No. 11-182

IN THE
Supreme Court of the United States

ARIZONA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR MADELEINE K. ALBRIGHT, WILLIAM S. COHEN, RUDOLPH F. DELEON, CONRAD K. HARPER, DONALD L. KERRICK, LAWRENCE J. KORB, JOHN D. NEGROPONTE, DAVIS R. ROBINSON, AND WILLIAM H. TAFT IV AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are former officials in the foreign policy, defense, and national security establishments of the United States Government, including the Departments of State and Defense. Madeleine K. Albright served as the 64th Secretary of State in 1997-2001 and the Ambassador to the United Nations in 1993-1997. William S. Cohen served as the 20th Secretary of Defense in 1997-2001. Rudolph F. deLeon served as the Deputy Secretary of Defense in 2000-2001. Conrad K. Harper served as the Legal Adviser of the Department of State in 1993-1996. Lt. Gen. Donald L. Kerrick, USA (Ret.) served as the Deputy National Security Advisor to the President in 2000-2001. Lawrence J. Korb served as an Assistant Secretary of Defense in 1981-1985. John D. Negroponte served as the Deputy Secretary of State in 2007-2009, the Director of National Intelligence in 2005-2007, the Ambassador to the United Nations in 2001-2004, and the Deputy National Security Advisor to the President in 1987-1989. Davis R. Robinson served as the Legal Adviser of the Department of State in 1981-1985. William H. Taft IV served as the Legal Adviser of the Department of State in 2001-2005, the Ambassador to the North Atlantic Treaty Organization in 1989-1992, and the Deputy Secretary of Defense in 1984-1989.

Amici served in several administrations headed by Presidents of both major political parties. The experi-

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), written consents to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

ence of amici in those positions leads them to agree wholeheartedly with this Court's frequently-repeated conclusions that U.S. immigration policy is integrally related to the Nation's foreign policy, and that state intervention in immigration policy such as that reflected in Arizona's S.B. 1070 could seriously undermine the effectiveness of the national government's foreign policy. Amici submit this brief to offer their perspective on the relationship between immigration policy and foreign policy, and to explain why it is essential that the national government speak exclusively to the circumstances under which aliens may be allowed to enter, may be allowed to remain in, or may be removed from the United States.

SUMMARY OF ARGUMENT

Immigration policy has been part and parcel of U.S. foreign relations since the country's founding. As this Court has recognized, the text, history, and structure of the Constitution require that the U.S. government speak with one voice on all issues of international relations. Consequently, the exclusivity of the national government's power over foreign policy matters such as trade or war applies with full force to immigration policy, including the regulation of aliens crossing or within U.S. borders.

Unifying control over foreign relations, including immigration, was one of the main reasons for replacing the decentralized system under the Articles of Confederation with the Constitution. The Framers were fully aware that U.S. treatment of aliens can have international implications and even determine questions of war and peace. From the Jay Treaty of 1794 to the Afghan Allies Protection Act of 2009, history has continuously confirmed the Framers' wisdom and foresight, as the

U.S. has routinely utilized immigration policy as an instrument of its foreign policy in rewarding allies and undermining adversaries.

Accordingly, this Court has invalidated state laws that interfere in foreign relations, even when the state law purportedly seeks to pursue the same objectives as the federal law or when the state law regulates activity traditionally regulated by states. Arizona's S.B. 1070 illustrates the ways in which state immigration laws can interfere with and thereby harm the Nation's foreign relations. It inherently undermines the exclusivity and uniformity of federal foreign relations power, threatens negative consequences for U.S. relations with other countries, and risks retaliation to U.S. citizens abroad.

ARGUMENT

I. THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION BAR STATES FROM INTERFERING IN FOREIGN RELATIONS

The Constitution allocates to the national government the exclusive responsibility for the conduct of the United States' relations with other countries and expressly restricts the states' power in this regard. The Framers, having witnessed the costs of decentralized authority under the Articles of Confederation, recognized the structural imperative to unify control over foreign relations at the federal level. The Constitution's text and structure so provide, and this Court has long recognized that foreign relations powers reside solely within the federal government and are not shared with the states.

A. One Of The Primary Purposes Of Establishing The Constitution Was To Transfer Power Over Foreign Relations To The Federal Government

Under the Articles of Confederation, the states were effectively free to interfere with the national government's efforts to conduct political and commercial relations with other countries.[2] In the words of George Washington, it was "idle to think of making commercial

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[2] For example, the Peace Treaty of 1783 with Great Britain obligated the United States to permit British recovery of good faith debts with no lawful impediments. *See* Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80, 82. It also prohibited any confiscations or prosecutions for acts taken in connection with the War of Independence. *See id.*, art. VI, 8 Stat. 83. However, the treaty was "liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures." *The Federalist* No. 22 (Alexander Hamilton); *see also* 1 *The Records of the Federal Convention of 1787*, at 316 (Farrand, ed., 3d ed. 1966) (James Madison) ("The tendency of the States to … violations [of the law of nations and of treaties] has been manifested in sundry instances."). The British alleged that "state laws enacted during the war for confiscation of Loyalist estates remained unrepealed, as did acts of proscription, banishment, and attainder[; and] that acts of confiscation had been passed since the peace in violation of Article VI." Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* 133 (2d ed. 1962). State interference with foreign debts led to retaliation by the British, who kept forts in the northwestern frontier in violation of the treaty. *See* Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 27 (1996). In addition to state-generated conflicts with Britain, "[a]bortive negotiations [for trade treaties] with other powers, notably Austria and Denmark, failed because [of] the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states." Bemis, *A Diplomatic History of the United States* 66 (1936).

regulations" on the part of the Confederation Congress. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* 34 (2d ed. 1962). "One State passe[d] a prohibitory law respecting some article, another State open[ed] wide the avenue for its admission. One Assembly ma[de] a system, another Assembly unma[de] it." *Id.* This structure "placed Congress in the awkward position of guaranteeing what it lacked the constitutional authority to deliver: the compliance of state legislatures and courts with a national commitment made to a foreign power." Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 27 (1996). This ability of the states to interfere in foreign relations was identified as "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283 (1976).[3] Indeed, "[n]othing contributed more directly to the calling of the 1787 Constitution Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. Am. Hist. 695, 697 (1987).

The Framers addressed this problem by drafting a Constitution that vested power over foreign relations exclusively with the federal government, ensuring that

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[3] *See also* Story, *Commentaries on the Constitution of the United States* 99, 101 (1833) ("[T]he want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation. … [The Confederation] congress possessed no effectual power to guaranty the faithful observance of any [foreign] commercial regulations; and there must in such cases be reciprocal obligations.").

the new Nation would speak with one voice when conducting foreign political and commercial affairs. *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). The Framers understood that such uniformity in foreign relations was essential for the peace and security of the United States. *The Federalist* No. 80 (Alexander Hamilton) ("the peace of the WHOLE ought not to be left at the disposal of a PART" since the "Union will undoubtedly be answerable to foreign powers for the conduct of its members"). Moreover, the Framers recognized that because the Nation as a whole will be "answerable" for relations with foreign nations, so should the federal government have exclusive power over this sphere. *Id.* ("the responsibility for an injury ought ever to be accompanied with the faculty of preventing it"); *see also The Federalist* Nos. 42, 44 (James Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers" so as to prevent the problem where "treaties might be substantially frustrated by regulations of the States"); *The Federalist* No. 3 (John Jay) (noting that securing the peace by adhering to the law of nations "will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies").[4]

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[4] *See also* 1 *The Records of the Federal Convention of 1787*, at 316 (James Madison) ("A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole."); *id.* at 19, 24-25 ("[P]articular states might by their conduct provoke war without controul" because, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty," the national government "cannot punish that State, or compel its obedience to the treaty.").

The Framers' decision to entrust the foreign relations power to the federal government is reflected in several of the Constitution's express grants of authority to Congress and the President, as well as through several express restrictions on the power of the states. Congress has the power to "provide for the common Defence," to "lay and collect … Duties," to "regulate Commerce with foreign Nations," to "establish an uniform Rule of Naturalization," to "declare War," and to "repel Invasions." U.S. Const., art. I, § 8, cls. 1, 3, 4, 11, 15. And the President is empowered to serve as the "Commander in Chief of the Army and Navy of the United States," to "make Treaties," and to "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate. *Id.*, art. II, § 2, cls. 1, 2. Conversely, states are restricted from imposing import and export duties, entering into agreements with foreign powers, or engaging in war. *See id.*, art. I, § 10, cls. 1, 2, 3. The Constitution thereby established the "authority of the federal government in foreign relations [a]s exclusive" and "bar[red] action by the states that intrude[d] on foreign relations." Henkin, *Economic Rights Under the United States Constitution*, 32 Colum. J. Transnat'l L. 97, 103 (1994).

B. This Court Has Frequently Affirmed The Exclusive Power Of The Federal Government Over Foreign Relations

In keeping with the text, structure, and history of the Constitution, this Court has repeatedly recognized that the "Federal Government … is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *see also American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 n.11 (2003) (noting that

the "Constitution entrusts foreign policy exclusively to the National Government"); *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 575-576 (1840) (opinion of Taney, C.J.) ("Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government …. It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities.").

Because the power over foreign relations is vested exclusively in the federal government, this Court has invalidated state laws that "interfere[] with the National Government's conduct of foreign relations." *Garamendi*, 539 U.S. at 401 (invalidating California statute requiring disclosure of information about Holocaust-era insurance policies, because it interfered with the conduct of foreign relations); *see also Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (invalidating Massachusetts statute that imposed economic sanctions on companies doing business with Burma, even though it pursued the same objectives as federal sanctions against Burma since the "fact of a common end hardly neutralizes conflicting means"); *Zschernig* v. *Miller*, 389 U.S. 429, 435, 441 (1968) (invalidating state law involving probate procedures—a subject traditionally regulated by states—recognizing that the state law had "great potential for disruption or embarrassment" of the United States in its foreign relations and that this interference would have "a direct impact upon foreign relations").

II. IMMIGRATION POLICY IS INEXTRICABLY INTERTWINED WITH FOREIGN RELATIONS

A. This Court Has Recognized That Immigration Policy And Enforcement Implicate Foreign Relations

This Court has consistently recognized that "'policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.'" *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976)). For this reason, this Court has "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) (collecting cases).

"Federal authority to regulate the status of aliens derives from several sources, including the Federal Government's power … '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs." *Toll*, 458 U.S. at 10 (citation omitted). Immigration policy involves fundamental questions about who may enter the country, who may stay, and under what conditions they may remain and for how long. All of these determinations reflect political, diplomatic, and national security considerations entrusted to the judgment of the national government. *See Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982) ("With respect to the actions of the Federal Government, alienage classification may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation."). Indeed, the power

to regulate immigration is "necessary for maintaining normal international relations and defending the country against foreign encroachments." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (internal quotation marks omitted).

This Court recognized the inextricable link between immigration policy and foreign relations in *Toll*, 458 U.S. 1. In that case, this Court struck down a Maryland statute that denied in-state tuition preferences to children of aliens who worked for certain international organizations. The Court explained it had "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders" in part because "[f]ederal authority to regulate the status of aliens derives from … the Federal Government's power … '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs." *Id.* at 10 (citation omitted). Because Maryland's law effectively interfered with Congress's exercise of these powers—the denial of the tuition preference negated federal tax benefits intended to induce the aliens' organizations to locate significant operations in the United States—the Court struck down Maryland's law. *Id.* at 14-17.

This Court has also stressed that the federal government's power over immigration and power to conduct foreign policy are intertwined because of immigration policy's potential to cause conflict—perhaps even armed conflict—with foreign powers. In *Hines*, the Court observed that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. at 64. The Court invalidated Pennsylvania's alien registration law, stress-

ing that issues involving "the conduct of affairs with foreign sovereignties," including immigration policy, must not be left to states to regulate. *Id.* at 63. This Court made clear that "the general field of foreign affairs[] include[s] power over immigration," *id.* at 62, and that the regulation of aliens is "intimately blended and intertwined with responsibilities of the national government," *id.* at 66.

Similarly, in *Chy Lung* v. *Freeman*, the Court invalidated a California law that empowered the California Commissioner of Immigration to demand a bond upon the arrival of foreign women he deemed "'lewd or debauched.'" 92 U.S. 275, 277 (1876). The Court noted that the commissioner could conceivably enforce the law in such a way as to "bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend." *Id.* at 279. Noting that "a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations," *id.* at 280, the Court asked rhetorically, if California's immigration enforcement should produce "a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" *Id.* at 279; *see also Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924) (invalidating state immigration regulations inconsistent with treaty obligations intended to "strengthen friendly relations between the two nations").

This Court's concern that immigration policy might provoke international conflict is not an idle one. For example, the United States' exclusion of Chinese nationals in the late-19th and early-20th centuries "evoked a series of diplomatic protests by the Government of China" and a boycott that "virtually destroyed our China trade" from 1904 to 1906. Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 Law &

Contemp. Probs. 299, 304 (1956). In the early 20th century, alien land laws that restricted Japanese ownership of land in California caused an "international incident," resulting in a protest lodged by the Japanese government, the formation of anti-American societies in Japan, and calls for declaration of war against the U.S. *Oyama* v. *California*, 332 U.S. 633, 655-656 (1948) (Murphy, J. concurring). In 1924, in retaliation for the U.S. decision to exclude Japanese citizens from the United States, Japan imposed a 100% tariff on all American goods. *See* Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 49 (2004). Concerns about immigration policies affecting foreign policy and potentially provoking international tension remain real today. *See infra* Part II.B; *see also* Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. 49, Dkt. No. 16-1, *United States* v. *South Carolina*, No. 11-cv-2958 (D.S.C. Nov. 7, 2011) (noting danger of retaliation); Pl.'s Mot. for Prelim. Inj. 22, 45, 72, Dkt. No. 2, *United States* v. *Alabama*, No. 11-cv-2746 (N.D. Ala. Aug. 1, 2011) (same).

B. The Federal Government Uses Immigration As An Instrument of Foreign Policy

The federal government has also long used immigration policy and enforcement as an affirmative instrument of foreign policy. By exercising its power to welcome, expel, detain, and place conditions on aliens, the federal government uses immigration policy to serve and promote its foreign policy goals.

1. Power to welcome aliens

The federal government's exercise of its power to admit aliens to advance its foreign policy objectives dates from the dawn of the Republic. In the 1794 Jay

Treaty, the United States and Great Britain mutually agreed to allow each other's citizens, as well as Indians in both the United States and Canada, free passage across the U.S.-Canada border, along with the right to carry on commerce in each other's territory.[5] This provision of the Jay Treaty was an integral part of the resolution of long-festering disputes between the two nations. *See* Bemis, *Jay's Treaty* 167. In particular, the U.S.-Canada border established under the Peace Treaty of 1783 divided Indian territory and was viewed by the Indian tribes as a British "betrayal of their interests" as it impeded the previous flow of commerce. *Id.* at 10. Given the "embarrassments of the new boundary," *id.* at 13, the British were concerned that "the Indians themselves … might be turned against them." *Id.* at 172-173. In turn, the U.S. wanted to avoid "possible friction with British forces" in resolving its conflict with Indian tribes. *Id.* at 153. Due to this common interest in preventing continued frontier crises, the starting negotiating position of both the U.S. and Great Britain was to remove the commercial restrictions of the boundary and establish free passage rights. *See id.* at 381-382 (British position); *id.* at 394 (U.S. position). Thus, immigration policy became an important part of U.S. foreign policy.

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[5] *See* Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, art. III, 8 Stat. 116, 117 ("It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line freely to pass and repass by land, or inland navigation, into the respective territories and countries of the two parties on the continent of America (the country within the limits of the Hudson's Bay Company only excepted) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other.").

Since that time, the federal government has continued to use its power to welcome aliens for several foreign policy purposes.

Resolving Wartime Labor Shortages. In 1942, as the United States mobilized for war in Europe and East Asia, it faced severe labor shortages in agriculture and railroads. To forestall those shortages, the United States negotiated a bilateral agreement with the Mexican government formalizing and encouraging the longstanding practice of Mexican migrant workers traveling to the United States to provide temporary labor. The U.S. government, which technically served as the migrant workers' employer, agreed to pay their transportation, living, and repatriation expenses. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 Berkeley La Raza L.J. 125, 129-130 (2004). The U.S. ambassador to Mexico called this program an "absolute need as a war measure." *See* Dominguez, *Immigration as Foreign Policy in U.S.-Latin American Relations* 151, *in Immigration and U.S. Foreign Policy* (Tucker et al., eds. 1990). The U.S. government agreed to extend this program in 1951 at least in part to mitigate the renewed labor shortages during the Korean War. Morgan, 15 Berkeley La Raza L.J. at 127; Bickerton, *Prospects for a Bilateral Immigration Agreement With Mexico: Lessons from the Bracero Program*, 79 Tex. L. Rev. 895, 906 (2001).

Undermining Adversaries. Throughout the Cold War, the United States used its refugee policy to try to undermine Communist adversaries. The U.S. government viewed each refugee who chose the United States over a Communist country as a victory in the ideological battle, and it hoped that an outpouring of refugees

from Communist countries to the United States would embarrass or destabilize the Communist countries. *See* Loescher & Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* xvii (1986) (citing a State Department official); Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38 Int'l Org. 429, 439 (1984). Accordingly, the U.S. government encouraged refugees of Communist countries to come to the United States. For much of the Cold War, federal laws defining who was a refugee explicitly referred to persons fleeing "a Communist-dominated country or area." *See* Teitelbaum, 38 Int'l Org. at 430. In practice, for much of the Cold War the U.S. accepted refugees primarily from Communist states.

The United States' policy toward Cuba illustrates the point. After Fidel Castro came to power in 1959, the United States encouraged Cubans to come to the United States even if they did not fit the traditional definition of persons fleeing persecution. President Eisenhower's Cuban Children's Program paid for thousands of Cuban children to be resettled in the United States; President Kennedy's Cuban Refugee Program provided resettlement assistance and social services; and President Johnson made clear that, despite the 1965 Immigration Act's refugee caps, the United States still welcomed Cuban refugees, saying upon signing the Act: "I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it." Dominguez, *Immigration as Foreign Policy in U.S.-Latin American Relations* 154; Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 39-41 (1988).

Hundreds of thousands of Cuban refugees accepted that invitation and fled to the United States.[6] In 1961, President Kennedy told the Soviet Government that the outflow was "evidence [of] growing resistance to the Castro dictatorship." Dominguez, *Immigration as Foreign Policy in U.S.-Latin American Relations* 153. In 1965, President Johnson said it was a "mark of failure" when a regime's "citizens voluntarily choose to leave the land of their birth for a more hopeful home in America." *Id.* at 154.[7]

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[6] Between 1959 and 1979, nearly 900,000 Cubans entered the United States. Reimers, *Still the Golden Door: The Third World Comes to America* 159 (2d ed. 1992) (estimating 200,000 Cuban refugees between 1959 and 1962); S. Comm. on the Judiciary, 96th Cong., *Review of U.S. Refugee Resettlement Programs and Policies* 13 (Cong. Research Serv. Comm. Print 1980) (estimating over 690,000 Cuban refugees between 1962 and 1979). During much of this same period, the United States discouraged migration from nearby allies (e.g., El Salvador and Haiti) that it did not want to embarrass or destabilize. *See* Dominguez, *Immigration as Foreign Policy in U.S.-Latin American Relations* 157 (Haiti); Mitchell, *Introduction: Immigration and U.S. Foreign Policy toward the Carribbean, Central America, and Mexico* 24, *in Western Hemisphere Immigration and United States Foreign Policy* (Mitchell, ed. 1992) (El Salvador); Teitelbaum, 38 Int'l Org. at 439 (El Salvador).

[7] Since the Refugee Act of 1980, asylum applicants have had to prove they are "unable or unwilling to return to … [their] country [of habitual residence] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987). Some have observed that this new eligibility standard, which eliminated geography and ideology as factors, was designed to "insulate the asylum process from the influences of politics and foreign policy." *Doherty* v. *INS*, 908 F.2d 1108, 1118 (1990), *rev'd on other grounds*, 502 U.S. 314 (1992). While the Refugee Act

Fostering Goodwill Among Allies. The federal government has also used its immigration policy to foster goodwill among allies. At the beginning of World War II, the Chinese Exclusion Act, which prohibited most immigration of Chinese nationals, was still in place, even though China was an allied power. Japanese wartime propaganda tried to use this fact to weaken ties between China and the United States. General Chang Kai-shek, the leader of allied China, asked the United States to end its exclusionary policy. In 1943, to help preserve China's friendship, Congress repealed Chinese exclusion.[8] *See* Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

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aimed to introduce more ideologically neutral standards for determining asylum, foreign policy considerations nonetheless may still play a role, albeit more indirectly, in assessing human rights conditions in other countries. Courts reviewing whether an applicant has proven a well-founded fear of persecution often rely on State Department reports regarding the human rights and political conditions in the applicant's country of residence. *See In re V-T-S-*, 21 I. & N. Dec. 792, 799 (BIA 1997) ("[C]ountry condition profiles developed by the State Department have been found to be 'the most appropriate and perhaps the best resource' for information on conditions in foreign nations." (quoting *Kazlauskas* v. *INS*, 46 F.3d 902, 906 (9th Cir. 1995))); *accord In re J-H-S-*, 24 I. & N. Dec. 196, 198 n.1, 202-203 (BIA 2007); *In re J-W-S-*, 24 I. & N. Dec. 185, 189-191 (BIA 2007). Those reports and their underlying determinations of how to characterize conditions in a foreign country are important expressions of our foreign policy and are intended to influence the behavior of those foreign nations.

[8] *See* United States Department of State, Office of the Historian, *Repeal of the Chinese Exclusion Act, 1943*, *available at* http://history.state.gov/milestones/1937-1945/ChineseExclusionActRepeal (last visited Mar. 25, 2012) (repeal was "grounded in the exigencies of World War II, as Japanese propaganda made repeated reference to Chinese exclusion from the United States in

More recently, the United States enacted the Afghan Allies Protection Act of 2009. Pub. L. No. 111-8, div. F, tit. VI, § 602(b), 123 Stat. 524, 807. This statute is intended to recognize, protect, and reward Afghans who have served the U.S. government for at least a year since October 2001, by providing them with special immigration status.

2. Power to expel, detain, and place conditions on aliens

The federal government has also used its power to expel, detain, and place conditions on aliens to ensure national security during wars and to exert strategic pressure on the aliens' home country governments.

Expel and Detain. The Alien Enemy Act of 1798 authorized the President to detain or remove aliens who were from a country at war with the United States. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. §§ 21-24). The Act, which has been in effect since its passage, *see Johnson* v. *Eisentrager*, 339 U.S. 763, 773-775 & n.6 (1950), has been used repeatedly over the years: President Madison used it during the War of 1812; it served as the basis for internment and President Wilson's restrictions on German and Austro-Hungarian aliens in World War I; and, in World War II, President Roosevelt invoked the Act immediately after Pearl Harbor to grant the Attorney General and Secretary of War the power to arrest and detain German, Japanese, and Italian alien enemies. *See* Klein & Wittes, *Preventive Detention in American Theory and Practice*, 2 Harv. Nat'l Sec. J.

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order to weaken the ties between the United States and its ally, the Republic of China").

85, 103-107 (2011). As this Court has said, this "[e]xecutive power over enemy aliens … has been deemed, throughout our history, essential to war-time security." *Eisentrager*, 339 U.S. at 774; *see also Ludecke* v. *Watkins*, 335 U.S. 160, 171 & n.18 (1948).

Place Conditions. In response to the 1979 Iranian hostage crisis, President Carter directed the Attorney General to identify and begin deporting Iranian post-secondary students in the United States who were in violation of their visa terms. McDonald, *Selective Enforcement of Immigration Laws on the Basis of Nationality as an Instrument of Foreign Policy*, 5 Immigr. & Nat'lity L. Rev 327, 327-328 (1981-1982). The Attorney General, in turn, issued a regulation requiring Iranian students to provide their immigration status information to a local INS office within thirty days. *See id.* at 328.

When students challenged this regulation's constitutionality in court, the Attorney General filed an affidavit saying that the regulation was "a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." *See Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (internal quotation marks omitted). Upholding the regulation, the court acknowledged the link between immigration policy and foreign relations by noting that the regulation's effect on Iranians in the United States might affect the attitude and conduct of the Iranian government. *Id.* at 748; *see also Yassini* v. *Crosland*, 618 F.2d 1356, 1361 (9th Cir. 1980) (per curiam) (in case with related facts, acting INS Commissioner "averred that he issued the directive only after he consulted with the Attorney General, and that the directive was designed to further the policy expressed

in the Presidential directive and to aid the President's efforts to secure the release of the hostages").

C. Foreign Policy Considerations Are Embedded In The Structure Of Immigration Law

Recognizing that immigration policy and enforcement implicate the conduct of foreign relations, Congress designed federal immigration law to allow the Executive to take account of foreign policy considerations in managing immigration. The Nation's immigration laws govern, *inter alia*, which aliens may enter and reside in the United States, who may be removed, conditions of residence, the consequences of unlawful presence, and who may become naturalized citizens. *See* 8 U.S.C. §§ 1101, *et seq.* But because Congress has also recognized that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted), Congress has thus granted the Executive considerable discretion in enforcing those laws.

In exercising that discretion, the Executive has traditionally taken into account many factors that implicate foreign affairs. As the United States has explained, those factors include such foreign policy goals as facilitating trade and commerce, responding to humanitarian concerns, and avoiding harm to the Nation's foreign relationships. *See* Compl. ¶ 19. In pursuit of those goals, the Department of Homeland Security and Department of Justice may decline to impose certain immigration sanctions, or may confer immigration benefits, on removable aliens. *Id.* ¶ 21. For instance:

- the government may waive a ground of deportability "for humanitarian purposes … or when it is otherwise in the public interest," 8 U.S.C. § 1227(a)(1)(E)(iii);

- the government may grant temporary protected status (which precludes removal) to nationals from countries that the DHS Secretary determines to be involved in an "ongoing armed conflict … [that] would pose a serious threat to their personal safety," 8 U.S.C. § 1254a(b)(1)(A);

- the government may admit aliens who have been convicted of certain crimes—despite a law generally barring their admission—"in extraordinary circumstances, such as those involving national security or foreign policy considerations," 8 C.F.R. § 212.7(d); *see* 8 U.S.C. § 1182(a)(2), (h)(2);

- the government may admit otherwise inadmissible aliens if their admission is determined to be "in the interest of national security or essential to the furtherance of the national intelligence mission," 50 U.S.C. § 403h.

Conversely, federal immigration law also gives the Executive discretion to take action against aliens in furtherance of certain foreign policy goals. If the Secretary of State determines that an alien's presence in this country would have "potentially serious adverse foreign policy consequences," the government may refuse to allow the alien to enter the country, 8 U.S.C. § 1182(a)(3)(C)(i); or deport him if he is already present in the country, *id.* § 1227(a)(4)(C)(i). Likewise, the Secretary of State may deny an alien a visa if the Secretary "deems such refusal necessary or advisable in the foreign policy or security interests of the United States." 6 U.S.C. § 236(c)(1). And during wartime, the

President may "apprehend[], restrain[], secure[], and remove[] … alien enemies." 50 U.S.C. § 21;[9] *see supra* Part II.B.

As these provisions demonstrate, federal immigration law is not a rigid set of rules. Rather, Congress structured the statutory scheme to allow the Executive Branch to take a variety of goals, including foreign policy considerations, into account when managing immigration policy. In particular, Congress gave the Executive flexibility in deciding how to enforce immigration law so as to advance foreign policy goals—a sphere that is exclusively the responsibility of the federal government.

III. STATE IMMIGRATION LAWS LIKE S.B. 1070 INTERFERE WITH FOREIGN RELATIONS

State immigration laws can interfere with U.S. foreign policy in several ways: by undermining the United States' ability to speak with one voice to other countries; by introducing a cause of irritation between the U.S. and other countries; by exposing to retaliation U.S. citizens living and doing business abroad; and by undermining U.S. effectiveness in its dealing with multilateral bodies.

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[9] *See Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952) ("Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation." (footnote omitted)); *Eisentrager*, 339 U.S. at 775 ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists.").

A. State Immigration Laws Like S.B. 1070 Can Undermine The Exclusivity And Uniformity Of The Federal Foreign Relations Power

Given that immigration policy is a subset of foreign policy, this Court has long understood that the United States must be able to "speak with one voice" on immigration matters no less than on other foreign relations issues such as trade or war. *Zadvydas* v. *Davis*, 533 U.S. 678, 700 (2001) ("We recognize, as the Government points out, … the Nation's need to speak with one voice in immigration matters." (internal quotation marks omitted)).[10] A cacophony of voices, especially from diverse scripts, inevitably undermines the effectiveness of U.S. immigration and foreign policy, contrary to the constitutional design. As described above, the United States throughout its history has used immigration as an instrument of foreign policy, as an incentive for allies, and as a sanction against other countries. *See supra* Part II.B. The power of such tools "rests on [the federal government's] capacity to bargain for the benefits of access" on a nationwide and uniform basis, "without exception for enclaves fenced off willy-nilly by inconsistent" state laws. *Crosby*, 530 U.S. at 381.

If the rule were otherwise for immigration policy, then both the benefits and burdens of federal immigration law could be weakened by inconsistent state poli-

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[10] *See also Japan Line*, 441 U.S. at 449; *Michelin Tire*, 423 U.S. at 285; *Pink*, 315 U.S. at 242 (Frankfurter, J., concurring) ("In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.").

cies. The threat posed by the proliferation of state laws—many of which may be inconsistent with each other—is particularly serious. For instance, one study found that the fifty states explored over 1,000 different measures regulating immigrants in 2007 alone, and at least 156 of these measures became law. *See* Chishti, et al., *Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures*, 1916 PLI/Corp 195, 203 (2011). In 2011, thirty-one states introduced immigration legislation mirroring Arizona's S.B. 1070, and five enacted similar bills into law. *See* Downes, *When States Put Out The Unwelcome Mat*, N.Y. Times, Mar. 11, 2012, at SR10. The possibility of numerous such laws, with their promotion of policy goals of "attrition through enforcement" or similar competing objectives, amply illustrates how state immigration laws can interfere with uniform and consistent foreign policy goals. *See* Pet. App. 57a (Noonan, J., concurring) ("[t]hat fifty individual states or one individual state should have a foreign policy is absurdity too gross to be entertained").

B. State Immigration Laws Can Also Affirmatively Harm Relations With Foreign Countries And Expose U.S. Citizens To Potential Reciprocal Retaliation, As Illustrated By S.B. 1070

State immigration laws can also harm relations with foreign nations and endanger the ability of U.S. citizens to travel and conduct business abroad. Senior State Department officials have identified several harms to the Nation's foreign relations caused by state immigration laws, including Arizona's S.B. 1070:

- antagonizing foreign governments, harming U.S. relations with them and making them less willing to negotiate with, assist, or support the

United States across a broad range of foreign policy issues, including favorable trade and investment agreements, cooperation with counterterrorism and drug trafficking operations and support in various international bodies;

- endangering U.S. efforts to protect the immigration status and treatment of U.S. citizens residing and conducting business abroad, exposing them to potential reciprocal retaliation; and
- the threat of undermining the standing of the United States in international and multilateral bodies to advocate effectively on behalf of U.S. national interests.

See Declaration of James B. Steinberg 19, *United States* v. *Arizona*, (D. Ariz. July 6, 2010) ("Steinberg Decl.") (identifying harms flowing from Arizona's immigration law); *see also United States* v. *South Carolina*, 2011 WL 6973241, at *17 (D.S.C. Dec. 22, 2011) (in which Deputy Secretary of State William Burns identified several harms flowing from South Carolina's immigration law).

Arizona's S.B. 1070 presents a particularly clear illustration of the ways in which state immigration laws can harm the Nation's foreign relations. S.B. 1070 rapidly generated significant friction between the U.S. and other countries and made them less willing to cooperate with the United States. Only a month after the law took effect, the President of Mexico expressed his country's concern in a speech to the U.S. Congress,[11] raised

[11] Felipe Calderón, Speech to U.S. Congress, May 19, 2010, cited in Steinberg Decl. 20.

the issue in bilateral talks with President Obama, and addressed it in a joint press conference following their meeting.[12] In June 2010, six Mexican governors cancelled their trips to Phoenix for an annual conference of U.S. and Mexican governors on border issues, leading Texas and Arizona to boycott the rescheduled conference venue in New Mexico. *See* Bracamontes, *US-Mexico border-state governors to convene in Santa Fe*, El Paso Times, Sept. 18, 2010. And unfavorable public attitudes in Mexico towards the United States jumped from only 27 percent to 48 percent shortly following enactment of the Arizona law—no minor consequence for the millions of Americans who travel to and conduct business with Mexico each year. *See* Steinberg Decl. 21 (citing a Pew Research Center study).

Arizona's law has also produced ripple effects throughout Central and South America. It has damaged U.S. relations with Bolivia, Brazil, Columbia, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua, whose presidents and parliaments have issued statements criticizing the law. *See* Steinberg Decl. 21. Both El Salvador and Mexico have also issued travel warnings or alerts to their citizens traveling to the U.S. *See id.*

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[12] *See* Remarks by President Obama and President Calderón of Mexico at Joint Press Availability, May 19, 2010, *available at* http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-president-calder-n-mexico-joint-press-availability (last visited Mar. 25, 2012) ("[W]e will retain our firm rejection to criminalize migration so that people that work and provide things to this nation will be treated as criminals. And we oppose firmly the S.B. 1070 Arizona law given [unfair] principles that are partial and discriminatory.").

State immigration laws like S.B. 1070 also create a risk of retaliation against U.S. citizens residing or conducting business abroad. Indeed, in immigration matters, countries frequently respond to restrictions on their citizens by enacting reciprocal measures.[13] For example, in 2004 Brazil singled out U.S. nationals for fingerprinting and photographing upon entry into Brazil to respond in equal measure to the U.S. fingerprinting of foreign nationals under the Enhanced Border Security and Visa Entry Reform Act of 2002. *See* Rohter, *U.S. and Brazil Fingerprinting: Is It Getting Out of Hand?*, N.Y. Times, Jan. 10, 2004, at A3 ("With Brazil and the United States holding fast to their insistence on photographing and fingerprinting visitors from the other country, what began as a minor dispute last week is now threatening to sour relations between the two countries, the most populous in the Western Hemisphere."); Rohter, *Brazil Jails American Airlines Pilot Over Fingerprinting Snub*, N.Y. Times, Jan. 15, 2004, at A6; *Travel Advisory: Visa Fees Raised For Brazil and Turkey*, N.Y. Times, Dec. 8, 2002, at E3 (on the same day that the U.S. increased processing fees for nonimmigrant visas, Brazil and Turkey increased their fees the same amount). Such retaliatory measures also have the potential to engender disputes between the United States and those countries, given the estab-

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[13] *See Garcia* v. *Texas*, 131 S. Ct. 2866, 2870 (2011) (Breyer, J., dissenting) (expressing concern about ability of U.S. citizens traveling abroad to have consular assistance in the event of detention); *Medellín* v. *Texas*, 552 U.S. 491, 566 (2008) (Breyer, J., dissenting) (state court decision would "precipitat[e] actions by other nations putting at risk American citizens who have the misfortune to be arrested" abroad).

lished obligation of countries to provide diplomatic protection to their nationals abroad.[14]

Finally, state immigration laws like Arizona's S.B. 1070 also threaten to undermine the United States' standing and persuasive authority in multilateral and regional bodies to advocate effectively on behalf of U.S. national interests. For example, during the United Nations Human Rights Council session in June 2010, several countries singled out S.B. 1070 as discriminatory legislation. *See* Steinberg Decl. 23. And the United States, in its December 2011 periodic report to the Human Rights Committee under the International Covenant on Civil and Political Rights, was compelled to explain U.S. compliance with international obligations in light of Arizona's law. *See* Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, CCPR/C/USA/4, Dec. 30, 2011, at 173-174, *available at* www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.USA.4.doc (last visited Mar. 25, 2012).[15]

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[14] *See* 2 *Restatement (Third) of Foreign Relations* § 713, cmts. a, b (1987); *Case Concerning Elettronica Sicula S.p.A. (U.S.* v. *Italy)*, 1989 I.C.J. 15, 20 (Judgment of July 20); *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)*, 1979 I.C.J. 7, 8 (Order of Dec. 15); *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 180-181 (Judgment of Aug. 27); *see generally* Borchard, *The Diplomatic Protection of Citizens Abroad* (1919).

[15] Six United Nations Special Rapporteurs (on migrants, racism, minorities, indigenous people, education, and cultural rights) issued a joint statement criticizing the law and state that "vague standards and sweeping language of Arizona's immigration law … raise serious doubts about the law's compatibility with relevant international human rights treaties to which the United States is a

Among regional institutions, the Organization of American States issued a press release "express[ing] concerns during a session of the Permanent Council about the legal measures recently adopted by the State of Arizona." Organization of American States, Press Release, Apr. 28, 2010, *available at* http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-142/10 (last visited Mar. 25, 2012). Similarly, the Inter-American Commission for Human Rights "expresse[d] its deep concern with the high risk of racial discrimination in the implementation of the law" and "with the criminalization of the presence of undocumented persons." Inter-American Commission on Human Rights, Press Release, Apr. 28, 2010, *available at* http://www.cidh.org/comunicados/english/2010/47-10eng.htm (last visited Mar. 25, 2012). It also "exhort[ed] U.S. authorities to find adequate measures to modify the recently approved law in the State of Arizona in order to bring it into accordance with international human rights standards for the protection of migrants." *Id.*

To be sure, federal immigration policy can also cause friction with foreign nations. But when Congress or the Executive enacts or enforces a provision of immigration law that has the potential to engender disapproval by other countries, it can balance that risk against the possible benefits of pursuing the policy in question. State immigration policies, however, carry

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party." United Nations Office of the High Commissioner for Human Rights, Press Release, *UN experts warn against "a disturbing legal pattern hostile to ethnic minorities and immigrants*," May 10, 2010, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10035&LangID=E (last visited Mar. 25, 2012).

the risk of embroiling the national government in disputes not of its making. That risk is inconsistent with the constitutional design that the Framers enacted.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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