No. 11-182

In The Supreme Court of the United States

STATE OF ARIZONA, *and* JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENT

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

CAC seeks to preserve the careful balance of state and federal power established by the Constitution, including its Amendments. CAC filed *amicus curiae* briefs in *Wyeth v. Levine*, 555 U.S. 555 (2009), and *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), arguing for an approach to preemption that is consonant with the Constitution's text and history. CAC also has an interest in ensuring that the Constitution's protections for all persons, including resident aliens and undocumented immigrants, are secured by both the states and the federal government, as demonstrated by its *amicus* brief in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). CAC thus has a strong interest in this case and the development of preemption and immigration law generally.[1]

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that 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 curiae* or its members made a monetary contribution to its preparation or

INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona attempts to portray this case as a simple, run-of-the-mill "implied preemption case." Pet. Br. at 23. This premise is stunningly wrong. The typical implied conflict preemption case does not involve specific constitutional provisions that clearly give the federal government exclusive power over a certain sphere, withdrawing any concurrent authority from the states. The typical implied conflict preemption case does not involve statutes that reflect Congress's specific intent to vest the Executive with broad discretion to follow policy goals and enforcement as it sees fit.

This case is plainly not the typical preemption case. The Constitution gives the federal government exclusive authority to regulate immigration in a uniform fashion across the country. By specifying that Congress has the power to establish a "uniform" rule of naturalization, the Constitution's text makes clear that states do not have concurrent authority to regulate immigration and naturalization. The delegation of power to the federal government to regulate foreign affairs, including the treatment of foreign citizens who are present in the United States, also reflects the framers' desire that our nation speak with one voice in this area. In addition, the Fourteenth Amendment gives Congress exclusive

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submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

authority over decisions to admit foreigners to national and state citizenship, as well as broad enforcement power to protect the constitutional rights of immigrants residing in the United States.

Arizona's S.B. 1070 runs directly up against these constitutionally delegated, inherently *federal* powers. Moreover, Congress has specifically sought to give the Executive significant discretion in immigration matters, and, particularly enforcement of immigration laws. This discretion is necessary for the Executive to "balance[e] a number of factors which are peculiarly within its expertise," *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), including foreign relations, humanitarian considerations, and protecting the nation's borders and security.

Through the imposition of criminal penalties on undocumented immigrants and the introduction of police measures that threaten to lead to harassment and unjust detention of both legal and non-legal U.S. residents, S.B. 1070 contradicts federal immigration law. Because the Constitution's Supremacy Clause displaces state laws that directly conflict with federal law—both constitutional and statutory—S.B. 1070 is preempted. Accordingly, the court below was correct to find that the United States is likely to prevail on the merits of its preemption claim, and to enjoin the relevant provisions of S.B. 1070.

ARGUMENT

I. Arizona Wrongly Suggests That This Case Raises A Typical Implied Conflict Preemption Question.

The Constitution declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.[2] This Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g.*, *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause."). The framers of the Constitution sought to balance the desire to preserve state

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[2] The framers intended the Supremacy Clause to serve an important function in establishing the relationship between the federal government and the individual states in our Constitution's new federalist system. As James Madison noted, because the Articles of Confederation lacked a federal supremacy rule, "'[w]henever a law of a State happened to be repugnant to an act of Congress,' it 'will be at least questionable' which law should take priority, 'particularly when the latter is of posterior date to the former.'" James Madison, *Vices of the Political System of the United States* (Apr. 1787) *in* 9 PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975).

authority with the pressing need to ensure the federal government's ability to govern the Union effectively. Alexander Hamilton explained how federal supremacy would work under the proposed Constitution, and to what extent the states would retain certain powers not "delegated to the United States":

> This exclusive delegation . . . would exist in only three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

Federalist No. 32, 194 (Alexander Hamilton) *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) (emphasis in original). *See also* 2 MEMOIR, CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON (1829) 230 (Letter to Mr. Wythe) (writing that "the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty").

In applying this rule in most preemption cases, the Court starts "with a presumption that the state statute is valid," and requires the party seeking

preemption to "shoulder[] the burden of overcoming that presumption." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-662 (2003). *See also Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Similarly, in the typical conflict preemption case, "courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended." *California v. FERC*, 495 U.S. 490, 497 (1990). Arizona claims this "presumption against preemption" and clear evidence rule apply to this case. Pet. Br. at 28-29. But Arizona's S.B. 1070 law is not the typical preemption case, because the Constitution has expressly taken away from the states the power to regulate immigration and naturalization.

Significantly, Alexander Hamilton specifically used the federal power over immigration and naturalization to illustrate a constitutional authority granted to the federal government that would be "repugnant" and "contradictory" if exercised by a state. *Federalist* No. 32, at 194. Referring specifically to the "clause which declares that Congress shall have power 'to establish an UNIFORM RULE of naturalization throughout the United States,'" Hamilton explained that the "[t]his must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE." *Federalist* No. 32, 195 (emphasis in original).

While this Court has appropriately declined to preempt state law under the Commerce Clause pursuant to a broad implied preemption theory, instead applying a "presumption against preemption" in contexts where states have long held concurrent authority to regulate, *e.g.*, *Wyeth*, such precedents

are inapplicable here. *See Hines v. Davidowitz*, 312 U.S. 52, 68 & n.22 (1941) (distinguishing between the more robust preemption of state regulation regarding the rights and liberties of aliens, where power has been exclusively granted to the federal government under the Constitution, and state regulation in areas "where the Constitution does not of itself prohibit state action, as in matters related to interstate commerce," such as "state pure food laws regulating the labels on cans"). The presumption against preemption asserted by Arizona, *see* Pet. Br. at 28-29, does not apply to this case because, as illustrated by the text and history presented below, the Constitution specifies that Congress has power to create a "uniform" rule for naturalization and immigration, and states thus do not have concurrent authority in this area. *Accord United States v. Locke*, 529 U.S. 89, 108 (2000) (noting that because "[t]he state laws now in question bear upon national and international maritime commerce . . . in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers"). As this Court held in *Takahashi v. Fish & Game Commission*:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in

> the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

334 U.S. 410, 419 (1948) (citation omitted). Because there is no assumption of concurrent constitutional authority in matters of immigration, the Constitution puts its thumb on the scale of preemption rather than *against* preemption, as is often the case in other contexts.

In addition, contrary to Arizona's suggestion that the Court must look for evidence that Congress has clearly displaced S.B. 1070, in the immigration context courts must look for affirmative evidence that Congress has allowed the states to exercise concurrent jurisdiction. *See DeCanas v. Bica*, 424 U.S. 351, 363 (1976) (finding that the state's regulation of aliens and employment was not preempted because there was "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law"); *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (finding discriminatory state tuition policy preempted in the absence of evidence that "Congress ever contemplated that a State . . . might impose discriminatory tuition charges and fees solely on account of the federal immigration classification").

II. Articles I And II Of The Constitution Exclusively Vest The Federal Government With Power Over Naturalization And Immigration.

The Constitution provides that "Congress shall have Power To . . . . establish an uniform Rule of Naturalization . . . throughout the United States." U.S. CONST. art. I., § 8, cl. 4. As James Madison explained, this provision was included in the Constitution to improve upon the flawed Articles of Confederation:

> The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. . . . The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

Federalist No. 42, 265-66, 267 (James Madison).

It was clear to the Constitutional Convention delegates that the Confederation's weak central government "could not check the quarrels between states . . . not having constitutional power nor means to interpose according to the exigency: that there were many advantages, which the U.S. might acquire, which were not attainable under the confederation." May 29, 1787, THE RECORDS OF THE FEDERAL

CONVENTION OF 1787 (Max Farrand, ed.) (1911). The resolution of uniform naturalization rules was proposed by Edmund J. Randolph on May 29, 1787, and on several occasions subsequently. *Id.*; *id.*, June 15, 1787; *id.*, Aug. 6, 1787; *id.*, Sep. 12, 1787. *See also id.*, June 16, 1787. Other delegates to the Convention acknowledged that "the [National Legislature] is to have the right of regulating naturalization." *Id.*, Aug. 9, 1787 (statement of James Madison); *see also id.*, Aug. 13, 1787 (statement of Alexander Hamilton) ("The right of determining the rule of naturalization will then leave a discretion [sic] to the Legislature on this subject which will answer every purpose."). From our Constitution's very beginnings, it was understood that the federal government's power over immigration would preempt efforts by the states to regulate immigration and naturalization.[3]

The framers' decision to write the Naturalization Clause the way it appears in the Constitution—specifying a "uniform" rule—necessitates preemption of state authority over immigration. As Alexander Hamilton put it so succinctly, the power "must necessarily be exclusive; because if each state had power to

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[3] While the Constitution refers to "naturalization," not immigration specifically, this Court has long recognized that the Naturalization Clause also gives Congress exclusive authority to enact the "specialized regulation of the conduct of an alien before naturalization," and that "the 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." *Hines*, 312 U.S. at 62.

prescribe a DISTINCT RULE, there could not be a UNIFORM RULE." *Federalist* No. 32, 195 (emphasis in original).

This Court's earliest cases recognized the exclusive authority of the federal government on matters of immigration and naturalization. Early in the Court's history, Chief Justice John Marshall declared that "the power of naturalization is exclusively in Congress," *Chirac v. Chirac*, 15 U.S. 259, 269 (1817), and held that a federal treaty between France and the United States defining the property rights of French immigrants residing in the United States preempted a Maryland law to the contrary. *Id.* at 270-78; *see also Houston v. Moore*, 18 U.S. 1, 49 (1820) (opinion of Justice Story) (citing the Naturalization Clause as one of the instances in which "the [C]onstitution has expressly given an exclusive power to Congress" and "there is a direct repugnancy or incompatibility in the exercise of it by the States"); *Golden v. Prince*, 10 F. Cas. 542, 545 (C.C. D. Pa. 1814) (opinion of Justice Bushrod Washington) (observing that the power to enact "bankruptcy and naturalization laws by the state governments is incompatible with the grant of congress to pass uniform laws on the same subject. . . . [T]he former would be dissimilar and frequently contradictory; whereas the systems are directed to be uniform, which can be only be rendered so by the exclusive power in one body to form them.").

The structure of federal power under the Constitution requires that immigration law be uniform and under exclusive federal control, and gives the federal government the power to pass laws necessary

to achieve this uniformity and execute federal law effectively. For example, this Court has interpreted the authority to regulate noncitizens as necessary to Congress's power under the Constitution's Naturalization Clause. In *Hines v. Davidowitz*, which involved Pennsylvania's alien registration act, Justice Hugo Black stated that "specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish an Uniform Rule of Naturalization . . . .'" 312 U.S. at 66. *Accord Toll*, 458 U.S. at 11; *Takahashi*, 334 U.S. at 419.

Furthermore, because immigration laws affect noncitizens they are also a component of foreign affairs. Congress has authority to "regulate Commerce with foreign Nations" under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the federal government has broad power under the Foreign Affairs Clauses.[4] "[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," its history, and Court precedent. *Hines*, 312 U.S. at 62 & n.9 (noting how "[t]he importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly devel-

[4] These clauses include the power to declare war, found in Article I, Section 8, Clause 11, the Senate's power to advise and consent to the appointment of ambassadors, found in Article II, Section 2, Clause 2, and, finally, the presidential power to make treaties with the advice and consent of the Senate, found in Article II, Section 2, Clause 2.

oped in Federalist papers No. 3, 4, 5, 42 and 80."). If a state promulgates immigration law that is inconsistent with or not affirmatively allowed by the federal government, it is necessarily abridging the federal government's constitutionally-granted supreme power over immigration.

This Court has upheld the federal government's power over immigration law as exclusive. In *DeCanas v. Bica*, the Court held that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." 424 U.S. at 354. This power is "broad" and includes authority over who "shall be admitted," the "period they may remain," "regulation of their conduct before naturalization," and the "conditions of their naturalization." *Id.* at 358 n.6 (quoting *Takahashi*, 334 U.S. at 419).

The Court has also made clear that "[u]nder the Constitution the states are granted no such powers." *Id.* States can enact a law affecting undocumented persons within their borders, as long as the statute does not encroach upon immigration law, 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." *Id.* at 355. The sphere of permissible state action is limited because state laws that impose "distinct, unusual and extraordinary burdens and obligations upon aliens . . . bear[] an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one." *Hines*, 312 U.S. at 65-66.

Arizona attempts to escape the force of precedent and constitutional text and history by arguing that preemption can only come from congressional action, not from the Executive's policy aims. But Congress has made the deliberate choice to vest Executive officials with significant control and discretion over many aspects of immigration law, recognizing that "policy toward aliens is vitally and intricately interwoven with . . . the conduct of foreign relations." *Harisiades v. Shaugnessy*, 342 U.S. 580, 588-89 (1952). *See also INS v. Chadha*, 462 U.S. 919, 954 (1983). As explained in detail in the United States' brief, Congress has made clear its intent to give the Executive significant discretion in immigration matters, and, particularly enforcement of immigration laws. U.S. Br. at 18-22. This discretion is necessary for the Executive to "balance[e] a number of factors which are peculiarly within its expertise," *Heckler v.* Chaney, 470 U.S. 821, 831 (1985), including foreign relations, humanitarian considerations, and protecting the nation's borders and security.

III. The Fourteenth Amendment Affirms That The States Lack Authority To Regulate Citizenship And Immigration.

The changes made to the Constitution by the Fourteenth Amendment underscore the federal government's exclusive power over immigration, naturalization, and citizenship. Drafted in 1866 and ratified in 1868, the Fourteenth Amendment made national and state citizenship a right of all persons born or naturalized in the United States and extended to all persons residing in the United States

guarantees of equal protection of the laws and due process of law. Making United States citizenship "paramount and dominant instead of being subordinate and derivative," *Arver v. United States*, 245 U.S. 366, 389 (1918), the Amendment gave the federal government exclusive authority over citizenship as well as broad enforcement power to protect the constitutional rights of immigrants residing in the United States.

In 1866, contemporaneous with the drafting of and debates on the Fourteenth Amendment, the 39th Congress enacted the Civil Rights Act of 1866, using its Naturalization Clause authority to make the newly freed slaves American citizens. The Act's broad guarantee of birthright citizenship extended citizenship to "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . ." 14 Stat. 27 (1866).

During the debates over the Act, the Reconstruction Framers recognized that the Naturalization Clause gave Congress exclusive power and control over the transition from the status of resident to citizen. Senator Trumbull, the Act's sponsor, explained that "[w]e all know that no State has authority to make a citizen of the United States. The Constitution . . . vests in Congress the sole power of naturalization, and it may make a citizen of a foreigner . . . ." Cong. Globe, 39th Cong., 1st Sess. 1756 (1866). The power to admit foreigners into the community of United States citizens, Senator Trumbull explained, is "vested in Congress, and nowhere else." *Id.* at 475; *see also id.* at 1075 (Sen. Nye) (noting "[t]he exclusive power of Congress over the subject of

citizenship and naturalization"); *id.* at 1832 (Rep. Lawrence) ("The whole power over citizenship is intrusted to the national Government…."). In *United States v. Rhodes,* 27 F. Cas. 785 (C.C. D. Ky. 1866), Justice Swayne, riding circuit, upheld the constitutionality of the Civil Rights Act, citing the Naturalization Clause and explaining that it has been "settled by the supreme court that this power is vested exclusively in congress." *Id.* at 790.

Once ratified, the Fourteenth Amendment wrote into the Constitution the guarantee of national and state citizenship, providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . . ." U.S. CONST. amend. XIV. As the framers recognized during the debates, the Fourteenth Amendment made citizenship—whether by birth or naturalization—a constitutional right, denying states the ability to decide who shall be citizens of the United States, or of their respective states. The Fourteenth Amendment made all United States citizens, by law, citizens of the state in which they reside.

Senator Howard, one of the primary drafters of the Fourteenth Amendment, explained that the Citizenship Clause "settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States," putting the "question of citizenship . . . beyond the legislative power . . . ." Cong. Globe, 39th Cong., 1st Sess. 2890, 2896 (1866). Operating in tandem with the Naturalization Clause, the Fourteenth Amendment took away the power of states to decide whether persons—either

native or foreign-born—would become citizens. "The States, after the adoption, could no longer naturalize. This power, by the Constitution, was given to Congress. But now upon the moment of naturalization the foreigner becomes a citizen of the United States, and . . . any one of the States by the same residence . . . ." *Id.* at 3032 (Rep. Henderson).

Opponents of the Fourteenth Amendment attacked the Citizenship Clause's guarantee, complaining that the new Amendment would interfere with state authority to restrict immigration. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (Sen. Cowan) ("I am unwilling, on the part of my State, to give up the right . . . of expelling a certain number of people who invade her borders . . . . Are the States to lose control over this immigration?"). In response, the Amendment's supporters pointed out that, even before the Amendment had been proposed, the courts had consistently recognized that state efforts to restrict immigration were inconsistent with Congress's express constitutional powers. *Id.* at 2892 (Sen. Conness); *see also id.* (Sen. Howard) (approving these decisions as "very just and constitutional").

Other aspects of the Fourteenth Amendment further extended Congress's power over immigration at the expense of the states. The Fourteenth Amendment specifically grants Congress the power to enforce its guarantees. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). Within two years of the Amendment's ratification, Congress used its enforcement power to protect the constitutional rights of resident aliens,

rejecting charges that Congress was improperly "strik[ing] entirely at the police power of the States over the subject of immigration." Cong. Globe, 41st Cong., 2nd Sess. 1536 (1870) (Sen. Casserly).

The Enforcement Act of 1870 banned discrimination against aliens in the exercise of civil rights and taxation, specifically limiting taxes that states could impose on persons immigrating to the country. As Senator William Stewart explained, "we will protect Chinese aliens or any other aliens whom we allow to come here . . .; let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). While Senator Stewart recognized that Congress had the authority to enact legislation "to prevent anybody from bringing them," *id.*, once present in the country, it was Congress's duty "to see that they have the equal protection of the laws." *Id.* States could not use their police power "to rob" immigrants "of their ordinary civil rights." *Id. See also In re Ah Fong*, 1 F. Cas. 213, 218 (C.C.D. Cal. 1874) (holding California statute regulating arrival of Chinese immigrants preempted by the federal Enforcement Act of 1870) (opinion of Field, J.).

Consistent with this text and history, it is settled law that the Fourteenth Amendment guarantees "equality of protection . . . to every one whilst within the United States, from whatever country he may have come from," *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (opinion of Field, J.), and sharply limits the authority of states to "deny [aliens] entrance and abode." *Truax v. Raich*, 239 U.S. 33, 42 (1915). This Court's cases interpreting the Four-

teenth Amendment have long recognized the fundamental difference between the authority of the states and the federal government over immigration. The Court explained more than half a century ago that "[t]he Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. . . . the states are granted no such powers." *Takahashi*, 334 U.S. at 419, 420. Accordingly, "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Id.*; *Truax*, 239 U.S. at 42 ("Reasonable classification implies action consistent with the legitimate interests of the state, and . . . cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."). *See also Ah Fong*, 1 F. Cas. at 217 ("If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies. The state cannot exclude them arbitrarily . . . .").

IV. The Enjoined Provisions Of S.B. 1070 Directly Conflict With The Constitution's Exclusive Grant Of Authority Over Immigration To The Federal Government.

As explained in the brief of the United States, pursuant to its constitutional authority, Congress has established "a comprehensive federal statutory regime for the regulation of immigration and naturalization," with administration of that regime

principally charged to officers in the Executive Branch. *E.g.*, U.S. Br. at 2-8. On its face, S.B. 1070 aims to supplant the federal government's comprehensive policy of regulating immigration and naturalization with Arizona's own contrary policy—"attrition through enforcement"—in direct contravention of the Constitution's grant of exclusive authority to the federal government. In addition, in its specifics, Arizona attempts to further its own interests with respect to immigration in several ways that directly conflict with this federal framework and are clearly preempted under the Constitution.

First, S.B. 1070 adds criminal penalties under state law for an immigrant's failure to register with the federal government, as required by 8 U.S.C. §§ 1304(e), 1306(a), and carry federal registration documents. S.B. 1070, § 3, codified at Ariz. Rev. Stat. § 13-1509. Federal law requires certain aliens to register and carry proof of such registration, and has set the failure to follow these requirements as a misdemeanor. *See* 8 U.S.C. §§ 1201, 1301, 1302, 1304(e), 1306(a). Unlike the federal law, however, Arizona's law is targeted specifically at undocumented immigrants—S.B. 1070 § 3 is inapplicable to lawfully present aliens. Ariz. Rev. Stat. § 13-1509(F). It thus does not simply duplicate federal penalties for failure to register, it creates a new category of state crime that is applicable only to those immigrants who are unlawfully present. The federal government has never criminalized a person's mere presence in the United States, and Arizona's attempt to create a new category of criminal punishment for undocumented immigrants conflicts with the federal government's authority.

Second, S.B. 1070 allows for criminal punishment of undocumented immigrants who seek to work in Arizona. S.B. 1070, § 5, codified at Ariz. Rev. Stat. § 13-2928(C). This directly conflicts with the federal government's chosen means of ensuring that employers hire only authorized workers: under federal law, *employers* face a range of civil and criminal sanctions for hiring unauthorized employees. 8 U.S.C. §§ 1324a(e)(4), 1324a(f). The federal government has elected not to impose criminal penalties on undocumented immigrants who seek or obtain employment in this country. *See* U.S. Br. at 39. Congress recognized that "many who enter illegally do so for the best of motives—to seek a better life for themselves and their families," and that "legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682, pt. 1 at 46 (1986).

Third, S.B. 1070 requires state and local law enforcement officers to determine the immigration status of any person whom they stop or detain whenever "reasonable suspicion" exists that the person might be an illegal alien. S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-1051(B). This nondiscretionary directive applies even in the most innocuous of stops—for jaywalking, not having one's dog on a leash, or riding a bicycle on the sidewalk. In addition, any person who is arrested may only be released after state or local law enforcement officers verify the person's immigration status to their satisfaction. S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-1051(B). These provisions unquestionably conflict with Congress's manifest purpose to create a uniform system

of regulation that leaves immigrants "free from the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74.

Furthermore, the requirement that arrestees prove their immigration status to the satisfaction of state authorities raises the specter of lawfully present immigrants and U.S. citizens detained for unspecified amounts of time while their status is checked. This is hardly consistent with the Supreme Court's reasoning in *Hines* that immigration law is intended to avoid imposing burdens on lawfully-present aliens. *Id.* at 73-74. *See also id.* at 70 ("Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history.").

Fourth, and finally, S.B. 1070 authorizes a state officer to arrest a person without a warrant if the officer has probable cause to believe that the person—including a person who is lawfully present in the United States—has previously committed a public offense that would render the person removable from the United States. S.B. 1070, § 6, codified at Ariz. Rev. Stat. § 13-3883(A)(5). As a threshold matter, it is likely to be difficult for Arizona's state and local law enforcement officers to accurately navigate the often complicated world of immigration law to determine when a public offense qualifies a person for removal, *see Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (observing that "whether a conviction for a particular offense will

make an alien removable is often quite complex"); federal law specifies certain federal proceedings, generally before an immigration judge, as the "sole and exclusive procedure for determining whether an alien . . . may be . . . removed from the United States." 8 U.S.C. § 1229a(a)(3). Moreover, a person who is present in the United States unlawfully may seek relief from removal, asking for asylum for example. *Id.* § 1158. Unlike Arizona's law, federal law recognizes that officials charged with enforcing immigration law can and should exercise discretion with respect to removal based on humanitarian concerns. *E.g.*, 8 U.S.C. §§ 1158, 1254a (providing protection from removal for fear of persecution or ongoing armed conflict in the alien's home country); *id.* § 1182(d)(5)(A) (authorizing parole for "urgent humanitarian reasons or significant public benefit"); *id.* § 1227(a)(1)(E)(iii) (providing for a waiver of removal to preserve family unity). This reflects the federal government's "desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances." J.A. 109 (Ragsdale Decl. ¶ 19). Such concerns are absent from Arizona's strict, nondiscretionary enforcement regime, which provides for a private right of action against officers and severe penalties if S.B. 1070 is not enforced to its letter. And again, this provision is contrary to Congress's desire to avoid imposing burdens on lawfully-present aliens and keep U.S. residents "free from the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74.

Arizona's law directly conflicts with federal immigration policy promulgated pursuant to express and exclusive constitutional authority. The district

court properly enjoined provisions of S.B. 1070 because the United States is likely to prevail in its argument that those provisions are preempted by federal law, and the Ninth Circuit correctly upheld that injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

March 26, 2012