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 AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] The AFL-CIO has long been concerned with immigration law as it affects the rights of workers and, for this reason, has filed briefs as *amicus curiae* in cases addressing this topic. *See*, *e.g.*, *Hoffman Plastic Compounds*, *Inc. v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan*, *Inc. v. NLRB*, 467 U.S. 883 (1984).

The AFL-CIO believes that the current federal immigration system is broken. However, the recent efforts by several states to address the deficiencies in the federal immigration system on a patchwork basis – *see*, *e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535; Georgia Illegal Immigration Reform and Enforcement Act, 2011 Ga. Laws 794 – are not only unwise as a matter of immigration policy, they are also largely preempted by federal immigration law under the Supremacy Clause of the U.S. Constitution.

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[1] Counsel for the petitioners and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Because the problems associated with our broken immigration system are felt in all fifty States, the AFL-CIO takes the position that a comprehensive federal solution is required. *See* AFL-CIO & Change to Win, The Labor Movement's Framework for Comprehensive Immigration Reform (April 2009), *available at* http://www.aflcio.org/Issues/Immigration. That solution should include an improved employment authorization mechanism and operational control of the border between the United States and Mexico as well as an opportunity for the current undocumented population to earn lawful status in the United States. *Ibid.*

STATEMENT

The State of Arizona enacted Senate Bill 1070 ("S.B. 1070") on April 23, 2010, 2010 Ariz. Sess. Laws, Ch. 113, and amended that law a week later with the enactment of House Bill 2162, 2010 Ariz. Sess. Laws, Ch. 211.[2] In its statutory statement of purpose, S.B 1070 declared:

> "The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." S.B. 1070, § 1, Ariz. Rev. Stat. § 11-1051 note.

Before S.B. 1070 could take effect, the United States sued Arizona in federal district court, alleging that six provisions of the law are preempted by the federal Immigration and Nationality Act (INA) and therefore violate the Supremacy Clause.

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[2] All references herein to "S.B. 1070" are to the bill as amended by House Bill 2162.

The district court held that four provisions of the Arizona law are preempted and enjoined their enforcement. Pet. App. 116a-169a. Arizona appealed the district court's decision and the Ninth Circuit affirmed. Pet. App. 1a-115a. Arizona then filed a petition for a writ of certiorari, which this Court granted.

Three of the enjoined provisions provide that: (i) Arizona law enforcement officers must determine the immigration status of any individual they stop where the officer has reasonable suspicion the individual is unlawfully in the United States, § 2(B), Ariz. Rev. Stat. § 11-1051(B); (ii) Arizona law enforcement officers may make a warrantless arrest where the officer has probable cause that an individual had committed an offense that makes him or her removable from the United States, § 6, Ariz. Rev. Stat. § 13-3883(A)(5); and (iii) the violation of the existing federal requirement that aliens carry their registration documents is a state criminal offense, § 3, Ariz. Rev. Stat. § 13-1509.

The fourth enjoined provision, Section 5(C) of S.B.1070, Ariz. Rev. Stat. § 13-2928(C), states:

> "It is unlawful 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 this state."

A violation of § 5(C) is a Class 1 misdemeanor, § 5(D), Ariz. Rev. Stat. § 13-2928(D), punishable by up to six months imprisonment and a fine of up to $2,500, Ariz. Rev. Stat. §§ 13-717, 13-802.

The AFL-CIO agrees with the United States and the courts below that all four provisions of S.B. 1070 are preempted by federal law. As to §§ 2(B), 6, and 3, the AFL-CIO fully joins in the arguments presented by the United States in its brief for why those provisions are preempted. The AFL-CIO files this brief as *amicus curiae* to elaborate on why § 5(C) of the Arizona law, which makes unauthorized work by an alien who is unlawfully present in the United States a state criminal offense, is preempted by federal law as well.

SUMMARY OF ARGUMENT

The authority to regulate immigration is an exclusively federal power. This federal power, which has been implemented by the Immigration and Nationality Act, includes the power to comprehensively regulate the employment of aliens in order to deter aliens from entering the United States unlawfully in search of employment and to deter lawfully-admitted aliens from violating the terms of their admission to the United States by engaging in unauthorized employment.

Section 5(C) of S.B. 1070 is preempted because, by criminalizing any alien who is unlawfully present in the United States and who engages in unauthorized employment, it seeks to deter the unlawful entry into and presence of aliens in Arizona, rather than to regulate employment relationships within the State. In fact, S.B.1070 says nothing at all about employment relationships as such. Instead, the law uses unauthorized employment as a vehicle for levying a state criminal penalty on aliens for their unlawful presence in the United States.

By enforcing a one-size-fits-all state criminal penalty for violations of federal immigration law, § 5(C) of S.B. 1070 interferes with the United States' ability to tailor its enforcement efforts in a manner calibrated to further the overall goals of federal immigration policy. Because S.B. 1070 interferes with the comprehensive system established by Congress to enforce federal immigration law, the Arizona law is preempted.

ARGUMENT

1. It is beyond dispute that the authority to regulate immigration to the United States is an exclusively federal power. As this Court has explained,

> "[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court." *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (footnotes omitted).

However, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised." *De Canas v. Bica*, 424 U.S. 351, 355 (1976). The determining factor is whether the state statute constitutes "a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Ibid.* This "power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent

power of state and nation, but . . . whatever power a state may have is subordinate to supreme national law. *Hines*, 312 U.S. at 68.

The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas*, 424 U.S. at 353, 359). Pursuant to this comprehensive scheme, it has long been the case that "[a]ny alien who is present in the United States in violation of [the INA] or any other law of the United States, or whose nonimmigrant visa . . . has been revoked . . . is deportable." 8 U.S.C. § 1227(a)(1)(B). Prior to 1986, this Court understood that the INA "'at best' expressed 'a peripheral concern with [the] employment of illegal entrants.'" *Id.* at 1974 (quoting *De Canas*, 424 U.S. at 360).

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359, amended the INA in a way that "'forcefully made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991)). The IRCA amendments to the INA did so by

> "establish[ing] an extensive 'employment verification system,' [8 U.S.C.] § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not law-

fully authorized to work in the United States, § 1324a(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

* * *

Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1)." *Id.* at 147-48 (footnotes omitted).[3]

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[3] Although IRCA's amendments to the INA do not require employers to verify the employment authorization of independent contractors, they do forbid employers from "us[ing] a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(4). As a result, "federal law prohibits individuals or businesses from contracting with an independent contractor knowing that the independent contractor is not authorized to work in the United States." U.S. Citizenship and Immigration Services, Who Needs to Use Form I-9?, *available at* http://www.uscis.gov/portal/site/uscis/ menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=97bd1a48b9a2e210VgnVCM100000082ca60aRCRD&vgnextchannel=97bd1a48b9a2e210VgnVCM100000082ca60aRCRD. *Accord* 8 C.F.R. § 274a.5.

Four years later, "Congress concluded that the IRCA's employer-sanctions provisions were not having the desired effect of reducing the flow of illegal immigration that is motivated by the prospects of U.S. employment." *Villegas-Valenzuela v. INS*, 103 F.3d 805, 807 (9th Cir. 1996). The problem was "the large number of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions." 136 Cong. Rec. S13,628-29 (daily ed. Sept. 24, 1990) (statement of Sen. Simpson). To close this loophole in the INA's comprehensive scheme regulating the employment of aliens, Congress amended the Act yet again.

Section 544 of the Immigration Act of 1990 (IMMACT), Pub. L. 101-649, 104 Stat. 4978 (codified as 8 U.S.C. § 1324c), amended the INA by adding civil money penalties, § 1324c(d), and new immigration sanctions, § 1227(a)(3)(C), for aliens who evade the INA's employment verification requirements by committing document fraud. The 1990 amendments reaffirmed that aliens who commit such acts also remain subject to criminal penalties. § 1324c(c). Thus, as this Court succinctly explained, "[a]liens who use or attempt to use such documents are subject to fines and criminal prosecution." *Hoffman Plastic*, 535 U.S. at 148.

The impetus for Congress' decision to twice amend the INA to "ma[ke] combating the employment of illegal aliens central to 'the policy of immigration law,'" *id.* at 147, was a recognition that "[e]mployment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to

accept employment in violation of their status," H.R. Rep. No. 99-682, pt. I, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. In enacting IRCA, Congress intended that "[e]mployers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment." *Ibid.* In enacting § 544 of the IMMACT, Congress intended that "a system of civil fines [would] deter users of fraudulent documents," 136 Cong. Rec. S13,628-29 (daily ed. Sept. 24, 1990), from engaging in a practice that had undermined the effectiveness of the INA's employment verification system. Together, the purpose of the IRCA and IMMACT amendments was to make regulation of the employment of aliens part and parcel of the INA's overall purpose of regulating "'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (quoting *De Canas*, 424 U.S. at 359).

2. Arizona claims that § 5(C) of S.B. 1070 is an "exercise of [its] traditional state authority to regulate the employment relationship." Pet. Br. at 53. But even a cursory review of the Arizona law demonstrates that the state statute, like the INA, seeks to regulate not the employment relationship as such but "the terms and conditions of admission" of aliens to the United States.

First, by its own terms, S.B. 1070 is directed at "deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States," S.B. 1070, § 1, not regulating employment relationships within the State. In con-

trast to the examples given by this Court of "States[']. . . broad authority under their police powers to regulate the employment relationship to protect workers within the State" – "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws," *De Canas*, 424 U.S. at 356 – § 5(C) of S.B. 1070 says nothing at all about relationships between employers and employees in Arizona nor how the law would "protect workers within the State." Rather, § 5(C) of the Arizona law uses the pretext of enforcing the INA's prohibition of unauthorized work by certain aliens as a basis for enforcing the INA's prohibition on the unlawful presence of aliens.

Arizona forthrightly admits that the challenged provisions of S.B. 1070, including § 5(C), "impose penalties under state law for non-compliance with federal immigration requirements." Pet. Br. at i. Arizona's justification for §§ 2(B) and 6 of S.B. 1070 – which, respectively, permits Arizona law enforcement officers to question individuals about their immigration status during lawful stops and permits law enforcement officers to make warrantless arrests of aliens in certain circumstance – is that "States have inherent authority to enforce federal law." Pet. Br. at 24. Similarly, Arizona acknowledges that § 3 – which sanctions any alien who fails to comply with federal registration requirements – "adopts the federal rule as its own" but levies supplemental state criminal penalties. Pet. Br. at 25. Rather than regulate employment relationships within Arizona, § 5(C) of S.B. 1070, like § 3 of that same law, instead "impose[s] parallel state penalties for the violation of federal rules." Pet. Br. at 25.

Like the other challenged provisions, the purpose of § 5(C) is "to discourage and deter the unlawful entry and presence of aliens." S.B. 1070, § 1. This purpose is highlighted by the fact that § 5(C) only proscribes work by aliens who are "unlawfully present in the United States." In other words, § 5(C) only applies to workers who are removable under federal law and does not seek to regulate the employment of legally present aliens who engage in unauthorized employment.

In contrast to § 5(C) of S.B. 1070, federal law prohibits employment by aliens who are *either* (i) unlawfully present in the United States and not authorized to work, 8 U.S.C. § 1324a(h)(3)(A), *or* (ii) are lawfully present in the United States but lack work authorization, § 1324a(h)(3)(B). The first category includes most aliens who are unlawfully present in the United States.[4] The second category, which the Arizona law does not reach, includes the many types of "nonimmigrant" – such as tourists, students, and the spouses and children of some visa-holders – who the federal government grants permission to be present in the United States but does not authorize to work. *See generally* 8 C.F.R. § 274a.12 (listing various classes of aliens authorized to accept employment).

The fact that the Arizona law criminalizes unauthorized work only by those aliens who are unlawfully present in the United States – rather than all unau-

[4] But not all such aliens. *See*, *e.g.*, 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 274a.12(c)(8) (some asylum applicants, although unlawfully present in the United States, may be authorized to work while their applications are pending).

thorized work performed by aliens – is further evidence that the true purpose of § 5(C) is "to discourage and deter the unlawful entry and presence of aliens," S.B. 1070, § 1, not to regulate employment relationships within the State.

3. Contrary to S.B. 1070's one-size-fits-all approach to prohibiting unauthorized work by unlawfully present aliens – and contrary to Arizona's repeated claims that federal law "is silent with respect to penalties on unauthorized workers," Pet. Br. at 53-54 – federal law provides a comprehensive array of sanctions against aliens who engage in unauthorized employment – including immigration penalties, civil fines, and criminal penalties – that, taken together, provide the United States with the prosecutorial flexibility it needs to achieve the overall goals of federal immigration policy.

As an initial matter, when the federal government apprehends an alien who is engaged in unauthorized work, it can remove that alien from the United States, either on the basis that the alien was not entitled to be in the United States in the first instance, 8 U.S.C. § 1227(a)(1)(A) & (B), or, in the case of an alien who is lawfully present in the United States, on the basis that by engaging in unauthorized employment the alien violated the terms of his or her visa, § 1227(a)(1)(C); 8 C.F.R. § 214.1(e).

In addition to providing for removal and other sanctions related to the ability of an alien to remain in the United States, the INA grants the United States authority to fine an alien who attempts to subvert the INA's employment verification requirements by

engaging in document fraud.[5] As previously noted, § 544 of the IMMACT amended the INA to provide for civil monetary penalties for aliens who engage in document fraud, which include any attempt:

> "(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act . . . ,
>
> (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act . . ., [or]
>
> (4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 274A(b) [8 U.S.C. § 1324a(b)]." 8 U.S.C. § 1324c(a)(2)-(4).

These provisions have been uniformly interpreted as "prohibit[ing] aliens from using or attempting to

[5] The INA provides a unified enforcement process for the Act's civil document fraud provisions, employer sanctions provisions, and anti-discrimination provisions. *Compare* 8 U.S.C. § 1324a(e) *with* § 1324b(e)-(j) *with* § 1324c(d). All three provisions of the INA are administratively enforced through the Office of the Chief Administrative Hearing Officer of the Department of Justice's Executive Office for Immigration Review. *See* 28 C.F.R. § 68.1. And all three provisions carry the same civil money penalties for first offenses – from $375 to $3,200 – and similarly escalating fines for subsequent offenses. *Compare* 8 U.S.C. § 1324a(e)(4)(A) *with* § 1324b(g)(2)(B)(iv) *with* 8 U.S.C. § 1324c(d)(3). *See also* 8 C.F.R. §§ 270.3(b)(1) & 274a.10 (b)(1).

use 'any forged, counterfeit, altered, or falsely made document' or 'any document lawfully issued to or with respect to a person other than the possessor' for purposes of obtaining employment in the United States." *Hoffman Plastic*, 535 U.S. at 148 (quoting 8 U.S.C. § 1324c(a)(1)-(3)). *Accord Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997); *Villegas-Valenzuela*, 103 F.3d at 807-08; *Remileh v. INS*, 101 F.3d 66 (8th Cir. 1996). *See also* Immigration and Naturalization Service, Penalties for Document Fraud, 57 Fed. Reg. 33862 (July 31, 1992) (Final Rule) (codified as 8 C.F.R. pt. 270) (stating that "section 274C [8 U.S.C. § 1324c] is applicable . . . to document fraud in the employment verification system"). In addition to civil money penalties, "aliens who commit civil document fraud are subject to immediate deportation." *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (discussing § 1227(a)(3)(C)).

Finally, the INA includes criminal sanctions for aliens who engage in false statements or document fraud to evade the INA's employment verification requirements. As part and parcel of the INA's mandatory employment verification system, the IRCA amendments made it a crime for an alien to provide a false statement or fraudulent documents to obtain unauthorized employment. 8 U.S.C. § 1324a(b)(5) (stating that the I-9 Form "and any information contained in or appended to such form" may be used for purposes of enforcing "[18 U.S.C. §§] 1001, 1028, 1546, and 1621," pertaining, respectively, to false statements, identity fraud, fraudulent use of immigration documents, and perjury). And, when Congress enacted § 544 of the IMMACT to add civil fines for aliens who engage in document fraud in an effort to

obtain employment to the INA, it stated clearly that "[n]othing in this section shall be construed to diminish or qualify any of the penalties available for activities by this section but proscribed as well in title 18, United States Code." 8 U.S.C. § 1324c(c).

In sum, the INA, through civil and criminal penalties against employers who hire unauthorized aliens and immigration penalties, fines, and criminal penalties against aliens who engage in unauthorized employment, provides a "*comprehensive* scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic*, 535 U.S. at 147 (emphasis added). That is, after Congress' amendments of the INA in IRCA and the IMMACT, "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies," "[e]ither the undocumented alien . . . or the employer." *Id.* at 148.

4. Arizona claims that its effort to enforce the INA's prohibition on the unlawful presence of aliens through a state criminal law is "wholly consistent" with the "'strong federal policy of prohibiting illegal aliens from seeking employment in the United States.'" Pet. Br. at 57 (quoting *Arizona*, 641 F.3d at 360). That is not so, because the "[c]onflict in technique" between the Arizona law and the INA's comprehensive federal enforcement scheme is "fully as disruptive to the system Congress erected as [a] conflict in overt policy." *Wisc. Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1985) (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

"Even without an express provision for preemption," "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal immigration law, like the National Labor Relations Act (NLRA) in the arena of industrial relations, carries special preemptive force over state enactments, because "the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government," in particular, "the supremacy of the national power in the general field of foreign affairs." *Hines*, 312 U.S. at 62, 66.

The preemption issue in this case closely resembles the issue addressed in *Gould*. *Gould* considered whether federal labor law preempted a Wisconsin statute that debarred any company that repeatedly violated the NLRA from contracting with the State. In *Gould*, as here, the State contended that its law was an exercise of its traditional authorities – there the State's spending powers – rather than an effort to enforce federal law. 475 U.S. at 287. This Court roundly rejected that argument, explaining that "on its face the debarment statute serves plainly as a means of enforcing the NLRA" – "firms adjudged to have violated the NLRA three times are automatically deprived of the opportunity to compete for the State's business." *Id.* at 287-88. In this case, similarly, the Arizona law "on its face . . . serves plainly as a means of enforcing" the INA, because aliens "adjudged to have violated" the INA "are automatically" deemed violators of Arizona's criminal law as well. *See* Pet. Br. at i (explaining that S.B. 1070 "impose[s] penalties under state law for non-compliance with federal immigration requirements").

The Arizona law, in other words, like the Wisconsin law in *Gould*, "functions unambiguously as a supplemental sanction for violations" of the INA. *Gould*, 475 U.S. at 288. As such, the Arizona law conflicts with "'the range and nature of . . . remedies that are and are not available [as] . . . part' of the comprehensive system established by Congress" to achieve that same end, *id.* at 287 (quoting *Lockridge*, 403 U.S. at 287), constituting "an obstacle to the success of the National Government's chosen 'calibration of force'" in accomplishing the goals of federal immigration policy, *Am. Insur. Assoc. v. Garamendi*, 539 U.S. 396, 425 (2003) (quoting *Crosby*, 530 U.S. at 380).

The federal government's reserved discretion to exercise its "chosen 'calibration of force,'" *ibid.*, has special importance in the immigration context, because the underlying rationale for the INA's prohibition on the employment of unauthorized aliens is to "deter aliens from entering [the United States] illegally or violating their status in search of employment," H.R. Rep. No. 99-682, pt. I, at 46. To this end, the United States may, in certain instances, decide to prioritize the expeditious removal of an alien found working unlawfully, rather than expend the time and public resources required to civilly or criminally prosecute the alien for an employment-related violation. *Cf.*, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (noting that concerns regarding delay "are greatly magnified in the deportation context" because "the consequence [of delay] is to permit and prolong a continuing violation of United States law"). Any attempt by Arizona to criminally prosecute unlawfully present aliens for working without authorization in the State would

frustrate the federal government's ability to quickly remove such aliens from the United States.

Conversely, the federal government also has statutory authority to exercise its discretion to forego sanctions against an alien who has been apprehended for unauthorized work in the United States if that person is "a victim of a severe form of trafficking in persons," including labor trafficking, 8 U.S.C. §§ 1101(a)(15)(T), 1184(o); 28 C.F.R. § 1100.35, or is a victim of certain other defined crimes, including involuntary servitude or forced labor, and "is likely to be helpful to a Federal, State, or local law enforcement official . . . investigating or prosecuting [such] criminal activity," 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14. Again, Arizona's assertion of authority to criminally prosecute any unlawfully present alien found working without authorization in the State would interfere with the federal government's ability to offer leniency to an alien to obtain cooperation in a federal criminal enforcement effort.

In sum, § 5(C) of S.B. 1070 is "disruptive to the system Congress erected" to enforce federal immigration law, *Gould*, 475 U.S. at 286, because by asserting the authority to levy criminal sanctions against unlawfully present aliens engaged in unauthorized employment in the State, Arizona interferes with the federal government's ability to calibrate its employment-related immigration enforcement efforts to further the goals of overall federal immigration policy. Because of these "conflicting means," *Crosby*, 530 U.S. at 379, between federal immigration law and § 5(C) of S.B. 1070, the Arizona law is preempted.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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STATUTORY APPENDIX

8 U.S.C. § 1324c

§ 1324c. Penalties for document fraud

(a) Activities prohibited. It is unlawful for any person or entity knowingly–

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or to obtain a benefit under this Act,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act or obtaining a benefit under this Act,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 274A(b) [8 USCS § 1324a(b)] or obtaining a benefit under this Act, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits

under this Act, or any document required under this Act, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

(b) Exception. This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of title 18, United States Code [18 USCS §§ 3521 et seq.].

(c) Construction. Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities by this section but proscribed as well in title 18, United States Code.

(d) Enforcement.

(1) Authority in investigations. In conducting investigations and hearings under this subsection–

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing.

(A) In general. Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the

Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing. Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders. If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a), the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and desist order with civil money penalty [Caution: For inflation-adjusted civil monetary penalties, see 8 CFR 270.3(b)(1)(ii).]. With respect to a violation of subsection (a), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of–

(A) not less than $ 250 and not more than $ 2,000 for each document that is the subject of a violation under subsection (a), or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $ 2,000 and not more than $ 5,000 for each document that is the subject of a violation under subsection (a).

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative appellate review. The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which

case the decision and order of the Attorney General shall become the final agency decision and order under this subsection.

(5) Judicial review. A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for

(6) Enforcement of orders. If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(7) Waiver by Attorney General. The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly violates subsection (a)(6) if the alien is granted asylum under section 208 [8 USCS § 1158] or withholding of removal under section 241(b)(3) [8 USCS § 1251(b)(3)].

(e) Criminal penalties for failure to disclose role as document preparer.

(1) Whoever, in any matter within the jurisdiction of the Service, knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, pre-

pared or assisted in preparing an application which was falsely made (as defined in subsection (f)) for immigration benefits, shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both, and prohibited from preparing or assisting in preparing, whether or not for a fee or other remuneration, any other such application.

(2) Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits pursuant to this Act, or the regulations promulgated thereunder, whether or not for a fee or other remuneration and regardless of whether in any matter within the jurisdiction of the Service, shall be fined in accordance with title 18, United States Code, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.

(f) Falsely make. For purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.