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

AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are United States Members of Congress Gary Ackerman (NY), Joe Baca (CA), Xavier Becerra (CA), Howard Berman (CA), Donna Christensen (VI), Judy Chu (CA), Hansen Clarke (MI), Yvette Clarke (NY), Emanuel Cleaver (MO), James Clyburn (SC), John Conyers (MI), Elijah Cummings (MD), Danny Davis (IL), Ted Deutch (FL), Keith Ellison (MN), Anna Eshoo (CA), Sam Farr (CA), Chaka Fattah (PA), Bob Filner (CA), Charles Gonzalez (TX), Al Green (TX), Gene Green (TX), Raúl Grijalva (AZ), Luis Gutiérrez (IL), Janice Hahn (CA), Maurice Hinchey (NY), Rubén Hinojosa (TX), Mike Honda (CA), Steny Hoyer (MD), Jesse Jackson, Jr. (IL), Sheila Jackson Lee (TX), Hank Johnson (GA), John Larson (CT), Barbara Lee (CA), John Lewis (GA), Zoe Lofgren (CA), Carolyn Maloney (NY), Jim McDermott (WA), Gregory Meeks (NY), George Miller (CA), Gwen Moore (WI), Jim Moran (VA), Jerrold Nadler (NY), Grace Napolitano (CA), Eleanor Holmes Norton (DC), Ed Pastor (AZ), Nancy Pelosi (CA), Pedro Pierluisi (PR), Jared Polis (CO), Mike Quigley (IL), Charles Rangel (NY), Silvestre Reyes (TX), Laura Richardson (CA), Lucille Roybal-Allard (CA), Bobby Rush (IL), Linda Sánchez (CA), Loretta Sanchez (CA), Jan Schakowsky (IL), José Serrano (NY), Terri Sewell (AL), Albio Sires (NJ), Louise Slaughter (NY), Bennie Thompson (MS), Edolphus Towns

1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The parties have filed blanket consents with the Court consenting to the filing of all *amicus* briefs.

(NY), Chris Van Hollen (MD), Nydia Velázquez (NY), Maxine Waters (CA), and Frederica Wilson (FL). *Amici* are all currently serving in the One Hundred Twelfth United States Congress.

Amici curiae are dedicated to preserving a consistent, uniform approach to the regulation of immigration in the United States, as required by the Constitution. In particular, *amici* believe that, where Congress has acted, the doctrine of federal preemption prevents states from encroaching upon immigration regulation, an area of law explicitly reserved to the federal government. As Members of Congress, with the authority and responsibility to enact laws governing immigration, *amici* are aware of the importance of consistent enforcement of those laws throughout the United States.

Amici recognize the careful balance that federal immigration legislation strikes between enforcement priorities and humanitarian interests, and are concerned that Arizona S.B. 1070 disrupts that deliberately constructed congressional balance. In the view of *amici*, the issue before the Court is more than merely a legal issue; it is important from a human rights perspective and could have wide-sweeping effects on all minorities living in Arizona and, potentially, throughout the Nation.

SUMMARY OF THE ARGUMENT

Amici curiae urge the Court to affirm the Ninth Circuit's decision because the Framers vested authority in Congress, not the several states, to determine how federal immigration law is enforced. Arizona should not be allowed to usurp Congress's authority through S.B. 1070. As the argument below will show, each of the disputed provisions

of S.B. 1070 directly conflicts with the enactments and intent of Congress on vital issues of national interest. As such, these provisions are preempted by federal law and therefore invalid.

In drafting and passing S.B. 1070, Arizona entirely ignores the fact that Congress has already acted in many of the areas that S.B. 1070 is designed to govern. In so doing, Arizona impermissibly seeks to substitute *its* judgment and *its* priorities for those of Congress.

For example, Congress has legislated that state and local officers may undertake federal immigration-officer functions only under the strict supervision and control of federal agencies. Arizona ignores these limits, demonstrated by the fact that Sections 2(B) and 6 of S.B. 1070 authorize Arizona officers to perform immigration-officer functions, subject to state oversight only.

Additionally, Congress has created a comprehensive national immigrant registration scheme and repeatedly rejected proposals to criminalize mere unlawful presence. Arizona distorts this scheme by adding its own alien registration penalties in Section 3 of S.B. 1070 that, in effect, criminalize unlawful presence in Arizona.

Finally, to deter unauthorized immigration but protect the human rights of all workers and their families, Congress has sanctioned employers for hiring unauthorized workers and consistently declined to focus enforcement measures on workers. Arizona disrupts this carefully constructed balance through Section 5(C) of S.B. 1070, which penalizes undocumented immigrants merely for seeking or performing work.

For these reasons, and those discussed throughout this brief, *amici curiae* respectfully urge this Court to affirm the Ninth Circuit's decision and to hold that Sections 2(B), 3, 5(C), and 6 of S.B. 1070 are preempted by federal law.

ARGUMENT

I. Federal Authority over Immigration and Removal Policy Preempts State Laws that Conflict with Congressional Enactments and Intent.

A. Where Federal Law Exists in a Particular Field, Conflicting State Laws Are Preempted.

Where, as here, Congress has decided to act on specific immigration issues, any state action aimed at those same issues is preempted. *See* U.S. CONST. art. VI, cl. 2 (the "Supremacy Clause").

The Supremacy Clause serves a critical purpose in delineating the relationship between the powers of the federal government and those of the states. The Framers understood that it was vital to cordon off certain areas of law as the province of the federal government in order to ensure consistency throughout the United States with respect to those issues that implicate national interests. As a prime example of an area where the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT," Alexander Hamilton pointed to Article I, Section 8, Clause 4, the

> clause which declares that Congress shall have power 'to establish an UNIFORM RULE of

> naturalization throughout the United States.' This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

THE FEDERALIST No. 32, at 194 (Clinton Rossiter ed., 1961) (emphasis in original). Similarly, James Madison wrote that:

> The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions . . . . The new Constitution has accordingly, with great propriety, made provision against [adverse consequences resulting from such dissimilarity] . . . by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

THE FEDERALIST No. 42, at 265-67. The Framers intended the Constitution's grant of power to Congress to establish a "uniform Rule of Naturalization" to preempt state authority on matters of naturalization and immigration. U.S. CONST. art. I, § 8, cl. 4.

Given this history, it is unsurprising that Congress has legislated heavily in the field of immigration from the earliest days of the Nation. The first national immigration law was the Naturalization Act of 1790, followed by the Alien and Sedition Acts of 1798. *See* 1 Stat. 103; 1 Stat. 566-69. Since 1790, Congress has passed no fewer than ninety laws regulating immigrants and the immigration process in a continuing effort to balance the myriad national interests affected by immigration. *See* IRA J.

KURZBAN, IMMIGRATION LAW SOURCEBOOK, 3-29 (12th ed. 2011).[2] These interests include, *inter alia*, sustaining the United States' unique melting-pot culture and reaping the benefits of diversity, maintaining control over national borders, giving refuge, adhering to treaty obligations respecting human rights, regulating the immigration process, promoting effective foreign policy and diplomatic relations, and advancing national security concerns. *Id.*

The Immigration and Nationality Act ("INA"), as amended, is the most complete embodiment of Congress's policies and priorities for United States immigration. *See* 8 U.S.C. § 1101 *et seq.* As a "comprehensive federal statutory scheme for regulation of immigration and naturalization," *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (internal citations omitted), the INA includes provisions regulating state enforcement of federal immigration laws, *see* 8 U.S.C. § 1357(g), unlawful entry and presence, *see* 8 U.S.C. § 1326, alien registration, *see* 8 U.S.C. § 1301 *et seq.*, and the employment of unlawfully present immigrants, *see* 8 U.S.C. § 1324a.

S.B. 1070, through which Arizona seeks to establish its own rules and enforcement priorities, relates to these same precise areas, conflicts with, and will frustrate both

2. Congress has continuously passed immigration enforcement laws in the last decade and a half following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996). In 2011 alone, Members of Congress proposed over three hundred bills and resolutions relating to the subject of immigration, making clear that Congress continues to exercise its broad powers and responsibility over immigration.

Congress's intent and its enforcement priorities. *See* 2010 Ariz. Sess. Laws, Ch. 113.

This Court has repeatedly held that the Supremacy Clause preempts state laws that act as obstacles to national legislation in the immigration area. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941) (holding that the federal Alien Registration Act of 1940 preempted a Pennsylvania alien registration statute). The Court further made clear in *Takahashi v. Fish & Game Commission* that

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

334 U.S. 410, 419 (1948) (internal citations omitted).

B. Arizona S.B. 1070 Usurps the Authority Vested in Congress.

Arizona enacted S.B. 1070 because it disagreed with congressional immigration priorities and objectives and sought to develop an alternative state legislative scheme for the enforcement of immigration law. Arizona's

governor, Janice Brewer, made clear the state's motives in adopting this law when, upon signing S.B. 1070, she stated:

> The bill I'm about to sign into law — Senate Bill 1070 — represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix . . . . We in Arizona have been more than patient waiting for Washington to act.

Janice K. Brewer, Governor, Statement at the Signing of S.B. 1070 (Apr. 23, 2010), *available at* http://www.azpost.state.az.us/bulletins/eo201009.pdf.

The author of Arizona's immigration law, former Arizona State Senator Russell Pearce, confirmed that a desire to supplant congressional directives was the motivating concern behind S.B. 1070 when he issued a press release stating:

> We are a nation of fifty sovereign U.S. states, not a nation of 50 subservient states to be dictated to by a Big Brother leviathan. When the Supreme Court rules, I expect that Washington will learn an important lesson in its proper role, not just on immigration but in its role in governance . . . . The president can sue every state if he pleases, or he can get out of the way while we do the job Washington won't in protecting our great nation from illegal aliens.

Press Release, Sonoran Alliance, Senator Russell Pearce Predicts Supreme Court Will Uphold SB1070 (Feb. 7, 2012), *available at* http://sonoranalliance.com/tag/russell-pearce/.

This explicit challenge to congressional authority to regulate immigration is further reflected by S.B. 1070's statement of intent:

> The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together 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. Through S.B. 1070, Arizona seeks to establish its own immigration scheme, thereby usurping the constitutional authority vested in Congress.

C. The Preemption Doctrine Invalidates State Laws that Conflict with Congressional Purposes and Objectives.

Under the rules of conflict preemption, where, as here, a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[,]" it is invalid. *Hines*, 312 U.S. at 67. Congressional intent is the "touchstone" in preemption analysis. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 98 (1992). This task requires a court to "look[] to the provisions of the whole [federal] law, and to its object and policy . . . ." *Id.* (quotation omitted). A state law must not interfere with the methods chosen by Congress to achieve its legislative

purposes and objectives. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Courts must examine not only the law's professed purpose, but also determine its effect on the federal scheme. *See Gade*, 505 U.S. at 105.

II. S.B. 1070 Sections 2(B) and 6 Are Preempted.

The Ninth Circuit correctly held that S.B. 1070 Sections 2(B) and 6 (the "stop-and-arrest provisions") are preempted. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011).

A. The Stop-and-Arrest Provisions Conflict with the INA and Specifically with Congressional Intent.

The Arizona stop-and-arrest provisions are invalid because they are fundamentally inconsistent with the INA and with the limited statutory means provided by Congress to allow states to cooperate with the federal government in the area of immigration enforcement. Under the INA, Congress has authorized states and localities to participate in immigration enforcement in only four narrow situations. *See* 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c), and 1357(g)(1)-(9).[3] Specifically, through

3. Under Section 1103(a)(10), if the Attorney General determines that there is an "actual or imminent mass influx of aliens," he is authorized to delegate certain immigration-enforcement powers to state and local officers. Section 1252c authorizes non-federal officers to arrest and detain unlawfully present immigrants who were previously removed due to a felony conviction, but only after obtaining confirmation of their status from the federal government. Similarly, under Section 1324(c), all officers "whose duty it is to enforce criminal laws" may make arrests for violation of provisions related to "bringing in and harboring certain aliens."

Section 1357(g), Congress established a mechanism to allow states to participate in immigration enforcement, but only under federal oversight and control to ensure conformity with federal standards.

The stop-and-arrest provisions require Arizona state and local officers to act as immigration officers.[4] Section 2(B) requires that Arizona officers, without congressionally mandated training and supervision, determine the immigration status of any person they lawfully stop, detain, or arrest and who they have "reasonable suspicion" is in the United States without authorization. S.B. 1070 § 2(B). It also mandates that officers must determine the immigration status of *all* arrestees before they are released. *Id*. Section 6 expands officers' warrantless arrest power to include instances where they have probable cause to believe that immigrants have committed "public offenses" that render them removable under federal law. S.B. 1070 § 6.

As explained below, by authorizing local officers to perform these enforcement functions free from federal oversight, the stop-and-arrest provisions of S.B. 1070 obstruct the full execution and accomplishment of congressional objectives reflected in the INA.

4. *See* discussion *infra* Section II(A)(2), comparing S.B. 1070 §§ 2(B) and 6 *with* 8 U.S.C § 1357, which sets forth the "Powers of Immigration Officers and Employees."

1. The Legislative History of 8 U.S.C. § 1357(g) Demonstrates that Congress Intended State Officers to Perform Immigration-Officer Functions Only with Federal Authorization and Supervision.

The structure and purpose of Section 1357(g) preempts state enforcement of federal immigration law except in the narrow situations provided for by Congress. *See* 8 U.S.C. § 1357(g) (INA Section 287(g)). In 1996, Congress amended 8 U.S.C. § 1357 to permit the Attorney General to deputize state and local officers of jurisdictions seeking to assist the federal government in enforcing immigration laws.[5] 8 U.S.C. § 1357(g)(1)-(9). Section 1357(g)(1)-(9) provides the Attorney General discretion to enter into written agreements (commonly known as "287(g) agreements") with states and localities under which their officers may perform certain immigration-officer functions.[6]

Congress structured Section 1357(g) to condition state participation in immigration enforcement on strict federal supervision, direction, and control. *See* 8 U.S.C. § 1357(g)(1)-(9). To this end, Congress imposed a series of prerequisites for the execution of 287(g) agreements designed to safeguard federal interests. The Attorney

5. IIRIRA § 133 ("Acceptance of State Services to Carry Out Immigration Enforcement"). At that time, IIRIRA was still the Immigration Control and Financial Responsibility Act, its original name. 142 CONG. REC. H2378, H2444 (daily ed. Mar. 19, 1996).

6. In 2003, Congress amended the INA to transfer this responsibility to the Department of Homeland Security ("DHS"). Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, Div. L, § 105, 117 Stat. 11, 531 (2003).

General must set forth which immigration-officer functions the participating state or local officer may perform and for how long the officer is authorized to perform such functions. Further, the Attorney General is required to "supervise and direct" the performance of such functions. *Id.* § 1357(g)(5). Additionally, Section 1357(g) requires that participating officers "have knowledge of, and adhere to, Federal law relating" to any immigration-officer function they perform and the 287(g) agreement must certify that the officers "have received adequate training regarding the enforcement of relevant Federal immigration laws." *Id.* § 1357(g)(2).

Through creation of the 287(g) program, Congress made patently clear its intent that the federal government must direct all cooperative immigration enforcement efforts. *See Int'l Paper Co.*, 479 U.S. at 494 (explaining that state laws must not interfere with congressional methods). The legislative history of IIRIRA, including the statements of its principal Senate and House authors, demonstrates that the 287(g) program was developed because of concern that states could not enforce federal immigration laws within their borders:[7]

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7. Like the states, Congress understood that local law enforcement lacked inherent enforcement power and could wield only as much authority as permitted by the federal government. *See, e.g.*, 142 Cong. Rec. H2475, H2476 (daily ed. Mar. 20, 1996) (statement of Rep. Latham) ("There is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case."); *id.* at H2477 (statement of Rep. Doolittle) ("All the local law enforcement can do is call up the INS and notify them that they have observed [an unlawfully present immigrant with a criminal background] in the area and say where they saw him, and that is it.").

> Senator Charles Grassley of Iowa: "I wrote this law . . . . because our borders were not secure and local law enforcement didn't have the power to arrest and detain [an unlawfully present immigrant until he committed a violent crime]." Letter from Charles Grassley, Senator, to Janet Napolitano, Secretary of the Department of Homeland Security (July 14, 2009), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=21811 [hereinafter Grassley Letter].
>
> Representative Lamar Smith of Texas: "The [287(g)] program was created to *let* State and local law enforcement officials help enforce all immigration laws" and "*assist* in the investigation, apprehension, and detention of illegal aliens." *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws Before the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (emphasis added).

But Congress expressly conditioned this "assistance" on direct federal supervision and control of any immigration-officer functions performed by state and local officers. This safeguard is critical in ensuring that all officers enforcing immigration law act in furtherance of Congress's decisions regarding how to protect and advance the myriad national interests affected by immigration.[8] On March 19, 1996,

8. Among many other protections, participating officers in 287(g) agreements must successfully complete a training program run by Immigration and Customs Enforcement ("ICE")

upon introduction of Section 1357(g), Representative Xavier Becerra of California immediately raised concern over state and local officers enforcing immigration law:

> I would say that when you start allowing local law enforcement to go out there and seek out people who may be undocumented, or who may have questionable immigration status, what you are doing is asking them to perform the work of immigration or Border Patrol officers. If they are going to go through the whole training that a Border Patrol officer goes through, that is something different, and perhaps we could discuss it then, but I see nothing in this amendment that would provide for that, and what it does for me is cause a great deal of concern that *what we are doing is extending the reach of the Federal Government without*

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covering critical subjects such as "the scope of immigration officer authority," "relevant immigration law," "the ICE Use of Force Policy," and "civil rights laws." *See* City of Phoenix Police Dep't 287(g) Memorandum of Agreement, 18-19 (Mar. 10, 2008) [hereinafter Phoenix 287(g) Agreement], *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreement Understanding/r_287gphoenixpd101509.pdf; *see also* 8 U.S.C. § 1357(g)(2). Further, to advance national security interests, they must prioritize arrest and detention of immigrants who pose the greatest threat of harm to society, based on a mandate given by Congress to DHS in federal appropriation bills. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, tit. II, 123 Stat. 2149 (2009); Department of Homeland Security Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, tit. II, 122 Stat. 3659 (2008); Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, Div. B, tit. I, § 1101(a)(3), 125 Stat. 102 (2011); Phoenix 287(g) Agreement, 18-24.

> *extending the protections that should be there with it.*

142 CONG. REC. H2378, H2445 (emphasis added).

Representative Christopher Cox of California, one of the principal co-authors of Section 1357(g), responded:

> I note in response to my colleague from California's concerns that the Attorney General will enter into agreements with States requiring *ongoing Federal supervision of these efforts so that everything will be conducted under the watch of the INS and the Attorney General in conformity with Federal standards.*

Id. (emphasis added). Where, as here, the "legislative history of the Act indicates that Congress was trying to steer a middle path" to balance competing interests, a state law that disrupts that balance is preempted. *See Hines*, 312 U.S. at 73-74.

2. The Stop-and-Arrest Provisions Impermissibly Authorize Arizona Officers to Perform Functions They Can Undertake Only as Permitted by Congress.

In contravention of Congress's clear intent, the stop-and-arrest provisions allow state and local officers to perform certain immigration-officer functions without appropriate training, and entirely free from federal supervision and control. Indeed, these provisions vest Arizona officers with powers substantially similar to those they have under the state's existing 287(g) agreements. As

such, these provisions are preempted. *See Gade*, 505 U.S. at 107 ("[P]reemption analysis cannot ignore the effect of the challenged state action . . . .").[9]

As explained above, under 287(g) agreements, state and local officers may only perform immigration-officer functions after DHS is satisfied that they have been trained properly and will correctly prioritize federal enforcement goals.[10] By contrast, an officer performing substantially similar functions under S.B. 1070 is not required to complete any federal training programs with respect to federal immigration laws or to consider federal priorities when performing immigration-officer functions. *See* S.B. 1070 §§ 2(B), 6. The risk that an untrained and unsupervised officer will simply choose to detain people who strike him or her as "foreign" is as obvious as it is enormous.

In addition to allowing officers without appropriate training in immigration law to perform immigration-enforcement functions, S.B. 1070 allows Arizona state and local officers to avoid congressionally mandated federal oversight. For example, under Section 2(B), any Phoenix police officer with "reasonable suspicion" that a person stopped, arrested, or detained is unlawfully present in the

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9. *See generally Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 285-86 (1971) ("The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.").

10. *See supra* note 8, at 14-15; Phoenix 287(g) Agreement, 18-24.

United States must determine that person's immigration status. S.B. 1070 § 2(B). In creating this requirement, S.B. 1070 seeks to evade the federal oversight required by the Phoenix Police Department's existing 287(g) agreement, which provides that a federally deputized local officer may "interview any person reasonably believed to be an alien about his right to be or remain in the United States," but may do so only after "obtain[ing] approval from an ICE supervisor." *See* Phoenix 287(g) Agreement, 20; *see generally* 8 U.S.C. § 1357(a)(1) (providing that immigration officers have warrantless authority to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States").

Under S.B. 1070 Section 6, any Phoenix officer may make a warrantless arrest if he has probable cause to believe the arrestee has committed a removable "public offense." S.B. 1070 § 6.[11] Similarly, under the 287(g) agreement, a participating local officer has the authority "to arrest without warrant for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens . . . ." *See* Phoenix 287(g) Agreement, 20; *see also* 8 U.S.C. § 1357(a)(4) (power of immigration officers to make warrantless arrests based on commission of removable felonies). Under both

11. Arizona law defines a public offense as "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state." Ariz. Rev. Stat. Ann. § 13-105(27) (2011).

Section 6 and the 287(g) agreement, Phoenix officers can make a warrantless arrest based on a removability determination.[12] But under Section 6, the officer is acting absent the necessary federal authority to do so.

Accordingly, the stop-and-arrest provisions pose an obstacle to the full execution and accomplishment of federal objectives. *See Hines*, 312 U.S. at 67.

B. 8 U.S.C. §§ 1357(g)(10) and 1373(c) Do Not Save the Stop-and-Arrest Provisions from Preemption.

Arizona cannot save S.B. 1070 §§ 2(B) and 6 from preemption by arguing that because 8 U.S.C. §§ 1357(g)(10) and 1373(c) "place an affirmative obligation on federal authorities to respond to state law enforcement officers . . . . any serious effort to conclude that federal law preempts Section 2(B)" should be "doom[ed.]" Brief of Petitioner-Appellant at 33, *Arizona v. United States*, No. 11-182 (U.S. Feb. 6, 2012) [hereinafter Petitioner Brief]. Arizona's interpretation would render Section 1357(g)(1)-(9) superfluous.[13] *See Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same

12. As Justice Alito observed in his concurrence in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010), "providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex."

13. Section 1357(g)(1)-(9) provides and sets the minimum requirements for agreements under the 287(g) program. *See* 8 U.S.C. § 1357(g)(1)-(9).

enactment."). Under Arizona's flawed reading, Sections 1357(g)(10) and 1373(c) provide a vehicle for states and localities to avoid the constraints Congress purposefully built into the 287(g) program and give them unfettered, independent authority to enforce federal immigration law. That is not what Congress intended, and it is not how these provisions should be construed. *See Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 226 U.S. 384, 389 (1912) (explaining that provisions passed as "part of the same act" and "at the same time" must be construed as "intended not to conflict but to be in accord").

Contrary to Arizona's assertion, Section 1357(g)(10) is not a "savings clause" for state immigration enforcement authority. *See* Petitioner Brief at 32. Section 1357(g)(10) merely states that a 287(g) agreement is not required for states and localities "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 "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal" of unlawfully present immigrants. *See* 8 U.S.C. § 1357(g)(10).

As an initial matter, the provision's Senate author has not treated Section 1357(g)(10) as a savings clause. To the contrary, in a 2009 letter to DHS, Senator Grassley explained that a reduction in the responsibilities delegated by DHS to state and local officers under 287(g) agreements "may *preclude* local law enforcement from apprehending illegal aliens who they encounter in the course of their normal duties." *See* Grassley Letter, *supra* at 14 (emphasis added). If another subsection of the law he

authored permitted the states to authorize such activity independently of the 287(g) program, Senator Grassley would have had no reason to express such concern. *See id.*

Read reasonably, Section 1357(g)(10) reflects congressional intent, demonstrated by other INA provisions,[14] that the federal government maintain discretion outside the 287(g) program to utilize state and local resources to enforce immigration law. *See* 8 U.S.C. § 1357(g)(10). Along with Section 1357(g)(1)-(9), this provision was introduced as part of a congressional enactment entitled "Acceptance of State Services to Carry Out Immigration Enforcement" — it cannot be construed to give states an independent grant of enforcement authority. Accordingly, Section 1357(g)(10) does not permit Arizona to provide assistance that the federal government has neither invited nor accepted.[15]

By contrast, Arizona's interpretation of Section 1357(g)(10) gives no meaning and effect to Section 1357(g)(1)-(9). As explained above, Congress created and structured the 287(g) program to permit state and local officers to perform immigration-officer functions, but only with federal authorization and supervision. *See supra* at 12-16. Arizona, however, construes Section 1357(g)(10) to

14. *See, e.g.*, 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c).

15. Indeed, the Department of Homeland Security "has invited and accepted the assistance of state and local law enforcement personnel in a variety of contexts" other than the 287(g) program. *See Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (Sept. 21, 2011), DHS, *available at* http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf.

allow its officers to perform similar functions, subject to no such limitations. *See* Petitioner Brief at 33. Therefore, Arizona seeks to make the prerequisites Congress clearly set forth in Section 1357(g)(1)-(9) entirely optional, undermining the express intent that they be mandatory. *See United States v. Raynor*, 302 U.S. 540, 547 (1938) ("A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."); *supra* at 15-16 (statements by Reps. Becerra and Cox).

Arizona's further assertion that Section 1373(c) "expressly reserve[s] to the States the authority exercised by Arizona in Section 2(B)" is similarly flawed. Petitioner Brief at 34. Section 1373(c), enacted simultaneously with Section 1357(g), requires that ICE respond to federal, state, or local agency requests to verify citizenship or immigration status for any lawful purpose. *See* 8 U.S.C. § 1373(c).[16] This provision simply ensures the proper flow of information to the extent authorized by law. *See id*. It cannot logically reserve to states and localities powers that Congress recognized that they do not have except as authorized by federal law. *See supra* at 14 (statements by Sen. Grassley and Rep. Smith); *see also supra* note 7, at 13. Nor does it purport to do so. Under well-established statutory interpretation principles, Section 1373(c) cannot be read in isolation to change the terms of and defy the congressional intent behind one of its companion provisions, Section 1357(g). *See Wood*, 226 U.S. at 389.

16. Section 1373 addresses requests to the Immigration and Naturalization Service ("INS"); however, the INS functions governed by this provision are now performed by ICE.

Accordingly, this Court should affirm the Ninth Circuit's decision to enjoin S.B. 1070 Sections 2(B) and 6.

III. Sections 3 and 5(C) of S.B. 1070 Are Preempted.

The Ninth Circuit also correctly held that S.B. 1070 Sections 3 and 5(C) (the "criminal provisions") are preempted. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011).

A. S.B. 1070 Section 3 Is Preempted Because Congress Enacted a Comprehensive Scheme for Immigration Registration and Declined to Criminalize Unlawful Presence.

This Court has already considered and rejected state attempts to enact their own alien registration schemes. In *Hines*, the Court concluded:

> [W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

312 U.S. at 66-67. The INA establishes a comprehensive, congressionally enacted registration scheme. *See* 8 U.S.C. § 1301 *et seq.* In attempting to supplement and modify that scheme, S.B. 1070 conflicts with federal law and ignores the priorities established by Congress and, therefore, is preempted. First, Section 3 improperly

supplements the federal scheme because it imposes state criminal penalties for violation of two federal immigrant registration provisions, 8 U.S.C. §§ 1304(e) and 1306(a). S.B. 1070 § 3.[17] Second, Section 3 modifies Sections 1304(e) and 1306(a) because it essentially criminalizes unlawful presence[18] even though Congress has repeatedly considered and rejected legislation that would do so. *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.") (emphasis in original). By criminalizing unlawful presence in the United States,

17. Under 8 U.S.C. § 1306(a), it is a misdemeanor offense for any immigrant who must apply for registration and be fingerprinted to willfully fail or refuse to comply with this requirement. It is also a misdemeanor offense under 8 U.S.C. § 1304(e) for any immigrant over the age of 18 to fail to carry and possess "any certificate of alien registration or alien registration receipt issued to him . . . ."

18. Under federal law, any immigrant who violates the registration laws is criminally liable, regardless of whether he is lawfully or unlawfully present. *See* 8 U.S.C. §§ 1304(e) and 1306(a). However, Section 3's criminal penalties for violating the same provisions are applicable only to unlawfully present immigrants. Because, by definition, unlawfully present immigrants neither register with the federal government nor possess documents verifying their immigration status, they cannot possibly comply with Section 3. Therefore, Section 3's practical effect is to criminalize unlawful presence itself. *See Gade*, 505 U.S. at 105 ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").

Arizona does what Congress explicitly decided not to do.[19] *Compare* S.B. 1070 § 3 *with* Michael John Garcia, Cong. Research Serv., RS22413, Criminalizing Unlawful Presence: Selected Issues 2-3 (2006) [hereinafter CRS Report] (listing unsuccessful proposals made in the 109th Congress to criminalize unlawful presence).

B. S.B. 1070 Section 5(C) Is Preempted Because It Conflicts with Congressional Intent Not to Penalize Unauthorized Immigrants for Seeking or Performing Work.

Section 5(C) subjects unlawfully present immigrants to criminal liability for knowingly applying for, soliciting, or performing work in Arizona. S.B. 1070 § 5(C). This provision is preempted because Congress has explicitly considered and declined to sanction unlawfully present immigrants for seeking or performing work and, instead, has elected to focus enforcement efforts on employers who knowingly hire unlawfully present immigrants.[20] *See Hines*, 312 U.S. at 73-74 (where Congress decides to regulate an area of immigration, and "[t]he legislative history of the Act indicates that Congress was trying to

19. The INA imposes criminal penalties for unlawful presence when an immigrant is found in the United States after having left pursuant to a removal order. *See* 8 U.S.C. § 1326. Otherwise, only civil penalties are applicable, namely, removal proceedings. *See* CRS Report, 1 ("Although unlawful entry into the United States is both a criminal offense and a ground for removal, unlawful presence is only a ground for deportation and is not subject to criminal penalty, except when an alien is present in the United States after having been removed.").

20. *See* Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, tit. I, 100 Stat. 3359 (1986).

steer a middle path" to balance competing interests in doing so, state laws that disrupt that balance are invalid).

In enacting IRCA, "[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals. Instead, it deliberately adopted sanctions with respect to the *employer* only." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990) (emphasis in original and internal citations omitted), *rev'd on other grounds*, 502 U.S. 183 (1991); *see generally* 8 U.S.C. § 1324a ("Unlawful Employment of Aliens").[21] Again, the Court should not permit Arizona to do what Congress explicitly considered and rejected.

The legislative history of IRCA confirms that, in deciding to focus enforcement efforts on employers, Congress considered the human rights of workers and their families when it struck a careful balance between the interests of deterring undocumented immigration and concern for the undocumented immigrant population:

> Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.

21. Although immigrants can be subject to criminal penalties under the INA for making certain false statements or attestations as well as for other fraudulent acts made in the course of seeking employment, *see* 8 U.S.C. § 1324a(b), the acts of seeking or performing work are not penalized.

H.R. Rep. No. 99-682, pt. I at 46 (1986); *see also Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong. 59 (1985) (statement of Sen. Simpson, Chairman, S. Comm. on the Judiciary) ("[I]t was my thought, and the thought of the Select Commission, we ought to try the most humane [way] first, which is to reduce the magnet of jobs."). Congress here considered that even people who are undocumented need to eat, and feed their families, and live. It considered their basic human rights, and the Court should not permit Arizona to abrogate those rights. Indeed, Congress's decision was consistent with its longstanding resistance to sanctioning unlawfully present immigrants solely for seeking or obtaining work, and it must be given preemptive effect.[22] Arizona should not be allowed to upset this carefully constructed balance and to undermine federal immigration enforcement priorities by turning enforcement efforts on unlawfully present immigrants who apply for, solicit, or perform work in Arizona.

The Ninth Circuit's decision to enjoin Sections 3 and 5(C) of S.B. 1070 should be affirmed.

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22. *See, e.g.,* 118 CONG. REC. H30153, H30155 (daily ed. Sept. 12, 1972) (statement of Rep. Rodino, Chairman, H. Comm. on the Judiciary) ("[W]e have avoided imposing any additional criminal sanctions on the alien who enters illegally and obtains employment, or on the non-immigrant who accepts unauthorized employment in violation of his status.").

CONCLUSION

For the foregoing reasons, *amici curiae* join Respondent in respectfully requesting that the Ninth Circuit's opinion be affirmed.

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