No. 11-182

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Arizona's state immigration-enforcement scheme, S.B. 1070, expressly makes "attrition through enforcement the public policy of all state and local government agencies in Arizona." The district court preliminarily enjoined four provisions of S.B. 1070 as likely preempted by federal law, and the court of appeals affirmed. The questions presented are:

1. Whether Section 3 of S.B. 1070, which creates a state-law crime of being unlawfully present in the United States and failing to register with the federal government, is likely preempted by federal law, which comprehensively regulates alien registration.

2. Whether Section 5, which creates a state-law crime of seeking work or working while not authorized to do so, is likely preempted by federal law, which imposes civil and criminal penalties on employers who knowingly employ unauthorized aliens but only civil sanctions on aliens who work without authorization.

3. Whether Section 2, which requires state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained without regard to federal enforcement priorities, is likely preempted by federal law, which requires state immigration enforcement efforts to be cooperative with federal officials and consistent with federal priorities.

4. Whether Section 6, which authorizes warrantless arrests of aliens believed to be removable, is likely preempted by federal law, which requires state immigration enforcement efforts to be cooperative with federal officials and consistent with federal priorities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-115a) is reported at 641 F.3d 339. The opinion of the district court (Pet. App. 116a-169a) is reported at 703 F. Supp. 2d 980.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2011. On June 30, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 10, 2011, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 12, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. The Comprehensive Federal Immigration Framework

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, established a comprehensive federal statutory regime for the regulation of immigration and naturalization. The Attorney General and the Secretary of Homeland Security (Secretary) principally administer that regime.

1. The INA includes a comprehensive scheme for the registration of aliens in the United States. Subject to certain exceptions, aliens are required to register upon (or before) entering the United States. See 8 U.S.C. 1201(b), 1301-1306; 8 C.F.R. Pt. 264. An alien is given a registration document "in such form and manner and at such times as shall be prescribed under regulations issued by the [Secretary]."[1] 8 U.S.C. 1304(d). Willful failure to register as required, or (for adults) failure to carry a registration document after receiving it, is a federal misdemeanor. 8 U.S.C. 1306(a), 1304(e).[2]

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[1] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security (DHS). Some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

[2] Some aliens (such as those traveling pursuant to electronic authorization under the Visa Waiver Program) never receive a written certificate of alien registration. J.A. 49. Other aliens who pursue particular immigration benefits (such as asylum) from within the United States do not formally register until that application is granted, unless they also seek and obtain employment authorization while the application is pending. See J.A. 40-48.

2. An alien also commits a federal misdemeanor if he unlawfully enters the United States (such as by eluding immigration inspectors). 8 U.S.C. 1325. Unlawful reentry after removal, a more serious crime, is a federal felony. 8 U.S.C. 1326. An alien who is merely present in the country without federal authorization is not subject to criminal prosecution, but only to civil removal and detention in aid of removal. See 8 U.S.C. 1182(a)(6)(A)(i), 1226, 1227(a)(1)(A)-(B).

Formal removal proceedings are conducted in federal immigration court, a specialized tribunal. With limited exceptions,[3] they are the "sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." 8 U.S.C. 1229a(a)(3). Only federal officials acting on behalf of the Secretary may initiate such proceedings. 8 C.F.R. 239.1(a). The INA establishes the grounds on which an alien may be ordered removed. See 8 U.S.C. 1182(a), 1227(a) (2006 & Supp. IV 2010). It also gives the Executive Branch discretion to grant various forms of relief from removal, up to and including permanent cancellation of removal and adjustment to lawful-permanent-resident status. See, *e.g.*, 8 U.S.C. 1229b(a)-(b), 1255 (2006 & Supp. IV 2010).

3. Congress has authorized the Secretary to prescribe which classes of aliens are authorized to work in the United States. 8 U.S.C. 1324a(h)(3). To discourage illegal immigration, federal law prohibits employers from knowingly hiring or continuing to employ aliens who are not authorized to work, and requires employers to verify new employees' work eligibility at the time of hiring. 8 U.S.C. 1324a(a) and (b). Employers who vio-

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[3] See, *e.g.*, 8 U.S.C. 1225(b)(1)(A), 1228(b) (providing for expedited removal for, *e.g.*, certain arriving aliens and criminal aliens).

late those prohibitions face a range of civil and criminal penalties. By contrast, federal law does not impose criminal penalties on unauthorized workers for the mere act of seeking or performing work; document fraud and similar acts carry criminal penalties, but unauthorized work triggers only civil sanctions, such as removal.

4. a. Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2012, Pub. L. No. 112-74, Div. D, Tit. II, 125 Stat. 950 (2011).[4] Consistent with that directive, U.S. Immigration and Customs Enforcement (ICE) has made its highest priority an area that petitioners also emphasize (Br. 3-6): "aliens who pose a danger to national security or a risk to public safety," including aliens engaged in or suspected of terrorism and aliens convicted of criminal activity. J.A. 108. ICE also has focused on dismantling large organizations that smuggle aliens and contraband, which "tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and weapons." J.A. 106.[5]

As part of its emphasis on removing criminal aliens, ICE has adopted an initiative known as "Secure Communities" to ensure rapid identification of removable aliens who are arrested on criminal charges. Local law-enforcement agencies share arrestees' fingerprints with

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[4] Accord, *e.g.*, Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Tit. II, 123 Stat. 2142 (2009) (same); Department of Homeland Security Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 (2008) (same).

[5] During an average day, ICE officers remove from the United States approximately 900 aliens. Approximately half of those aliens are persons who had committed crimes. J.A. 102.

the FBI for criminal record checks; under Secure Communities, that information is shared with DHS. ICE uses the information to identify arrestees who are unlawfully present or otherwise removable. ICE, *Secure Communities*, http://www.ice.gov/secure_communities (last visited Mar. 18, 2012). Secure Communities is already online in 75% of local jurisdictions, including every county in Arizona,[6] and ICE estimates that it will have deployed Secure Communities nationwide in Fiscal Year 2013.

b. ICE additionally focuses on "maintain[ing] control at the border" by giving priority to detaining and removing recent illegal entrants. J.A. 108-109. Other priorities include locating and removing fugitives who have failed to comply with final orders of removal. *Ibid.* In contrast, "[a]liens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority." J.A. 109.

In furtherance of DHS's emphasis on border control, "ICE has devoted substantial resources to increasing border security," particularly in the Southwest. J.A. 103. Approximately one-quarter of all ICE special agents are stationed in that region, including more than 350 in Arizona, and Arizona also has a substantial number of federal attorneys assigned to removal cases. J.A. 103-104.

Approximately 4000 Border Patrol agents were stationed along the border in Arizona between ports of entry as of May 2010. That number reflects a more than 40% increase over the number of agents stationed there

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[6] ICE, *Activated Jurisdictions* (Mar. 6, 2012), http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf.

five years earlier. J.A. 73. Their efforts are supplemented by nearly 40 DHS aircraft based in Arizona and crewed by Arizona-based Air Interdiction Agents. J.A. 75. The federal government has also erected approximately 305.7 miles of border fence in Arizona. J.A. 74. Over the last five years, Border Patrol apprehensions in that area have substantially decreased. J.A. 77-78. Furthermore, at the six land ports of entry within Arizona, thousands of people each year are determined to be inadmissible or withdraw their applications for admission. J.A. 71.

5. a. Federal immigration laws contemplate several ways in which state and local officers may cooperate with federal officials in federal enforcement of the INA. State and local law-enforcement officers are expressly authorized to make arrests for violations of the INA's prohibition against smuggling, transporting, or harboring aliens. See 8 U.S.C. 1324(c). Similarly, state and local officers may (if authorized by state law) arrest and detain an alien who is illegally present in the United States, was previously convicted of a felony in the United States, and then departed or was deported. 8 U.S.C. 1252c. That express authority is conditioned, however, on receiving prior confirmation from federal immigration officials of the target's status, and detention may extend no longer than necessary for federal officers to take the alien into custody for purposes of removal proceedings. In addition, if the Secretary determines that an actual or imminent mass influx of aliens presents urgent circumstances requiring an immediate federal response, she may authorize any state or local officer (with the permission of the officer's agency) to exercise the authority of federal immigration officers. See 8 U.S.C. 1103(a)(10).

b. Congress has also authorized DHS to enter into formal cooperative agreements with States and localities. Under these "287(g) agreements,"[7] appropriately trained and qualified state and local officers may perform specified functions of a federal immigration officer in relation to the investigation, apprehension, or detention of aliens. 8 U.S.C. 1357(g)(1)-(9). The state officers' activities under these agreements "shall be subject to the direction and supervision of the [Secretary]." 8 U.S.C. 1357(g)(3).

The INA further provides, however, that a formal, written agreement is not required for state and local officers to "cooperate with the [Secretary]" in certain respects. 8 U.S.C. 1357(g)(10). Specifically, even without a formal agreement, state and local officers are able to "communicate with the [Secretary] regarding the immigration status of any individual," or "otherwise to cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Ibid*.

Consistent with that provision, DHS has invited, and receives, assistance in a variety of contexts from state and local law-enforcement personnel without a 287(g) agreement. See DHS, *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (Sept. 21, 2011) (*DHS Guidance*), http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf. Arizona participates in several such cooperative law-enforcement programs, including the Alliance to Combat Transnational Threats, which seeks "to disrupt and dismantle violent cross-border criminal organizations that have a

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[7] 8 U.S.C. 1357(g) is Section 287(g) of the INA.

negative impact on the lives of the people on both sides of the border." J.A. 105.

c. To enhance communications, Congress has provided for the reciprocal exchange of information between the federal government and States and localities. 8 U.S.C. 1373. Subsections (a) and (b) prevent States and localities from enacting laws or policies that "prohibit[] or in any way restrict" the ability of state and local officers to cooperate with federal officials by sending and receiving information concerning an individual's immigration status. Subsection (c) provides, in turn, that DHS "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." To facilitate responses to such inquiries, DHS has established the Law Enforcement Support Center (LESC), to respond to inquiries around the clock. J.A. 91.

B. Arizona's S.B. 1070

This case involves four provisions of S.B. 1070, 2010 Ariz. Sess. Laws, Ch. 113.[8] The law's statement of purpose declares that S.B. 1070 was enacted to make "attrition through enforcement the public policy of all state and local government agencies in Arizona." § 1, Ariz. Rev. Stat. Ann. § 11-1051 note ("Intent"). In furtherance of that state policy, any state or local official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws

[8] All references to provisions of S.B. 1070 are to the law as amended shortly after adoption. Except as noted, references to the Arizona Revised Statutes Annotated are to the 2011 supplement.

* * * to less than the full extent permitted by federal law" is subject to civil penalties of up to $5000 per day. *Id.* § 2, Ariz. Rev. Stat. Ann. § 11-1051(H). Any legal resident of Arizona may bring a lawsuit to enforce these penalties. *Ibid.*

S.B. 1070's provisions are expressly designed to "work together" to deter the unauthorized entry, presence, and economic activity of aliens in the United States. S.B. 1070, § 1. Two of the provisions at issue—Sections 3 and 5—create new state crimes, and the others—Sections 2 and 6—impose requirements on Arizona law-enforcement officers to verify immigration status and provide arrest authority.

1. *Criminal provisions.* Section 3, Ariz. Rev. Stat. Ann. § 13-1509, makes it a state crime to violate the federal alien-registration statutes, see p. 2, *supra.* The state crime "does not apply to a person who maintains authorization from the federal government to remain in the United States." *Id.* § 13-1509(F).

Violation of Section 3 is a misdemeanor punishable by 20 days of imprisonment for a first violation and 30 days for a subsequent violation, or by a fine. Ariz. Rev. Stat. Ann. § 13-1509(H). Section 3 appears to make those penalties mandatory: a person sentenced under Section 3 "is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by [work-release and furlough statutes] until the sentence imposed by the court has been served," minus good-conduct time. *Id.* § 13-1509(D).

The relevant provision of Section 5, Ariz. Rev. Stat. Ann. § 13-2928(C),[9] makes it a state crime for any "un-

[9] All references to "Section 5" are to that subdivision.

authorized alien" who is unlawfully present in the United States to apply for, publicly solicit, or perform work as an employee or independent contractor.[10] Violation of Section 5 is a misdemeanor punishable by up to six months of incarceration, a $2500 fine, and three years of probation. *Id.* § 13-2928(F); see *id.* §§ 13-707(A)(1) (2010), 13-802(A) (2010), 13-902(A)(5).

2. *Stop and arrest provisions.* The relevant provision of Section 2, Ariz. Rev. Stat. Ann. § 11-1051(B), imposes two mandatory duties on all state and local law-enforcement officers in Arizona. First, whenever "practicable," an officer must determine the immigration status of any individual who is stopped or detained if there is reasonable suspicion that the person is an alien and "unlawfully present in the United States," unless doing so would hinder or obstruct an investigation. Second, a law-enforcement officer must determine the immigration status of anyone who is arrested before he is released.

Section 6, Ariz. Rev. Stat. Ann. § 13-3883(A)(5), authorizes an Arizona officer to arrest without a warrant any person whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States."

C. Four Provisions Of S.B. 1070 Are Enjoined

1. The United States filed this action to enjoin several provisions of S.B. 1070 as preempted by federal law, Pet. App. 170a-204a, and sought a preliminary injunction. The district court declined to enjoin certain parts of S.B. 1070, but preliminarily enjoined the portions of

[10] An "[u]nauthorized alien" is an alien not authorized "under federal law to work in the United States." Ariz. Rev. Stat. Ann. § 13-2928(G)(2) (citing 8 U.S.C. 1324a(h)(3)).

Sections 2, 3, 5, and 6 discussed above, as likely preempted by federal law. *Id.* at 116a-169a.

The court held that Section 3 impermissibly creates an Arizona-specific "supplement" to "the uniform," "complete," and "comprehensive federal alien registration scheme." Pet. App. 149a-150a. The court further held that Section 5 is likely preempted by the INA's comprehensive scheme of employment regulation, which does not criminalize seeking work. *Id.* at 151a-156a.

The court also held that mandatory verification of federal immigration status under Section 2 would divert federal resources from implementation of federal priorities and burden lawfully present aliens. Pet. App. 146a. The court further held that Section 6, which would require state officers to make complex judgments about whether an alien will be found removable under federal law, burdens lawfully present aliens by exposing them to wrongful warrantless arrest. *Id.* at 165a.

Finally, the court found that the United States had established likely irreparable injury to its "ability to enforce its policies and achieve its objectives" regarding the national immigration laws, and that the other equitable factors supported preliminary injunctive relief. Pet. App. 165a-168a.

2. The court of appeals affirmed, concluding that the district court did not abuse its discretion. Pet. App. 1a-115a.

a. The court unanimously held that the criminal provisions of Sections 3 and 5 are likely preempted. The court first concluded that Section 3's state-law crime of failure to register is incompatible with the INA, under this Court's decision in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). Pet. App. 29a-30a.

The court also unanimously concluded that Section 5 conflicts with Congress's comprehensive and "complex scheme to discourage the employment of unauthorized immigrants—primarily by penalizing employers who knowingly or negligently hire them." Pet. App. 35a. Congress declined to impose criminal penalties on unauthorized aliens who work or seek work, and it imposed only civil immigration consequences for working without authorization (and criminal penalties for fraud); Arizona's "criminalization of work," the court of appeals concluded, was likely preempted as "a substantial departure" from Congress's approach. *Id.* at 39a, 40a.

b. By a divided vote, the court concluded that the stop and arrest provisions of Sections 2 and 6 likely are also preempted.

The court explained that 8 U.S.C. 1357(g)(10), which authorizes state and local officers to "cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present" even in the absence of a written agreement, "does not permit states to * * * systematically enforce the INA in a manner dictated by state law." Pet. App. 15a. The court concluded that Section 2's mandatory directive to verify the immigration status of anyone stopped and suspected of being unlawfully present "attempt[s] to hijack a discretionary role that Congress delegated to the Executive" in enforcing the INA. *Id.* at 22a. The court noted that the enactment of Section 2 "has had a deleterious effect on the United States' foreign relations," *ibid.*, thereby "thwart[ing] the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." *Id.* at 26a.

Finally, the court concluded that Section 6's new grant of warrantless arrest authority is likely pre-

empted, because it exceeds the "circumstances in which Congress has allowed state and local officers to arrest immigrants." Pet. App. 44a-45a. The court held that States lack inherent authority to enforce civil immigration laws and that Section 6 both exceeds the scope of congressionally authorized cooperation and interferes with federal prerogatives. *Id.* at 45a-53a.[11]

c. Judge Noonan joined the court's opinion and also filed a separate concurring opinion to "emphasize the intent of [S.B. 1070] and its incompatibility with federal foreign policy." Pet. App. 55a. He explained that the provisions of S.B. 1070 were intended to work together to effectuate Arizona's goal of "attrition through enforcement," and that it would be "difficult to set out more explicitly the policy of a state in regard to aliens unlawfully present not only in the state but in the United States." *Id.* at 56a.

d. Judge Bea concurred in affirming the preliminary injunction with respect to Sections 3 and 5 but would have reversed the injunction with respect to Sections 2 and 6. Pet. App. 66a-114a.

SUMMARY OF ARGUMENT

I. Under the Constitution, the National Government has plenary authority to admit aliens to this country, to prescribe the terms under which they may remain, and if necessary, to remove them. Because those decisions involve other countries' citizens, they necessarily implicate "important and delicate" considerations of foreign policy. *Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941). As the Framers understood, it is the National Government

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[11] The court of appeals also concluded that the government had established the other requisites for granting a preliminary injunction. Pet. App. 54a. Petitioners do not challenge that conclusion.

that has ultimate responsibility to regulate the treatment of aliens while on American soil, because it is the Nation as a whole—not any single State—that must respond to the international consequences of such treatment.

In the INA, Congress vested the Executive Branch with the authority and the discretion to make sensitive judgments with respect to aliens, balancing the numerous considerations involved: national security, law enforcement, foreign policy, humanitarian considerations, and the rights of law-abiding citizens and aliens. The Executive Branch has considerable statutory discretion to decide who may enter and who must leave; who must register while in the country, with whom, and under what conditions, and what punishment to seek for a violation; who may work while here; and when an alien is subject to removal, what considerations might justify allowing her to remain at liberty temporarily, or even to remain in the country permanently. Discretion is a necessary part of many statutory enforcement schemes, but the need for that discretion is especially strong in the area of immigration. The decision to admit, detain, or remove a particular alien depends not only on resource constraints, but on numerous other considerations that call for a decisionmaker to exercise sound judgment on behalf of the Nation as a whole, according to a single standard. The INA assigns the Executive Branch that function.

In S.B. 1070, Arizona seeks to interpose its own judgments on those sensitive subjects. Arizona has adopted its own immigration policy, which focuses solely on maximum enforcement and pays no heed to the multifaceted judgments that the INA provides for the Executive Branch to make. For each State, and each locality, to

set its own immigration policy in that fashion would wholly subvert Congress's goal: a single, national approach.

Each provision of S.B. 1070 at issue here is preempted.

II. A. Congress has set forth a single federal framework governing aliens' obligations to register and maintain proof of that registration. This Court in *Hines* established that Congress had left no room for the States to adopt their own rival registration rules. Section 3 of S.B. 1070 fails under that holding. Although petitioners acknowledge that Arizona has not sought to set up its own registration *system*, it has set up its own registration *penalties* and its own scheme of registration *enforcement*. The State cannot, in the name of enforcing a *federal* registration obligation that runs between individual aliens and the National Government, claim the right to punish aliens who are not registered but who the Executive Branch has decided not to prosecute based on important considerations consistent with the INA.

B. Congress has likewise set forth a comprehensive scheme governing employment of aliens. When an employer hires an individual, the employer must follow a statutorily specified procedure to verify that the new employee is authorized to work. Employers are subject to carefully graduated penalties for breaches of that duty. Employees are subject to criminal punishment only for deceptive practices in seeking employment, and they may face civil consequences for working without authorization. But Section 5 seeks to criminalize working, or even seeking work, without authorization, a penalty rejected by Congress and contrary to the balanced and comprehensive framework Congress created.

C. In enforcing the INA, the United States welcomes the assistance of state and local officers, provided that they work "cooperat[ively]" with federal officers toward the goals and priorities set by the Executive Branch, as Congress has specified in the INA itself. 8 U.S.C. 1357(g)(10)(B). Before S.B. 1070, Arizona officers routinely worked in partnership with federal officers to cooperatively enforce the immigration laws. Section 2 changed Arizona's policy from one of cooperation to one of confrontation. By insisting indiscriminately on enforcement in all cases, and requiring state and local officers (whenever practicable) to verify the immigration status of everyone they stop or arrest if there is reasonable suspicion that the person is unlawfully present, Section 2 forbids officers—on pain of civil penalties—from looking to the lead of federal officials and adhering to the enforcement judgments and discretion of the federal Executive Branch. Congress's authorization of "cooperat[ion]" does not permit Arizona to set its own immigration policy. Section 2 makes cooperation impossible.

D. Section 6 likewise is not "cooperat[ion]," because it empowers state and local officers to pursue and detain a person based on the officers' perception that the person is removable, and without regard for whether proceedings to remove that person would be consistent with the federal government's priorities.

ARGUMENT

I. ARIZONA'S STATUTE IMPERMISSIBLY SEEKS TO FRUSTRATE THE DISCRETIONARY JUDGMENTS THROUGH WHICH THE FEDERAL GOVERNMENT SETS IMMIGRATION POLICY FOR THE NATION

A. Under The Constitution And The INA, The Federal Government Comprehensively Regulates Immigration And Enforces The Immigration Laws

1. The "authority to control immigration * * * is vested solely in the Federal Government," *Truax* v. *Raich*, 239 U.S. 33, 42 (1915), and the formulation of "[p]olicies pertaining to the entry of aliens and their right to remain here * * * is entrusted exclusively to Congress," *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). This Court has repeatedly recognized that "whatever power a state may have" to legislate regarding immigration and alien registration is "subordinate to supreme national law." *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941); see also *Toll* v. *Moreno*, 458 U.S. 1, 11 (1982); *De Canas* v. *Bica*, 424 U.S. 351, 354 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 84 (1976); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705-706 (1893); *Chae Chan Ping* v. *United States*, 130 U.S. 581, 603-605 (1889).

The allocation of that authority to the National Government reflects the fundamental proposition that the United States' "policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations," *Harisiades* v. *Shaugnessy*, 342 U.S. 580, 588-589 (1952). "One of the most important and delicate of all international relationships," this Court has stated, is "the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines*, 312 U.S. at 64.

The Framers vested that power exclusively in the National Government so that the Nation can speak with one voice in this area. See *The Federalist No. 42*, at 279 (James Madison) (Jacob E. Cooke ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). The alternative—with variegated state laws reflecting different and perhaps conflicting state policies—is cacophony. Such a situation would also risk allowing "a single State * * * , at her pleasure, [to] embroil us in disastrous quarrels with other nations." *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875), and threaten retaliatory action against American citizens abroad, see *Hines*, 312 U.S. at 64-65; J.A. 142-143, 149.

2. In pursuance of the National Government's paramount authority in this area, Congress has enacted the INA, which today comprehensively regulates not only the admission and removal of aliens, but also their registration and employment. The role of the Executive Branch is a crucial part of that comprehensive framework.

Whenever Congress vests enforcement authority in an Executive Department, the Department presumptively possesses the responsibility to exercise discretion, "balancing a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). That is especially so in the context of immigration, 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) (citation omitted).

Thus, Congress has vested various responsibilities under the INA in the President, the Secretary of Home-

land Security, the Attorney General, the Secretary of State, and other federal officers, because immigration touches numerous national concerns: protecting the Nation's security and borders, foreign relations, humanitarian considerations, and justly administering the INA with respect to both citizens and aliens. That broad grant of discretion is manifested in a number of specific provisions of the INA.

In particular, "Congress [has] made a deliberate choice to delegate to the Executive Branch * * * the authority to allow deportable aliens to remain in this country in certain specified circumstances," whether by postponing or forgoing removal proceedings, granting interim release, or granting relief from removal. *INS* v. *Chadha*, 462 U.S. 919, 954 (1983). First, the Executive Branch may refrain from initiating removal proceedings, and "[a]t each stage" it "has discretion to abandon the endeavor" if, in its judgment, the circumstances warrant. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999) (*AADC*).[12] Congress has not only recognized but has protected that executive discretion by expressly insulating it from judicial review. See 8 U.S.C. 1252(g); *AADC,* 525 U.S. at 483-484, 485 n.9, 486.

Second, once proceedings are initiated, Congress has given the Executive Branch substantial, unreviewable

[12] The same is true of the INA's criminal provisions. In keeping with the President's duty to take care that the laws be faithfully executed, U.S. Const. Art. II, § 3, the decision whether to prosecute any violation of "the Nation's criminal laws" is a "'special province'" of the Executive Branch. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). The detention and prosecution of foreign nationals for violating federal law also implicate the President's constitutional authority to conduct foreign relations.

discretion to release aliens on bond or conditional parole. See 8 U.S.C. 1226(a)(2) and (e). Congress has also authorized the Secretary to let a removable alien remain at liberty pending departure for as long as 120 days, in exchange for the alien's commitment to depart voluntarily. 8 U.S.C. 1229c; *Dada* v. *Mukasey*, 554 U.S. 1, 10-11 (2008).

Third, the Executive Branch has statutory discretion to grant lawful status to a removable alien pursuant to several forms of relief from removal. J.A. 44; see, *e.g.*, 8 U.S.C. 1229b, 1255 (2006 & Supp. IV 2010); pp. 21-22, *infra*. Several of those forms of relief take time to adjudicate,[13] and while the alien is pursuing a claim for a special visa or asylum, she remains formally unregistered and unlawfully present. J.A. 40-47.[14]

Fourth, even if permanent relief from removal is unavailable, the INA provides several grounds for allowing an alien to remain free or on supervised release pending eventual removal. For instance, humanitarian conditions, foreign-policy considerations, or other reasons may preclude or counsel against the alien's removal to a designated country. See, *e.g.*, 8 U.S.C. 1231(b)(3)(A), 1254a; *Zadvydas* v. *Davis*, 533 U.S. 678, 684 (2001); see also J.A. 139-141 (discussing treaty commitments and other reasons for these policies). Aliens granted Temporary Protected Status may not be detained and must receive work authorization while they maintain that status. 8 U.S.C. 1254a(a)(1)(B) and (d)(4). Other individuals who are not removed may obtain supervised release,

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[13] See, *e.g.*, 8 C.F.R. 214.2(t)(4)-(6) (extensive five-step, multi-agency review of applications for S visa).

[14] An application for the discretionary relief of adjustment of status satisfies the registration requirement, 8 C.F.R. 264.1(a) (Form I-485), but other applications for discretionary relief do not.

8 U.S.C. 1231(a)(3), and indeed, this Court has interpreted the governing statute presumptively to *require* such release after six months if removal is not yet reasonably foreseeable, *Zadvydas*, 533 U.S. at 701.

Congress has qualified the Executive Branch's discretion in some respects by adopting eligibility requirements (*e.g.*, disqualifying aggravated felons) and annual limits on certain categories of relief. But those tailored limitations only underscore Congress's judgment that unlawful presence does not in all cases justify detention, much less criminal punishment.

3. The Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely. DHS receives sufficient funding to provide for the removal of only about 400,000 aliens per year, whereas an estimated 10.8 million aliens are unlawfully present. J.A. 109. Enforcement considerations may also conflict with each other. For example, vigorously enforcing certain provisions of the INA, such as the criminal prohibitions on alien smuggling, will frequently require the Executive Branch to exercise its discretion to secure cooperation from witnesses, who may themselves be unlawfully present and potentially subject to removal or prosecution. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (noting government's "dual responsibility" in this regard); J.A. 87. Congress has recognized the importance of securing the cooperation and availability of alien victims and other witnesses and has explicitly given the Executive Branch additional discretion in this regard. See, *e.g.*, 8 U.S.C. 1101(a)(15)(S)-(U), 1182(d), 1184(k), (o) and (p), 1227(d) (2006 & Supp. IV 2010); 22 U.S.C. 7105(c)(3) (Supp. IV 2010). See generally, *e.g.*, ICE, *Tool Kit for Prosecutors*

(Apr. 2011), http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

Congress's decision to vest authority in the Executive Branch accords with the sensitivity of enforcement, detention, and removal decisions. It is the Executive Branch that must respond to the foreign-policy repercussions of any decision to admit, arrest, detain, or remove the nationals of other countries, see, *e.g.*, J.A. 140-160, and Congress thus has appropriately given the Executive Branch significant authority over those decisions. See, *e.g.*, *Jama* v. *ICE*, 543 U.S. 335, 348 (2005) (interpreting removal statute in light of the "customary policy of deference to the President in matters of foreign affairs," because "[r]emoval decisions * * * 'may implicate our relations with foreign powers'") (quoting *Mathews*, 426 U.S. at 81); accord *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009).

B. S.B. 1070 Would Supplant Federal Policy With A New And Contrary State Policy

The framework that the Constitution and Congress have created does not permit the States to adopt their own immigration programs and policies or to set themselves up as rival decisionmakers based on disagreement with the focus and scope of federal enforcement. Yet that is precisely what S.B. 1070 would do, by consciously erecting a regime that would detain, prosecute, and incarcerate aliens based on violations of federal law but without regard to federal enforcement provisions, priorities, and discretion. S.B. 1070 cannot be sustained as an exercise in *cooperative* federalism when its very design discards cooperation and embraces confrontation. Contrary to petitioners' assertion (Br. 26) that the States may exercise "plenary authority" in this area, it is Con-

gress that has been granted and exercised plenary authority over alien registration, employment, apprehension, detention, and removal, and it is the Executive Branch to which Congress has assigned the implementation of that authority. Under the INA, genuine cooperation by state and local law-enforcement officers with federal officials is welcome, see p. 7, *supra*, but S.B. 1070 is not cooperation at all.

S.B. 1070 rests on Arizona's view that the National Government has adopted a "misguided policy," Remarks by Gov. Jan Brewer, Apr. 23, 2010, at 2,[15] and has misallocated resources along the southern border, see Pet. Br. 2 & n.3, 14. Arizona seeks to replace federal policy with one of its own, which the statute calls "attrition through enforcement"; the provisions of S.B. 1070 are designed 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, Ariz. Rev. Stat. Ann. § 11-1051 note. And Arizona brooks no deviation from its policy: S.B. 1070 includes a highly unusual provision that imposes civil penalties on any official or agency that "limit[s] or restrict[s]" enforcement to anything less than the "full extent." Ariz. Rev. Stat. Ann. § 11-1051(A) and (H)-(J).

Petitioners assert that Arizona's status as a border State that is particularly affected by illegal immigration justifies its adoption of its own policy directed to foreign nationals. But the Framers recognized that the "bordering States * * * will be those who, under the impulse of sudden irritation, and a quick sense of apparent

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[15] http://azgovernor.gov/dms/upload/SP_042310_SupportOurLawEnforcementAndSafeNeighborhoodsAct.pdf.

interest or injury," might take action that undermines relations with other nations, and regarded that possibility as a further reason to vest authority over foreign affairs in the National Government. *The Federalist No. 3*, at 17 (John Jay).

Petitioners acknowledge that Congress has expressly stated its intent that the INA be applied uniformly, nationwide. See Pet. Br. 2, 60-61 (citing Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 115(1), 100 Stat. 3384). They contend, however, that Arizona may adopt its own approach to the enforcement of federal immigration law—and that any, some, or all of the 50 States (and presumably their political subdivisions) could adopt varying policies without threatening nationwide uniformity—because Arizona's approach is "substantive[ly]" compatible with the laws Congress has enacted. *E.g.*, Pet. Br. 23.

Arizona's contention is well wide of the mark. That the State purports to regulate the same conduct as federal law is the beginning of the inquiry, not the end. A scheme that depends on national uniformity cannot coexist with a patchwork of different state regimes, whether that patchwork involves 50 different decisionmakers, 50 different remedies, or 50 different substantive rules. Indeed, this Court has repeatedly held that in areas committed to the National Government, the States may not second-guess Congress's choice of how to carry out its aims, or through whom—even if the States profess to share the same aims as Congress. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 350, 352-353 (2001) (state tort remedy preempted even though it prohibited same conduct—fraud on a federal agency—as federal law); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 379-380 (2000)

(state procurement restriction preempted even though it "share[d] the same goals" as federal sanctions); *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286-288 (1986) (*Gould*) (state procurement restriction preempted even though it operated only after National Labor Relations Board found federal labor-law violations, because it was an impermissible "supplemental sanction" for those violations). The problem with the common-law tort in *Buckman* or the statutory debarment penalty in *Gould* was not that they applied to conduct that was *permitted* by federal law. Rather, the problem was that they allowed the State, or private plaintiffs, to second-guess a federal decision not to pursue a particular violation or not to impose a particular remedy, in an area of federal primacy.

These principles apply with particular force to immigration. Federal law controls both "the character of [immigration] regulations" and "the manner of their execution." *Chy Lung*, 92 U.S. at 280. Arizona seeks to enforce federal immigration law through means different from those Congress designated: it has criminalized acts that Congress has decided to punish only civilly; it has allowed county prosecutors to charge and incarcerate individuals for violations that the Executive Branch has decided not to pursue; and it has required state officers to take steps in the name of federal law enforcement without regard to the policies and priorities of the federal officials in whom Congress has vested enforcement authority. Those provisions significantly intrude on the comprehensive system Congress has enacted, an intrusion only heightened by petitioners' position that every other State could enact its own, distinct schemes of enforcement and punishment as well.

II. ARIZONA'S ATTEMPT TO PUNISH VIOLATIONS OF FEDERAL LAW INTRUDES ON EXCLUSIVE FEDERAL AUTHORITY

Both Section 3 and Section 5 create new state crimes allowing state prosecutors to punish conduct that federal law comprehensively regulates. Although petitioners refer to these provisions as examples of "cooperative law enforcement," Pet. Br. 26, in fact they involve no cooperation with the federal government; they are aimed at independently punishing violations of federal law, and they do so without regard to the discretion Congress has conferred on federal officials to enforce the INA.

Petitioners' primary argument in defense of these two provisions, therefore, is not actually about cooperation; it is the starker submission that a State may criminalize anything that Congress has prohibited, unless Congress expressly forbids the State from doing so. But Arizona has no authority to punish an offense that is solely against the United States or to add new punishments to a comprehensive federal regulatory scheme.

A. Section 3 Impermissibly Intrudes Into A Field Reserved To, And Occupied By, The Federal Government

In *Hines*, this Court struck down Pennsylvania's alien registration statute because the federal registration statute was a "complete scheme of regulation" that occupied the field. 312 U.S. at 66. Congress's decision to adopt "one uniform national system" of registration, *id.* at 73, preempted any efforts by a State in that area: the Court held that the State could not "curtail or complement * * * the federal law, or enforce additional or auxiliary regulations." *Id.* at 66-67.

The federal registration statute today is substantively identical to the one considered in *Hines*, compare 8 U.S.C. 1302(a) with 8 U.S.C. 452(a) (1946), although Congress has added a further requirement that adult aliens must carry on their persons any proof of registration they receive. 8 U.S.C. 1304(e). In short, both the alien's initial obligation and his continuing responsibility are now the subject of exclusive federal statutes. "[A]lien registration" thus remains a field of "dominant federal interest" where "Congress manifestly *did not desire* concurrent state action." *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 n.21 (1956) (emphasis added).

1. Arizona has no inherent power to impose criminal punishment for violation of a duty owed to the federal government

Petitioners assert (Br. 49) that the State may escape the clear holding of *Hines* because Section 3 does not establish its own state registration scheme, but only punishes unlawfully present aliens in state court for violating the federal registration law. But the fact that the State does not and cannot register aliens itself simply underscores the State's lack of any independent interest in punishing aliens who fail to register. In any event, as petitioners concede (*ibid.*), duplicative federal and state prohibitions cannot coexist where "field preemption by Congress" precludes duplication. See, *e.g.*, *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012). Alien registration is such a field.

In resisting that conclusion, petitioners can hardly assert that punishing aliens' failure to comply with their obligation to the *federal* government is a traditional area of *state* regulation. To the contrary, as this Court has squarely held, "the relationship between a federal

agency and the entity it regulates"—here, registration of aliens as part of the regulation of immigration—"is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347. An alien's breach of that federal obligation is inherently a federal matter that does not implicate state police-power considerations.

This Court has often held that in exclusively federal contexts like this one, a State has no inherent power to supplement the punishment for an offense *solely against the United States*. Thus, for instance, in *Buckman* this Court held that a State could not provide a tort remedy for claims premised on fraud perpetrated against the Food and Drug Administration (FDA) through the failure to make disclosures required by federal law. The Court observed that States have no general authority to legislate with regard to the duties owed to the federal government. 531 U.S. at 347-348. The holding of *Buckman*—which petitioners discuss only glancingly (Br. 53)—indisputably refutes petitioners' bold assertion (Br. 23) that "'parallel' tort claims" are "easy cases" for non-preemption merely because "both state and federal law enforce the same standard." As *Buckman* illustrates, a state law may interfere with a balanced federal approach even without setting a different substantive standard. See p. 24-25, *supra*.

The Court has reached the same conclusion in other contexts involving areas of plenary federal authority. For instance, the Court held in *In re Loney*, 134 U.S. 372 (1890), that States have no power to punish perjury before a federal tribunal. "[T]he power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals

that proceeding is had," the Court explained, and a witness in a *federal* judicial proceeding thus "is accountable for the truth of his testimony to the United States only." *Id.* at 375. The state prosecution was impermissible not because federal and state perjury laws were substantively different, but because a federal witness's breach of his duty of truthfulness does not impair "any authority derived from the State." *Ibid.*[16]

This Court in *Loney* distinguished the same line of cases on which petitioners rely—cases in which "the same act" may validly constitute "a violation of the laws of the State, as well as of the laws of the United States." 134 U.S. at 375. But each of those cases presented questions of legitimate local concern that were not displaced by federal law. Thus, for instance, in *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847), the Court upheld a conviction for passing a counterfeit coin, because although counterfeiting itself is an offense against the United States, passing the counterfeit coin was a "cheat" upon private individuals, which the State could prevent and punish. *Id.* at 433, 434.[17] Similarly, in *Gilbert* v. *Minnesota*, 254

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[16] Similarly, in *Nelson*, the Court held that the federal Smith Act of 1940 preempted state sedition laws, even those purporting to be compatible, because the prohibited subversive conduct was "not a local offense" but "a crime against the Nation." 350 U.S. at 504-505 (citation omitted). The Court analogized the Smith Act to the (simultaneously enacted) Alien Registration Act of 1940 at issue in *Hines*, noting that both concerned "a field of * * * dominant federal interest" in which "Congress manifestly did not desire concurrent state action." *Id*. at 504 n.21.

[17] Accord, *e.g.*, *California* v. *Zook*, 336 U.S. 725, 734-735 (1949) (state transportation law aimed at "evils * * * of the oldest within the ambit of the police power: protection against fraud and physical harm to a state's residents"); *Asbell* v. *Kansas*, 209 U.S. 251, 256 (1908) (law requiring inspection of imported animals "clearly within the authority

U.S. 325 (1920), the state statute punishing interference with enlistment in federal or state armed forces was "a simple exertion of the police power to preserve the peace of the State" against "a prompting to violence." *Id.* at 331.[18] Here, by contrast, compliance with the federal alien-registration and documentation requirements does not lie within any traditional police power of the state.

As petitioners acknowledge, the Court likewise held in *Gould* that States may not add to the comprehensive remedial scheme established by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, by refusing to contract with employers who are found by a federal agency to have committed multiple violations of that statute. The refusal to contract, the Court concluded, "functions unambiguously as a supplemental sanction for [federal] violations" for conduct that the State had no authority to regulate. 475 U.S. at 288. As the previous discussion illustrates, *Gould* is not a "lone exception" that is "inapplicable" outside "the field of labor relations." Pet. Br. 50 n.34. Rather, the basic holding of *Gould*—that "conflict is imminent" when "separate remedies are brought to bear on the same activity" that the federal government regulates exclusively, 475 U.S. at 286 (citation omitted)—has been repeatedly applied to reject claims like petitioners' here. Where federal law demands uniformity, the 50 States may not "add state penalties" or create their own "parallel enforcement track[s]," Pet. Br. 52, 61, whether or not they profess to

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of the state").

[18] Indeed, the State in *Gilbert* relied only on local police-power concerns and disclaimed any attempt to protect military recruiting, *per se*, from interference. 254 U.S. at 331.

share the same goal as the federal government. Accord, *e.g.*, *Crosby*, 530 U.S. at 380.

That principle is controlling here. Congress, in the exercise of its exclusive power over immigration, has adopted a single, unified scheme for prescribing when and how aliens must register, and with whom, and what the consequences shall be for failure to do so. Section 3 impermissibly inserts the State into that area.

2. Section 3 conflicts with the purposes and objectives of the INA

Even if the federal alien-registration scheme left room for States to adopt their own measures to punish noncompliance, Section 3 would still be preempted. Although nominally about registration, Section 3 does not seek to punish all failures to register with the federal government, or to carry federal registration papers, 8 U.S.C. 1304(e), but *only* those involving an alien without "authorization from the federal government to remain in the United States." Ariz. Rev. Stat. Ann. § 13-1509(A) and (F). As then-state Senator Russell Pearce, the sponsor of the provision, explained, Section 3 "says that if you're in Arizona * * * in violation of federal law, that you can be arrested under a state law." Video Recording: Meeting of Ariz. House Comm. on Military Affairs & Pub. Safety, Mar. 31, 2010, 18:15-18:39.[19] But the United States, in conformity with the practice of other nations, has declined to criminalize unlawful presence. J.A. 148-149. And allowing state prosecutors to pursue and incarcerate aliens based on their immigration status would impermissibly interfere with the Executive Branch's discretion, conferred by Congress, to

[19] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7286.

determine whether or not a particular alien's unlawful presence warrants detention or removal.[20]

a. Unlawful presence is not a crime under the INA. Rather, an alien who is present in the United States without authorization may be placed in civil removal proceedings; ordered removed by an Immigration Judge, subject to administrative and judicial review; and removed. 8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1). But although many unlawfully present aliens are detained and ultimately removed, Congress has provided the Executive Branch with substantial discretion to pursue other courses—*e.g.*, to defer proceedings, grant relief from removal, or allow temporary release from custody. See pp. 19-22 and note 14, *supra*. When the Executive Branch stays its hand in that fashion to allow individual aliens to remain at liberty, it naturally may also refrain from prosecuting them for registration violations, even though the aliens are unlawfully present and not registered.

b. Section 3 directly contradicts this federal scheme. Empowering a host of local officials and giving them only one function—criminally prosecuting unlawfully present, unregistered aliens—threatens to skew the balance fundamentally. Under Section 3, any unlawfully present and unregistered alien would be subject to criminal prosecution and incarceration if a local prosecutor so chose—without regard to the numerous considerations important to the United States as a whole. Congress gave discretion in this area to the Executive Branch, which is best able to balance those broader con-

[20] Indeed, by ruling out probation or a suspended sentence, Arizona also prescribes a harsher penalty than the federal alien-registration provisions. See 8 U.S.C. 1304(e), 1306(a); 18 U.S.C. 3561 (probation permissible).

siderations in individual cases. See *Buckman*, 531 U.S. at 348 (Congress gave FDA "ampl[e]" authority to prevent fraud on the agency, and sharing that authority with innumerable private plaintiffs "inevitably conflict[s] with the FDA's ability to police fraud *consistently with the [FDA's] judgment and objectives*") (emphasis added).

Petitioners suggest (Br. 26) that the Executive Branch's "enforcement posture" is not preemptive of its own force. But here the preemption comes from *Congress's* decision to assign to the Executive Branch, not to a host of local prosecutors pursuing a patchwork of local policies, the responsibility to make the sensitive judgments necessary to enforce the immigration laws. Both here and in *Buckman*, Congress vested enforcement authority in a single decisionmaker to guarantee the "flexibility" to pursue a "somewhat delicate balance" of "difficult (and often competing) objectives." 531 U.S. at 348, 349. Under the INA, Congress has assigned the Executive Branch the responsibility and discretion to decide the disposition of an unlawfully present alien—ranging from expedited removal to temporary release to permanent adjustment of status. It is Congress's action that preempts Arizona's attempt to second-guess the Executive's judgments.

B. Section 5 Impermissibly Imposes A Punishment That Congress Rejected In Adopting Comprehensive Federal Regulation

As petitioners acknowledge (Br. 57), Congress "decided not to impose [criminal] sanctions on unauthorized alien workers." Yet Section 5 makes it a crime in Arizona for an alien who is unlawfully present in the United States and is not authorized to work to "knowingly apply

for work, solicit work in a public place or perform work as an employee or independent contractor in this state." Ariz. Rev. Stat. Ann. § 13-2928(C). That provision is incompatible with the comprehensive federal scheme governing the employment of aliens.

1. Congress has specified that the INA's employment restrictions shall be enforced through employer sanctions, criminal prohibitions on document fraud and perjury, and removal

a. Until 1986, federal law did not generally proscribe the employment of unauthorized aliens. During that pre-1986 period, this Court held that Congress had not occupied the field governing the employment of aliens, explaining that Congress "believe[d] th[e] problem d[id] not yet require uniform national rules." *De Canas*, 424 U.S. at 360 n.9. At that time, "the Federal Government had 'at best' expressed 'a peripheral concern with [the] employment of illegal entrants.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1974 (2011) (quoting *De Canas*, 424 U.S. at 360).

In 1986, Congress changed that landscape dramatically by enacting IRCA. The product of a carefully negotiated compromise hammered out over several years, IRCA's major element was to add to the INA 8 U.S.C. 1324a, a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002). IRCA thus brought regulation of the employment of aliens within the INA's broader comprehensive framework for regulation of immigration generally—an area of exclusive federal responsibility.

Through detailed requirements, Congress made employers primarily responsible for preventing unautho-

rized aliens from obtaining employment: IRCA's prohibitions, penalties, and safe harbors focus on employers. IRCA makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U.S.C. 1324a(a)(1)(A) and (2). IRCA also requires every employer to verify the employment authorization status of those they hire, within a short time after the employee begins work. 8 U.S.C. 1324a(a)(1)(B) and (b); 8 C.F.R. 274a.2(b)(1)(i)-(ii). Good-faith compliance with that verification procedure can be a defense to liability. 8 U.S.C. 1324a(a)(3) and (b)(6). These requirements are enforced through an escalating series of civil and, ultimately, criminal penalties on employers. See 8 U.S.C. 1324a(e)(4) and (f); 8 C.F.R. 274a.10.

Congress preserved for the States a narrowly defined role in punishing state-licensed employers (and only employers) for violations of IRCA's requirements. IRCA's express-preemption clause specifies that States may impose sanctions "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens," but *only* "through licensing and similar laws." 8 U.S.C. 1324a(h)(2). All other state and local sanctions on employers, such as the state law the Court upheld against a field-preemption challenge in *De Canas,* are preempted. *Whiting*, 131 S. Ct. at 1975.

By contrast, Congress did not impose criminal penalties on unauthorized workers for the mere act of seeking or performing work. But Congress did not simply leave alien employees unregulated, as petitioners would have it (Br. 55). Rather, an alien whose nonimmigrant status does not permit him to work is subject to removal if he performs "[a]ny unauthorized employment." 8 C.F.R. 214.1(e); see 8 U.S.C. 1227(a)(1)(C)(i). Furthermore, an alien who works without authorization is generally ineli-

gible for the discretionary relief of adjustment of status. See 8 U.S.C. 1255(c)(2) and (8).

Although merely obtaining employment carries only civil consequences, obtaining employment *through fraudulent means* is punished criminally. In IRCA, Congress added a new provision criminalizing false attestations or document fraud during the verification procedure, 18 U.S.C. 1546(b), and reaffirmed that aliens who lie under oath, knowingly make a fraudulent statement, or forge or falsify a document are potentially subject to federal criminal prosecution under four specified provisions already on the books, 18 U.S.C. 1001, 1028, 1546(a), and 1621. 8 U.S.C. 1324a(b)(5) and (d)(2)(F)-(G). IRCA thus provided that the information an employee submits to verify work authorization may be used in a prosecution under the specified federal criminal statutes, or to enforce the INA itself, but "*may not be used*" for any other purpose. *Ibid.*[21] That prohibition, making the information that an alien submits available only under the INA or focused federal criminal provisions, underscores that IRCA leaves no room for the imposition of state criminal liability on individual aliens.

Congress also adopted certain protections for employees working unlawfully. Recognizing that employers might seek to transfer the financial risk of sanctions to the aliens they hire, Congress prohibited employers from requiring employees to "provide a financial guarantee or indemnity" against any IRCA liability, such as a bond. 8 U.S.C. 1324a(g)(1). An employer who violates this provision and is indemnified by an unauthorized

[21] In 1990 and 1996, Congress also added to the INA provisions for civil sanctions and cease-and-desist orders against aliens who submit forged, altered, or falsely made documentation in the employment-verification process. See 8 U.S.C. 1324c(a) and (d)(3).

employee must return to the employee any monies received. 8 U.S.C. 1324a(g)(2).[22]

b. Congress's omission of criminal penalties for unauthorized work, standing alone, was a deliberate decision, as the legislative history of IRCA demonstrates. In the years of hearings and debates that culminated in IRCA, Congress considered alternative means of regulating alien employment, including proposals for criminal penalties on unauthorized workers.[23] None of those proposals was adopted. Instead, the legislative history reflects a judgment that "many who enter illegally do so for the best of motives—to seek a better life for themselves and their families," and that "legislation containing employer sanctions is the most humane, credible and effective way to respond to" the influx of unauthorized

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[22] Congress also adopted new civil-rights protections, 8 U.S.C. 1324b, to ensure that employers do not react to the possibility of sanctions by discriminating against applicants based on national origin or citizenship status.

[23] See, *e.g.*, *Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 44-45, 56-59 (1985) (discussing one witness's proposal to fine and detain illegal aliens); 119 Cong. Rec. 14,184 (1973) (statement of Rep. Dennis) (stating that "[t]he bill originally considered" penalized both the employer and "the illegal alien who took work when he was not entitled to it," but explaining that the proposal for employee sanctions was later rejected); 118 Cong. Rec. 30,155 (1972) (statement of Rep. Rodino) (noting committee's rejection of proposal to "impos[e] any additional criminal sanctions on the alien who enters illegally and obtains employment," finding that such penalties "would serve no useful purpose"); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. Pt. 1, at 54, 77, 78, 85, 89-91, 102, 106, 108-109, 145-146, 155-156, 185-186, 210 (1971) (discussing proposal for criminal penalties on nonimmigrant aliens who accept unauthorized employment).

aliens. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46 (1986); accord *id.* at 49; S. Rep. No. 132, 99th Cong., 1st Sess. 8 (1985) (concluding that the "only" remaining approach was "to prohibit the knowing employment of illegal aliens" and enforce that prohibition through employer sanctions).

2. Section 5 impermissibly adds a punishment Congress rejected

a. Arizona attempts to defend Section 5 on the ground that it merely "impose[s] parallel state penalties" upon the employment of unauthorized workers and "adopts the federal rule as its own," Pet. Br. 25, 26. As discussed above, that argument fundamentally misconceives relevant preemption principles. Congress's comprehensive regulation of both employers and employees does not allow state penalties that the federal statute omits. See, *e.g.*, *Gould*, 475 U.S. at 288 & n.5 (state statute that enforced federal law by adopting a "punitive" "supplemental sanction" "conflict[ed] with the [agency's] comprehensive regulation").

Petitioners are demonstrably incorrect in their suggestion (Br. 14, 17, 53) that Congress has regulated only the "demand side" and not the "supply side" of the employment market. As shown above, Congress has adopted a number of measures to sanction aliens who work without authorization, especially those who obtain jobs through fraudulent means. Congress did not reject the idea of regulating employees altogether; it rejected the idea of criminally *prosecuting* employees merely for seeking work or working.

This conclusion is not altered by petitioners' observation that employment is generally a matter of state concern. "[E]ven state regulation designed to protect vital

state interests must give way to paramount federal legislation." *De Canas*, 424 U.S. at 357. As discussed at pp. 24-25, *supra*, state legislation that impinges on matters within the province of the National Government is preempted even if it purports to address matters of traditional state concern, such as contracting (*Crosby*), tort law (*Buckman*), or insurance, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003). Although Congress may have considered aliens' employment a largely local matter at the time of *De Canas*, that is no longer the case. In IRCA, Congress adopted a balanced federal regulatory regime, within the broader comprehensive scheme for the regulation of immigration under the INA. Indeed, the law at issue in *De Canas* itself is now preempted by IRCA expressly, see *Whiting*, 131 S. Ct. at 1975. Thus, while petitioners note that the Court in *De Canas* started from the assumption that state police power had not been superseded, the addition of IRCA to the INA reverses that assumption, just as the adoption of the NLRA did in the context of labor law, see *Gould*, 475 U.S. at 286.

b. Even if IRCA left room for supplemental state measures, Arizona's choice of means would still be preempted. Section 5 cannot be justified under a rule of "dual criminalization," because it criminalizes conduct that Congress affirmatively concluded, after extensive study, *not* to make criminal. Section 5—which does not require proof that the alien knew she was not authorized to work or misused any documents—does not even cover the same conduct that Congress made the sole bases of federal criminal liability. Section 5's criminal penalties for working, or seeking or soliciting work, conflict with the careful balance Congress struck, which does not impose sanctions if an alien and her employer substantially

comply in good faith with the verification procedure after hiring. See p. 35, *supra*; cf. 8 U.S.C. 1324b(a)(6) (prohibiting discriminatory refusal "to honor documents tendered that on their face reasonably appear to be genuine").

Indeed, Congress and DHS have allowed certain grace periods for good-faith compliance with verification requirements, and Section 5 would criminalize working even during those grace periods. First, a person must attest that she is authorized to work before beginning work, but she has three days to provide the necessary documentation. See p. 35, *supra*. Second, Congress included a similar grace period in the statute governing E-Verify—a program that verifies an employee's eligibility to work using electronic databases and that Arizona requires all businesses to use, *Whiting*, 131 S. Ct. at 1975, 1976-1977. When E-Verify provides a "tentative nonconfirmation" of a new employee's authorization to work, the employee may challenge that response and has a right to continue working unless a final nonconfirmation is received. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 403(a)(4)(B)(iii), 110 Stat. 3009-661 (8 U.S.C. 1324a note) ("In no case shall an employer terminate employment of an individual because of a failure of an individual to have identity and work eligibility confirmed under this section until a nonconfirmation becomes final.").

Moreover, Section 5 criminalizes even *applying for* or *soliciting* work. Under the INA, by contrast, employers are not required to verify eligibility until an employee is hired, 8 U.S.C. 1324a(a)(1)(B), and IRCA's civil-rights provision strictly limits an employer's ability to ask applicants for documents before (or as a condition

of) hiring them.[24] The same is true of the E-Verify statute, which requires safeguards preventing "unlawful discriminatory practices based on national origin or citizenship status, including * * * the use of the [E-Verify] system prior to an offer of employment." IIRIRA § 404(d)(4)(B), 110 Stat. 3009-664 (8 U.S.C. 1324a note). If the verification procedures work as they should, and the employee never makes a false attestation or begins work, the mere attempt furnishes no basis for criminal punishment.

IRCA also contains persuasive indicia that Congress's goal was to implement broadly applicable but balanced procedures that would deter the hiring of unauthorized aliens, preserve jobs for American workers, and reduce the incentive for aliens to enter illegally. Congress accordingly adopted carefully graduated penalties for violations by employers and provided that good-faith compliance with the verification procedure would ordinarily eliminate the employer's liability even if an unauthorized alien ended up working. Far from suggesting that isolated instances of unauthorized work are criminally punishable themselves, Congress affirmatively took steps to preclude such prosecutions. The verification procedure requires every new employee to submit Form I-9, swearing to his eligibility and allowing his employer to verify it. Yet Congress placed that form, and its supporting documentation, off limits except for certain specified *federal* law-enforcement purposes. See p. 36, *supra*.

c. Finally, petitioners observe (Pet. Br. 54) that Section 5 does not fall within the scope of IRCA's express-

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[24] See, *e.g.*, *Reyes-Martinon* v. *Swift & Co.*, 9 OCAHO No. 1068, at 11, 2001 WL 909276, at *8 (2001).

preemption provision, which bars "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). Preemption need not be express, and "neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'" *Buckman*, 531 U.S. at 352 (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (brackets in original)).[25] Here, the imposition of state criminal sanctions on individuals for working without authorization, a step IRCA rejected in favor of employer sanctions, document-fraud penalties, and civil consequences, is preempted because it both intrudes on and frustrates the comprehensive federal regime.

The fact that the saving clause does not authorize sanctions on employees distinguishes this case from both *Whiting* and *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), on which petitioners rely. In those cases, Congress had expressly saved the sort of state-law action that was at issue; the plurality in *Whiting* accordingly proceeded from the premise that Congress must have wanted to permit the States "appropriate tools" to carry out the licensing authority preserved by the saving clause. 131 S. Ct. at 1981. Here, Congress has given no textual reason to overlook the real and significant conflict between the federal law and the new state crime.

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[25] At the time Congress enacted IRCA, a number of States imposed sanctions on employers who hired unauthorized aliens. See *Whiting*, 131 S. Ct. at 1974 n.1 (collecting state statutes). IRCA therefore expressly preempted those sanctions. But there had been no similar proliferation of state sanctions against *employees*.

III. ARIZONA'S NEW STOP AND ARREST PROVISIONS ARE NOT VALID MEASURES TO COOPERATE WITH THE FEDERAL GOVERNMENT

The remaining provisions of S.B. 1070 that are at issue in this Court authorize Arizona law-enforcement officers to detain individuals whom they suspect of being present in the United States in violation of federal immigration law. Petitioners characterize those provisions as efforts to cooperate with the federal government in apprehending removable aliens. But by refusing to respect Congress's designation of the Executive Branch to take the lead in the enforcement of the federal immigration laws, and by requiring all Arizona officers to adhere instead to the State's own policy of "attrition through enforcement," Arizona has exceeded the permissible bounds of cooperation, and its stop and arrest provisions, Sections 2 and 6, are preempted.

A. In Our Federal System, State And Local Officers May Cooperate In The Enforcement Of The Immigration Laws Only Subject To The Ultimate Direction Of The Executive Branch

1. The Framers of the Constitution consciously determined that the new National Government, unlike its predecessor under the Articles of Confederation, would have the power to enforce its own laws for itself. The United States acts not through the several States, but directly on the People from whom it draws its authority. See *New York* v. *United States*, 505 U.S. 144, 165-166 (1992). The States have their own authority, separate and independent from that assigned by the Constitution to the National Government, subject to the federal Supremacy Clause. By allowing both federal and state governments alike to regulate directly within their own

designated spheres, without the other's concurrence, the Framers ensured that each of the two sovereigns would be "protected by incursion from the other." *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). A clear allocation of responsibility also ensured that the people would be able to hold the United States *and* the individual States directly accountable for their actions. *Ibid.*

Furthermore, by creating a federal Executive Branch headed by a Chief Executive, the Constitution provides for federal laws to be carried out without depending on state officials. Laws adopted by Congress, such as the INA, are to be enforced by the President and by officers of the United States answerable to him. U.S. Const. Art. II, § 3; *Printz*, 521 U.S. at 922. The President lacks such power over state officials. Accordingly, where Congress has vested ultimate enforcement authority exclusively in the Executive, state officials cannot engage in enforcement of that federal law entirely on their own. *Ibid.*; cf. *Free Enter. Fund* v. *PCAOB*, 130 S. Ct. 3138, 3154-3155; *Bowsher* v. *Synar*, 478 U.S. 714, 726-727 (1986).

The Constitution undoubtedly contemplates *cooperation* between sovereigns in the execution of federal law. Since the First Congress, federal legislation has provided for the officers of one sovereign to assist another sovereign in enforcing its laws or regulations. *Printz*, 521 U.S. at 910-911. But Congress cannot give responsibilities to state officers "*without the consent of the States*," *ibid.*, nor can it wholly export to state officers the President's power to take care that the laws be faithfully executed, *id.* at 922.

This case involves the converse situation: an effort by a State, without authorization by Congress or the Executive, to wrest from federal officials the enforcement of federal laws by imposing a mandatory directive as a matter of state law. The proper constitutional relationship is one of cooperation: while the President may accept assistance from other sovereigns in executing the laws assigned to the Executive Branch to administer, enforcement authority ultimately runs to the President and the Heads of Departments in whom statutory responsibilities are vested, and the exercise of such authority must be responsive to those officials' judgment and discretion.

That principle of cooperation undergirds the relationship between any two sovereigns who render mutual assistance. A sovereign offering assistance naturally takes its lead from, and respects the judgment of, the sovereign seeking help in enforcing its own laws. *A fortiori*, the federal-state relationship (which is governed by the Supremacy Clause) must presumptively involve comparable cooperation when a State undertakes to assist federal officers in the enforcement of federal law. And those principles apply with all the more force in the context of an area like immigration, which the Constitution assigns to the single National Government in recognition of the need for the United States to speak with one voice in its dealings with other countries and their nationals. See, *e.g.*, *Hines*, 312 U.S. at 64; *The Federalist No. 3*, at 14-15 (John Jay).

2. Congress has amended the INA expressly to incorporate that principle of cooperation by state and local law-enforcement officers with federal immigration officers. See 8 U.S.C. 1357(g)(10). The statute provides that, even without a formal agreement, state and local

officers who wish to assist in the execution of federal immigration law may "cooperate with the [Secretary]" in several ways: they may "communicate with the [Secretary] regarding [an individual's] immigration status," and they may "otherwise * * * cooperate in the identification, apprehension, detention, or removal of aliens not lawfully present."

The ability to "cooperate with the [Secretary]" in those areas contrasts with other provisions of the INA, which actually grant state officers some of the authority of a federal immigration officer, but only with prior federal approval. See 8 U.S.C. 1103(a)(10), 1357(g)(1). "[C]ooperat[ion]" under Section 1357(g)(10) does not require that state and local officers be under the day-to-day control of a federal agency, or that they obtain advance permission before taking action. But it necessarily contemplates that the responsible federal officials will take the lead in fashioning enforcement priorities and techniques, and that state and local officers can and will conform and respond to federal policies, determinations, and discretion. See *DHS Guidance* 8-10.[26] That is the very definition of cooperation. Arizona's attempt to set its own policy for enforcement of federal immigration law is not cooperation; it is confrontation.

B. Section 2 Impermissibly Requires Arizona Officers To Enforce Federal Immigration Law Without Regard To Federal Priorities And Discretion

1. Section 2 requires Arizona law-enforcement officers to verify the immigration status of anyone stopped or detained for any reason, whenever verification would

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[26] In contrast, other federal statutes explicitly authorize state officials to make arrests on their own for violations of criminal provisions of the INA in limited circumstances. See p. 6, *supra*.

be "practicable" and an officer has "reasonable suspicion" that the person is an alien unlawfully present in the United States. Ariz. Rev. Stat. Ann. § 11-1051(B). To further deter any possible exercise of discretion, Section 2 also provides that "[a]ny state or local official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws * * * to less than the full extent permitted by federal law" is subject to civil penalties of up to $5000 per day. S.B. 1070, § 2, Ariz. Rev. Stat. Ann. § 11-1051(H). Any legal resident of Arizona may sue to enforce these penalties. *Ibid*.

2. Section 2 thus imposes mandatory duties on state and local officers in connection with the enforcement of *federal* law to "identif[y]" and "apprehen[d]" unlawfully present aliens, 8 U.S.C. 1357(g)(10)(B). Although petitioners defend the provision (Br. 32) as facilitating permissible "cooperation between States and the federal government in connection with immigration enforcement," they fail to explain *how* it actually enhances cooperation. For instance, they do not dispute that even before Section 2 was enacted, state and local officers had state-law authority to inquire of DHS about a suspect's unlawful status and otherwise cooperate with federal immigration officers. J.A. 62, 82.

In fact, requiring state and local officers to detain every person suspected of being an unlawfully present alien until her status can be verified runs squarely contrary to Congress's direction to prioritize the removal of criminal aliens, see p. 4, *supra*, and to DHS's resulting enforcement priorities. Indeed, in petitioners' view the conflict with DHS's priorities is a virtue, given the State Legislature's expressed disagreement with federal enforcement policy (even though those priorities focus di-

rectly on concerns petitioners now emphasize, Br. 3-6). But petitioners cannot rely on a federal statute protecting federal-state "cooperat[ion]" to justify writing into state law their disagreement with federal policy.

The text of Section 1357(g)(10) refutes petitioners' notion (Br. 36) that Congress wrote the statute as a "saving clause" for state immigration *legislation*. The provision preserves the ability of a state or local "officer or employee" to "cooperate with the [Secretary]"; it makes no mention of state legislatures adopting their own laws that, at some broad level, each legislature deems "cooperat[ive]" with the intent of the INA (which S.B. 1070 is not in any event). Rather, Section 1357(g)(10) focuses on where cooperation actually occurs on a regular basis: in the field, at the level of individual officers.[27]

Cooperation at that level requires state and local officers to be free at all times to respond to federal direction and discretion about enforcement priorities—just as federal agents must be. DHS's highest enforcement priorities are aliens who threaten public safety or national security and members of criminal gangs that smuggle aliens and contraband. DHS also gives priority to removing repeat border crossers, recent entrants, aliens who have previously been removed, and aliens who have disregarded a final order of removal. J.A. 108-109; pp. 4-5, *supra*. Before S.B. 1070, state and local officers in Arizona were able to assist in the identifica-

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[27] Even if Section 1357(g)(10) is seen as saving "cooperat[ive]" state legislation, it follows that *non*-cooperative state legislation is preempted. See *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992); accord *id.* at 112-113 (Kennedy, J., concurring in part and concurring in the judgment).

tion, apprehension, and detention of aliens consistent with those priorities.

That form of on-the-ground cooperation is precisely what Section 2 forbids, on pain of civil penalties. Instead, state and local officers in Arizona are mandated to determine the immigration status of every person stopped for any infraction (including jaywalking) if there is a "reasonable suspicion" that the person may be "unlawfully present" in the United States and if verification is "practicable."[28] Section 2 thus redirects federal resources to immigration inquiries that law-enforcement officers would not otherwise have pursued—a consequence that would be greatly exacerbated if other States or localities followed suit. J.A. 96-98.

Furthermore, Section 2 does so not for a cooperative purpose, but in service of the State's own policy. Section 2 and the remainder of S.B. 1070 are designed to have the *in terrorem* effect of "discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note. And because the policy applies to *all* stops and arrests whenever there is reasonable suspicion that the person is unlawfully present, it threatens to result in the unnecessary detention of *lawfully* present aliens, a consequence with significant foreign-policy consequences for the National Government. See J.A. 132; *Hines*, 312 U.S. at 65-66 ("[S]ubjecting [aliens] alone, though perfectly law-abiding, to indiscriminate and repeated interception" is the sort of "distinct, unusual and extraordi-

[28] Petitioners' suggestion that the qualifier "practicable" limits Section 2's broad mandatory scope is meritless. Verification is "practicable" (within that word's ordinary meaning) whenever it can be accomplished, not whenever it is a good idea.

nary burden[]" that implicates national authority and international relations). Similarly, as noted at pp. 19-22, *supra*, the Executive Branch has ample statutory authority to allow aliens to remain at large despite being formally unregistered and not yet in lawful status; Section 2 threatens to subject those aliens, too, to repeated harassment despite the Executive Branch's decision to leave them at liberty.

It is true that Section 2 does not preclude officers from conducting verifications that are consistent with DHS's priorities; rather, it directs officers to conduct those verifications, and many more besides, and not to consider DHS's priorities at all. But petitioners cannot save Section 2 from a facial challenge by contending that DHS would have welcomed *some* of the verifications Section 2 mandates; Section 2 has no valid applications because it *always* precludes officers from taking DHS's priorities and discretion into account in the first place. A stopped clock may be right twice a day, but it is still a facially invalid method of timekeeping. And removing the obstacle of Section 2 would not eliminate requests for verification; rather, it would restore the previous condition of federal-state cooperation. *E.g.*, J.A. 62, 82.

Section 2 is preempted because in every instance, by interposing a mandatory state law between state and local officers and their federal counterparts, it "stands as an obstacle to the accomplishment" of the federal requirement of cooperation, *Hines*, 312 U.S. at 67, and the full effectuation of the enforcement judgment and discretion Congress has vested in the Executive Branch under the INA, see *Crosby*, 530 U.S. at 374-377.

3. Petitioners contend that Section 2's mandate is authorized by 8 U.S.C. 1373(c), which provides that DHS "shall respond to an inquiry by a Federal, State, or local

government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law." But Section 1373(c) does not expressly or impliedly authorize States to create independent regimes based on different enforcement priorities.[29] To the contrary, it was enacted as part of the same statute (IIRIRA) as Section 1357(g)(10), and indeed, part of Section 1357(g)(10) speaks directly to the same subject matter as Section 1373. Even in the absence of a formal 287(g) agreement, state and local officers are not precluded from "communicat[ing] with the [Secretary] regarding the immigration status of any individual," 8 U.S.C. 1357(g)(10)(A). But the statute expressly contemplates that such communication will be in the form of "cooperat[ion]." See 8 U.S.C. 1357(g)(10)(A)-(B) (officers may "communicate" or "otherwise * * * cooperate").

Thus, Section 1373(c) does not create an exception to the rule of federal-state *cooperation* in the "identification, apprehension, detention, or removal of aliens." 8 U.S.C. 1357(g)(10)(B). Rather, Section 1373 seeks to ensure "[c]ommunication between government agencies and [DHS]," 8 U.S.C. 1373 (heading), by providing for the reciprocal exchange of information between the federal government and state and local officers. See also 8 U.S.C. 1644 (similar, in benefits-eligibility context). In particular, Congress enacted Section 1373 to preempt

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[29] In contrast, when Congress directly authorized state and local officers to arrest and detain certain aliens who have illegally returned to the United States after previously being convicted of a felony and removed from the country, it directed the federal government to provide to those officers the specific information they need to "carry out [those] duties." 8 U.S.C. 1252c(b).

various state and local laws and policies that, at the time, precluded officials from sharing information with federal immigration authorities. See, *e.g.*, *City of New York* v. *United States*, 179 F.3d 29, 31-32 (2d Cir. 1999), cert. denied, 528 U.S. 1115 (2000). Subsections (a) and (b) of Section 1373 therefore prevent States and localities from enacting laws or policies that "prohibit[] or in any way restrict" the ability of state and local officers to cooperate with federal officials by sending and receiving information concerning an individual's immigration status. Subsection (c) provides, in turn, for federal responses to state inquiries for "purpose[s] authorized by law."[30] 8 U.S.C. 1373(c); see S. Rep. No. 249, 104th Cong., 2d Sess. 19-20 (1996) (explaining that Section 1373 is intended to assist the "Federal regulation of immigration" by "[p]rohibit[ing] any restriction on the exchange of information" between federal, state, and local authorities).

No restriction on communication is at issue here. DHS follows Section 1373(c)'s requirement to respond to inquiries, and nothing in this case seeks to change that. But Section 1373(c) does not sanction efforts to use DHS resources to enforce the federal immigration laws without regard to federal priorities and discretion. That is not "cooperation," because it forces those officers to make inquiries irrespective of whether they are cooperative with, or responsive to, the Secretary's administration of immigration enforcement. See *DHS Guidance* 11-12.

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[30] In addition to cooperation "in the identification, apprehension, detention and removal of aliens" authorized by Section 1357(g)(10), permissible "purposes authorized by law" may include purely state-law purposes, such as assessing flight risk in state-court bail proceedings.

C. Section 6 Impermissibly Authorizes State Officers To Arrest Aliens Based On Removability Without Regard For Federal Priorities

Section 6 authorizes warrantless arrests whenever an Arizona law-enforcement officer has probable cause to believe that "[t]he person to be arrested has committed any public offense that makes the person removable from the United States." Ariz. Rev. Stat. Ann. § 13-3883(A)(5). Before enactment of Section 6, Arizona law already authorized the warrantless arrest of a person who commits a felony, misdemeanor, petty offense, or one of certain criminal violations in connection with a traffic accident in Arizona. *Id.* § 13-3883(A)(1)-(4) (2010 & Supp. 2011). Arizona law also authorized the warrantless arrest of a person charged with a felony in another State. *Id.* § 13-3854 (2010). Thus, Section 6 added only the authority to arrest an alien who, an officer believes, has committed an offense that could make him removable, but who is not currently wanted on actual criminal charges for that offense (*e.g.*, because he has already served his sentence). Pet. App. 42a; see also *id.* at 161a-162a. Although petitioners claim "inherent" authority to "enforce" federal immigration law, Br. 45, they ultimately recognize (*id.* at 46) that under Section 1357(g)(10), participation by state and local officers in the "apprehension" or "detention" of aliens must be done in cooperation with federal officers. See pp. 45-46, *supra.*

1. Section 6 combines objectionable aspects of Sections 2 and 3: it empowers state and local officers to pursue and detain a person based on the officers' perception that the person is removable, and without regard to federal priorities or even specific federal enforcement determinations. Even if the officer is correct in believ-

ing that a ground for removal exists, but see pp. 54-55, *infra*, whether and when to pursue removal is within the Secretary's plenary discretion. In addition, the Executive Branch may—and in a few circumstances *must*, see 8 U.S.C. 1231(b)(3)—grant relief from removal or temporary release under numerous circumstances, even for some criminal aliens. Section 6 thus would result in the apprehension, detention, and harassment of ostensibly "removable" aliens whom, for various reasons, the federal government has decided not to remove or detain, just as Sections 2 and 3 would allow Arizona to harass or even punish aliens whom the federal government has allowed to remain, temporarily or permanently. See *Hines*, 312 U.S. at 65-66; pp. 32-33, 49-50, *supra*.

Such broad and unilateral arrest authority also is not necessary to facilitate true cooperative enforcement. State and local officials (including in Arizona) have long made arrests at the request of federal immigration officials, and federal officials may place detainers on aliens who are wanted by DHS but who otherwise would be released from state or local custody. 8 C.F.R. 287.7.[31]

2. Moreover, determining whether an alien has committed an offense that might make him removable under the INA will typically be outside the expertise of the arresting officer. That determination "is often quite

[31] Petitioners also contend (Br. 42) that Section 6 might be valid in at least some applications because it authorizes arrests of aliens who were "previously deported from the country for the crime but subsequently re-entered illegally." There is no indication that that was Section 6's purpose: unlawfully reentering the United States following removal is a felony, see 8 U.S.C. 1326(a), and federal felons were already arrestable, see p. 53, *supra*. Furthermore, Section 6 is triggered by commission of a "public offense," defined to include a violation of another State's law that would also be illegal in Arizona. Ariz. Rev. Stat. Ann. § 13-105(27). The federal crime of illegal reentry does not qualify.

complex." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring in the judgment). The INA generally does not list specific crimes that make an alien removable but, rather, uses "broad categor[ies] of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." *Ibid.* (citation omitted). And determining whether a particular crime fits within those categories "is not an easy task"; it may involve looking not only at the statute in question, but also at the record of conviction. *Ibid.*[32]

Section 6 cannot be deemed cooperative in any real sense. Nor was it needed for state and local officers to engage in the sort of true cooperation welcomed by the federal government.[33] Section 6 thus is preempted.

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[32] If the offense was committed outside Arizona, the officer would also have to determine whether the offense also would be punishable under Arizona law. Ariz. Rev. Stat. Ann. § 13-105(27).

[33] Petitioners cite various cases in support of their "inherent authority" argument, and several amici likewise assert that the Department of Justice's Office of Legal Counsel (OLC) has recognized States' inherent authority. Those cases, however, and the relevant portions of that OLC opinion, merely recognize States' ability, without situation-specific federal statutory authorization (such as 8 U.S.C. 1252c), to engage in the kind of cooperation with the federal government that is permissible under Section 1357(g)(10). See J.A. 270, 273, 280; see also *National Council of La Raza* v. *Department of Justice*, 411 F.3d 350, 353-355 (2d Cir. 2005). For instance, in *United States* v. *Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir.), cert. denied, 528 U.S. 913 (1999), a federal immigration officer called a state police officer "to investigate [a] suspicious transaction." *Id.* at 1295. The federal officer also "expressed suspicion" that one of the people he had seen "was an illegal alien" and affirmatively asked the state officer to arrest that person if he turned out to be, "in fact, in the country illegally." *Ibid.* See also *Muehler* v. *Mena*, 544 U.S. 93, 96, 100-101 (2005) (discussing federal immigration official's involvement in investigation); *United States* v. *Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984) (same). Nothing

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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in any of those authorities supports a claim that a State has inherent authority to enact a law mandating enforcement that is *not* "cooperat[ive]." See note 27, *supra*.