No. 11-182

In The Supreme Court of the United States

STATE OF ARIZONA and JANICE K. BREWER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR AMICUS CURIAE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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STATEMENT OF THE INTEREST OF AMICUS CURIAE[1]

The Association of the Bar of the City of New York is an independent, professional organization with membership comprised of more than 23,000 members. Founded in 1870, the Association has a long-standing commitment to fair and humane immigration laws and policies as well as to advancing the cause of human rights in the United States and abroad, and conducts much of its work in this area through its Committee on Immigration and Nationality Law. The Association has a concern with state statutes in general which seek to preempt the formulation of a rational federal program for immigration reform. The issues raised by statutes such as Arizona's Support Our Law Enforcement and Safe Neighborhoods Act of 2010 (hereinafter "SB 1070") tend to coarsen the debate which should inform all discussion of what a suitable federal program would comprise. Such statutes also interfere with the federal government's ability to conduct foreign affairs, which has serious national and international effects, some of which are already apparent. These concerns lie at the

[1] This brief of amicus curiae is submitted pursuant to a blanket consent to such briefs by both parties to this action. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

heart of the federal preemption issues which this brief seeks to address.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves review of a state statute (Arizona's SB 1070) which effectively compromises administration of the federal government's civil immigration enforcement mechanisms as prescribed by federal law. SB 1070 does this, moreover, without any existing agreement to carry out such enforcement as provided under federal law and under circumstances where (a) the federal government's exclusive power to regulate foreign affairs is directly implicated; and (b) the interests underlying the state's historical police powers (*e.g.*, over employment or domestic relations) are either minimal or absent. Under these conditions, in Amicus's submission, SB 1070 should be determined by this Court to be subject to federal preemption under the Supremacy Clause.

The federal government is now, and has always been, entrusted with the unique and exclusive responsibility to set and enforce civil immigration policy. As a general matter, states are prohibited by the Constitution and federal statute from enacting civil immigration law or policy, apart from a few discreet areas where permissible individual state action may incidentally affect the rights of aliens. These legitimate areas of action are "confined to the narrowest of limits," *Hines v. Davidowitz*, 312 U.S.

52, 68 (1941), defined by the states' traditional police powers and explicit savings clauses in federal statutes. *See id*.; *DeCanas v. Bica*, 424 U.S. 351, 356-57, 363 (explaining that where state laws implicate "the predominance of the federal interest in the fields of immigration and foreign affairs," the scales are weighted more heavily in favor of preemption than when "a state law is fashioned to remedy local problems[.]"); *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1974, 1980.

The authority to regulate civil immigration, moreover, has been identified by this Court as connected to the federal government's power to conduct foreign relations. *See Hines*, 312 U.S. at 62-64. This connection flows from the federal government's responsibility under the Constitution to negotiate with foreign powers concerning the treatment of U.S. citizens traveling abroad. *See Hines*, 312 U.S. at 65. The relationship between civil immigration enforcement and the foreign affairs power thus intensifies whenever, as a practical matter, actual foreign policy concerns are raised by overbroad state action. *See id*. at 63-64 ("If the United States should get into a difficulty which would lead to war, or to a suspension of intercourse, would California alone suffer, or all the Union?" (*quoting Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876)); *Chae Chan Ping v. United States ("Chinese Exclusion Case")*, 130 U.S. 581, 604-05 (1889); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424-25 (2003) (explaining that "protests from the German and Swiss governments" occasioned by

California's effort to obtain restitution for holocaust victims raised foreign policy concerns, and was preempted partly for that reason); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 382-84 (explaining that the filing of formal complaints by foreign nations with world governance organizations unhappy with Massachusetts' legislation to penalize the Burmese government required a preemption finding).

In the submission of Amicus, such effects are already discernable in the widespread negative responses to Arizona's initiative issued by, among others, states which have historically been considered as United States allies and trading partners, as well as from world governance organizations. Negative implications can also be gleaned in widely publicized and highly embarrassing episodes of administrative error in Arizona's enforcement of its new law: error which seems destined to produce significant diplomatic imbroglios.

That such results are invited by the present legislation flows from the total absence of any federal supervision of state officials in the enforcement of SB 1070 (in violation of federal law) and by the overbroad scope of SB 1070's statement of purpose: to make "attrition through enforcement" the policy of the state. The purpose clause at once removes the state statute from any anchor in the state's historical police powers while at the same time making clear the spirit in which SB 1070's enforcement provisions will be exercised – for instance, the apparent power to stop individuals upon "reasonable suspicion" that

they are present unlawfully. Such arbitrary state action, undertaken with specific disregard to the paramount national interest in regulating foreign relations, points forcefully to the conclusion that SB 1070 is subject to "obstacle" preemption: *i.e.*, that its provisions stand as a hindrance to the "accomplishment and the execution of the full purposes and objectives of Congress" to place the enforcement of civil immigration solely under the control of federal authorities. *Hines*, 312 U.S. at 67.

In analyzing the issue of whether SB 1070 stands subject to obstacle preemption, Amicus asks this Court to take into account the considerations relied upon by the founders in reposing the foreign affairs power exclusively within federal hands. As made manifest in THE FEDERALIST No. 42, the objective of the framers was to promote uniformity so as to enable the federal government to respond with one voice to the concerns of foreign powers. To do otherwise, Madison maintained, would be to expose the nation to the oxymoron of giving the states power without responsibility. Such concerns are present today with regard to the administration of SB 1070. Who will address the objections of Mexico or of Guatemala? Who will respond to the critique of the United Nations that SB 1070 stands as a potential impediment to implementation of the nation's international human rights obligations as required under general international law? Certainly not the state of Arizona, which has unilaterally generated these foreign affairs entanglements in the first instance.

Madison observed that depriving individual states of such powers "is fully justified by the advantage of *uniformity* in all points which relate to *foreign powers*; and of immediate *responsibility to the nation* in all those for whose conduct *the nation itself is to be responsible*." THE FEDERALIST No. 44. (Emphases added). Arizona's view of the law is counterfactual to this division of power: each individual state would set immigration policy, but would also saddle every other state and the nation as a whole with responsibility for the effects of its decisions. In light of the policy concerns outlined by Madison, this Court has repeatedly held that when an individual state seeks to alter the national immigration policy as the intended, primary, important or sole goal of its legislation, such efforts are preempted. *See Hines*, 312 U.S. 52 (1941). This result flows even in the absence of clearly incompatible congressional action, based on the perceived dangers of each state enacting its own immigration policy, and the resulting harm which would befall the entire nation if the policy of a single state were to provoke a hostile response from foreign powers. *See Chy Lung v. Freeman*, 92 U.S. 275 (1876).

Amicus also advances the argument that the state petitioners' novel construction of 8 U.S.C. § 1357(g)(10)(B) – a construction that would endow states with a historically unprecedented power to intensely enforce federal civil immigration law as a discrete policy goal – should be rejected based on the constitutional issue avoidance doctrine. Petitioners'

interpretation raises a potential constitutional question under the Supremacy Clause when the Immigration and Nationality Act is viewed in the context of the foreign affairs power, while that adopted by the Ninth Circuit does not. For similar reasons, Amicus submits that SB 1070, insofar as it empowers state officials to make effectively civil arrests of those found to be in the United States unlawfully, violates 8 U.S.C. § 1252c, which limits state power in this respect to aliens who have reentered the United States unlawfully after having been removed based on their convictions for very serious crimes.

Because Arizona's anti-immigrant legislation finds no anchor in any recognizable police power, implicates the federal foreign affairs power, has provoked a diplomatic controversy, and invades areas of exclusively federal concern in violation of 8 U.S.C. §§ 1357(g) and 1252c and other, related provisions in Title 8 of the U.S. Code, the challenged provisions of SB 1070 are impliedly preempted on their face by federal legislation and the Constitution of the United States.

ARGUMENT

I. ARIZONA'S S.B. 1070 IS PREEMPTED IN THAT IT UNLAWFULLY REGULATES CIVIL IMMIGRATION IN DEROGATION OF THE FEDERAL FOREIGN AFFAIRS POWER, FRUSTRATES IMPORTANT FEDERAL INTERESTS, AND IS NOT BOTTOMED ON TRADITIONAL STATE POLICE POWERS

A. Well Established Precedent in this Court Compels the Conclusion that the Challenged Provisions of S.B. 1070 Stand Preempted Both as a Matter of Statutory Construction and When the Immigration and Nationality Act is Viewed in the Context of the Foreign Affairs Power.

As a matter of constitutional law, constitutional interpretation and general principles of international law, the regulation of civil immigration is an exclusively federal concern. *See* U.S. CONST. art. I, § 8, cl. 4 (entrusting to the federal government the power to "establish a uniform Rule of Naturalization"); U.S. CONST. art. I, § 8, cl. 3 (to "regulate Commerce with foreign Nations"); U.S. CONST. art. I, § 8, cl. 11 ("To declare war"); U.S. CONST. art. II, § 1, cl. 1 (entrusting solely to the President "the Executive Power"),[2] § 2, cl.

[2] This power has been interpreted by this Court to vest in the Executive broad discretion in the conduct of international affairs, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), of which strategy and policy for enforcing federal

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2 (entrusting the President with the treaty-making power and, by implication and by reference to the "necessary and proper" clause, the concurrent power to engage with other nations in conduct of the Union's foreign affairs generally); *Hines*, 312 U.S. at 63-64 (recognizing federal government's exclusive authority to set national immigration policy so that individual state action does not threaten to embroil the entire nation in international controversy as a result of a patchwork system of anti-immigrant legislation); *Chinese Exclusion Case*, 130 U.S. 581, 603-04 (holding that any impairment of the ability of the federal government to control the flow of immigration into the territory, and to set the conditions upon which aliens admitted are allowed to remain, would amount to a "diminution" of our status as a sovereign nation existing within a broader community of states).[3]

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civil immigration law is an integral part. *Hines*, 312 U.S. at 52-53.

[3] In *Chae Chan Ping*, the Court explained the principle behind the exclusive federal immigration power:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout the entire territory. The powers to declare war, make treaties, suppress insurrection, regulate foreign commerce, secure republican government to the states, and admit subjects of other

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At the time the Constitution was adopted by the states, the framers already recognized the danger posed by individual states engaging in independent foreign policy ventures. Indeed, one of the most important rationales that led the country to discard the Articles of Confederation in favor of the Constitution was the young nation's felt need to speak and act with one voice in the international arena. *See Hines*, 312 U.S. at 63; *Garamendi* 539 U.S. at 413-14; *Zschernig v. Miller*, 389 U.S. 429, 442-43 (1968). This concern is reflected both in enumerated constitutional provisions, as well as in persuasive evidence of original meaning found in the Federalist Papers.

The framers were concerned that individual states might take action in foreign affairs that would burden the remainder of the states and the federal government with any resulting negative repercussions. *See* THE FEDERALIST No. 42 (Madison) ("If we are to be one nation in any respect, it clearly must be in relation to other nations"); THE FEDERALIST No. 80 (Hamilton) ("The security of the whole ought not to be left to a disposal of the part."). The framers were worried about a division of authority where states would retain power without responsibility: each state

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> nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

130 U.S. at 603-04.

could raise a crisis through its actions, and saddle the rest of the states and the nation with the cost.[4] The Court in *Hines* stayed faithful to the original intent of the framers to entrust the foreign policy power to exclusive federal control, when it invalidated Pennsylvania's attempt to create a scheme of alien registration parallel to that chosen by the federal government. 312 U.S. at 63-64. First, the Court reasoned: (a) that Pennsylvania's effort represented an attempt to add auxiliary or supplementary regulations to Congress' pervasive and comprehensive scheme to create a *uniform* system of civil alien registration; and (b) that the prospect of allowing the fifty states to layer onto this scheme fifty separate versions of alien registration law would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in creating such a uniform system. *See Hines*, 312 U.S. 65-69. Second, the Court explicitly recognized the special relationship that civil immigration policy bore to foreign affairs, and gave this relationship substantial weight in its preemption analysis. *See id*. at 62-63. The Court reasoned that state-by-state civil immigration legislation, unconnected to police powers, might embroil the nation as a whole in international controversies or conflicts. *See id.* at 63-64. As a result, the Court recognized the fundamentally federal nature of

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[4] *See Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, COMM. ON IMMIGRATION & NATIONALITY LAW (Bar Ass'n of the City of New York), July 2010, at 8.

the immigration power implicated in that case, and so held that any residual state authority to regulate in the field was "confined to the narrowest of limits." *See id*. at 68.

Hence, the predicates of federal preemption here rest not merely on federal statute, but also on the federal government's residual power to conduct the nation's foreign policy in a uniform manner. This principle was first definitively relied upon as an independent ground of preemption in *Zschernig*, 389 U.S. at 442-43 (holding a state inheritance statute preempted under the federal foreign affairs power, because the state law targeted regimes of foreign governments). *Zschernig* retains vitality as an important factor in a preemption analysis where state action triggers foreign policy consequences, and Congress has already legislated on the precise subject matter in question. *See, e.g., Garamendi*, 539 U.S. 419-20.

B. When the Meaning of 8 U.S.C. § 1357(g)(10)(B) is Construed in Light of the Important Foreign Policy Interests Implicated in this Case, the Challenged Sections of SB 1070 Stand Preempted Whether or not SB 1070 Contravenes an Explicit Federal Foreign Policy.

Contrary to the arguments of petitioners, there need be no explicit foreign policy, in the form of a federal treaty or statute, in order to hold Arizona's

effort here to set independent civil immigration policy preempted under the Constitution and federal law. This is particularly true where, as here: (a) the state attempts to regulate a subject matter with clear foreign policy implications that has traditionally been an exclusively federal area of action; (b) the state action has actually triggered intense negative foreign affairs effects; and (c) the state itself characterizes its effort as a break with federal policy (*i.e.*, Arizona wishes to pursue its policy of "attrition through enforcement" throughout the state, in disregard of the policy in force in the rest of the nation under federal law).

A close reading of the reasoning and logic of *Crosby* and *Garamendi* supports this analysis. In *Garamendi*, the Court held that California's effort to coercively obtain restitution for its citizens from insurance companies involved in holocaust-era dealings in Germany was preempted as an "obstacle" to the achievement of congressional purpose: to entrust the Executive with authority to seek a cooperative settlement through the venue of international negotiations. *See Garamendi*, 539 U.S. at 421-22. While the Court employed the language of conflict preemption in holding California's sanctions law invalid, it also applied *Zschernig*'s core rationale. There is thus a need to consider the federal and state interests involved, and weigh these interests in conducting a preemption analysis even under the rubric of conflict preemption. *See id*. at 420. The Court thereby eschewed a formalistic analysis such as that advanced

by the petitioners and dissent below that would require, in every case, an executive agreement, federal statute, or treaty provision as evidence of a foreign affairs policy with which state law conflicted, before holding a state law preempted. *See id*. at 421-22 ("The foregoing account of *negotiations* toward the . . . settlement agreements *is enough* to illustrate" the conflict between state and federal policy [emphases added]). It is the position of Amicus that *Garamendi*'s rationale supports the view that an explicit agreement is not a condition *precedent* to a finding of federal foreign affairs preemption, but instead that such agreements are one relevant source of evidence among others in a preemption analysis. Statements of Executive Branch officials are but another piece of relevant evidence. *See id*.

Further, while California had a strong interest in obtaining restitution for the wrongs suffered by its citizens when the Nazi regime confiscated their property during the holocaust,[5] its state effort was nonetheless preempted *both* by an executive agreement, as well as by the negotiations in which the President was engaged in the *lead up to* that agreement. Further, in *Garamendi*, the Court considered statements of Executive officials describing the negative impact of California's legislation on the

[5] It is within the police power of the states to protect their residents from harm by unfair and exploitative business practices by private firms. *See Hines*, 312 U.S. at 68 n.22; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

negotiating process to be relevant: Because the President was acting pursuant to his foreign relations powers, the views of Executive officials on the foreign affairs impact of California's action were relevant to the preemption analysis. *See Garamendi*, 539 U.S. at 415-20.

The *Crosby* Court also reaffirmed the core of *Zchernig*'s rationale in holding that preemption is favored when state action triggers a negative foreign affairs reaction, and thereby implicates the federal government's foreign affairs powers. 530 U.S. at 382-84. There, Massachusetts's legislation penalizing businesses doing business with the Burmese Government (in retaliation for that government's human rights violations) was preempted by federal legislation delegating to the President discretionary authority to choose an appropriate strategy to deal with the Burmese regime. While the Court identified Congress' express delegation of negotiating authority and discretion to the President as *one among several* factors favoring preemption, the Court also characterized the formal protests filed by our "allies and trading partners . . . with the National Government[ ]" in response to Massachusetts's action as an additional, *independent* factor favoring preemption. *Crosby*, 530 U.S. at 383-84. Moreover, the Court gave weight to statements by Executive officials to the effect that the state "Act ha[d] complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned to [the President] by Congress." *Id*.

The petitioners and the dissent below urge that negative international backlash is irrelevant in a conflict or obstacle preemption analysis, in the absence of conflicting foreign policy codified in statute, executive agreement, or treaty provision. *See* Brief for Petitioners at 57. This proposition is directly contradicted by the preemption analyses of this Court in *Crosby* and *Garamendi*. In both of these cases, the Court discussed foreign affairs backlash as a separate and relevant factor favoring conflict or obstacle preemption where the state action is closely connected to federal foreign policy interests.

Petitioner's rely primarily on *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994), for the proposition that statements by executive branch officials and complaints by foreign governments can never, standing alone, be given weight in a preemption analysis. *See* Brief of Petitioners at 59. The holding of *Barclays* is of doubtful guidance here, where a different preemption analysis is required, because Arizona's effort to regulate immigration as a discrete subject matter is not bottomed on its traditional police powers, such as the power to tax implicated in *Barclays*. *See also Hines*, 312 U.S. at 68; *DeCanas*, 424 U.S. at 356-57. Instead, SB 1070 ventures into a field of policy-making that has traditionally been the exclusive province of the federal government – the constitutional authority to regulate civil immigration as an incident to the foreign affairs power. Evidence of actual foreign policy backlash, which the record here amply demonstrates, coupled

with statements of executive officials to the same effect, must tip the balance in favor of federal preemption.

The unifying principle of these cases is that where, as here, a federal statute implicates foreign policy interests – which bear a compelling relationship to immigration regulation – any arguable ambiguity in statutory text must be resolved, if possible, in a way that does not impair the federal government's foreign affairs powers. *See generally Hines*, 312 U.S. 52 (holding that Congress' *uniform* scheme of alien registration implied an intent to preempt *piecemeal* schemes at the state level, and that the risk of negative foreign policy consequences flowing from such piecemeal state regulation also required preemption). This framework of statutory construction assists the Court in avoiding unnecessary adjudication of constitutional issues. *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

II. ARIZONA RETAINS NO "INHERENT AUTHORITY" TO REGULATE IMMIGRATION AS A DISCRETE SUBJECT MATTER, UNTETHERED TO THE EXERCISE OF ANY RECOGNIZABLY LEGITIMATE POLICE POWER

For over a century, this Court has honored the intent of the Constitution's framers to preclude disruptive state involvement in foreign policy generally, and in civil immigration policy in particular. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, *Hines*, 312

U.S. 52; *Zschernig*, 389 U.S. 429; *Crosby*, 530 U.S. 363; *Garamendi*, 539 U.S. 396. Since the questions raised by SB 1070 were first presented more than a century ago in *Chy Lung* and the *Chinese Exclusion Case*, this Court has continuously recognized "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation." *Hines*, 312 U.S. at 62-63. The Court in *Hines*, without actually recognizing the existence of state authority to regulate civil immigration, speculated only that any concurrent authority "that *may* exist is restricted to the narrowest of limits[,]" because this authority would not be premised on the states' recognizable police powers, such as the power to tax, or to regulate food safety. *See id*. at 68; *see also DeCanas*, 424 U.S. at 357; *Whiting*, 131 S.Ct. at 1974. This point of law clearly refutes the position advanced by the state petitioners and dissenting judge below: that states retain 'inherent,' undefined authority to regulate civil immigration as a discrete subject matter, outside of federal control and in conflict with federal policy embodied in statute and supported by the Constitution. *See* Brief of Petitioners at 42. *Cf*. 8 U.S.C. §§ 1357(g)(1-5) (allowing state participation in civil immigration enforcement only under close supervision by the Attorney General), § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the *administration and enforcement* of this chapter . . . except insofar as this chapter" implicates the authority of other branches of the *federal* government) & (a)(10) ("In the event the Attorney General determines that

an actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response, the Attorney General *may* authorize any State or local law enforcement officer . . . to exercise any of the" authority conferred upon the Attorney General by the Act). (Emphases added).

The dissent below and some scattered judicial commentary assert, without explanation or support, the existence of 'inherent' state authority to enforce civil immigration law as a discrete policy objective, on a massive scale and outside federal control. However, federal legislation and the weight of judicial opinion confines lawful state participation in immigration enforcement to the limits of the traditional police powers. *Hines*, 312 U.S. at 68; *DeCanas*, 424 U.S. at 357; *Whiting*, 131 S.Ct. at 1974.

To support its conclusion that States retain broad, inherent authority to regulate civil immigration itself – untethered to otherwise valid exercises of the police power – the State petitioners point primarily to the text of 8 U.S.C. § 1357(g)(10)(A) & (B).[6]

[6] The state also refers to 8 U.S.C. § 1373(c), compelling the federal government "respond to an inquiry [by a state] seeking to verify or ascertain the citizenship or immigration status of any individual . . . by providing the requested verification or status information[ ]" in support of its theory that states retain inherent authority to make arrests purely on suspicion of unlawful presence, on a mass scale, in an effort to change federal enforcement priorities. *See also Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1976 (2010) This statute merely ensures that the Executive Branch complies with Congress'

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Specifically, the petitioners assert that the clause in 1357(g)(10) allowing states to "communicate with the Attorney General regarding the immigration status of any individual[,]" or "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal" of unlawfully present aliens somehow 'confirms' 'inherent' state authority to conduct mass civil immigration arrests, independent of federal control, and in the service of a state-wide policy to change federal civil immigration enforcement priorities. *See* Brief of Petitioners at 46. This argument merely begs the question of whether such 'inherent' state authority exists or, if it does, what are its limits. While 8 U.S.C. § 1357(g) does not clearly identify what limits, if any, apply to state authority to arrest persons for alleged civil immigration violations, the statute cannot confer authority on states to regulate in ways that are constitutionally forbidden, *see Graham v. Richardson*, 403 U.S. 365, 382, While subsection (g)(10) does permit states to "cooperate with the Attorney General" in identifying, apprehending, or removing unlawfully present aliens, it does not

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scheme of *information sharing* with states who encounter potentially unlawful aliens in the course of *otherwise legitimate* law enforcement activities, or acting within the boundaries of state action permitted under 8 U.S.C. §§ 1252c and 1357(g). Section 1373(c) by no means serves as a license for states to make mass civil immigration arrests, outside of the requirement of federal supervision embodied in 8 U.S.C. § 1357(g), and in ways that violate the congressionally mandated conditions for making arrests premised purely on suspicion of civil immigration violations under 8 U.S.C. § 1252c.

identify the limits of state conduct that may be deemed 'cooperative' in nature.

An examination of the precedent of this Court, the provisions of Title 8 of the U.S. Code bearing on civil immigration policy, and the limited Circuit case law addressing the permissible range of state action to enforce federal civil immigration law, makes clear a basic division of authority between the federal government and the states. Where state officers engage in traditionally legitimate police functions – such as conducting searches to investigate possibly criminal conduct – such officers may inquire into the immigration status of the subjects of an otherwise valid search. However, no apposite case law remotely indicates that a state may, in effect, authorize its officers to engage in state-wide stops of suspected immigration violators – predicated on suspicion of civil unlawful presence and resulting in civil arrests – as an independent goal of state policy, untethered to any recognizable police power.

This is the authority Arizona effectively granted to its police through the combined operation of SB 1070 §§ 2(B), 3, and 6 – these provisions promote an unlawful melding of standards for making civil immigration arrests with those justifying arrests and investigations under state laws that are anchored to recognizable police powers. The text of 8 U.S.C. §§ 1252c and 1357(g) indicates that Arizona's effort to authorize statewide stops and subsequent civil immigration arrests exceeds the bounds of its police power, and is therefore invalid. These provisions of SB 1070

thus amount to a forbidden regulation of civil immigration as a discrete subject matter.

The putatively unlimited authority power of state officials to make stops based on suspicion of unlawful presence under SB 1070's provisions informs a discussion of their power to make civil immigration arrests. For if state officials may stop individuals on suspicion of unlawful presence under civil immigration law, they clearly are authorized to arrest such individuals on the same ground. That these results are within the compass of SB 1070 is made manifest by the law's statement of purpose: to wage a war of "attrition" against illegal immigration.[7] *See* SB 1070 § 1.

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[7] *See also Report*, *supra* note 4, at 23:

> SB 1070, as amended by HB 2162, creates an independent state offense for violating 8 U.S.C. §§ 1304(e) or 1306(a) [relating to registration by aliens and the carrying of registration papers]. The inclusion of this offense under state criminal jurisdiction presumably was intended to facilitate the making of "stops" of non-citizens having the appearance of being foreign. The provision also enables Arizona's enforcement to "bootstrap" its way into administering federal civil immigration standards by openly inquiring into immigration status without having to be concerned about whether "reasonable suspicion" exists. With the incorporation of failure to register or carry documentation into the state's criminal jurisdictional base, anyone appearing foreign can arguably be lawfully stopped and asked about his or her registration documents as a pretext for determining immigration status.

Moreover, the power of Arizona state officials to make arrests under the circumstances imagined by SB 1070's provisions is also preempted. Section 1252c of Title 8 of the United States Code commands that state officials obtain confirmation from the federal government of a person's unlawful civil immigration status, and permission from the federal government to make a civil immigration arrest on that basis, *before* making any civil immigration arrest. Section 1357(g)(10) discusses state authority to participate in civil immigration enforcement generally, but does not address the particular authority of states to make arrests premised on suspicion of civil immigration violations. Accordingly, 8 U.S.C. § 1252c impliedly limits the authority by which state officers may make arrests for civil immigration violations under 8 U.S.C. § 1357(g)(10) pursuant to three well-established principles of statutory construction: first, that individual provisions must be read *in pari materia* with the corpus of other, related provisions addressing the same subject of regulation *see Commissioner of Immigration of Port of New York v. Gottlieb*, 265 U.S. 310, 312-13 (1924); *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988); second, that when a subject matter is dealt with by two different statutory provisions, the more specific of the two governs the more general, *see Morton v. Mancari*, 417 U.S. 535 (1974); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); and third, that statutes must be interpreted to give meaning and operation to all related provisions, when possible. *See generally Negonsott v. Samuels*, 507 U.S.

99 (1993); *Mountain States Tel. & Tel. v. Pueblo of Santa Anna*, 472 U.S. 237 (1985); *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980).[8]

Furthermore, these statutory restrictions on when an *arrest* is permitted on the ground of suspected unlawful status are consistent with the constitutionally restricted role of the states in enforcing immigration policy, where the federal government is always the final arbiter of authority. Arizona's policy of "attrition through enforcement" which effectively directs its officers to arrest suspected illegal immigrants now and ask questions later, turns this delicately balanced division of powers on its head, and thereby unlawfully encroaches on federal sovereignty

[8] The Tenth Circuit's contrary view in *Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), is unpersuasive. The court there merely asserted, without explanation, that inherent authority existed in state officers to enforce federal civil immigration law, and then proceeded to explain that 8 U.S.C. § 1252c did not displace that authority. First, in light of the above discussion, it is unlikely that states retain any inherent authority to enforce civil immigration law as a discrete matter of policy without federal authorization, in light of the important federal interests involved. Second, the court in *Vasquez-Alvarez* offered no explanation as to why, if the state officers already possessed authority to make such arrests, Congress would have passed superfluous legislation authorizing the same activity, but only within rigid requirements set by § 1252c. The more plausible explanation is that the Tenth Circuit misconstrued the nature of state power in this area, or that it failed to recognize that Congress deprived states of such power when it enacted § 1252c. *See also United States v. Arizona*, 641 F.3d 339 (9th Cir. 2010).

and constitutional authority to control civil immigration enforcement as an incident of national foreign policy.

The Court has already addressed the limits of permissible exercises of state power that incidentally effect immigration issues in prior cases: In *Hines*, the Court clearly explained that these limits are drawn "narrow[ly]" by the state's police powers, providing as examples "state tax statutes or pure food laws regulating the labels on cans," and other matters of largely economic and health regulation that are primarily local in nature and do not implicate significant foreign affairs interests – e.g., regulation guaranteeing wholesomeness of agricultural products and preventing consumer fraud. 312 U.S. at 68 n.22.

Subsequent cases have further clarified the permissible range of state actions that nonetheless touch on immigration matters. In *DeCanas v. Bica*, the Court upheld a California law punishing state employers for hiring undocumented aliens without work authorization, when such hiring would harm lawful residents of the state. 424 U.S. 351. The Court reasoned that the law was directed toward a matter of only "local concern," that fell within the states' "broad authority under their police powers to regulate *the employment relationship* to protect workers in the state." *Id*. at 356 (emphasis added). The Court reasoned further that Congress had not acted to preempt individual state sanction of employers

hiring undocumented workers at the time the case was decided. *Id*.[9]

The Court again considered whether a state law penalizing employment of the undocumented was preempted in *Whiting*, 131 S.Ct. 1968. There, the Court upheld Arizona's law revoking the business and other licenses of firms found to have employed aliens unauthorized to work in the United States, because Congress had explicitly permitted states to impose civil or criminal sanctions on such employers through "licensing or similar laws." *Id*. at 1980. Citing *DeCanas*, the Court in *Whiting* reasoned further that the criminal punishment of employers for the conduct of employing aliens unauthorized to work in the United States represented a valid exercise of the recognized state police power to protect in-state workers by regulating "the employment relationship." 131 S.Ct. at 1974.

The state actions authorized and commanded by SB 1070 do not fall within any analog to the police powers recognized in these earlier cases: the power to stop and arrest aliens based on suspicion unlawful status under federal civil law, whether or not such stops and arrests are justified by the need to investigate,

[9] Additionally, the reasoning in *DeCanas* provides diminished support to the state petitioners, because the Court there explicitly declined to consider conflict or obstacle preemption – the issues on appeal here. *See id.* at 363.

prevent, or punish crimes or threats to the public safety in the circumstances of a particular case.[10] The

[10] The State defendants attempt to fit the challenged provisions of SB 1070 within the recognized state police powers to ensure public safety and punish and prevent crimes. States are, of course, permitted to punish and prevent crimes and breaches of the peace directly, by prohibiting specific criminal conduct and enforcing such prohibitions. However, Arizona's law does not prohibit breaches of the peace, but merely authorizes the arrest of suspected undocumented aliens – based solely on their alleged undocumented status – on the speculative justification that such arrests will indirectly promote public safety. *See* Brief of Petitioners at 1. *Cf. Robinson v. California*, 37 U.S. 660, 664-68 (1962) (holding that even where the state possessed authority pursuant to its police power to punish the *conduct* of drug use, the state's police power did not encompass the authority to punish the *status* of drug addiction). Whether a specific regulation is within the state's police power is a function of the nature of that action itself, not its intended effects. Otherwise, nearly any state conduct would be permissible as an exercise of police power, so long as the state asserted that the action promoted public safety. *DeCanas* and *Whiting* both concluded that the state actions in question – regulating the employment relationship as opposed to targeting aliens on the basis of their alleged undocumented status – were within the police power because they regulated the employment relationship, not because the state legislation arguably advanced – in some speculative and indirect sense – the integrity of the state's labor market, regardless of the regulatory means employed. The means employed by SB 1070 – the deputization of Arizona's police into what is in effect a state-level U.S. I.C.E. with broad authority to make mass arrests of aliens based solely on their suspected undocumented status – is not rendered valid merely because Arizona's goal of promoting public safety is valid in the abstract: the means employed to achieve the goal are what render the law invalid. Further, even Arizona's arguably valid policy justification is belied by the text of SB 1070 itself, which announces the legislative purpose to promote the *civil immigration*

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Circuits are split on the narrow question of whether *questioning* as to civil immigration status can alone rescue an extended, ongoing police search from an otherwise required finding of a Fourth Amendment violation. *See, e.g., United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008) (holding that police questioning prompted by suspicion of unlawful presence, as opposed to suspicion of a federal *criminal* violation, would not extend in time the validity of a search); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (assuming in dicta that while state and local police retained inherent authority to make arrests for violations of criminal INA provisions, but that any state authority to make arrests solely on suspicion of unlawful presence was preempted by the comprehensive scheme of civil enforcement contained in the Act). *Cf. United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984) (holding that a state policeman had inherent authority to inquire into immigration status violations where he pulled over a defendant for erratic driving, and subsequently discovered six persons in the defendant's truck, none of whom spoke English, and the evidence thus uncovered was subsequently used to charge the defendant with the crime of unlawfully transporting unauthorized aliens);

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policy of "attrition through enforcement" throughout the State. *See* SB 1070 § 1. Therefore, both as a matter of the means employed and the policy objectives sought, Arizona's SB 1070 cannot be characterized as an exercise of the State's traditional police power to prevent and punish crimes and threats to public safety.

United States v. Vasquez-Alvarez, 176 F.3d 1294 (holding that where a state officer was monitoring an individual, partially on suspicion of drug trafficking, he had inherent authority under state law to arrest that individual on the sole basis of suspected unlawful presence after the suspect admitted he was an 'illegal alien' notwithstanding any implied restrictions on such arrest authority under 8 U.S.C. § 1252c). However, no case so far has advanced the audacious view that an individual state may mandate that its officers engage in a statewide campaign of stops and arrests of suspected civil immigration law violators, under penalty of civil suit, and in pursuit of an independent civil immigration enforcement policy set by the state legislature.[11] Notwithstanding some

[11] The State petitioners cite the opinion of this Court in *Muehler v. Mena*, 544 U.S. 93 (2005), in support of their position that Arizona retains inherent authority to engage in a statewide campaign of mass civil immigration arrests, without federal supervision, approval, or acquiescence. That case is inapposite to the issues presented in this appeal, and provides limited guidance for delimiting the permissible role of states in civil immigration enforcement under 8 U.S.C. §§ 1357(g), 1252c, and other related provisions. In *Muehler*, agents of the former Immigration and Naturalization Service ("INS") accompanied state police officers in a search of a suspected gang house, during which the respondent, a resident of the home not involved in the alleged criminal activity, was detained and handcuffed for a prolonged period of time, and questioned as to her immigration status by both the INS agents and state police officers conducting the search. The respondent brought an 42 U.S.C. § 1983 suit against the state officers arguing, *inter alia*, that the questioning as to her immigration status was an independent violation of her Fourth Amendment rights.

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rhetorical flourishes, all of these cases, save one, limited any 'inherent' state authority to the ability to *inquire* into civil immigration status in the context of independently valid investigations, in the course of which state officers formed reasonable suspicions that the search subjects were involved in serious criminal activity. None of these cases, save *Vasquez*, held that mere suspicion of unlawful presence alone afforded a valid, independent basis to justify an stop or arrest, and even in *Vasquez*, the fact that the arrest occurred in context of an investigation into alleged drug trafficking brings the facts of that case within the mainstream of other Circuit law. *See Vasquez*, 176 F.3d at 1295.

Rejecting that argument, the Court held only that no reasonable suspicion was required to ask the respondent about her immigration status because "mere police questioning does not constitute a seizure[,]" and since the questioning did not prolong the search or detention of the respondent, "there was no additional seizure within the meaning of the Fourth Amendment." *See id.* at 100-01. The Court further reasoned that the existence of a warrant supported the reasonableness of the search. *See id.* at 102. The police conduct authorized by SB 1070, in contrast, would not simply allow questioning into immigration status when there is an independent basis for lawful search and seizure under state law supported by a valid warrant, but would in fact require warrantless, stops, searches, and detentions of subjects supported *solely* by suspicion of violations of federal civil immigration law, and such stops, searches, and detentions would be in effect *required* in every case by the threat of civil liability hanging over the state officers' heads. Thus, the legal issue presented by this case is far different from that addressed in *Muehler*, and requires a different analysis to resolve.

To illustrate this basic and, up until now, unquestioned understanding of the permissible scope of state action touching on immigration matters, 8 U.S.C. § 1252c and the background assumptions against which it was passed provide a useful point of reference. That provision, while specifically allowing state officers to make arrests for civil immigration violations, does so only when stringent conditions are satisfied.[12] First, the alien must have been convicted of a felony, and must have been previously removed from the country on that basis, or else departed the country before removal proceedings were initiated. Second, and importantly, *before making an arrest* of an alien suspect, the state officer must confirm the alien's status with federal authorities. In effect, the state officer must obtain federal permission before any arrest can be made.

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[12] The clear implication from the text of 8 U.S.C. § 1252c to allow state officers to make arrests for civil immigration violations only within the conditions discussed therein, preempts the civil immigration arrest authority granted by SB 1070 in light of the long line of cases of this Court excluding state regulation of civil immigration law as a discrete subject matter, *see Chinese Exclusion Case*, 130 U.S. 581; *Hines*, 312 U.S. 52 – except when an exercise of a recognizable police power touches on immigration, *DeCanas*, 424 U.S. at 356-57; *Whiting*,131 S.Ct. at 1974 – and the principle of construction whereby it is presumed that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986).

It is difficult to understand what meaning this provision might have, or even why Congress felt that it was necessary to enact, if as a general matter state officers retained *inherent* authority to make exactly these sorts of arrests without any prior federal authorization, as imagined by Arizona's statutory scheme at issue here. *See* SB 1070 § 2(B) (prohibiting release of an alien prior to confirmation with the federal government of the alien's immigration status). Even the sponsor of the bill that became § 1252c aired his reason for proposing the bill: in its absence, state officers retained *no* authority to make arrests solely for immigration violations, thus acknowledging the states' lack of inherent authority to take such action.[13]

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[13] As discussed *supra* in note 16, the Tenth Circuit's opinion in *Vasquez*, 176 F.3d 1294, is the most extreme position announced by a court thus far, and admittedly runs counter to this theoretical framework of the limits of state authority under the Act and the Constitution. That case announced the bold proposition that, notwithstanding the plain text of 8 U.S.C. §§ 1252c and 1357(g)(10) and the foreign policy interests implicated, states retain 'inherent' authority to authorize arrests based solely on suspicion of unlawful presence without any prior federal confirmation or permission, and as a totally independent goal of state policy. The Tenth Circuit in *Vasquez* asserted the existence of some 'inherent' authority to make such arrests, counter-intuitively disregarding the limits placed on such authority in 8 U.S.C. § 1252c. The *Vasquez* court itself candidly recognized that its decision effectively renders 8 U.S.C. § 1252c meaningless, casting further doubt on the vitality of its interpretation of whether that provision divests states of any inherent authority to make civil immigration arrests. *See Vasquez*, 176 F.3d at 1300 ("Accordingly, it might be argued that this court's

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III. THE SECTIONS OF SB 1070 CHALLENGED IN THIS APPEAL STAND PREEMPTED IN THAT THEY AUTHORIZE STATE OFFICERS TO MAKE ARRESTS ON CRITERIA DERIVED EXCLUSIVELY FROM CIVIL IMMIGRATION LAW

Section 1 of SB 1070 declares the legislative purpose to "make attrition through enforcement the public policy of all state and local government agencies in Arizona." To achieve this purpose, Section 6(A)(5) of the Act authorizes state police officers to make civil immigration arrests when the officer "has probable cause to believe . . . the person to be arrested has committed any public offense that makes the person removable from the United States." Essentially, then, this provision authorizes state officers to engage in interpretation of federal civil immigration law, by conflating the substantive grounds authorizing arrests under criminal law with the standards for removability under federal civil immigration law. Arrests allowed by Section 6(A)(5) are constitutionally unsound and preempted by federal legislation – such arrests do not fall within traditional police powers of the state, and are prohibited in that they exceed the limits of lawful state civil immigration

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interpretation of § 1252c leaves the provision with no practical effect. That reason standing alone is not, however, sufficient for this court to manufacture a purpose for § 1252c by interpreting it to preempt state law.").

arrests embodied in 8 U.S.C. §§ 1252c and 1357(g)(10).

SB 1070 § 3 makes any person who (a) is an unlawfully present alien, and (b) engages in conduct that fits the federal crime of willful failure to carry required alien registration documents under 8 U.S.C. §§ 1304(e) and 1306(a) guilty of a misdemeanor under state law. This provision is preempted and unconstitutional for three reasons. First, this state law crime is an attempt by Arizona to shroud with a veneer of criminal law what is, in effect, an unlawful authorization for state officers to engage in civil immigration arrests. Although Section 3 is facially a criminal provision, to enforce it, state officers must interpret and apply federal civil immigration law. This provision therefore enables Arizona state officers to unlawfully engage in inquiries into civil immigration status as a discrete subject matter under cover of investigating commission of a 'crime' under state law.[14] Second, Section 3 is preempted in that it creates a state criminal immigration provision that conflicts with the analogous federal criminal provision: the federal provisions on which Section 3 is based penalize *lawfully present* aliens for failure to carry documents, while Section 3 targets only the undocumented, a class not within the purview of 8 U.S.C. §§ 1304(e) and 1306(a)'s sanctions. Third, because any unlawfully present alien is automatically guilty of this state

[14] *See Report*, *supra* note 4, at 23.

law crime merely through his or her *status* of being undocumented (as opposed to *conduct*), the state provision is not tethered to any recognizable state police power regulating conduct, but instead criminalizes undocumented status using civil standards borrowed from federal immigration law.

Finally, Section 2(B) sends Arizona's state officers out on a campaign of mass civil immigration arrests and investigations, unconnected to other legitimate police activities, and imposes the draconian penalty of civil liability to ensure that state officers conduct this campaign with sufficient severity. *See* SB 1070 § 2(B). Further, the close connection between "reasonable suspicion" of unlawful presence, and the threat of civil liability for lax civil immigration enforcement, will lead Arizona police into an aggressive policy of civil immigration enforcement appropriate only for federal authorities. *See*, *i.e.*, SB 1070 § 2(B) ("A reasonable attempt *shall* be made, when practicable, to determine the immigration status of the person . . . [and] any person who is arrested *shall* have the person's immigration status determined before the person is released."). SB 1070 unlawfully blurs the critical division of authority between the federal and state governments to regulate matters related to immigration: While states may enforce and investigate civil immigration matters only as an incident to otherwise legitimate police activities, only the federal government is fully empowered to enforce civil immigration law in itself. Therefore, because Subsection 2(B) effectively encourages and authorizes state

officers to make what are, in effect, civil arrests under federal immigration law, SB 1070 is preempted in that it involves state officers in civil immigration law enforcement endeavors that are preempted by the Act and inconsistent with constitutionally limited state power to enforce and interpret federal civil immigration law.[15]

CONCLUSION

Arizona has attempted to regulate civil immigration as a discrete subject matter in a way untethered to any recognizable state police power, and has generated a diplomatic firestorm in the process. Unless the Court holds the challenged provisions of SB 1070 preempted, each individual state will have free reign to enact the immigration policy it sees fit, leaving the federal government impotent to address the resulting international backlash, while simultaneously

[15] Furthermore, as the determinations required respectively by SB 1070 §§ 2(B) (whether a person is an unlawfully present alien), and 6 (whether the person is an alien who has committed an offense that would make him/her removable), "are complex administrative questions that must be determined by application of the procedures set forth in the" Act, requiring "Arizona law enforcement officer[s] to make . . . determination[s] . . . for which the officer has neither the training nor the resources to make[,]" sections 2(B) and 6 conflict with the federal government's functional responsibility to administer the act in a uniform fashion, and are preempted for that additional reason. *See Report*, *supra* note 8, at 18-19.

imperiling U.S. citizens and residents traveling and living abroad. Arizona's SB 1070 represents an individual state's dangerous foray into purely immigration and foreign policy, against the clear intent of the Constitution's framers to confine State action in this area to the narrowest possible scope consistent with the protection of legitimate local interests.

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