No. 11-182

In the Supreme Court of the United States

ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE GREATER HOUSTON PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ALBERTO P. CARDENAS, JR.
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

Table of Contents—Cont.: **Page**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Cont.: **Page(s)**

Cases—Cont.: **Page(s)**

Constitutional Provisions:

Statutes and Regulations:

Statutes and Regulations—Cont.: **Page(s)**

Statutes and Regulations—Cont.: **Page(s)**

Other Authorities:

Other Authorities—Cont.: **Page(s)**

Other Authorities—Cont.: **Page(s)**

Other Authorities—Cont.: **Page(s)**

INTEREST OF *AMICUS CURIAE*[1]

The Greater Houston Partnership represents the interests of the Houston region's business enterprises, from the local entrepreneur to the global Fortune 500 company. It was founded in 1989 with the merger of the Houston Chamber of Commerce, the Houston Economic Development Council, and the Houston World Trade Association. Today, the Greater Houston Partnership is one of the Nation's most influential business organizations, with more than 2,100 members from the business community in and around the country's fourth largest city.

Given the major role Hispanic immigrants play in the Texas economy,[2] the Greater Houston

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] See, *e.g.*, Suzy Khimm, *How much did illegal immigrants contribute to Texas's economic boom?* Wash. Post. Wonkblog, Aug. 19, 2011, 2:43 PM ET, *available at* http://www.washingtonpost.com/blogs/ezra-klein/post/how-much-did-illegal-immigrants-contribute-to-texas-economic-boom/2011/08/19/gIQASvBFQJ_blog.html (discussing the important role legal immigrants play in Texas's economy and quoting a member of the Greater Houston Partnership); The Perryman Group, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry* 49 (April 2008) ("the Perryman Report"), *available at* http://americansforimmigrationreform.com/files/Impact_of_the_Undocumented_Workforce.pdf (calculating that up to eight percent of Texas's gross product depends on undocumented labor).

Partnership has taken a leadership position in the debate over the Nation's immigration policy in favor of comprehensive immigration reform. To that end, the Greater Houston Partnership has established an Immigration Task Force and Americans for Immigration Reform, a separate 501(c)(3) corporation; the group has held panel discussions on immigration policy;[3] its members have testified before Congress regarding immigration reform;[4] and the group and its members have commissioned studies[5] and published white papers[6] about U.S. immigration policy, many of which have garnered widespread press coverage.[7] The Greater Houston Partnership and its members have a keen interest in immigration legislation and its enforcement.

---

[3] *E.g.*, Susan Carroll, *Geraldo Rivera Speaks in Houston*, Houston Chron., June 30, 2009, *available at* http://www.chron.com/news/houston-texas/article/Geraldo-Rivera-speaks-in-Houston-1722756.php.

[4] *E.g.*, Greater Houston Partnership, *Partnership President to Testify Before House Subcommittee on Immigration – Sept. 30, 2010*, http://www.houston.org/greater-houston-partnership/public-policy/issues/immigration/.

[5] *E.g.*, the Perryman Report, *supra* n.2.

[6] *E.g.*, Patrick Jankowski, *Potential Tax Revenues from Unauthorized Workers in Houston's Economy* (Jan. 2012), *available at* http://www.houston.org/pdf/research/whitepapers/taxrevenuesundocumentedworkers.pdf.

[7] See, *e.g.*, Julián Aguilar, *A Divide on the Payoff of Legalizing Immigrants*, N.Y. Times, Jan. 29, 2012, at A23A (discussing the novel findings in Jankowski's study); Tom Balanoff, *Immigration reform crucial to recovery*, Chi. Sun-Times 15, Dec. 24, 2009 (discussing the Perryman Report).

Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("the Act" or "S.B. 1070") constitutes an unprecedented attempt by a State to establish its own immigration policy that is, by design, at odds with federal immigration policy. If the Act is upheld, Arizona will effectively have a separate, more stringent immigration-enforcement regime than the rest of the Nation, preventing the uniform enforcement of federal immigration law and raising serious federalism concerns.

The Greater Houston Partnership and its membership are particularly concerned about the spillover effects of Arizona's law. Given the fluid nature of immigration and free movement of persons between U.S. States, the effects of Arizona's immigration policy are not confined to its borders. The practical effect of Arizona's effort to achieve "attrition through enforcement," S.B. 1070 § 1, will be to drive illegal aliens, along with lawful resident aliens and citizens leaving an unwelcome environment, to surrounding States. The resulting "attrition" will not only affect Arizona's economy, but that of other States as well.

SUMMARY OF ARGUMENT

Arizona's defense of S.B. 1070 rests on the State's assertion that it is "simply [exercising] its inherent authority under Our Federalism." Pet. Br. 15. But as this Court has long held, federalism does not grant states residual authority to pass laws on whatever subjects they please; "States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring). The Founders recognized that the creation

and control of a uniform immigration law for the Nation was properly the domain of the federal government, see, *e.g.*, The Federalist No. 42, at 264-271 (James Madison) (Clinton Rossiter ed., 1961); David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* 89 (1997), and two centuries of increasingly comprehensive national immigration regulation have confirmed the preeminence of federal law in this area. Arizona's attempt to promote "attrition through enforcement," S.B. 1070 § 1, demonstrates the wisdom of uniform national law: Rather than "solving" the illegal-immigration problem, it simply pushes it to surrounding States that have no say over Arizona's law, which will themselves have every incentive to adopt such a law to pass the problem to yet some other neighbor.

Similarly unpersuasive is Arizona's claim that S.B. 1070 does not regulate immigration, but simply "deals with aliens." Pet. Br. 30. The contested provisions of S.B. 1070 explicitly incorporate federal immigration law and then mandate maximum enforcement of that law. Unlike the state statutes in *De Canas* v. *Bica*, 424 U.S. 351 (1976) (superseded by statute), and *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011), which involved regulation of the employer-employee relationship—a subject over which "States possess broad authority under their police powers," *De Canas*, 424 U.S. at 356, and one with only an "indirect," *id.* at 355, and "purely speculative," *ibid.*, impact on immigration—Arizona's law operates directly on aliens and has material effect.

Nor is S.B. 1070 authorized by the federal Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

See Pet. Br. 32-34. The provision Arizona claims is a "savings clause" merely authorizes States to "communicate" or "cooperate" with the Attorney General in implementing federal immigration law. By contrast, the savings clause at issue in *Whiting* expressly exempted from preemption the precise type of state licensing regulations at issue there. See 8 U.S.C. § 1324a(h)(2); *Whiting*, 131 S. Ct. at 1974, 1980 And Arizona's mandate of maximum enforcement runs directly counter to the structure of federal law and federal immigration enforcement priorities. See Resp. Br. 47-48. That is the point of S.B. 1070; through it, Arizona intends to supersede federal immigration enforcement it considers "inadequate," Pet. Br. 14, "relaxed," *id.* at 26, and "lax," *id.* at 26, 28.

Finally, apart from its significant constitutional problems, Arizona's law has harmed and will continue to harm lawful resident aliens and even citizens living in that State. The expansive scope of S.B. 1070, coupled with a low, "reasonable suspicion" threshold and a citizen-suit provision guaranteeing maximum enforcement, ensures that the law will "discourage and deter" not only illegal aliens from residing in Arizona, S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note, but lawful resident aliens and citizens as well. Studies show Hispanics are already leaving Arizona in droves as a result of S.B. 1070. See, *e.g.*, Adolfo Albo & Juan Luis Ordaz Diaz, *La Migración en Arizona y los efectos de la Nueva Ley "S.B.-1070"* (BBVA Research, Documento de Trabajo No. 11/16, May 2011), at 6, *available at* http://www.bbvaresearch.com/KETD/fbin/mult/WP_1116_Mexico_tcm346-257494.pdf?ts=932012. S.B. 1070 will have untold effects on the economy of a State where lawful

resident Hispanic aliens and citizens make up a critical part of both the workforce and consumer base. And, indeed, the practical effect of Arizona's law is not limited to Arizona. S.B. 1070 has the potential to significantly impact migration patterns throughout the Nation, particularly in the Southwest—a feature that only confirms the need for uniform enforcement of federal immigration law.

ARGUMENT

In Federalist No. 42, James Madison lamented the "dissimilarity in the rules of naturalization" that prevailed under the Articles of Confederation, which left to the several States the power to establish their own procedures for immigration and naturalization. The Federalist No. 42, *supra*, at 269. By the time of the Founding, that feature of the Articles "ha[d] long been remarked as a fault in our system." *Ibid.* "The new Constitution," he wrote, "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." *Id.* at 270-271; see also U.S. Const. art. I, § 8, cl. 4. Madison termed the power to be "an obvious and essential branch of the federal administration * * * [i]f we are to be one nation in any respect." The Federalist No. 42, *supra*, at 264.

Arizona S.B. 1070 threatens to disrupt the country's uniform immigration policy by mandating a state policy of immigration enforcement that intentionally departs from that set by the federal executive charged with implementing immigration

policy. The Greater Houston Partnership agrees with, and does not attempt to replicate, the compelling preemption analysis set forth in the brief of the United States. Rather, this brief addresses some of the claims Arizona has made to justify its unprecedented attempt to establish its own immigration policy, and discusses the grave practical implications S.B. 1070 will have for citizens and lawful resident aliens in Arizona and for the State's economy.

I. ARIZONA S.B. 1070 UNCONSTITUTIONALLY INHIBITS THE UNIFORM ENFORCEMENT OF FEDERAL IMMIGRATION LAW

Arizona essentially makes three points in favor of the constitutionality of S.B. 1070: first, that under "Our Federalism," a State is authorized to pass supplemental laws to implement and enforce federal immigration standards, Pet. Br. 15, 44, 51; second, that S.B. 1070 does not conflict with federal regulation efforts because it does not regulate immigration, *id.* at 29-31; and third, that S.B. 1070 does not conflict with federal regulation because Congress expressly authorized such legislation in a savings clause, *id.* at 32-34. Each of those arguments fails.

A. Principles Of Federalism Do Not Support S.B. 1070

Arizona seeks to justify its efforts to supplant federal immigration law by invoking principles of federalism; according to Arizona, S.B. 1070 "is simply an attempt by the State, pursuant to its inherent authority under Our Federalism, to add its own

resources to federal ones." Pet. Br. 15; see also *id.* at 3, 44, 51. But Arizona misunderstands that concept. Federalism does not mean that States maintain unfettered regulatory authority in all areas; although federalism contemplates that both sovereigns share power,

> [t]he States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. That the States may not invade the sphere of federal sovereignty is as incontestable * * * as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.

U.S. Term Limits, Inc., 514 U.S. at 841 (Kennedy, J., concurring) (citations omitted). As this Court has explained, "'Our Federalism' does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999) (quoting *Younger* v. *Harris*, 401 U.S. 37, 44 (1971)). Rather, federalism represents a "'system in which there is sensitivity to the legitimate interests of both State and National Governments.'" *Ibid.* (quoting *Younger*, 401 U.S. at 44). Arizona's immigration law fails to pass muster under basic principles of federalism.

1. *Federal Regulation Of Immigration Is Longstanding, Comprehensive, And Pervasive*

It has long been understood that, in regulating immigration, the Nation's interest in uniform law is paramount. As this Court observed more than a century ago, matters of immigration "ought to be * * * the subject of a uniform system or plan." See, *e.g.*, *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1875). Congress has long established uniform federal standards for immigration. The First Congress enacted a naturalization law in March 1790 setting conditions for admission to citizenship. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (Mar. 26, 1790). The law reflected Congress's understanding that the Constitution's requirement of "uniform rule[s]" was understood in "geographic terms." Currie, *supra*, at 89. "The history of the constitutional provision confirms this conclusion; Congress was given power to adopt a nationwide rule in order to prevent a state" from adopting standards that would have adverse effects on other States. *Ibid.* Subsequent enactments during the early Congresses likewise emphasized both the need for uniformity and—to that end—federal *exclusivity*. *Id.* at 192 ("The uncontested assumption seemed to be that exclusivity was necessary and proper to the exercise of congressional authority to provide a 'uniform' rule, as it clearly was."); see also *id.* at 195 n.173 (noting Congress declined to enact proposals that would have involved "[m]ingling of federal and state authority, interference with exclusive federal and state prerogatives, and violation of the apparent requirement that naturalization laws be uniform"); see also David P. Currie, *The Constitution*

in Congress: The Jeffersonians 1801-1829 5 (2001) (noting Congress shortened the residency requirement).[8]

Beginning after the Civil War, Congress expanded its immigration-control efforts. In 1875, for instance, Congress passed the Page Act, which prohibited the immigration from Asia of groups it considered undesirable. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. And, in 1882, Congress enacted the first comprehensive Immigration Act, which established a uniform system for controlling the arrival of immigrants on U.S. soil. Ch. 376, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551-1574 (2006)).

Nine years later, Congress left little room for doubt that the federal government, not the States, was the proper locus of immigration regulatory authority. In the Immigration Act of 1891, Congress created an Office of the Superintendent of Immigration under the direct authority of the Secretary of the Treasury. Ch. 551 § 7, 26 Stat. 1084, 1085 (codified as amended at 8 U.S.C. §§ 1551-1574 (2006)). The federal administrative apparatus grew exponentially

---

[8] Although much of the legislation passed by early Congresses concerned rules of naturalization, Congress's power extended to the treatment of aliens in the country. See, *e.g.*, Alien Act, ch. 66; 1 Stat. 570 (June 25, 1798) (authorizing the president to deport aliens he deemed dangerous); see also James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359, 416 (2010) ("[T]he breadth of the Framers' conception of naturalization suggests that we should view Congress's immigration power as a subset of its naturalization authority, rather than as a separate category.").

from there. In 1933, the President established the Immigration and Naturalization Service to aid efforts at enforcing federal immigration law. Exec. Order No. 6166 (June 10, 1933). And in 1940, the Attorney General created the Board of Immigration Appeals. Reorg. Plan No. V (May 22, 1940); 3 C.F.R. 1940 Supp., ch. IV at 336; see also Att'y Gen. Order No. 3888, 5 Fed. Reg. 2454 (July 3, 1940).

Congress passed the first Immigration and Nationality Act in 1952. Pub. L. No. 82-414, 66 Stat. 163. That statute, which exists in amended form today, 8 U.S.C. § 1101 *et seq.*, represented "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins* v. *Moreno*, 435 U.S. 647, 664 (1978). In the next few decades, Congress expanded the INA to cover additional matters. For instance, the Immigration and Nationality Act of 1965 established a uniform system of immigration quotas designed to limit immigration to individuals who "will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." Pub. L. No. 89-236, § 203(a)(3), 79 Stat. 911, 913. Alongside the INA, Congress passed the Refugee Act of 1980, which established a uniform system for granting refugee status to certain immigrants. Pub. L. No. 96-212, § 101(a), 94 Stat. 102.

More recently, Congress has passed laws to promote a uniform method of controlling the number of illegal immigrants working in the country. For example, in the Immigration Reform and Control Act of 1986, Congress created a system authorizing

employer penalties and an employment verification system. Pub. L. No. 99-603, tit. I, 100 Stat. 3359, 3360. To ensure an appropriate level of enforcement, Congress included a provision requiring that administrative entities file reports to keep Congress informed of the efficacy of the INA programs. *Id.* at tit. IV, 100 Stat. at 3440. Congress expanded its efforts in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), enhancing penalties for document forgery and smuggling, increasing the authority of federal officials to apprehend and remove illegal immigrants, and creating a pilot system of tighter employer restrictions. Pub. L. No. 104-208, 110 Stat. 3009-546.

Many of these regulatory efforts, including those in the IIRIRA, are now codified with the 2006 iteration of the omnibus Immigration and Nationality Act. 8 U.S.C. § 1101 *et seq.* That act authorizes the Attorney General to take numerous steps to combat illegal immigration, including pursuing criminal charges, *id.* § 1325(a)(1), seeking civil removal, *id.* § 1182(a)(6)(A)(i), and allowing an alien to depart on his own accord, *id.* § 1229c(a)(1). In offering a choice among those various options, the INA "delegate[s] tremendous authority to the executive branch." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 513 (2009).

Throughout this long period of expanding federal immigration law, no one seriously questioned that it was the prerogative of the federal government to regulate immigration for the Nation as a whole. Indeed, that fact was sufficiently self-evident for this Court to conclude that the "[p]ower to regulate immi-

gration is unquestionably exclusively a federal power." *De Canas*, 424 U.S. at 354; see also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[The immigration power] is vested solely in the Federal Government * * * .").

2. *S.B. 1070 Is Inconsistent With Principles Of Federalism*

Arizona's immigration law is fundamentally inconsistent with the demonstrated national interest in a uniform immigration policy and thus unsupported by principles of "Our Federalism." The stated purpose of Arizona's law is to promote "attrition through enforcement" by "discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note. At least in theory, the attrition Arizona seeks is to return illegal aliens to their country of citizenship.[9] But in reality, the law only "discourage[s] and deter[s]" aliens from going to or remaining *in Arizona*; in the absence of uniform National policy, the incentives that cause aliens to enter and remain in the United States unlawfully are not affected. In addition, because "it's much harder to come back" to the United States "[o]nce the[aliens] return" to their country of origin, "[i]t's much

---

[9] Cf. Molly O'Toole, *Arizona State Senator Russell Pearce Discusses Illegal Immigration, SB 1070, and Elections*, Latin America News Dispatch, Sept. 9, 2010, http://latindispatch.com/2010/09/09/russell-pearce-discusses-illegal-immigration-sb-1070-and-elections-interview/ (interview with the sponsor of S.B. 1070) ("I want the laws enforced. * * * [I]f you won't go home, I'll help you.").

more likely we're seeing internal migration." Husna Haq, *Hispanics abandon Arizona, fleeing economy, immigration law*, Christian Sci. Monitor, June 10, 2010, *available at* http://csmonitor.com/USA/Society/2010/0610/Hispanics-abandon-Arizona-fleeing-economy-immigration-law. Thus, it is widely expected that persons who leave Arizona as a result of S.B. 1070 will simply relocate to other U.S. states without laws like Arizona's—*i.e.*, they will join "friends, family, or other Hispanic communities in California, Texas, New Mexico, and other states with large Hispanic populations." *Ibid.*

By establishing its own state policy of heightened immigration enforcement explicitly designed to exceed federal enforcement efforts, Arizona thus does not in any sense "solve" the problem of illegal immigration, but rather just exports it to other States that have not yet adopted comparable immigration measures. Such activity is inconsistent with the longstanding federal policy of uniformity in immigration, and inconsistent with the idea that principles of federalism do not permit States through their regulatory choices to impose costs on other States or their residents. Cf. *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) ("Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States * * *."); *Saenz* v. *Roe*, 526 U.S. 489 (1999) (striking down a state law on the grounds that it inhibited the interstate movement of people). The Constitution gives certain authorities to the federal government to protect states from the externalities of laws they had no say in adopting, and which they have no means of

repealing. After all, when "'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers,* 550 U.S. at 345 (quoting *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768 n.2 (1945)).

In effect, Arizona's law creates a situation in which every State that might expect to attract significant numbers of aliens will have a strong interest in passing its own state law mandating higher immigration enforcement within its borders. In fact, similar legislation has already been passed in Alabama, Georgia, South Carolina, and Utah. Jeremy Redmon, *Illegal Immigration*, Atlanta J.-Const., Mar. 2, 2012, at B1; see also, *e.g.*, *United States* v. *Alabama*, No. 11-14532-CC (11th Cir. Mar. 8, 2012) (enjoining provisions in Alabama's immigration law); *United States* v. *Alabama*, 443 F. App'x 411 (11th Cir. 2011) (same). Allowing individual states to determine piecemeal the level of federal immigration enforcement within their borders prevents uniform enforcement of federal immigration law, effectively reverting to the "dissimilarity" in the Articles of Confederation. The Federalist No. 42, *supra*, at 269 (Madison). The resulting lack of uniform policy highlights the absurdity of Arizona's argument that it is merely pursuing its "inherent [state] authority under 'Our Federalism,'" Pet. Br. 15, for, "'if each state had power to prescribe a distinct rule, there could be no uniform rule.'" Joseph Story, 3 Commentaries on the Constitution § 1099 (1833) (quoting The Federalist No. 42, *supra*).

This is not to minimize Arizona's illegal immigration problem—it is a serious problem that many States face. But since it is a national problem, our federalist system of government contemplates a national solution, which can only be accomplished effectively with the uniform enforcement of federal immigration law. Congress, in fact, has increased funding for border enforcement by $90 billion dollars over the past decade, "dramatically reduc[ing] illegal immigration";[10] and, since 1993, increased the number of Border Patrol personnel from 4,000 to over 24,000, and that agency's budget from $400 million to $3.5 billion.[11] Although Arizona's government may have concluded S.B. 1070 advances Arizona's interests, those are the interests of just one State out of many. As this Court put it, the "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—* * * bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one." *Hines* v. *Davidowitz*, 312 U.S. 52, 65-66 (1941).

B. S.B. 1070 Regulates Immigration

Arizona's immigration law is at odds with over a century of increasingly comprehensive federal immi-

---

[10] Martha Mendoza, *Tab for border security: $90 billion in 10 years. Anti-terror efforts now aiming at drugs, illegal immigration*, Houston Chron., June 26, 2011, at A25.

[11] Ana Cristina González, *A mayor corrupción fronteriza, prolifera el narcotráfico en Texas*, La Presna San Antonio, Jan. 15, 2012 (discussing the findings of the Texas Border Coalition).

gration regulation. Arizona attempts to skirt this "unquestionably exclusive[]," *De Canas*, 424 U.S. at 354, federal regulatory power by arguing that S.B. 1070 does not in fact regulate immigration, Pet. Br. at 29-31, but merely "deals with aliens." *Id.* at 30. The State fails to explain how provisions that explicitly incorporate federal *immigration law*, and mandate maximum enforcement of that *immigration law* (because of disagreement with federal policy about its enforcement, see *id.* at 26, 28), do not themselves regulate immigration but simply "deal[] with aliens." That conclusion appears to be premised on the assumption that the States have plenary authority to regulate aliens residing within their borders. But the federal government's power to regulate is not limited to entry and exit. Rather, this Court's "cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens *within our borders*." *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982) (emphasis added). And this Court time and again has found State laws to be preempted where, as here, they "imposed burdens on aliens lawfully within the country." *De Canas*, 424 U.S. at 363; *Toll*, 458 U.S. at 12 (discussing preemption of State laws that impose an "'auxiliary burde[n] upon the * * * residence of aliens'") (quoting *Graham* v. *Richardson*, 403 U.S. 365, 379 (1971)).

The authorities Arizona cites fall far short of justifying S.B 1070. The state statute at issue in *De Canas* provided that "'[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.'" *De Canas*, 424 U.S. at 352 (quoting Cal. Labor Code

Ann. § 2805(a)). In holding that provision not implicitly preempted by federal immigration law, the Court emphasized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State" and that Congress "intend[ed] that States may * * * regulate the employment of illegal aliens." *Id.* at 356, 361. *Chamber of Commerce* v. *Whiting* similarly involved a business licensing provision that this Court upheld because it fell within the States' broad "police powers to regulate the employment relationship to protect workers within the State," and the Court emphasized that the law "falls within the plain text of [the federal immigration statute's] savings clause." 131 S. Ct. at 1974, 1980. Indeed, this Court in *Plyler* v. *Doe*, 457 U.S. 202 (1982) (cited at Pet. Br. 30), *invalidated* a state statute that withheld funds for the education of illegal aliens, emphasizing that "only rarely are such matters [as alien status] relevant to legislation by a State." *Id.* at 225.

Arizona's S.B. 1070 is a far cry from the statutes in *De Canas* and *Whiting*. In contrast to those two laws that regulated *employers* and had at most a "purely speculative and indirect impact on immigration," *De Canas*, 424 U.S. at 355, the statutes here operate directly on aliens and the effect they have is undoubtedly material. Section 3 of S.B. 1070 makes it a state crime to fail to carry federal registration papers. Ariz. Rev. Stat. Ann. § 13-1509(F). Section 6 authorizes state officials to conduct warrantless arrests of persons believed to have committed a "public offense" that makes the person removable from the United States. *Id.* § 13-105(27). Section 5 makes it a state crime for, among other things, any "unauthor-

ized alien" to apply for work. *Id.* § 13-2928(C). And Section 2 requires state officers to determine the immigration status of anyone stopped if there is a "reasonable suspicion" that the individual is "unlawfully present in the United States"; and if arrested, officers must verify the person's immigration status before they may release him. *Id.* § 11-1051(B).

As the district court found, Pet. App. 146a, mandatory verification of immigration status would directly burden lawfully present aliens by requiring them to prove their status during routine interactions with police, and by subjecting them to arrest and detention if they happen to forget their immigration documents at home. Indeed, even *naturalized citizens* would be exposed to arrest and detention during routine police interactions if they leave home without carrying documents establishing their citizenship. The district court also found (Pet. App. 165a) that Section 6 would subject lawful resident aliens to "wrongful[] arrest" based on conduct that would not actually result in removal. Thus, in no sense can the provisions of S.B. 1070 constitute valid state regulation of a subject of traditional state concern that only incidentally burdens immigration, in contrast to the state statutes in *De Canas* and *Whiting*. Rather, they directly and materially regulate "the conditions under which a legal entrant may remain" in the United States. *De Canas*, 424 U.S. at 355.

C. Congress Did Not Authorize S.B. 1070

Arizona contends that Congress implicitly authorized legislation such as S.B. 1070 by including in the Immigration and Nationality Act Section 287(g)(10)—

which it terms a "savings clause" like the one in the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324a, at issue in *Whiting*. Pet. Br. 10, 19, 24, 32, 34. Properly understood, Section 287(g)(10) is not a savings clause. In any event, S.B. 1070 does not come within its ambit.

1. *Section 287(g)(10) Is Not A Savings Clause*

Arizona attempts to liken Section 287(g)(10) to the savings clause at issue in *Whiting*. See Pet. Br. 51-52. But the provision at issue there *expressly* exempted from preemption the precise type of state licensing statute at issue in that case:

> The provisions of this Section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2) (emphasis added); cf. *Freightliner Corp* v. *Myrick*, 514 U.S. 280, 288 (1995) ("[A]n express definition of the pre-emptive reach of a statute * * * supports a reasonable inference * * * that Congress did not intend to pre-empt other matters * * * ."). By contrast, the INA's supposed "savings clause" is part of a provision authorizing the Attorney General, notwithstanding a statutory prohibition on the government's acceptance of voluntary services codified at 31 U.S.C. § 1342, to enter into agreements with States or municipalities to perform some of the functions of a federal immigration officer. See 8 U.S.C. § 1357(g)(1)-(9). The statute states,

> Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States * * *, may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law."

8 U.S.C. § 1357(g)(1). Section 1342, which is part of the Antideficiency Act, in turn prohibits an officer or employee of the United States government from "accept[ing] voluntary services * * * exceeding that authorized by law" except under specified circumstances. 31 U.S.C. § 1342.

The provision on which Arizona bases most of its argument states, in full:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
>
> (A) *to communicate with the Attorney General* regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise *to cooperate with the Attorney General* in the identification, apprehension, detention,

> or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10) (emphases added). Unlike the savings clause in *Whiting*, which explicitly exempts a certain type of regulation from express preemption, the INA provision only provides an exemption from the statutory prohibition on "accept[ing] voluntary services." 31 U.S.C. § 1342. The provision does not purport to address preemption, but simply seeks to dispel any inference that might otherwise arise because of the authorization for the Attorney General to enter into agreements with States and local governments.

Far from supporting Arizona's argument that Congress authorized states to pass legislation such as S.B. 1070, *Whiting* undercuts it. Congress knows how to "save" a provision from preemption when it wants to. It did not do that in Section 1357(g)(10); if that was Congress's intent, it used language singularly ill-suited to that purpose. The face of the provision reflects that Congress did not purport to "save" State law from preemption, but only to dispel the inference that otherwise might have arisen from a statutory exemption to the Antideficiency Act. This language simply leaves the law where it was before the INA authorized the Attorney General to enter into such agreements. See *United States* v. *U.S. Dist. Court*, 407 U.S. 297, 303 (1972) (construing similar language to mean that "Congress simply left [the law] where it found [it]").

2. *Arizona's Law Does Not Represent Either Communication Or Cooperation With The Attorney General, And Thus Does Not Fall Within The Ambit Of Section 287(g)(10)*

In an effort to shoehorn S.B. 1070 into the "cooperat[ion]" language of Section 287(g)(1), Arizona attempts to portray the relationship between S.B. 1070 and federal enforcement of federal immigration law as "cooperative," "parallel," and "harmonious." Pet. Br. 8, 14, 20, 22-26, 28, 29, 30, 36, 44, 50-52. It is nothing of the sort. S.B. 1070 does not represent an effort to cooperate with federal enforcement of federal immigration law; instead, it represents Arizona's own immigration policy of "attrition through enforcement," adopted with the stated intent of "supplement[ing]" (Pet. Br. 14)—really, *supplanting*—the federal government's "inadequate," *ibid.*, "relaxed," *id.* at 26, and "lax" enforcement, *id.* at 26, 28. S.B. 1070 represents the State's effort to challenge and replace the federal government's "misguided policy,"[12] not to work cooperatively in furtherance of enforcing it.

Furthermore, examining the provisions in S.B. 1070 in light of the INA shows they do not fit any conceivable definition of "cooperate." Sections 3 and 5 of Arizona's statute, for instance, criminalize as a matter of state law violations of federal immigration law. See Ariz. Rev. Stat. §§ 13-1509, 13-2928. But, in setting federal immigration policy, Congress presented the executive with a wide range of enforce-

[12] S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note.

ment options. In addition to pursuing criminal charges against an illegal alien, 8 U.S.C. § 1325(a)(1), the Justice Department may seek the alien's removal in a civil action, *id.* § 1182(a)(6)(A)(i); may allow the alien to depart the United States voluntarily, *id.* § 1229c(a)(1); may grant the alien asylum, *id.* § 1158; may in some circumstances move that the alien be granted "lawful admission for permanent residence," *id.* § 1186b; or may for the time being defer action, as a matter of "administrative convenience to the government which gives some cases lower priority," 8 C.F.R. § 274a.12(c)(14) (2010); cf. 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested * * * is [entrusted] to officers of the Department of Justice, under the direction of the Attorney General."). And the executive branch has made it clear that it focuses its efforts on its "highest enforcement priorities"—*i.e.*, "aliens who threaten public safety or national security," "members of criminal gangs that smuggle aliens and contraband," as well as "repeat border crossers, recent entrants, aliens who have previously been removed, and aliens who have disregarded a final order of removal." Resp. Br. 48; see also Exercising Prosecutorial Discretion, Memorandum from Doris Meissner, INS Comm'r, to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg'l & Dist. Counsel of INS (Nov. 17, 2000) (discussing the factors considered when exercising discretion to remove illegal aliens). By singling out for criminal sanction those whom federal authorities could have chosen (and frequently do choose) either not to pursue or to pursue civilly, Arizona is hardly "act[ing] or operat[ing] jointly with

[the federal government] to concur in action, effort, or effect." Webster's New Int'l Dictionary 585 (2d ed. 1954) (defining "cooperate"). Even if Arizona could be seen as pursuing the same goal as the federal government—and it cannot—"'the fact of a common end hardly neutralizes conflicting means.'" *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 425 (2003) (quoting *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000)).

Section 2 of S.B. 1070 further undermines any claim that the statute is a "cooperative" measure. It effectively provides Arizona residents with a private right of action to ensure the maximum enforcement of federal immigration law as supplemented by state remedies. See Ariz. Rev. Stat. § 11-1051(H) ("A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts enforcement of federal immigration laws * * * ."). This provision all but guarantees maximum enforcement, because the State will be liable for substantial damages so long as *any* lawful Arizona resident desires maximum prosecution of immigration law. This Court has noted that giving private parties the means of enforcement results in enforcement different in kind from that yielded by government enforcement. As this Court has noted in the *qui tam* context, prosecutions spurred by private action "'compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.'" *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (quoting *United*

States ex rel. Marcus v. *Hess*, 317 U.S. 537, 541 n.5 (1943)).

Indeed, Arizona plainly chose to include Section 2(H) for precisely that reason—to ensure maximum enforcement of federal immigration law. But the INA's purported "savings clause" does not authorize states to pass measures concerning federal immigration law in order to bring up enforcement of federal law to the state's desired level. Rather, the INA only authorizes states to "cooperate" with the Attorney General in "identif[ying], apprehen[ding], det[aining], or remov[ing]" illegal aliens. 8 U.S.C. § 1357(g)(10). And in light of the federal government's very different enforcement priorities and means of enforcement, Section 2(H) is not an example of Arizona engaging the federal government to "work together [or] act in conjunction * * * to an end or purpose." Oxford Eng. Dictionary 898 (2d ed. 1992) (defining "cooperate").

Arizona's law not only conflicts with the discretionary authority Congress authorized the federal executive to exercise with regard to immigration violations; it also raises troubling foreign-affairs concerns. This Court has noted the considerable deference given to executive discretion in the immigration context because of its implications for sensitive foreign-affairs matters. See, *e.g.*, *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)); cf. *Toll*, 458 U.S. at 10 (noting the "broad authority over for-

eign affairs" as a source of "[f]ederal authority to regulate the status of aliens").

In *Printz* v. *United States*, 521 U.S. 898 (1997), this Court struck down certain provisions in the Brady Handgun Violence Prevention Act, in part because they gave executive-enforcement power to state officials. Arizona's immigration law, too, effectively purports to arrogate to state officials the federal executive's enforcement power; indeed, Section 2(H) *mandates* that state officials exercise that enforcement power in a particular way by providing Arizona citizens a private right of action to force state officials to execute federal immigration law to the fullest extent possible. See Ariz. Rev. Stat. § 11-1051(H). As the district court noted, the enactment of Section 2 thus "has had a deleterious effect on the United States' foreign relations," Pet. App. 22a, by "thwart[ing] the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." *Id.* at 26a. As this Court said in *Printz*, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed * * * .'" 521 U.S. at 922 (quoting U.S. Const., art. III, § 3).

II. ARIZONA S.B. 1070 WILL "DISCOURAGE AND DETER" LAWFULLY PRESENT ALIENS AND EVEN CITIZENS, HARMING THE STATE'S ECONOMY

The stated purpose of S.B. 1070 is "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present

in the United States," S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note. As discussed below, because the effects of these measures will not be limited to aliens unlawfully present in this country, but will be felt by both lawful aliens and United States citizens (especially naturalized citizens), S.B. 1070 will "discourage and deter the * * * presence" of a far broader group of people. As a result, Arizona's immigration law will foreseeably have profound practical effects on the movement of people into and out of the State, with commensurate impacts on economic activity within Arizona and other States, particularly those in the Southwest. Examining the foreseeable impacts of Arizona's go-it-alone strategy shows the wisdom of the Framers in charging the federal government with establishing a single nationwide immigration policy.

A. Arizona's Law Will Foreseeably Cause The Arrest And Detention Of Lawful Aliens And Citizens

Although the Arizona law may target only illegal aliens, it foreseeably has a much broader impact. Three provisions in particular are likely to affect citizens and aliens who are lawfully present in the country. First, Section 2 of the law mandates that Arizona law enforcement officials inquire into an alien's immigration status if they have "reasonable suspicion" to believe that the alien is present illegally. Ariz. Rev. Stat. Ann. § 11-1051(B). See generally *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) (stating that reasonable suspicion requires only "a minimum level of objective justification"); *Fraternal Order of Police Lodge No. 5* v. *Tucker*, 868 F.2d 74, 81 (3d Cir. 1989) (referring to reasonable

suspicion as a "relatively low standard"); *South Dakota* v. *Dahl*, No. 26061, 2012 WL 314010, at *3 (S.D., Feb. 1, 2012) (same). That provision applies during "any lawful stop"—which could include a stop at a roadside checkpoint set up for the specific purpose of checking travelers' immigration status. See Ariz. Rev. Stat. Ann. § 11-1051(B). Second, Section 3, *id.* § 13-1509, makes it a state crime to violate federal statutes requiring certain aliens to obtain and carry federal registration papers, 8 U.S.C. §§ 1304(e), 1306(a). And third, Section 6, authorizes Arizona officers to arrest without a warrant any person whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Ariz. Rev. Stat. Ann. § 13-3883. Arizona law defines "public offense" to mean conduct subject to imprisonment or a fine under Arizona law and also, if committed outside Arizona, under the law of the State in which it occurred. *Id.* § 13-105(27).

Together, these laws greatly increase the risk that lawful aliens and even citizens will be routinely stopped, asked for immigration papers and—if they happen not to be carrying them (or proof of citizenship), arrested and detained until such documents can be produced. During any routine traffic stop, roadside sobriety checkpoint, or even a roadside *immigration status* checkpoint, police would be required to inquire into the immigration status of anyone who "looked" like an alien or spoke with an accent to determine their immigration status, which would easily suffice to meet the minimal standard of "reasonable suspicion." *Id.* § 11-1051(B). Any state or local official or agency whose policy "limits or

restricts the enforcement of federal immigration laws * * * to less than the full extent permitted by federal law" would be liable for civil penalties of up to $5,000 per day to any lawful Arizona resident seeking more vigorous enforcement. *Id.* § 11-1051(H). And although section 3 only makes not carrying immigration papers a crime for persons who are unlawfully present, see *id.* § 13-1509(F), it nonetheless would permit detention of *any* persons believed to be aliens who were unable to produce such papers until they were able to establish legal residence.

Thus, as the district court concluded, "there is a substantial likelihood that officers will wrongfully arrest legal resident aliens" under these provisions. Pet. App. 165a. The same risk exists of wrongfully detaining *citizens*. Arizona does not have an especially high number of foreign-born persons living within its borders: it ranks thirteenth nationally, with just 13.4% of the population born abroad, lower than both the District of Columbia (13.5%) and Maryland (13.9%), and far below California (27.2%), New York (22.2%), New Jersey (21%), Florida (19.4%), Nevada (18.8%), Hawaii (18.2%), and Texas (16.4%).[13] But the State's foreign-born population is overwhelmingly Latin American in origin: 69.4% were born in Central or South America,[14] mostly (90%) in neighboring Mexico.[15] Because the illegal aliens in Arizona are also overwhelmingly Latin American

---

[13] See http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[14] Arizona Fact Sheet, *available at* http://www.migrationinformation.org/datahub/state.cfm?ID=AZ#2.

[15] Haq, *supra*.

(and typically Mexican[16]), a significant segment of the State's population of lawful resident aliens and citizens is at risk of being caught up in Arizona's mandatory maximum enforcement regime. This is not simply an academic concern. Lawfully present aliens and citizens have *already been arrested* and detained on suspicion of being illegal aliens under the Arizona law and similar laws enacted by other States.[17]

---

[16] Mike Flannery, *More Illegal Immigrants in Illinois than Arizona*, Fox Chicago News (July 29, 2010), http://www.myfoxchicago.com/dpp/news/metro/illinois-arizona-illegal-immigrants-20100728.

[17] See, *e.g.*, Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. Times, A20, Dec. 14, 2011 ("82 people who were held for deportation from 2006 to 2008 at two immigration detention centers in Arizona, for periods as long as a year, were freed after immigration judges determined that they were American citizens."); Alicia E. Barron, *Truck driver forced to show birth certificate claims racial-profiling*, 3TV News, Apr. 21, 2010, *available at* http://www.azfamily.com/video/featured-videos/Man-says-he-was-racially-targeted-forced-to-provide-birth-certificate-91769419.html; D.A. Morales, *German Mercedes-Benz executive arrested in Alabama under new immigration law*, TucsonCitizen.com, Nov. 19, 2011 (lawfully present German executive arrested and detained at police headquarters under new Alabama illegal immigration law after he was unable to produce authorized identification during auto stop of his rental vehicle), *available at* http://tucsoncitizen.com/three-sonorans/2011/11/19/german-mercedes-benz-executive-arrested-in-alabama-under-new-immigration-law/; Assoc. Press, *Japanese Honda employee ticketed under new immigration law*, al.com, Nov. 30, 2011 (reporting that a Japanese Honda employee was "ticketed at a routine police roadblock for not having an Alabama driver's license, even though he had a valid Japanese passport and an international driver's license," under provisions of Alabama's anti-illegal immigration law), *available at* http://blog.al.com/wire/2011/11/honda_employee_arrested_in_tal.html; see also Anna Gorman, *Arizona immigration law an unpleasant*

Indeed, even before the law's enactment, one in ten Hispanic Arizonans reported police asking about their immigration status. Pew Hispanic Center, *Hispanics and Arizona's New Immigration Law* (Pew Research Ctr., Wash. D.C.), Apr. 29, 2010, at 3, http://pewhispanic.org/files/factsheets/68.pdf.

B. Arizona's Law Will "Discourage And Deter" Citizens and Lawfully Present Aliens From Residing In Arizona, Having Significant Economic Effects

Although Arizona seeks "[a]ttrition" of illegal immigrants "through enforcement," it appears it will have broader effects on the State's entire Hispanic population. All signs indicate that Hispanics in Arizona expect that the number of wrongful detentions will increase. And a significant number of the State's Hispanics will react to an increasingly "hostile environment"[18] by leaving Arizona.

Indeed, the exodus has already begun. The recent enactment of Arizona's immigration law necessarily limits the amount of data available, but studies already show that the specter of S.B. 1070 has had a major effect on Arizona's Hispanic population. For example, a study conducted by BBVA, an international economic research group, based on data from

---

reminder of Chandler's past, L.A. Times, June 6, 2010 (recounting how police detained "dozens of U.S. citizens and legal residents—often stopping them because they spoke Spanish or looked Mexican" during 1997 roundup of illegal aliens), *available at* http://articles.latimes.com/2010/jun/06/nation/la-na-chandler-20100606.

[18] Haq, *supra*.

the U.S. Current Population Survey, reported that 100,000 Hispanics have left Arizona as a result of the law. BBVA Research, *supra*, at 6.[19] Other reports confirm that Hispanic parents are pulling their children out of school in unusually high numbers.[20] And other States that have enacted similar laws are noticing the same phenomenon. After Alabama enacted its immigration law, "a number of Hispanic families, both legal residents and those in the country illegally, fled Alabama for other states," and Alabama schools reported higher-than-usual absences among Hispanic children. Rick Jervis & Alan Gomez, *Fear in Ala. Towns over tough immigration law*, USA Today, Oct. 19, 2011, http://www.usatoday.com/news/nation/story/2011-10-18/immigrants-leave-alabama-town-over-immigration-law/50819276/1.

These actions are having ripple effects throughout the Arizona economy. It is impossible to overstate the central role Hispanics play in the economic life of Arizona today. Although Arizona is ranked fourteenth in population overall,[21] it has the fourth-largest Hispanic population of any U.S. state.[22]

---

[19] *Available at* http://www.bbvaresearch.com/KETD/fbin/mult/WP_1116_Mexico_tcm346-257494.pdf?ts=932012.

[20] Alan Gomez, *Hispanics flee Arizona ahead of immigration law*, USA Today, June 9, 2010, www.usatoday.com/news/nation/2010-06-08-immigration_N.htm#.

[21] U.S. Census Bureau, State Rankings—Statistical Abstract of the United States, *Resident Population—July 2009*, http://www.census.gov/compendia/statab/2012/ranks/rank01.html.

[22] *Market Will Follow Rise in Hispanic Business Ownership*, http://www.cooleyadvertising.com/adbiz/winter08_hispanic.html.

According to 2010 census figures, nearly one-third of Arizona residents—approximately 1.9 million people—identified themselves as Hispanic.[23] Hispanics accounted for much of the State's population growth during 2000-2010, when Arizona's Hispanic population grew by 46 percent, more than double the growth rate for non-Hispanic Caucasians.[24] As of 2010, one-third of Arizona Hispanics were foreign born.[25]

Hispanics play a correspondingly great role in the State's economy. In 2010, Hispanics comprised 30 percent of the Arizona workforce.[26] The percentage is higher still in certain sectors of the economy; for instance, Hispanics make up 40 percent of Arizona's service-sector workforce.[27] Hispanic-owned businesses comprise 10.7 percent of all businesses in Arizona.[28] Hispanics also account for a significant percentage of the State's consumer base; studies show

---

[23] Ronald J. Hansen, *A detailed look at state's growth*, Ariz. Republic, Mar. 11, 2011, *available* at http://www.azcentral.com/arizonarepublic/news/articles/2011/03/11/20110311census0311.html.

[24] *Ibid.*

[25] Pew Hispanic Ctr., *supra*, at 5.

[26] Judson Berger, *Arizona Boycotts Could Hit Hispanic Hospitality Workers*, Fox News May 21, 2010, http://www.foxnews.com/politics/2010/05/21/arizona-boycotts-hit-hispanic-hospitality-workers/.

[27] *Ibid.*

[28] News Release, U.S. Census Bureau, *Census Bureau Reports Hispanic-Owned Businesses Increase at More Than Double the National Rate* (Sept. 21, 2010), http://www.census.gov/newsroom/releases/archives/business_ownership/cb10-145.html.

that Hispanics comprise 16 percent of Arizona's total buying power, which puts the State fourth nationally.[29] And more than half of Arizona's Hispanics are homeowners (55%).[30]

As enforcement of the new law drives even lawful resident aliens and citizens out of the State, ripple effects are being felt throughout Arizona's business community. According to David Castillo, the co-founder of the Latin Association of Arizona, a "chamber of commerce for nearly 400 first-generation Hispanic business owners,"[31] once the law went into effect, "everything fell apart."[32] The effects are especially pronounced in light of the lingering effects of the 2008 recession. As a demographer for the Pew Research Center noted, "[i]f you have a bad economy and a hostile environment, then that's likely to cause people to think twice about coming, and possibly even to leave."[33] According to the BBVA Research study, the mass departure from Arizona has already cost the State and its businesses literally millions of dollars. BBVA Research, *supra,* at 7. Sectors of the economy that have been particularly hard hit include agriculture, construction, manufacturing, and the service industry. *Ibid.* Similar effects have been confirmed in Alabama. See Jervis & Gomez, *supra* (noting that

---

[29] *Comprehensive Information On Hispanics In Arizona*, AZ Business Magazine, Nov. 1, 2009, http://aznow.biz/workforce/comprehensive-information-hispanics-arizona.

[30] Gomez, *supra*.

[31] *Ibid.*

[32] Haq, *supra*.

[33] *Ibid.*

"[b]usiness is down 60% from last month—and dropping by the day" among businesses that cater to Hispanics in Alabama). If Arizona's law is fully implemented, the number of Hispanics leaving can be expected to rise.

Because the law appears to be driving many undocumented aliens to relocate to other States rather than return to their country of origin, see *supra* pp. 13-14, Arizona's policy will inevitably have effects on other States as well. The law thus does not in any sense "solve" the problem of illegal immigration, but simply exports the effects that Arizona felt to States that have not yet adopted a regime to supplement (and supplant) federal enforcement efforts. The Arizona law will foreseeably result in the movement of significant numbers of aliens from one State to others. States that wish to avoid becoming the recipient of inflows of Arizona's former residents may feel the pressure to join the growing number of jurisdictions that adopt aggressive new laws to "discourage and deter," S.B. 1070 § 1, aliens—and sometimes citizens—from taking up residence within their borders.

* * * * *

The serious impact that Arizona's law will have not only on its own economy, but also that of surrounding States, underscores the wisdom of the Founders in seeking to create a uniform policy of immigration and naturalization. See, *e.g.*, The Federalist No. 42, *supra*, at 264-271. When one State takes it upon itself to mandate its own unique level of federal immigration enforcement, it effectively nullifies the purpose of uniform federal law. In order to prevent this, our Nation wisely puts the

power to set immigration policy in the hands of Congress, and the power to enforce federal immigration law in the hands of the federal executive—not in the legislatures and governors of the various States. As Joseph Story wisely noted while discussing immigration policy nearly two centuries ago, "It follows, from the very nature of the power, that to be useful, it must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy." Joseph Story, *supra*, §§ 1098-1099.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ALBERTO P. CARDENAS, JR.
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amicus Curiae

MARCH 2012