S.B. 1070 and other similar state legislative proposals, LIRS issued a statement in 2011, "LIRS Laments Harmful Impacts of Proposed State Legislation," urging states to seek compassionate ways to build welcome for migrants and to continue to pressure Congress and the federal government to overhaul the nation's immigration laws and policies.

While Lutheran and Catholic doctrines diverge on certain issues, along with the U.S. Conference of Catholic Bishops, both ELCA and LIRS believe strongly in the promotion of family unity. Christian Scripture and tradition uphold the central role of the family in the formation of faith, character, and community. In addition, both ELCA and LIRS are com-

mitted to the protection of human dignity and advocate for the humane enforcement of U.S. immigration laws and the fair treatment of all migrants and refugees. ELCA and LIRS are gravely concerned that S.B. 1070's provisions contradict the biblical mandate to welcome and care for newcomers and will have a devastating impact on families and communities. For these reasons, ELCA and LIRS support the conclusions drawn by the U.S. Conference of Catholic Bishops in this brief.

4. Rev. Gradye Parsons, as Stated Clerk of the General Assembly, is the senior ecclesiastical officer of the Presbyterian Church (U.S.A.). The PC(U.S.A.) is a national Christian denomination with nearly 2,016,000 members in more than 10,560 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

This brief is consistent with the policies of the General Assembly of the PC(U.S.A.) regarding Federal Immigration Reform that recognizes the importance of family unity and human rights. The General Assembly has not addressed the issue of federal preemption; however, in 2008 the Assembly stated that the practice of police officers working in collaboration with Federal government institutions to enforce immigration laws represents a dangerous situation for families and the community in general. The same Assembly denounced the suffering and hurting of thousands of young children and parents, which is the product of separation during deportations. Many General Assemblies have reiterated that all humans

should have access to basic human needs like health, education, and housing.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

SUMMARY OF THE ARGUMENT

I. Federal statutes often result from comprehensive policy judgments concerning the best way to promote competing goals. When states have passed laws that would upset this delicate balance reached at the federal level, the Court has held that the comprehensive federal regime preempted the state laws. In those circumstances, the state laws stood as obstacles to the full purposes of the federal scheme.

II. The provisions of S.B. 1070 at issue here fall within this general rule of obstacle preemption.

A. Federal immigration law represents a comprehensive balance of competing interests. It seeks to balance the removal of undocumented immigrants from this country against competing objectives, including concerns for family unity and human dignity.

Family unity represents the cornerstone of federal immigration policy. Federal law, for example, grants the largest number of annual visas to family members of U.S. citizens and lawful permanent residents, and gives the Attorney General discretion to waive bars on admission out of "family unity" concerns. Similarly, immigrants may seek cancellation of re-

moval if it would cause exceptional hardship to their families, and, when enforcing the removal provisions, the government has long exercised its prosecutorial discretion in a manner that promotes family unity.

It is not surprising that concerns for family would impact the immigration laws. The institution of the family is deeply rooted in this nation, and receives constitutional protection. Promoting family stability, moreover, remains a modern goal, as evidenced by current federal law and modern empirical research. Family stability is a goal shared by many, including the Catholic Church, which views families as the building blocks of society and recognizes the special need that immigrants have for their families.

Federal immigration law also seeks to promote human rights and dignity as an equally important objective. Congress has directed the Attorney General to enforce immigration law in a manner that "safeguards the constitutional rights, personal safety, and human dignity" of immigrants. Federal law has eliminated barriers to entry based on race, gender, or national origin. And it permits removable immigrants to remain here for humanitarian reasons, such as unsafe conditions in the immigrants' home country or risks that the immigrants may be persecuted there. Finally, rather than punish immigrants who have come here in search of work to support their families, Congress opted for more humane sanctions on employers.

Concerns for human rights have long animated federal law. Our Constitution recognizes the fundamental worth of all humans, and protects against laws that would undermine their dignity. Undocumented immigrants are thus entitled to constitution-

al protection. Many federal statutes, such as the Civil Rights Act of 1964, were enacted to correct affronts to the dignity of certain groups. Immigration laws passed during that era were designed with the same concerns in mind. By doing so, the country remedied past animus against, among others, Catholic immigrants. The Catholic Church shares these objectives, insisting upon respect for the inalienable rights of all people, including undocumented immigrants.

B. S.B. 1070 stands as an obstacle to this comprehensive federal immigration scheme, because it fails to account for these important federal objectives.

As a general matter, S.B. 1070 sets "attrition" of undocumented immigrants "through enforcement" as the single state goal. It thus departs from the balanced federal judgment that takes into account family unity and human dignity. Indeed, Arizona adopted S.B. 1070 precisely because it disagreed with the nuanced federal approach. Because S.B. 1070 is an attempt to undermine federal law, it is preempted.

More specifically, the United States has shown in detail why each of the provisions of S.B. 1070 at issue here undercut important federal objectives. As one example, § 3 would exacerbate the breakup of families. It criminalizes the mere presence of undocumented immigrants in Arizona, with no allowance for family concerns. Indeed, S.B. 1070 creates a private right of action against any official who would refuse to prosecute because of those concerns. As another example, § 5 would undermine the inherent dignity of undocumented immigrants who seek work in this country to support their families. By punishing immigrants for merely seeking or obtaining work, it starkly conflicts with the federal decision that em-

ployer sanctions represented the most humane option for deterring employment by undocumented immigrants.

II. Aside from the specific provisions of S.B. 1070 at issue here, the Arizona legislation, along with other state immigration laws, presents a serious threat to religious liberty. The Catholic Church, like other religious institutions, believes that it has a moral and religious duty to help all in need. Numerous Catholic organizations thus offer wide-ranging charity, running soup kitchens, pregnancy counseling centers, and homeless shelters, to name a few. This duty of service extends to immigrants, which has led the Church to create institutions designed specifically to assist them.

S.B. 1070 and many state immigration laws like it threaten this Catholic mission to provide food, shelter, and other care to all. The laws contain provisions that make criminal the "harboring" of undocumented immigrants or the "encouraging" of them to enter the state. While ostensibly based on federal law, most courts have correctly recognized that these provisions are preempted because of the uniformity concerns highlighted by the United States in this case.

If allowed to stand, these state laws would burden the religious liberty of Catholic institutions in many ways that the federal regime does not. They go further in criminalizing aid to undocumented immigrants than does current federal law. Indeed, the Religious Freedom Restoration Act prohibits the federal government, but not the states, from enforcing the immigration laws in a manner that imposes substantial burdens on religious exercise. Moreover, the fed-

eral law has a specific exemption for religious ministers, an exemption absent in the state enactments. And, even if they were coextensive with federal law (which they are not), these varied state laws need not be enforced in the same manner. Allowing a multitude of state and local prosecutors to set their own enforcement priorities would equally chill religious exercise.

In sum, a patchwork set of state "harboring" regulations like S.B. 1070's would seriously threaten the Catholic Church's mission to serve all in need. The United States' effort to establish a single set of immigration laws thus constitutes a sound federal objective that this Court should particularly respect in regard to the S.B. 1070 provisions at issue here.

ARGUMENT

I. THE SUPREMACY CLAUSE PREEMPTS STATE LAWS THAT UNBALANCE COMPREHENSIVE FEDERAL REGULATORY SCHEMES

The Court has long recognized that federal laws frequently result from *competing* interests to effect *competing* objectives. *See Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 348-51 (2001). This makes eminent practical sense. "[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Rather, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Id.* at 526.

Accordingly, federal law impliedly preempts state laws that "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *AT&T Mobility LLC v. Concep-*

cion, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). In other words, where federal legislation has sought "to achieve a somewhat delicate balance of statutory objectives," state laws that would alter the federal balance reached must give way. *Buckman*, 531 U.S. at 348; *see Boggs v. Boggs*, 520 U.S. 833, 844 (1997) ("States are not free to change [federal law's] structure and balance."). That is true even if "the ultimate goal of both federal and state law" is the same, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987), because the states can just as easily skew comprehensive federal regimes through conflicting means as through conflicting ends, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000).

Numerous decisions from this Court illustrate this principle. The Court has held, for example, that comprehensive federal transportation regulations preempted state tort suits because, while both sought to promote automobile safety, state law sought to mandate specific safety devices in conflict with a federal objective to give manufacturers flexibility to try different options. *Geier*, 529 U.S. at 877-82. Likewise, the Court has ruled that federal drug laws preempted state tort suits alleging fraud on the FDA, because the federal regime gave the FDA discretion to enforce its provisions in a manner that balanced competing objectives, and that balance would be "skewed" if private individuals could also enforce the laws. *Buckman*, 531 U.S. at 348-51. And the Court has held that federal labor laws preempted broader state "regulatory or judicial remedies," because the narrower federal remedies reflected a compromise of competing labor policies. *Wis. Dep't of Indus., Labor*

& Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986). As explained below, like these other federal regimes, federal immigration law represents a comprehensive scheme of competing statutory interests.

II. THE S.B. 1070 SECTIONS AT ISSUE HERE IMPEDE FEDERAL GOALS OF PROMOTING FAMILY UNITY AND HUMAN DIGNITY

Under standard obstacle-preemption analysis, federal immigration law preempts the S.B. 1070 provisions at issue in this case. Federal immigration law has long set a "delicate balance," *Buckman*, 531 U.S. at 348, seeking to further *not just* the removal of undocumented immigrants from this country, *but also* other, competing goals. S.B. 1070, by contrast, skews this balanced approach by setting "attrition through enforcement" as the only goal of immigration law at the expense of all others. *Id.* § 1. It cannot stand.

A. Federal Immigration Law Seeks To Balance Competing Social Policies

Enacted in 1952 and amended many times since, the Immigration and Nationality Act (INA) creates a "comprehensive federal statutory scheme" that "set[s] the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully" here. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011). While these enactments have sought to ensure that the immigration laws are "enforced vigorously," Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384, that has never been their *only* statutory objective. Rather, federal immigration law has traditionally strived to regulate immigration in a manner that promotes other important "competing

values." *Rodriguez*, 480 U.S. at 526. Two, family unity and human dignity, are especially significant.

1. Family unity represents a cornerstone of federal immigration law

a. Federal immigration law seeks to keep parents and their children together. Both modern provisions and provisions dating to the original INA underscore this "intention . . . regarding the preservation of the family unit." H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680; *see* H.R. Rep. No. 101-723(I), at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6717 (referring to "family reunification" as "the cornerstone of U.S. immigration policy"); S. Rep. No. 89-748, at 13 (1965), *reprinted in* 1965 U.S.S.C.A.N. 3328, 3332 (describing "[r]eunification of families" as "the foremost consideration").

As numerous circuit courts of appeals have recognized, this important federal objective infuses myriad aspects of the immigration law and its judicial interpretation. *See, e.g.*, *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) ("It is consistent with Congress's remedial purposes . . . to interpret the statute's ambiguity . . . in a manner that will keep families intact."); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Mufti v. Gonzales*, 174 F. App'x 303, 306 (6th Cir. 2006) ("Congress's intent is clear: family unification is one of the highest goals of our immigration law."); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The [INA] was

intended to keep families together," and "should be construed in favor of family units.").

Entry. To begin with, Congress has long "felt that, in many circumstances, it [is] more important to unite families and preserve family ties than it [is] to enforce strictly" arbitrary numerical quotas on the number of immigrants that may enter this country. *I.N.S. v. Errico*, 385 U.S. 214, 220 (1966). Thus, Congress preserves the largest number of visas available each year for family members of U.S. citizens and permanent residents. *See* 8 U.S.C. § 1151(a), (c). Federal law generally places no cap on the number of children, spouses, and parents of U.S. citizens that may enter, *id.* § 1151(b)(2)(A)(i), and allocates a substantial percentage of visas to family members of permanent residents, *id.* §§ 1151(a)(1), 1153(a).

In addition to this general "[p]reference allocation for family-sponsored immigrants," *id.* § 1153(a), federal law gives the Attorney General additional discretion "to assure family unity" in specific situations. *See, e.g.*, *id.* §§ 1157(c)(3), 1182(d)(11). With respect to an immigrant seeking adjustment of status to lawful permanent resident, for example, the Attorney General may take into account family unity by waiving otherwise applicable bars to admission. *See id.* § 1159(c); *see also id.* § 1182(a)(3)(D)(iv). Likewise, federal law allows the Attorney General to waive the bar against the admission of immigrants who have assisted other undocumented immigrants to enter, if they have assisted only a parent, spouse, or child. *Id.* § 1182(d)(11). "[F]amily unification [was] . . . the motivation behind the creation of [these] waiver[s]." *Mufti*, 174 F. App'x at 306.

Removal. Family considerations also affect removal proceedings for immigrants already here. Federal law, for example, permits cancellation of removal for an undocumented immigrant if the removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child." 8 U.S.C. § 1229b(b)(1)(D). And while a lawfully admitted immigrant is removable if he assists in bringing an undocumented immigrant into the United States, the Attorney General may waive this provision if the lawfully admitted immigrant only assisted an immediate family member. *Id.* § 1227(a)(1)(E)(iii).

The federal government also gives preferential consideration to family ties in its enforcement of the general removal provisions. "When weighing whether an exercise of prosecutorial discretion may be warranted" in a particular case, federal agents must consider such factors as "the person's . . . family relationships" and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency* 4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (last visited Mar. 21, 2012) (hereinafter "Morton"). Family ties also count as an important discretionary factor when the executive determines whether it will grant asylum to an immigrant. *See, e.g.*, *Huang v. I.N.S.*, 436 F.3d 89, 101 (2d Cir. 2006).

b. The idea that federal law should promote family unity is hardly limited to immigration, but instead reverberates throughout our laws. "The integrity of the family unit has found protection in" our founding

document, the Constitution itself. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court has recognized a right to traditional marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and parents also have a liberty interest in their children's upbringing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). Numerous historical sources confirm the importance of marriage and family in American tradition. *See, e.g.*, Noah Webster, *An Am. Dict. of the English Language* (1st ed. 1828) (noting purposes of "marriage"); William Blackstone, 1 *Commentaries* 422 (same).

Promoting family stability, moreover, remains a modern goal. It is evident in a diverse array of modern federal legislation, ranging from the Family and Medical Leave Act (which was designed to promote "the stability and economic security of families," 29 U.S.C. § 2601(b)(1)), to the Indian Child Welfare Act (which was passed "to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902). Current empirical sources confirm the ongoing importance of family stability. *See, e.g.*, Kristen Anderson Moore, et al., *Marriage From a Child's Perspective, Child Trends Res. Brief* 6 (June 2002).

The Catholic Church, for its part, counts over 68 million Americans as its members—about 22% of all Americans. And it has long shared Congress's dedication to stable families. The Church sees families as society's building blocks. Pope John Paul II, *Fami-*

liaris Consortio 42 (1981) ("The family has vital and organic links with society, since it is its foundation and nourishes it continually."). According to Church teaching, families have a number of natural rights, including "the right to exist and to progress as a family" and the right to a societal structure that allows them "to live together." Holy See, *Charter of the Rights of the Family* arts. 6, 10 (Oct. 22, 1983), *available at* http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html (last visited Mar. 21, 2012).

The Church also believes that "[t]he families of migrants have the right to the same protection as that accorded other families," including the "right to see their family united as soon as possible." *Id.* art. 12. If anything, family concerns are heightened for immigrants, as they "are even more in need of their own family, since for those who are far from home family support is indispensable." Msgr. Agostino Marchetto, *Address in Brussels, Belgium* (July 10, 2007), *available at* http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070710_migrazione-sviluppo_en.html (last visited Mar. 21, 2012).

2. Federal immigration law seeks to protect human rights and human dignity

a. As an equally important objective, federal immigration law seeks to promote human rights and human dignity. Congress has plainly and unmistakably instructed the Attorney General that, "in the enforcement of [the immigration] laws, [he] shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens." Pub. L. No. 99-603, § 115, 100 Stat. at 3384; *see also, e.g.*,

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(22), 114 Stat. 1464, 1468 (noting that "the Declaration of Independence" "recognizes the inherent dignity and worth of all people"); Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102, 102 (noting "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"). As with family unity, this important objective permeates federal immigration law.

Entry. Illustrating the federal concern for human dignity and rights, the immigration laws have progressively eliminated barriers to entry based on race, gender, or national origin. "One of the significant provisions of [the original INA] [was] the elimination of race as a bar to naturalization and immigration," H.R. Rep. No. 82-1365 at 28, 1952 U.S.C.C.A.N. at 1679, and it also eliminated "the existing inequalities in the treatment of the sexes," *id.* at 37, 1952 U.S.C.C.A.N. at 1689. And while the original INA maintained a national-origin quota system that allocated visas based on nationality, the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (1965), subsequently "repeal[ed] [those] provisions," S. Rep. No. 89-748 at 10, *reprinted in* 1965 U.S.S.C.A.N. at 3328. As President Johnson explained, this 1965 law addressed the "basic problems of human dignity" by returning the country "to the finest of its traditions"—adherence to "the principle that values and rewards each man on the basis of his merit as a man." Presidential Statement on Signing of the Immigration Bill, 1 Weekly Comp. Pres. Doc. 365-66 (Oct. 11, 1965).

Removal. Federal law also ensures basic human rights and dignity by permitting otherwise removable immigrants to remain in this country for a variety of humanitarian reasons. For example, the Attorney General may allow immigrants to remain here on a temporary basis if he finds that their safety would be threatened in their home countries by armed conflicts or natural disasters. 8 U.S.C. § 1254a(a), (b)(1). Similarly, undocumented immigrants in this country are permitted to apply for asylum if they have a "well-founded fear of persecution" "on account of race, religion, nationality, membership in a particular social group, or political opinion," or if they have been "forced to abort a pregnancy or to undergo involuntary sterilization." *Id.* §§ 1101(a)(42), 1158(b)(1). Federal law also mandates that immigrants who face a clear likelihood of torture may not be sent back to their countries. *See* 8 C.F.R. § 1208.16(c). Immigrants who are victims of human trafficking or domestic abuse also may seek to remain here. *See* 8 U.S.C. §§ 1101(a)(15)(T), 1154(a)(1)(A)(iii); 8 C.F.R. § 214.11.

More generally, as with family unity, the federal government has followed Congress's command to enforce the immigration laws in a manner that promotes humanitarian concerns. When determining whether to exercise prosecutorial discretion not to seek the removal of an undocumented immigrant, for example, it directs federal agents to consider such factors as the "conditions in the home country"; "whether the person or the person's spouse suffers from severe mental or physical illness"; and "whether the person is likely to be granted temporary or permanent status or other relief from removal, including

as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime." Morton, at 4.

Employment. After years of investigations and hearings, Congress also enacted a narrowly tailored approach to the problem of employment by undocumented immigrants, again designed to balance basic human dignity with competing concerns. "Witnesses from all parts of the country and all walks of life testified that the illegal alien was industrious, hard-working and motivated primarily by the desire to improve his lot in life and provide for his family." *Illegal Aliens; A Review of Hearings Conducted During the 92d Congress*, at 10 (Feb. 1973) (hereinafter "*Illegal Aliens*"). Congress heard that decisions by undocumented immigrants to seek employment here typically stemmed from "self-preservation," whereas employer decisions to hire them originated with a "profit" motive. *Id.* at 22. Given those circumstances, Congress viewed "employer sanctions" as "the most humane . . . way to respond to the large-scale influx of undocumented aliens," recognizing that "many who enter illegally do so for the best of motives." H.R. Rep. No. 99-628(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650; *see Illegal Aliens* at 20 ("'He is seeking to find an opportunity, and I think we have got to act in a humanitarian manner.'") (statement of Chairman Rodino). Thus, rather than punish immigrants for working, Congress placed sanctions on employers. 8 U.S.C. § 1324a(a)(1)(A).

b. Concerns for human rights and human dignity permeate and animate federal laws well beyond the INA. Indeed, our "founding documents" themselves "recognize[] the inherent dignity and worth of all people." Pub. L. No. 106-386, § 102(22), 114 Stat. at

1468. Thus, "the Constitution demand[s] recognition of certain . . . rights" that originate with the "human dignity inherent in all persons." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). For example, "'[t]he basic concept underlying the Eighth Amendment['s ban on cruel and unusual punishment] is nothing less than the dignity of man.'" *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)). And immigrants retain the inherent dignity and human rights that entitle them to constitutional protections even if they reside here without authorization. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law . . . .").

In addition, many other federal statutes, like the Civil Rights Act of 1964, were enacted to correct wide-ranging affronts to human dignity. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity"); *see also, e.g.*, 42 U.S.C. §§ 8011(a)(2)(D), 11301(a)(6). Those who passed the 1965 immigration reform eliminating national-origin quotas placed the reform on par with these other civil-rights laws of the era. *See, e.g.*, 111 Cong. Rec. 21,749, 21,783 (1965) (statement of Rep. Burton) ("Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration.").

By doing so, the federal government acted to remedy the country's past wrongs against particular im-

migrant groups. For example, "[a] large percentage of immigration during [the mid-1800s] was Catholic," and this Catholic immigration lit "the fire of racial and religious intolerance" because "[C]atholicism was in disfavor at the time." H.R. Rep. No. 82-1365 at 8, 1952 U.S.C.C.A.N. at 1657. "At its most vitriolic, nativism manifested itself in anti-Catholic riots" that undermined the rights and dignity of these immigrants. Select Commission on Immigration and Refugee Policy, *Staff Report, U.S. Immigration Policy and the National Interest* 175 (1981).

The Catholic Church, for its part, has long shared the goals of protecting these important aspects of personhood. *See* Pope John Paul II, *Evangelium Vitae* 8 (1995) (describing the human community as "one great family, in which all share the same fundamental good: equal personal dignity"). To those ends, "[t]he Church invites all people of goodwill to make their own contributions so that every person is respected and discriminations that debase human dignity are banned." Pope John Paul II, *Message for World Migration Day* (Nov. 9, 1997), *available at* http://www.vatican.va/holy_father/john_paul_ii/messages/migration/documents/hf_jp-ii_mes_09111997_world-migration-day-1998_en.html (last visited Mar. 21, 2012). The Catholic Church unapologetically demands that "public authorities" "respect the fundamental and inalienable rights of the human person." Catechism of the Catholic Church ¶ 1907. And this human dignity knows no cultural or geographic boundaries; "[r]egardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected." U.S. and Mexican Catholic Bishops, *Strangers No Longer: Together on*

the Journey of Hope ¶ 38 (Feb. 23, 2003) (hereinafter "*Strangers*").

B. S.B. 1070 Interferes With The Considered And Balanced Judgments Embodied In Federal Immigration Law

As the foregoing makes clear, S.B. 1070, with its punitive focus on "attrition through enforcement," "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of'" federal immigration laws. *Concepcion*, 131 S. Ct. at 1753 (citation omitted). Simply put, it would "skew[]" the "balance of statutory objectives" in federal immigration laws. *Buckman*, 531 U.S. at 348.

S.B. 1070—by setting "attrition" of undocumented immigrants "through enforcement" as the sole goal, *id.* § 1—departs from the federal balanced judgment that takes into account family unity and humanitarian factors, among others. As Attorney General Meese indicated for the Reagan Administration, "regaining control of our borders is not the only princip[le] that must govern responsible immigration policy." *Immigration Control and Legalization Amendments: Hearing on H.R. 3080 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 99th Cong. 28, at 7 (1985). Yet Arizona adopted its single-minded view of proper policy precisely *because* it disagreed with the more nuanced and sensitive approach reflected in federal law, intending to undercut it. Remarks by Gov. Jan Brewer, *Support Our Law Enforcement and Safe Neighborhoods Act* (Apr. 23, 2010), *available at* http://azgovernor.gov/dms/upload/SP_042310_SupportOurLawEnforcementAndSafeNeighborhoodsAct.pdf (last visited Mar. 21, 2012) (suggesting state law was

necessary due to "decades of federal inaction and misguided policy"). That S.B. 1070 was enacted to remedy what Arizona perceived as inadequate federal policy demonstrates that it improperly seeks to alter the federal immigration law's "structure and balance." *Boggs*, 520 U.S. at 844.

The United States has explained in detail how each of the S.B. 1070 provisions at issue in this case would skew immigration policy judgments made at the federal level by implementing one objective (the attrition of undocumented immigrants) at the cost of all others. *See* Br. for United States 26-55. That these state provisions would eviscerate two central principles behind the federal government's immigration policy, family unity and human dignity, underscores the point. Two examples illustrate how they would undermine these goals.

First, despite the centrality of family unity enshrined in federal immigration law, S.B. 1070 § 3, Ariz. Rev. Stat. Ann. § 13-1509(A), would actually exacerbate the breakup of families beyond what federal law would permit, let alone require. That section makes it a state crime punishable by fines or imprisonment to be present in the United States without proper documentation. *Id.* It makes no allowance for family considerations in enforcement. To the contrary, S.B. 1070 requires state and local law enforcement personnel to immediately detain every person they stop who is even suspected of being an undocumented immigrant, *see* Ariz. Rev. Stat. Ann. § 11-1051(B), taking no account of family needs, and purports to create a private right of action against any official who would refuse to prosecute because of family concerns, *see* Ariz. Rev. Stat. Ann. § 11-1051(H).

Thus, an undocumented immigrant whom the federal government allows to remain because, for example, he is "the primary caretaker of a person with a mental or physical disability," Morton at 4, could nevertheless face fines or imprisonment under state law. And a state official who complied with that federal decision could be subject to severe civil penalties, Ariz. Rev. Stat. Ann. § 11-1051(H).

These criminal sanctions, particularly imprisonment, would seriously impact the ability of immigrants who are punished by S.B. 1070 to care for their children and would separate families. Since studies suggest that 85% of immigrant families are of "mixed" status with at least one undocumented member, McCarrick Statement, at 6, it is self-evident that § 3's failure to consider family unity would have wide-scale repercussions. Indeed, the devastating impacts on families of harsh immigration enforcement have been documented recently by the Applied Research Center in its report, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (available at http://www.arc.org/shatteredfamilies (last visited Mar. 21, 2012)). This report demonstrates that aggressive immigration enforcement by local police has resulted in the citizen children of noncitizens often being separated from their parents and facing barriers to reunification.

Second, S.B. 1070 § 5, Ariz. Rev. Stat. Ann. § 13-2928(C), would undermine the human dignity of immigrants who have come here in search of a better life for their families. That section makes it a crime for undocumented immigrants to seek or obtain work in Arizona. *Id.* It is in stark contrast with the inten-

tional federal decision that "employer sanctions" were "the most humane" option for deterring undocumented-immigrant employment, H.R. Rep. No. 99-628(I), at 46, 1986 U.S.C.C.A.N. at 5650, since the undocumented immigrants were driven by "very strong economic necessity" to support themselves and their families, *Illegal Aliens*, at 20. Again, that which the federal government has chosen to provide as a result of a holistic view of how our borders should be protected cannot and should not be arbitrarily abridged by individual states—especially if they are acting on the very national-origin animus that federal law proscribes.

III. MORE GENERALLY, S.B. 1070 AND OTHER STATE IMMIGRATION LAWS THREATEN RELIGIOUS LIBERTY

Apart from the specific provisions of S.B. 1070 at issue in this particular matter, the legislation also presents serious threats to religious liberty. Were the Court to take a narrow view of preemption in the immigration context, Catholic charitable institutions could be subject to a set of fifty different laws—with fifty different enforcement standards and interpretive glosses—regulating their charitable efforts. S.B. 1070, combined with other state immigration laws like it, could thus hinder religious institutions such as the Catholic Church, whose missions require them to serve all in need, regardless of race, religion, or immigration status, on a nationwide (and, indeed, international) basis. The threat to religious liberty provides a concrete example why the Court should adequately account for the federal objective to seek one national set of immigration laws in this delicate area. *See* Br. for United States 24-25.

A. The Catholic Church, like others, believes that it has a moral and religious duty to serve all in need. That is an important religious tenet flowing directly from scripture. "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2006).

In line with a divine call to action, numerous Catholic institutions provide charitable assistance to the poor and underserved. In 2010 alone (the most recent year for which figures are available), Catholic Charities assisted over 10 million people in the United States. *See* Catholic Charities, *At A Glance* 1 (2010), *available at* http://www.catholiccharitiesusa.org/document.doc?id=2853 (last visited Mar. 21, 2012). That assistance ranged from operating soup kitchens, to offering pregnancy and adoption counseling, to providing temporary shelters and transitional housing. *Id.*

The Church's duty to help all in need necessarily extends to both documented and undocumented immigrants. The Book of Matthew "describes the mysterious presence of Jesus in the migrants who frequently lack food and drink and are detained in prison." *Strangers* ¶ 26. The Church believes that it must follow Jesus's command concerning these migrants: "'Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me.'" *Id.* Catholic teaching has thus led the Church to minister specifically to this country's immigrant population. The Conference, for example, created the De-

partment of Migration and Refugee Services (MRS) specifically to ensure that "immigrants, refugees, migrants, and people on the move are treated with dignity, respect, welcome and belonging." 2010 Migration and Refugee Services Annual Report at ii, *available at* http://www.usccb.org/about/migration-and-refugee-services/2010migrationandrefugeeservicesannualreport.cfm (last visited Mar. 21, 2012). MRS, along with dozens of local diocesan offices, assists thousands of refugees to resettle in the United States each year, and oversees a network of state-licensed foster-care programs that care for victims of human trafficking, unaccompanied migrant children, and refugee children.

B. S.B. 1070 and many other state and municipal immigration laws of recent vintage threaten grave disruption of this Catholic mission to provide charity to all in need. S.B. 1070, for example, makes it unlawful for a person who is in violation of a criminal statute to "[c]onceal, harbor or shield . . . an alien from detection" or to "[e]ncourage or induce an alien to come to or reside in [Arizona]" "if the person knows or recklessly disregards" that the assisted immigrant is undocumented. S.B. 1070 § 5, Ariz. Rev. Stat. Ann. § 13-2929(A)(2)-(3). Several other states and municipalities have also enacted similar laws, creating a diverse patchwork of provisions that, like S.B. 1070, generally make criminal the "harboring" of undocumented immigrants. *See, e.g.*, Ala. Code § 31-13-13(a)(1)-(2); Ga. Code Ann. § 16-11-201(b); Okla. Stat. Ann. tit. 21 § 446(B); S.C. Code Ann. § 16-9-460(D); Utah Code Ann. § 76-10-2901(2)(b)-(c); Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006); Hazleton, Pa., Ordinance 2006-18 § 5 (Sept. 21, 2006).

In defense of these various provisions, states and municipalities have argued that they are merely enforcing federal laws that prohibit individuals from "conceal[ing], harbor[ing], or shield[ing] from detection" undocumented immigrants, or from "encourag[ing] or induc[ing]" those immigrants to enter the United States. 8 U.S.C. § 1324(a)(1)(A). Most courts have rejected these arguments, correctly recognizing that these provisions are preempted because of the national uniformity concerns highlighted by the United States in this case. *See, e.g.*, *United States v. South Carolina*, __ F. Supp. 2d __, 2011 WL 6973241, at *12 (D.S.C. Dec. 22, 2011); *United States v. Alabama*, 813 F. Supp. 2d 1282, 1331-36 (N.D. Ala. 2011); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1333-36 (N.D. Ga. 2011).

The United States' objective to create one set of national immigration laws supports fairness not simply for immigrants but also for the Church. If allowed to stand, these varied state laws would burden the religious liberty of Catholic institutions in many ways that the federal immigration regime rightly does not. To begin with, these state laws are likely to be interpreted to go further in criminalizing mere charity to undocumented immigrants than federal law currently does. As Judge Richard Posner recently noted, federal law generally has been interpreted *not* to reach mere assistance to undocumented immigrants, such as "providing [them] a place to stay." *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012); *see also, e.g.*, *Alabama*, 813 F. Supp. 2d at 1334 (citing circuit courts requiring a defendant to substantially facilitate the alien remaining unlawfully in the United States or to prevent detection by authorities). Moreover, the federal government faces

significant constraints on its ability to enforce federal law in a manner that infringes religious liberty imposed by the Religious Freedom Restoration Act (RFRA). Under RFRA, federal immigration laws, like other laws, may not substantially burden the religious exercise of Catholic institutions unless the federal government can prove that the burden in a particular case was the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-34 (2006).

Since *City of Boerne v. Flores*, 521 U.S. 507 (1997), however, RFRA has not applied to states or municipalities. *Id.* at 536. RFRA, therefore, would not constrain state interpretation of state laws, increasing the likelihood that those laws would proliferate in a disjointed manner inconsistent with the federal scheme. State courts could "interpret [their] [state]-specific . . . harboring scheme[s] 'unconstrained by the line of federal precedent' interpreting the federal" provisions, and unfettered by RFRA. *Alabama*, 813 F. Supp. 2d at 1335 (quoting *Ga. Latino Alliance*, 793 F. Supp. 2d at 1335).

Broad interpretations of these state laws would obviously interfere with the Catholic Church's religious mission and liberty, which transcends the geographic borders in which Catholic organizations operate. Such laws, for example, could be used to impose liability, even criminal liability, on Catholic institutions that offer temporary shelter to all who request it, including homeless undocumented immigrants. *See* Catholic Charities, *At A Glance*, at 2. As one example, Alabama suggested that the mere "act of provid-

ing housing to unlawfully present aliens" could violate its state provisions. *See Alabama*, 813 F. Supp. 2d at 1335. Forcing Catholic institutions to check the papers of all they serve (and turn away undocumented immigrants) would not only impose substantial administrative burdens (thereby wasting their charitable assets), but also fundamentally violate the Catholic Church's religious beliefs that it cannot turn away others in need.

In addition, since "this is a religious nation," *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892), Congress has seen fit to exempt from certain federal harboring laws religious denominations that "encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination[s]" under some circumstances. 8 U.S.C. § 1324(a)(1)(C). The state laws, by contrast, have no similar provision. They thus "creat[e] the potential scenario where a [religious organization] acting lawfully under the federal harboring statute could be prosecuted by state officials for conduct expressly excepted from federal criminal law." *South Carolina*, 2011 WL 6973241, at *12; *see Alabama*, 813 F. Supp. 2d at 1332 (noting that, given their lack of a religious exemption, the state laws "'impose[] prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation'") (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

Even if these varied state harboring laws were completely coextensive with federal law—and they clearly are not—they would still constitute threats to

religious liberty. They would transfer the tools for discerning and prosecuting specific activities under these rules from the hands of federal prosecutors (who have generally exercised their discretion consistent with the more balanced and sensitive federal approach to immigration law) to state or local prosecutors (who do not have that experience and in any case will not share that sensitivity), as "part of a larger state effort to alter federal immigration enforcement priorities and to assert state control over such policy decisions." *South Carolina*, 2011 WL 6973241, at *13. Such a transfer of power would be deeply troubling, and would threaten great mischief, because states and municipalities could pursue prosecutions in a manner inconsistent with federal priorities or with the priorities of other states. One court, for example, suggested that Georgia "wildly exaggerate[d] the scope of the federal crime of harboring" to justify a broad interpretation of Georgia's provisions. *Ga. Latino Alliance*, 793 F. Supp. 2d at 1335.

Such a patchwork set of different criminal laws and enforcement regimes would undoubtedly chill Catholic institutions' religious exercise, especially since these varied provisions are open to interpretation. *See, e.g.*, *Costello*, 666 F.3d at 1043-50. Alabama courts could interpret their statute to reach a Catholic Charities entity running a soup kitchen in a predominately immigrant area, whereas Georgia courts could simultaneously take a different view.

In sum, a patchwork set of state "harboring" regulations like S.B. 1070's would seriously threaten to interfere with the Catholic Church's religious mission to serve all in need. This very real threat to religious liberty is yet another reason why the United States'

effort to establish a single set of national immigration laws constitutes a sound federal objective that this Court should account for when addressing the provisions of S.B. 1070 at issue in this case.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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