No. 11-182

In The
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration issue in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over its 30-year history. Institute attorneys currently handle over one hundred cases nationally, including numerous cases that concern the interplay between the government and its citizens. One of the purposes of The Rutherford Institute is to preserve the most basic freedoms our nation affords its citizens – in this case, the right to be free from unreasonable searches and seizures and the right to be free from discrimination based on racial origin.

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

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the brief of Respondent United States of America.

SUMMARY OF ARGUMENT

The Arizona law at issue in this case threatens to move our nation yet one step closer to a "police state" in which basic civil liberties are sacrificed in the interest of quelling popular fears. While the State of Arizona contends that S.B. 1070 is aimed at remedying and preventing illegal immigration, the law cannot be enforced without serious encroachment upon, and violations of, both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Therefore, while the Court addresses the question of whether or not federal immigration law preempts the Arizona bill, *Amicus* hopes the Court will ever be mindful of an even greater concern: that the bill is "preempted" by our nation's Bill of Rights.

As the Ninth Circuit explained in upholding the district court's injunction prohibiting enforcement of parts of the bill, S.B. 1070's provision for warrantless arrests goes far beyond what is allowed by competing federal laws. In so doing, it raises serious implications for the Fourth Amendment rights of Arizona's citizens, particularly those of Hispanic descent.

Furthermore, for Hispanic individuals, the protections of the Equal Protection Clause of the Fourteenth Amendment will be seriously eroded by the statute. S.B. 1070 cannot be enforced in a race-

neutral manner, but can be enforced only by using race as a proxy for immigration status. Thus, if the injunction is withdrawn, enforcement of S.B. 1070 will result in profiling and disparate treatment of individuals based on race, and the error costs associated with enforcement will be felt almost exclusively by citizens and legal residents of Hispanic origin. This will undermine the concept of equality of citizenship guaranteed by the Fourteenth Amendment.

Both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment have unique places in this Court's jurisprudence in protecting individual rights. *Amicus* urges the Court to recognize that the Fourth Amendment and the Equal Protection Clause militate against enforcement of S.B. 1070 and asks the Court to uphold the decision of the U.S. Court of Appeals for the Ninth Circuit.

ARGUMENT

S.B. 1070 VIOLATES THE CONSTITUTIONAL RIGHTS OF U.S. CITIZENS AND LEGALLY PRESENT ALIENS

I. Fourth Amendment Concerns

Irrespective of the legitimacy of Arizona's desire to combat the deleterious effects of illegal immigration, the State must not and cannot achieve its goals by infringing on the constitutional rights of citizens and legally present residents. In the state legislature's alleged zeal to stem the flow of illegal immigrants, it has passed a law that does just that. While the Ninth Circuit was correct in ruling that Section 6 conflicts with federal immigration laws, *Amicus* submits that the Court should be even more concerned with the fact that the venerable Fourth Amendment clearly "preempts" the law in question and requires that it be stricken.

Section 2(B) provides that following "any lawful stop, detention or arrest made" by Arizona law enforcement, and "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt *shall* be made, when practicable, to determine the immigration status of the person." Ariz. Rev. Stat. § 11-1051(B) (emphasis added). For an individual who is arrested and whose status cannot be determined or presumed, the status verification must be performed "before the person is released." *Id.* Moreover, Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer

has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." *Id.* at § 13-3883(A)(5).

Sections 2 and 6 of S.B. 1070 provide for the warrantless detention of individuals solely to verify immigration status even in the absence of probable cause that the individual detained has committed any crime. As the Ninth Circuit noted, this goes beyond the scope of applicable federal immigration laws. *See United States v. Arizona*, 641 F.3d 339, 361 (9th Cir. 2011) ("Nothing in [the federal immigration law] permits warrantless arrests . . . .").

Amicus submits that the real concern here is much greater than the issue of whether federal immigration law permits this scheme; the real concern is that judicial approval of S.B. 1070 would signify a dramatic expansion of circumstances under which this Court's Fourth Amendment jurisprudence has permitted warrantless arrests. It is well-established that the Fourth Amendment permits warrantless arrests where law enforcement officers have probable cause to believe that the subject has committed a felony, or where the subject commits a misdemeanor in the officer's presence. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). However, S.B. 1070 goes far beyond this.

Indeed, the Ninth Circuit recognized that the law's standard for warrantless arrests – probable cause that a person has committed a "public offense that makes the person removable" – clearly extends to misdemeanors. *Arizona*, 641 F.3d at 361.

Because Section 6 does not require that these "public offenses" be witnessed by the arresting officer in order to justify an arrest (the historical standard, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 328, 340 (2001)), the law opens the floodgates to warrantless arrests that have heretofore not been sanctioned by this Court under the Fourth Amendment.

In granting an injunction prohibiting enforcement of parts of S.B. 1070, the district court also noted that "[u]nder Section 2(B) of S.B. 1070, all arrestees will be required to prove their immigration status to the satisfaction of state authorities, thus increasing the intrusion of police presence into the lives of legally-present aliens (indeed, even United States citizens), who will necessarily be swept up by this requirement." *United States v. State of Arizona*, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010). By mandating verification of immigration status, S.B. 1070 prolongs the duration of the stop well beyond the time needed to effectuate the original purpose of the stop. This is particularly egregious because S.B. 1070's verification requirement applies to all stops, however minor.

Such extended stops violate the established principle that police stops must "last no longer than necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "[U]nless there is articulable suspicion of other illegal activity," law enforcement's intrusion upon an individual's freedom of movement must end once the original purpose of the stop has been accomplished. *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001) (quoting *United States v. Holloman*, 113

F.3d 192, 196 (11th Cir. 1997)). The Court has heretofore maintained that upon making a lawful stop, officers may only question individuals on an unrelated subject – such as immigration status – if the questioning does not unreasonably prolong the stop. *See Muehler v. Mena*, 544 U.S. 93, 100-01 (2005); *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). S.B. 1070 clearly requires Arizona law enforcement officers to violate these standards.

Furthermore, in granting a preliminary injunction against enforcement, the district court explicitly recognized that the period of detention for at least some arrestees awaiting verification of their immigration status could be lengthened to such a degree as to violate the Fourth Amendment. The court there stated that it was "cognizant of the potentially serious Fourth Amendment problems with the inevitable increase in length of detention while immigration status is determined . . . ." *Arizona*, 703 F. Supp. 2d at 995 n.6. Consequently, the expanded length of time individuals – including citizens and legal residents – will spend in custody while their immigration statuses are being investigated raises additional Fourth Amendment implications.[2]

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[2] *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (noting that rules allowing for searches of undocumented non-citizens have to account for "the Fourth Amendment rights of citizens who may be mistaken for aliens").

Should this state of affairs be approved by this Court, our society will lose a significant benefit of living in a free society – freedom from lengthy police detentions based on unarticulated "suspicions" of behaviors that do not rise to the level of crimes. In many instances, cases in which lawful stops would otherwise be resolved by the issuance of a citation or warning will escalate to detentions where the sole purpose is to investigate the individual's immigration status. A wide range of conduct can justify a stop by law enforcement personnel, and under S.B. 1070, any of these stops can subsequently escalate into a full-blown immigration status investigation. The prolonged detention associated with this – that would otherwise be impermissible – violates the Fourth Amendment. For example, the Eleventh Circuit has held that in the absence of suspicion of criminal activity, the continued detention of a motorist is unlawful even though the motorist has been lawfully stopped and issued a speeding citation. *United States v. Tapia*, 912 F.2d 1367, 1370 (11th Cir. 1990)

In summary, any legitimization of the practices required by S.B. 1070 would eviscerate the historical practice of liberally construing the Fourth Amendment. This Court has long held that "the Fourth Amendment [is] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty." *Olmstead v. United States*, 277 U.S. 438, 464-65 (1928) (internal citations omitted). If S.B. 1070 is upheld, core Fourth Amendment values will be eroded with consequences far beyond the immigration context. The Court must therefore either take this opportunity to reinforce

Fourth Amendment values or run the risk of sacrificing many of those values altogether. The result of S.B. 1070 and the similar laws that would inevitably follow in other states would be a transformation of the American way of life – from civil society to police state.

II. Equal Protection Concerns

Justice Harlan famously stated that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). S.B. 1070 has the very real potential to create both the perception and the reality that a new lower class of citizenship exists for one segment of citizens in the United States – those of Hispanic appearance. The law would seriously undermine the very concept of equal protection because the harms associated with its enforcement will fall disproportionately on individuals of Hispanic origin.

While S.B. 1070 does ostensibly prohibit enforcement predicated "solely" on race, color, or national origin, by definition this explicitly permits enforcement based on these criteria so long as some other factor, however small, is alleged to be present. Thus, S.B. 1070 seemingly comports with the Court's dicta in *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975), that "apparent Mexican ancestry" constitutes a legitimate consideration under the Fourth Amendment for making an immigration stop so long as such appearance is not the sole criteria used. However, whatever force this dictum may once have had, reliance upon it is no longer justified.

Brignoni-Ponce was decided in 1975, and since then courts have become increasingly suspicious of reliance on race in immigration enforcement.[3] In fact, in 2000, the United States Court of Appeals for the Ninth Circuit pointed out that the census data cited by the Court in *Brignoni-Ponce* in 1975 as supporting the idea that apparent Mexican descent was a relevant factor in producing reasonable suspicion has changed dramatically in ways that completely undermine the justification for any reliance on race in formulating suspicion. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132-33 (9th Cir. 2000) (en banc) ("Current demographic data demonstrate that the statistical premises on which its [*Brignoni-Ponce*] dictum relies are no longer applicable.").

Even if S.B. 1070 cannot be declared facially invalid for allowing race to be considered in law enforcement, its obvious vulnerability to abuse in application warrants this Court's careful attention. In particular, the bill's "reasonable suspicion" standard that triggers police action is so vague that it is dangerously amenable to individual stereotypes that will inevitably be based exclusively upon "race, color, or national origin." *Amicus* does not contend that law enforcement personnel will enforce the bill's

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[3] *See United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc) (disregarding *Brignoni-Ponce* and holding Border Patrol cannot rely on "Hispanic appearance" in deciding whether to make an immigration stop).

provisions out of racial animus, but the reality is that "how officers police remains very much racially inflected."[4] In enjoining enforcement of an Alabama bill similar to S.B. 1070, the District Court for the Northern District of Alabama noted that local officers "are not trained to discern suspicion of unlawful presence without consideration of the person's race, color, or national origin." *Hispanic Interest Coalition of Alabama v. Bentley*, 2011 WL 5516953 at *39 (N.D. Ala. Sept. 28, 2011). In practice, therefore, race, color, and national origin will frequently be the sole criteria by which S.B. 1070 is enforced.

Thus, some investigations of Hispanic persons will inevitably be initiated in the absence of genuine individualized suspicion. These law enforcement

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[4] Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARVARD CIV. RIGHTS-CIV. LIBERTIES L. REV. 1 at *2 (Winter, 2011). *See also* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004) (discussing the widespread nature of implicit biases, even among those who consider themselves to be unbiased); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491-1528 (2005) (discussing the pervasiveness of implicit racial bias and the resulting consequences).

efforts based on "Hispanic appearance" will be "dramatically overbroad and unnecessarily include[] many U.S. citizens and lawful immigrants."[5] "[S]uch classifications fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association."[6]

The Fourteenth Amendment "grafted a requirement of equal citizenship onto the Constitution as a whole, including the Fourth Amendment."[7] Yet the effect of S.B. 1070 would be to inequitably heighten concerns about governmental infringement of civil liberties for racial minorities.[8]

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[5] Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 707 (2000). *See also id.* at 707-11 (discussing the problem of "overbreadth" in immigration enforcement tactics that rely on appearance).

[6] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351-52 (1949).

[7] Capers, *supra* note 4, at *37.

[8] *See* Peter A. Lyle, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L. J. (Winter, 2001).

If enforced, then, S.B. 1070 will rekindle a pernicious and recurring theme of U.S. history: inequality of citizenship. Simply put, enforcement of S.B. 1070 will have the effect of "creat[ing] 'partial membership' or more colloquially, second-class citizenship, for Latinos in the United States."[9]

Regardless of whether S.B. 1070 is the product of a facially neutral scheme, its effects will primarily be felt by minorities of Hispanic descent. Citizenship and legal presence in the United States will be no protection against these harms. As discussed above, S.B. 1070 cannot in practice be enforced in a race-neutral manner. Instead, it will be enforced against individuals of Hispanic origin, regardless of their immigration status. Enforcement of the bill will, intentionally or subconsciously, result in law enforcement using race as a proxy for immigration status. Such profiling of Latinos to determine nationality is inconsistent with notions of equal citizenship.[10] By using race as a proxy for immigration status, "the burden of proof shifts. The law-abiding minority must mount an affirmative defense, must in effect take the stand, and must rebut the presumption" that their presence in the United States is illegal."[11]

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[9] Johnson, *supra* note 5, at 717.

[10] *See* Capers, *supra* note 4.

[11] *Id.* at *22.

The consequence of such a policy of enforcement is obvious: it will "contribute to racial balkanization" and lead to second-class status for American citizens of Hispanic descent.[12] These concerns have been acknowledged in the debate surrounding S.B. 1070. For example, Arizona State Representative Bill Konopnicki realized these concerns when he stated that enforcement of S.B. 1070 will make the State of Arizona "look like Alabama in the '60s."[13]

Overall, the enforcement of S.B. 1070 will undermine much of the progress in racial equality that has been achieved since the Civil War. The concept of citizenship, as this Court recognized in its seminal Fourth Amendment case *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), involves the enjoyment of "dignity and integrity." At the very least, this means being "accorded a level of respect, regard, and autonomy in dealings with the police."[14]

The conversion of routine law enforcement stops into full-blown immigration investigations whenever the individual stopped is of Hispanic descent will reinforce negative stereotypes about

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[12] *Id.* at *2.

[13] Randal C. Archibold, *Immigration Bill Reflects a Firebrand's Impact*, NY TIMES, Apr. 19, 2010, *available at* http://www.nytimes.com/2010/04/20/us/20immig.html.

[14] Capers, *supra* note 4, at *11.

Latinos and will punish citizens and lawful residents of Hispanic background based solely on the color of their skin. Profiling practices such as these result in stigmatic harms "that undermine the very notion of equal citizenship."[15]

> When police use race to determine whom to "encounter," or whom to stop, the police in effect stigmatize race by ascribing negative meanings to racial differences. Put differently, profiling both communicates that race matters . . . and communicates why . . . . It suggests that individuals, because of the color of their skin, are by definition suspect.[16]

These same results can be expected to follow from laws such as S.B. 1070, where race inevitably becomes an overriding factor in the length and intensity of otherwise routine police stops.

Moreover, the mere perception that the bill is being enforced on the basis of racial profiling creates citizenship harms, including notions of lack of equality and lack of belonging. Such behavior "perpetuate[s] the notion that race matters – that it matters to be black or brown or yellow, and that it matters to be white. In short, racial profiling

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[15] *Id.* at *4.

[16] *Id.* at *24.

reinforces notions of racial difference."[17] This results in "a stigma that is both socially inscribed and officially inscribed. It is representative of the state assigning worth, engaging in caste-ing."[18] The disparate treatment that would accompany enforcement of S.B. 1070 amounts to the imposition of a "racial tax" on Hispanics, citizens and non-citizens alike.[19] Such enforcement sends a state-sanctioned message "about the continued existence of a racial hierarchy in which some citizens enjoy more privileges and immunities, more freedom of movement, and a greater sense of belonging than others. . . . [M]ost noticeably, it adds legitimacy to private discrimination."[20]

These concerns are particularly acute because "race-based discriminatory enforcement generally continues unabated, unreported, and unremedied."[21] In order to avoid suspicion and arrest, S.B. 1070 will encourage citizens of Hispanic origin to carry proof of citizenship in order to avoid interrogation – a burden that will not be shared by other citizens.

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[17] *Id.* at *23.

[18] *Id.* at *24.

[19] *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1998).

[20] Capers, *supra* note 4, at *26.

[21] Johnson, *supra* note 5, at 699.

Finally, it must be noted that under enforcement of S.B. 1070, American citizens and legal immigrants of Hispanic origin are also likely to disproportionately suffer the erosion of sacred First Amendment rights. The affected groups could be forced to abandon protected rights of free expression and assembly, such as speaking Spanish in public or congregating with other "Hispanic-looking" individuals, for fear of triggering police investigation.[22]

U.S. citizens and legal residents of Hispanic origin who are not fluent in English are therefore at grave risk of interrogation and arrest simply for not speaking English fluently or looking sufficiently "American" – while nevertheless engaging in legal activities. Clearly, the law would thus impose a serious chilling effect on fully protected First Amendment activity. Such a Hobson's Choice is clearly impermissible under, and an affront to, the Constitution, representing something "akin to constitutional rights segregation."[23]

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[22] *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc), *vacated on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (holding that an individual's choice of language is "pure speech" and fully protected under the First Amendment).

[23] Capers, *supra* note 4, at *35.

CONCLUSION

Legislatures in several states have already enacted laws similar to S.B. 1070.[24] If the injunction prohibiting enforcement of parts of S.B. 1070 is overturned, many more can be expected to follow suit. Thus, the case at bar holds colossal implications—on a national scale—for individual rights protected by the Fourth and Fourteenth Amendments.

Amicus requests that in its review of this case, the Court look beyond the question of whether federal immigration statutes preempt the operation of S.B. 1070 to take cognizance of the far greater form of "pre-emption" occasioned by our nation's Bill of Rights. Concerns over illegal immigration must not be permitted to justify the onset of a police state.

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[24] The States of Alabama, Georgia, Indiana, South Carolina, and Utah have all enacted legislation similar to S.B. 1070. Parts of each of these statutes have been enjoined pending this Court's decision in the present case.

Respectfully submitted,

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