NO. 10-1901

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2010

STATE OF ARIZONA; JANICE K. BREWER,
Governor of the State of Arizona,
in her official capacity,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONERS

TEAM 1111
Attorneys for Petitioners

QUESTIONS PRESENTED

I. Whether the Immigration and Nationality Act impliedly preempts a state law provision that requires officers to check the immigration status of a person stopped, detained, or arrested where the state law specifically requires the person's immigration status to be determined by the federal government.

II. Whether the Immigration and Nationality Act impliedly preempts a state law provision that sanctions a person without an alien registration document even though the state law mirrors the federal provision's language and objectives.

III. Whether the Immigration Reform and Control Act impliedly preempts a state law provision making it a crime for illegal aliens to solicit, apply for, or perform work where the state law focuses on employee sanctions, while the federal law concerns employer sanctions.

IV. Whether the Immigration and Nationality Act impliedly preempts a state law provision that authorizes officers to make warrantless arrests for civil violations of immigration law.

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The opinion of the United States District Court for the District of Arizona is reported as *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010). The opinion for the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 11, 2011. R. at 4805. This Court has appellate jurisdiction over this Petition pursuant to the grant of writ of certiorari as required by 28 U.S.C. § 1254(1) (2006). This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article VI, Clause 2 of the United States Constitution, which provides: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. *See* App. "A." This case also involves the interpretation of section 1357(g) of the Immigration and Nationality Act, which provides: "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State . . . to communicate with the Attorney General regarding immigration status of any individual, including reporting the knowledge that a particular alien is not lawfully present in the United States; or otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10) (2006). *See* App. "B." The Appendix includes this section, as well as other relevant sections codified at 8 U.S.C. §§ 1304, 1306, 1324, 1373, and 1644 (2006).

See App. "B." This case also involves sections 2(B), 3, 5(C), and 6 of Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act" (S.B. 1070). *See* App. "C."

STATEMENT OF THE CASE

The failure to identify the status of illegal aliens is a costly problem for local, state and national government. The federal government lacks the resources to adequately address the issue. Because of its proximity to the Mexican border, the State of Arizona has one of the largest concentrations of illegal aliens. When Arizona passed legislation to aid the federal government in identifying illegal aliens, the federal government did not welcome the help. Instead, it claimed that only the federal government is permitted to address the issue.

Federal Immigration Statutory Scheme. Enacted in 1952, the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. §§ 1101–1778 regulates the conditions by which aliens may enter and remain in the country and authorizes the Secretary of the Department of Homeland Security (DHS) to enforce the nation's immigration laws. *See* 8 U.S.C. § 1103 (2006). Operating under the DHS, U.S. Immigration and Customs Enforcement (ICE) is responsible for interior enforcement of immigration laws. ICE's responsibilities include "identifying criminal aliens for removal" and "detaining illegal immigrants and ensuring their departure (or removal) from the United States." Blas Nuñez-Neto, Cong. Research Serv., RS 21899, *Border Security: Key Agencies and Their Missions* 4 (2005).

Through specific subsequent legislation, Congress established a federal policy encouraging state and local authorities to help enforce federal immigration law. 8 U.S.C. § 1644 barred state and local agencies from "prohibit[ing] or in any way restrict[ing] any government entity or official from sending or receiving . . . information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1644 (2006). 8 U.S.C. § 1357(g)

authorized the Attorney General to enter into agreements that delegate authority for immigration enforcement within the state or local law enforcement's jurisdiction. 8 U.S.C. § 1357(g) (2006). Section 1357(g) also ensures that no agreement is required for state and local law enforcement officers:

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10). Finally, 8 U.S.C. § 1373 provides that the federal government "shall respond to an inquiry by" any government agency "seeking to verify or ascertain the citizenship or immigration status of any individual . . . by providing the requested verification or status information." 8 U.S.C. § 1373(c) (2006). Section 1373(c) is based on Congress' decision that the "acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. No. 104-249, at 19–20 (1996).

Arizona's Immigration Law. In response, Arizona's legislature enacted the "Support Our Law Enforcement and Safe Neighborhoods Act," (S.B. 1070) to address the rampant illegal immigration, the rapid increase in criminal activity, and the serious threat to public safety. *See generally* S.B. 1070. Its purpose was to eliminate sanctuary policies, to promote cooperation in enforcing federal immigration law, and to adopt state crimes replicating federal immigration crimes pursuant to the State's broad police powers. *See generally* S.B. 1070.

Four sections of S.B. 1070 were critical:

- **Section 2(B)** directs an officer to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010). It requires the person's immigration status to be determined by the federal government pursuant to 8 U.S.C. § 1373(c). *Id.*

- **Section 3** provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code Section 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. § 13-1509(A) (2010). This section does not apply to anyone authorized by the federal government to remain in the country. *Id.*

- **Section 5(C)** makes it a crime for an illegal alien to solicit, apply for, or perform work in Arizona. Ariz. Rev. Stat. Ann. § 13-2928(C) (2010).

- **Section 6** authorizes a warrantless arrest where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010).

The District Court. The United States filed its complaint and moved to enjoin enforcement of S.B. 1070. R. at 4810. Although the United States requested the law be enjoined in its entirety, it specifically argued facial challenges to only six select provisions of the law. R. at 4811. Finding that the United States was likely to succeed on the merits regarding its argument that sections 2(B), 3, 5(C), and 6 were preempted by federal law, the district court granted the United States' motion for a preliminary injunction in part, enjoining enforcement of S.B. 1070 sections 2(B), 3, 5(C), and 6. R. at 4811.

The Court of Appeals. Arizona appealed the order to the Ninth Circuit Court of Appeals. R. at 4805. Affirming the decision, the appellate court held that "there is likely no set of circumstances under which S.B. 1070 would be valid" and that the district court did not abuse its discretion in reaching its conclusion. R. at 4829.

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction of S.B. 1070 as the United States is not likely to prevail on the merits of any aspect of its preemption claim. Contrary to the conclusions of the courts below, the enjoined sections of the Arizona law are entirely consistent with the specific principles of federal law.

First, federal law does not impliedly preempt section 2(B), which directs an officer to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States. This provision does not stand as an obstacle to the enforcement of federal law. Amended in 1996, the Immigration and Nationality Act has established a federal policy encouraging States' assistance in the enforcement of immigration law. Courts have consistently held, in harmony with the legislature's intent, that the Act promotes state cooperation in enforcing immigration law. True to its purpose, it effectively removed obstacles interfering with the free flow of information between states and the federal government. Specifically, it ensured states could identify illegal aliens outside the scope of the Attorney General's supervision. While never leaving the Act's plain language, section 2(B) improves the exchange of information by requiring Arizona officers to conduct immigration status checks during an otherwise lawful encounter. In effect, the federal government conserves resources and receives more information, while the state government deters illegal immigration and protects citizens within its borders.

Second, federal law does not impliedly preempt section 3, which was designed to assist federal authorities enforce the criminal provisions of federal immigration law. The state law neither intrudes into a field exclusively occupied by the federal government nor serves as an impermissible obstacle to the enforcement of federal law. The states' right to enforce criminal provisions of federal law is grounded firmly in the context of immigration. Moreover, section 3 mirrors the federal law to avoid tension with the Act's plain language. And because section 3 does not make any determination of whether a person may be admitted or remain in the country, it does not regulate immigration. Section 3 does nothing more than assist federal law enforcement in furthering Congress' intent for aliens to register with the federal government.

Third, federal law does not impliedly preempt section 5(C), which makes it a crime for an illegal alien to solicit, apply for, or perform work in Arizona. This, too, is neither foreclosed by field or obstacle preemption principles. The Immigration Reform and Control Act sought to discourage the employment of illegal aliens. True to its purpose, it created a comprehensive scheme to sanction employers who hire illegal aliens. But employee sanctions are not addressed anywhere in the Act's language. Since the power to regulate employment remains within the states' historic police powers, section 5(C) implements sanctions on employees who are illegal aliens and working within Arizona's borders. As it avoids encroaching upon employer sanctions—the field occupied by federal immigration law—section 5(C) also avoids preemption. As a result, both the federal and state law seek to discourage the employment of illegal aliens.

Finally, federal law does not impliedly preempt section 6, which authorizes a warrantless arrest where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. The states' have an inherent right to enforce civil provisions of federal law. The civil provisions of federal immigration law are no

different. Indeed, Congress has codified the states' inherent right to enforce immigration laws and makes no distinction between civil and criminal violations. Further, the overlap between civil and criminal violations is constantly growing. As a result, the policy implications in requiring officers in the field to discern subtle differences between civil and criminal law are untenable. As this Court has observed, the civil aspect of immigration law has become intimately related with the state criminal process.

This Court should reverse the lower court's judgment and dissolve the permanent injunction.

ARGUMENT AND AUTHORITIES

The court of appeals resolved the preemption issue by granting the United States' motion for preliminary injunction on four sections of S.B. 1070. R. at 4811. The United States had the burden of demonstrating that (1) it is likely to succeed on the merits of the claim, (2) it will suffer irreparable harm absent injunctive relief, and (3) the balance of the equities and the public interest favor granting the injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The court of appeals' opinion focused on the first prong and considered if the United States was likely to succeed on the merits of its preemption claim. R. at 4811 n.1.

While an appellate court generally "review[s] the district court's entry of a preliminary injunction under a deferential abuse-of-discretion standard, the legal conclusions upon which an injunction is based are subject to more exacting de novo review." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1242–43 (11th Cir. 2010). Accordingly, determinations regarding legal issues such as preemption are reviewed de novo and without deference to the district court. *Zimmerman v. Puccio*, 613 F.3d 60, 70 (1st Cir. 2010).

I. ARIZONA'S LAW IS NOT PREEMPTED BY FEDERAL IMMIGRATION LAW.

State and local governments have struggled for decades to address the issues associated with illegal immigration. The impact illegal immigration has on local government is astonishing. One 2007 study indicates that the *net* fiscal cost of illegal immigration imposed on all levels of government (including any tax payments from illegal aliens) by illegal aliens was $89.1 billion. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 460 (2008) [hereinafter Kobach, *Reinforcing the Rule of Law*]. The cost of illegal immigration would be much worse, but the cooperation of state and local law enforcement has increased significantly since 1996. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105 (1996) (prohibiting state and local governments from restricting government employees who seek to provide immigration information to federal authorities); Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009 (1996) (same).

Similar to state and local governments around the nation, Arizona faces serious obstacles associated with illegal immigration. Illegal immigration substantially burdens Arizona's economy. The total cost of providing public services to the state's estimated 475,000 illegal aliens is approximately $1.3 billion per year. Kobach, *Reinforcing the Rule of Law*, *supra*, at 460. It also depresses wage scales and deprives both citizens and legally admitted aliens of jobs and better working conditions. *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976). Because the numerous fiscal costs associated with illegal immigration are so burdensome, Arizona has a meaningful interest in addressing "local problems" resulting from a workforce made up of illegal aliens. *Id.*

Arizona responded to this local problem with a local solution. When it passed S.B. 1070, Arizona's law enforcement would be able to perform immigration status checks to help identify illegal aliens, to sanction illegal immigrants for failing to obey federal registration laws, and to deter illegal aliens from working. Nevertheless, the Department of Justice seeks to block the legislation claiming that the INA preempts Arizona's authority to pass the law.

The concept of preemption derives from the Supremacy Clause of the Constitution, which vests Congress with the power to preempt state law. U.S. Const. art. VI, cl. 2. It can be either express or implied.[1] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). As this Court has recognized, implied preemption "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempt state law." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)) (internal quotations omitted).

The court of appeals held that S.B. 1070 was impliedly preempted on two theories. First, the court held that sections 3 and 5(C) are field preempted by the INA. R. at 4833, 39. And second, the court held that sections 2(B), 3, 5(C), and 6 are conflict preempted by the INA. R. at 4850. Sections 3 and 5(C), however, do not regulate immigration, or a field occupied by federal law, and sections 2(B), 3, 5(C), and 6 avoid conflict with the INA by either requiring Arizona's law enforcement to act consistent with the INA or by mirroring the Act's plain language. Without a stronger indication from Congress to the contrary, this Court should not strip Arizona of its right to protect its citizens.

[1] The INA does not have an express preemption provision. Accordingly, the United States' argument rests solely on the notion of implied preemption.

A. The Federal Government Has Not Occupied the Fields Addressed by the Arizona Law.

Arizona's law regulates immigrants, not the broader concept of immigration. The state law does not concern the field preemption reserved for laws specifically directed at immigration policy. Field preemption occurs where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983). Field preemption may be found only where the federal scheme is "so pervasive as to make reasonable the inference that Congress left no room for the State to supplant it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Federal law occupies both the field of immigration and the field of employer sanctions. The Arizona law does not encroach on either field.

1. Section 3's registration requirement merely enforces federal law as contemplated by the INA and makes no attempt to affect the federal decision of whether an alien may be admitted or allowed to remain in the United States.

The United States claims that section 3 interferes with the "complete scheme of regulation" over immigration. R. at 4831. Section 3 provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code Section 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. § 13-1509(A) (2010). By making the failure to register with the federal government a state crime, section 3 does not regulate immigration; rather, it regulates conduct within Arizona's borders.

Arizona does not dispute that federal power over the regulation of immigration is supreme. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). The regulation of immigration primarily involves "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. Accordingly, where a

state law determines who may or may not be removed from the country it necessarily violates the federal government's exclusive power to regulate immigration. *Plyler v. Doe*, 457 U.S. 202, 240 n.6 (1982) (Powell, J., concurring).

But state laws are not necessarily preempted because they touch upon a field that Congress has the power to regulate. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). In fact, this "Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power . . . ." *DeCanas*, 424 U.S. at 355. To the contrary, the mere fact that "aliens are the subject of a state statute does not render it a regulation of immigration" existing exclusively within the federal government's jurisdiction. *Id.*

Making the same mistake, the court of appeals fails to distinguish between immigration and immigrants, "assuming falsely that primacy over one requires dominion over the other as an organic constitutional phenomenon." Gary E. Endelman & Cynthia Juarez Lange, *Can State and Local Governments Fix the Problem?*, 13 Bender's Immigr. Bull. 1217, 1256 (2008). By sanctioning aliens who fail to register, Arizona's concern is the conduct of aliens—not their exclusion or admission. Further, section 3 does not authorize Arizona's officers to determine whether a person should be removed from the United States. Nor does it apply to anyone authorized by the federal government to remain in the country.

The court of appeals held that the field of registering and documenting aliens is a "complete scheme of regulation," and therefore, Arizona's law cannot "complement, the federal law, or enforce additional or auxiliary regulations." R. at 4831 (citing *Hines*, 312 U.S. at 66–67). To reach this mistaken conclusion, the court relied on *Hines*. But the Court in *Hines* did not address field preemption. There, the plaintiffs challenged a Pennsylvania law requiring aliens to

obtain and carry alien identification cards. *Hines*, 312 U.S. at 61. The Court began its analysis by explaining that it was "expressly leaving open all . . . other contentions, including the argument that the federal power in [the field of registering and documenting aliens], whether exercised or unexercised, is exclusive." *Id.* at 62. The Court went on to observe that where Congress has passed "a complete scheme of regulation . . . states cannot, *inconsistently with the purpose of Congress*, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Id.* at 66–67. (emphasis added). The Court held that the state act was inconsistent with the federal law's purpose, which was "to protect the personal liberties of law-abiding aliens through one uniform national registration system." *Id.* at 74.

The inconsistency in *Hines* is palpable. Under the Federal Alien Registration Act, aliens are not required to pay a registration fee, carry a card, or show a card to police on demand; whereas under the Pennsylvania statute, aliens must pay a $1 registration fee, carry a card at all times, and show a card to police on demand. *Id.* at 59. The intrusive nature of the Pennsylvania statute is "inconsistent[] with the purpose of Congress" because it would likely result in "inquisitorial practices and police surveillance" unrelated to any congressional goal. *Id.* at 74. The Court held that the state law in *Hines* could not "complement" or "enforce additional or auxiliary regulations" because it was inconsistent with Congress' purpose—not because federal law occupied the field of registration and documentation.

Further, the Court in *Hines* not only explicitly declined to address whether federal law occupies the field, but also makes clear that section 3 would not be prohibited from "complement[ing]" and "enforc[ing] additional or auxiliary regulations" because it—unlike the law in *Hines*—guards against inconsistency with federal law as it mirrors sections 1304 and 1306 "in all material respects." *Whiting*, 131 S. Ct. at 1971. In fact, section 3 furthers Congress' goals

by ensuring aliens comply with federal registration laws. Because section 3 does not determine whether a person may be admitted or remain in the United States, section 3 is not field preempted.

2. Section 5(C) regulates illegal aliens who seek employment and makes no attempt to regulate the employers covered under IRCA.

The court of appeals held that section 5(C) is preempted by the Immigration Reform and Control Act of 1986 (IRCA); a "complex scheme" designed "to discourage the employment" of illegal aliens. R. at 4835. Its interpretation, however, is far too broad because IRCA preempts sanctions on employers hiring illegal aliens—not illegal aliens seeking employment.

Illegal immigration deprives citizens and legally admitted aliens of jobs. *DeCanas*, 424 U.S. at 356. It also deflates wage scales and harms working conditions. *Id.* Moreover, the majority of illegal immigration stems from the pursuit of employment. Kobach, *Reinforcing the Rule of Law*, *supra*, at 470–71. Removing the incentive to work inevitably reduces the illegal alien population in the community. *Id.* Arizona has a significant interest in addressing "local problems" resulting from a workforce consisting of illegal aliens. *DeCanas*, 424 U.S. at 357. So Arizona enacted section 5(C) to address a "local problem" with a local solution. Section 5(C) makes it a crime for an illegal alien to solicit, apply for, or perform work in Arizona. Ariz. Rev. Stat. Ann. § 13-2928(C) (2010).

Because the power to regulate employment remains within the states' historic police powers, the presumption against preemption applies here. *DeCanas*, 424 U.S. at 356. Accordingly, this Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009) (internal quotations and citations omitted). To overcome the presumption, the United States must demonstrate that it

was the clear and manifest purpose of Congress to prohibit states from regulating *any* employment of illegal aliens. Because the United States has failed to meet its burden, section 5(C) is not preempted by IRCA.

Limited express preemption provisions indicate that Congress did not intend to occupy the legislative field. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (when an express preemption provision "provides a reliable indicium of congressional intent with respect to state authority . . . there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation") (internal citations and quotation marks omitted). IRCA's limited express preemption provision displaces "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens." 8 U.S.C. § 1324a(h)(2) (2006). The IRCA warns states not to levy civil or criminal sanctions upon employers; not the unauthorized aliens themselves. So while IRCA expressly preempts states from imposing *employer* sanctions, it is glaringly silent on states imposing *employee* sanctions. The limited express preemption provision demonstrates that Congress did not intend to occupy the entire legislative field of employment particularly where, as here, there is a presumption against preemption of state law. At a minimum, the fact that Congress has not imposed sanctions on aliens for performing unauthorized work is insufficient to show that it was the "clear and manifest purpose of Congress" to occupy the field of sanctioning illegal aliens for performing work. Because section 5(C) imposes *employee* sanctions—not *employer* sanctions—it is not field preempted by IRCA.

B. The Arizona Law Does Not Conflict with Federal Law.

The Arizona law also does not run afoul of the second aspect of implied preemption, known as conflict preemption, which may be found in two forms. First, conflict preemption

exists where "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). And second, conflict preemption exists where the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (stating whether obstacle preemption exists "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). Because the United States does not contend that compliance with both laws is physically impossible, obstacle preemption is the only cognizable basis to support conflict preemption—albeit a meritless one.

1. Section 2(B)'s immigration status checks do not conflict with federal law.

Section 2(B) directs an officer to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010). The issue before this Court concerns whether Arizona can require its officers to check a person's immigration status during an otherwise lawful encounter. The straightforward answer is "yes."

a. Section 2(B) is consistent with Congress' intent in the Immigration and Nationality Act for state law enforcement officials to assist federal authorities in identifying illegal aliens.

Congress has encouraged federal authorities to avail themselves of any assistance that state and local authorities are willing to provide. Congressional intent is derived from the language and structure of the statute itself. *United States v. Lanier*, 520 U.S. 259, 267 (1997). When statutory language is plain and unambiguous, the Court must ascertain and give effect to Congress' intent as expressed by the language of the statute. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)

("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says."). This Court may also interpret statutes on similar topics together. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845).

Three statutes, in particular, signify Congress' intent to promote cooperation and communication between the state and federal government. First, 8 U.S.C. § 1644 prohibits state and local governments from restricting any government agency or official from exchanging information regarding a person's immigration status. 8 U.S.C. § 1644 (2006).

Second, 8 U.S.C. § 1357(g)(10) codifies that state and local law enforcement are authorized:

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10) (2006).

And third, 8 U.S.C. § 1373(c) makes clear that the federal government *must* respond to *any* state inquiry about a person's status: "The Immigration and Naturalization Service *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 . . . by providing the requested verification or status information." 8 U.S.C. § 1373(c) (2006) (emphasis added). Congress also made the response unconditional; there is no limit on how many or how often inquiries can be made. The Senate Bill's Committee Report explains that Congress envisioned state assistance: "[T]he acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation

of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. No. 104-249, at 19–20 (1996).

Section 2(B) is not preempted if it remains within the Act's plain language—and it does so under any fair reading of the statute. By implementing immigration status checks, Arizona's law does no more than "communicate with the Attorney General about a person's immigration status" and "cooperate with the Attorney General in the identification" of illegal aliens. And because the federal government "shall respond" to unlimited status requests, section 2(B) remains within the confines of the Act's plain language. The Court's analysis should end here.

Moreover, these statutes collectively demonstrate Congress' intent for states to assist federal authorities in identifying illegal aliens. As Judge Learned Hand explained, "[I]t would be unreasonable to suppose that [the United States'] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928). And the reason is simple: "The nearly 800,000 police officers nationwide represent a massive force multiplier . . . . The net that is cast daily by local law enforcement during routine encounters with members of the public is so immense that it is inevitable illegal aliens will be identified." Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 181 (2006) [hereinafter Kobach, *Quintessential Force Multiplier*]. By encouraging state officers to identify illegal aliens, federal law enforcement improves their presence exponentially, while also conserving valuable resources. And by identifying illegal aliens who pose a threat to public safety, the security of state and local communities will not go unprotected.

Nevertheless, the court of appeals held that the "mandatory nature of section 2(B)'s immigration status checks is inconsistent with the discretion Congress vested in the Attorney

General to supervise and direct State officers in their immigration work according to federally-determined priorities." R. at 4825. In arriving at its conclusion, the court of appeals made three critical mistakes: (1) Section 2(B)'s "mandatory nature" does not obstruct Congress' objectives; (2) Section 2(B) does not require the Attorney General's supervision; and (3) Section 2(B) does not interfere with an established Executive foreign policy.

b. Full compliance with the Immigration and Nationality Act does not obstruct Congress' intent.

This Court's most recent conflict-preemption case decided last Term, *Chamber of Commerce of U.S. v. Whiting*, is instructive. In *Whiting*, the issue was whether IRCA preempts an Arizona law that requires employers to use E-Verify (a voluntary system provided by Congress that lets employers verify a worker is authorized to work).[2] 131 S. Ct. at 1973. Despite Arizona mandating the use of a voluntary process, this Court held that Arizona's law is not preempted because Congress not only provided a mechanism for states to use, but also "consistently expanded and encouraged" the states to use it, as indicated by Congress instructing the Secretary of Homeland Security to make it available in all 50 states. *Id.* at 1986. And because the system relies on the federal government's determination about the person's immigration status, the Court reasoned that Arizona's law effectively "guard[s] against any conflict" with federal law. *Id.* at 1982.

Here, like the state law in *Whiting*, section 2(B) requires Arizona officers to embrace a voluntary mechanism that Congress not only provides, but also encourages states to use. The mechanism in this case is 8 U.S.C. § 1373(c), which provides that the federal government *must*

[2] Though the issue in *Whiting* concerned a saving clause in a preemption provision, this Court's analysis here is no different. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding that neither an express preemption provision nor a saving clause "bar[s] the ordinary working of conflict preemption principles").

respond to *any* state inquiry regarding a person's immigration status. 8 U.S.C. § 1373(c) (2006). Moreover, Congress has "consistently expanded and encouraged" its use, as indicated by Congress creating the Law Enforcement Support Center (LESC) "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." R. at 4864. So by requiring Arizona officers to check a person's status, section 2(B) "simply implement[s]" the procedures that "Congress expressly allowed Arizona to pursue" under federal law. *Whiting*, 131 S. Ct. at 1981. And "[g]iven that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.*

Further, *Whiting* makes clear that Arizona does not, as the court of appeals concluded, "sidestep Congress' scheme" by deciding how to enforce the INA. R. at 4822. Instead, section 2(B), like the state law in *Whiting*, diffuses tension with the Act by relying only on the federal government's determination of a person's immigration status. *See* Ariz. Rev. Stat. Ann. § 11-1051(B) (2010) ("The person's immigration status shall be verified with the Federal Government pursuant to 8 U.S.C. § 1373(c)."). As a result, only the federal government decides whether to detain, transport, or remove the alien; to investigate and collect evidence; or to not act at all. The only real effect of section 2(B) is to promote better communication between Arizona's officers and federal authorities. In other words, directing Arizona officers to check a person's immigration status represents the full extent of section 2(B)'s authority; Arizona is simply not authorized to decide how to enforce the INA.

Arizona understands that Congress did not intend to make immigration status requests mandatory. But the fact that Congress did not force all states to comply, fails to establish that Arizona cannot do so. Without more, there cannot be an inference that Congress intended to

prevent states from mandating its use. Because its "mandatory nature" is consistent with the Act's plain language, as confirmed by this Court in *Whiting*, section 2(B) does not conflict with Congress' intent.

c. The Attorney General's supervision is not necessary to determine the status of an alien.

Congress acts "intentionally and purposely" when it includes particular language in one section of a statute, but omits it in another. *Russello v. United States*, 464 U.S. 16, 23 (1983). The INA provides that state officers who enter into a formal agreement with the Attorney General "shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(3) (2006). As a result of the agreement, the officers qualify to perform functions relating to the "investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1) (2006). On the other hand, state officers who do not enter into an agreement still have the right "to cooperate with the Attorney General in the *identification* . . . of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B) (2006) (emphasis added). By excluding "identification" from the functions performed by officers *with* an agreement, and including it under the functions performed by officers *without* an agreement, it follows that Congress acted "intentionally and purposely" to ensure states have the right to identify illegal aliens without "the direction and supervision of the Attorney General."

Undaunted by the Act's plain language, the court of appeals insists that section 2(B) is preempted because it conflicts with Congress' intent to provide the Attorney General with "flexible and effective authority" in enforcing the INA. R. at 4824–25. To be clear, Arizona does not dispute that Congress can delegate preemptive authority to the Attorney General. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982). And Arizona concedes that Congress delegated some discretion to the Attorney General under the INA. *See* 8

U.S.C. § 1357(g)(1)–(9) (2006). But Congress delegated no discretion in providing states with properly requested status information; federal authorities must respond to a state's inquiry about a person's immigration status and states have the right to communicate with the Attorney General about a person's immigration status. 8 U.S.C. §§ 1357(g)(10)(A), 1373(c) (2006). Without more, section 2(B) cannot be preempted because it operates outside of the Attorney General's discretion.

The court's reliance on *Buckman Co. v. Plaintiffs' Legal Committee* is misplaced. In *Buckman*, the Court determined that allowing a state tort action would cause applicants before a federal agency "to submit a deluge of information that the [agency] neither wants nor needs, resulting in additional burdens on the [agency's] evaluation of an application" and harmful delays in the agency process. 531 U.S. 341, 351 (2001). Here, however, Congress has expressly encouraged states to submit status requests, not only by mandating a federal response, but also by creating the Law Enforcement Support Center (LESC) "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." R. at 4864. Because the Act's plain language authorizes states to identify illegal aliens outside of the Attorney General's "direction and supervision," section 2(B) cannot be preempted by the Attorney General's discretion.

d. Arizona's status check law cannot conflict with foreign policy.

Finally, section 2(B) also fails to conflict with a formal Executive foreign policy. The court of appeals cites *Crosby v. National Foreign Trade Council* and *American Insurance Ass'n v. Garamendi* to support the proposition that section 2(B) is preempted because it conflicts with Executive foreign policy. R. at 4824–26. The court, however, relies on cases supporting Arizona's position because the possibility that section 2(B) could have "some incidental or

indirect effect in foreign countries" is not an unlawful intrusion into foreign affairs. *Clark v. Allen*, 331 U.S. 503, 517 (1947). Instead—as was the case in *Crosby* and *Garamendi*—preemption exists only where state law conflicts with a *formal* or *established* foreign-relations goal.

In *Crosby v. National Foreign Trade Council*, a Massachusetts law prohibited its companies from purchasing goods and services from companies doing business with Burma. 530 U.S. at 363. Meanwhile, Congress passed legislation directing the President to impose sanctions on Burma and to develop a strategy for improving Burma's political and social climate. *Id.* at 374. This Court concluded that the state law conflicted with the President's authority to develop a "comprehensive, multilateral strategy" because it prohibited some contracts permitted by the Federal Act, affected more investment than the Federal Act, and reached foreign and domestic companies while the Federal Act confined its reach to United States' persons. *Id.* at 375.

In *American Insurance Ass'n v. Garamendi*, the President entered into the "German Foundation Agreement," which required Germany to establish a foundation to compensate Holocaust victims. 539 U.S. 396, 396 (2003). In exchange, the President agreed to encourage state and local governments to honor the Agreement as the exclusive mechanism for resolving these claims. *Id.* Then California passed legislation requiring insurance companies in California to disclose the details of insurance policies issued to people in Europe between 1920 and 1945. *Id.* This Court held that the state law conflicted with the Executive's specific, foreign-relations objectives, as "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." *Id.* at 421.

In *Crosby*, the state law conflicted with the rules established by the President to sanction Burma. And in *Garamendi*, the state law conflicted with the rules established by the President in an executive agreement with Germany. Both *Crosby* and *Garamendi* found that the state law was preempted by an established foreign-policy goal. But that is exactly what is missing from this case: The court of appeals fails to identify an executive agreement or formalized treaty that conflicts with section 2(B). Further, because section 2(B) is consistent the Act's plain language, it is Congress' legislation—not section 2(B)—that is responsible for any negative effect on foreign relations caused by open dialogue between Arizona and the federal government.

If informal Executive foreign policies could preempt state laws—as the court of appeals held—it would create an anomalous government imbalance where "evolving changes . . . from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action." R. at 4874. Such an outcome would undermine the fundamental principle that immigration "policy choices and value determinations [are] constitutionally committed . . . to the halls of Congress . . . ." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). It would also cause confusion as courts would have to decide whether statutes conflict with the most recent Executive policy, instead of Congress' policy. Because informal Executive policy decisions are not the "full purposes and objectives of Congress," section 2(B) is not conflict preempted by an Executive foreign policy.

Section 2(B) is consistent with Congress' intent that state officials assist federal officials in identifying illegal aliens. Its full compliance with the plain language of the Immigration and Nationality Act does not obstruct Congress' intent; it furthers it. Moreover, Congress ensured that states are authorized to identify illegal aliens outside of the Attorney General's discretion. In effect, this avoids the whimsical policy preferences of the newest administration. And section

2(B) does not interfere with Executive foreign policy. To find otherwise would allow any informal Executive foreign policy to preempt conflicting state laws. Because section 2(B) is consistent with the "full purpose and objectives of Congress," it is not conflict preempted by the INA.

2. Section 3's registration requirement merely mandates compliance with federal law and, thus, cannot conflict with federal law.

Section 3 survives conflict preemption because it mirrors federal objectives. States are authorized to act with respect to illegal aliens "where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler*, 457 U.S. at 225; *see also DeCanas*, 424 U.S. at 363 (finding no preemption of state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country"). As the Ninth Circuit explained, "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Fla. Lime*, 373 U.S. at 142), *rev'd on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (emphasis added). Congress has amended the INA 135 times since 1952 and has never expressly preempted concurrent state regulation. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (explaining that the case for preemption is "particularly weak" where Congress is aware of a state law operating in a field of interest and decides "to tolerate whatever tension there [is] between them").

Section 3 represents concurrent enforcement because it sanctions the same activity the INA prohibits. Section 3 provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code Section 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. § 13-1509(A) (2010).

8 U.S.C. § 1304(e) requires aliens to carry a registration document and 8 U.S.C. § 1306(a) requires aliens to register with the federal government. 8 U.S.C. §§ 1304(a), 1306(a) (2006). Because section 3 prohibits the failure to carry or complete a registration document—the same activity proscribed by sections 1304(e) and 1306(a)—it represents concurrent enforcement of federal law and cannot stand as an obstacle to "full purpose and objectives of Congress."

3. Section 5(C)'s sanctions against illegal aliens seeking employment does not conflict with federal law as both the federal and state law share the goal of seeking to discourage the employment of illegal aliens.

Section 5(C) makes it a crime for an illegal alien to solicit, apply for, or perform work in Arizona. Ariz. Rev. Stat. Ann. § 13-2928(C) (2010). Because the power to regulate employment remains within the states' historic police powers, the presumption against preemption applies here. *DeCanas*, 424 U.S. at 356. Accordingly, this Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194–95 (internal quotations and citations omitted). To overcome the presumption, the United States must demonstrate that it was the clear and manifest purpose of Congress to prohibit states from regulating *any* employment of illegal aliens. Because the United States has failed to meet its burden, section 5(C) is not preempted by IRCA.

This Court has recognized that illegal immigration threatens significant state interests. In *DeCanas*, the Court acknowledged that State legislation concerning the employment of unauthorized aliens was in the "mainstream of [state] police power." 424 U.S. at 356. The Court recognized that illegal immigration "deprives citizens and legally admitted aliens of jobs . . . [and] can depress wage scales and working conditions of citizens and legally admitted

aliens." *Id.* at 356–57. The Court also acknowledged the states' interest in addressing "local problems" resulting from a workforce that is not authorized to work in this country. *Id.*

Section 5(C) does not conflict with federal law because it shares the same objective. A primary purpose in restricting immigration is to preserve jobs for American workers. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991). Likewise, section 5(C)'s primary purpose is to preserve jobs for American workers by discouraging illegal aliens from seeking employment. It also assists federal authorities by tapping into state and local law enforcement's access to local knowledge and resources that typically would be out of reach. It is impractical for federal law enforcement to patrol the streets of every city. State and local authorities, however, patrol those same streets on a daily basis. Section 5(C) and IRCA share a common goal of discouraging illegal aliens from working in the United States; therefore, it cannot be conflict preempted.

4. Section 6's authorization of the warrantless arrest of removable aliens does not conflict with federal law as States have the right to enforce civil violations of immigration law.

Section 6 authorizes a warrantless arrest where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010). The issue turns on whether state officers may enforce civil violations of immigration law. Because section 6 stems from the states' inherent authority to make civil arrests, as recognized by the INA, it cannot be conflict preempted.

a. States have the inherent authority to make civil arrests.

No circuit court has ever held that the federal government preempts states from making arrests for a civil violation of federal immigration law. That is, of course, before the court of

appeals did in this case. By contrast, the Courts of Appeals for the First, Fourth, Fifth, Eighth, Tenth and Eleventh Circuits recognize state officers' authority to make immigration arrests.[3]

For example, in *Lynch v. Cannatella*, New Orleans Harbor Police arrested sixteen Jamaican stowaways on a barge headed for ports on the Mississippi River. 810 F.2d 1363, 1367 (5th Cir. 1987). The Fifth Circuit considered whether 8 U.S.C. § 1223(a), which defines the process for detaining alien stowaways, preempted the harbor police from detaining the illegal aliens. *Lynch*, 810 F.2d at 1370–71. Finding against preemption, the Fifth Circuit made clear, "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Id.* at 1371.

Or, in perhaps the most salient case, *United States v. Vasquez-Alvarez*, the Tenth Circuit Court of Appeals interpreted 8 U.S.C. § 1357(g)(10), which codifies the states' authority to make immigration arrests. 176 F.3d 1294, 1300 (10th Cir. 1999). The court declared that it "evince[d] a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Id.* Thus, the Tenth Circuit Court of Appeals—like the Fifth Circuit Court of Appeals—made no distinction between enforcing civil and criminal immigration laws.

Nevertheless, the court of appeals insists that *Vasquez* is distinguishable from this case because the Tenth Circuit incorrectly "interpreted § 1357(g)(10) to mean a 'formal agreement is not necessary for state and local officers to cooperate with the Attorney General in identification, apprehension, detention, or removal of aliens.'" R. at 4847. But even a cursory review of

[3] *See Estrada v. Rhode Island*, 594 F.3d 56 (1st Cir. 2010); *United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007); *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987); *United States v. Rodriquez-Arreola*, 270 F.3d 611 (8th Cir. 2001); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *United States v. Vasquez*, 225 F. App'x 831 (11th Cir. 2007).

§ 1357(g)(10) reveals that the Tenth Circuit could not have misinterpreted the statute's plain language:

> *Nothing in this subsection shall be construed to require an agreement* under this subsection in order for any officer or employee of a State or political subdivision of a State . . . *to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens* not lawfully present in the United States.

8 U.S.C. § 1357(g)(10)(B) (emphasis added). Rather than adhering to the Act's plain language, the court of appeals continued to ignore this Court's instruction that "extrinsic aids to construction" may be used "to solve, but not create, an ambiguity." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932).

Instead, the court relied on dicta from *Gonzales v. City of Peoria*—where the court expressly limited its holding to criminal laws—to support the proposition that state officers are not authorized to make civil arrests. R. at 4843. In that case, eleven individuals of Mexican descent challenged the City of Peoria, Arizona for ordering its officers to arrest aliens suspected of illegally entering the United States in violation of 8 U.S.C. § 1325, a criminal provision of federal immigration law. *Gonzales*, 722 F.2d at 468, *rev'd on other grounds*, *Hodgers-Durgin*, 199 F.3d 1037 (en banc). The issue before the Ninth Circuit was confined to whether local police officers could enforce criminal violations of the INA. *Id.* at 472. The court held that state officers are authorized to enforce criminal provisions of the INA. *Id.* However, in passing, the court noted:

> We *assume* that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power of immigration. *However, this case does not concern that broad scheme*, but only a narrow and distinct element of it—the regulation of criminal immigration activity by aliens.

Id. at 474–75 (emphasis added). Other than one broad statement made without any analysis, the court of appeals cannot cite to any separate authority, or point to any other reason that suggests a state officer cannot enforce civil of immigration laws.

Further, the court of appeals' decision is at variance with the opinion of the Department of Justice's Office of Legal Counsel (OLC).[4] In 2002, Attorney General Ashcroft weighed in on the issue and concluded that "[a]rresting aliens who have violated criminal provisions of [the INA] or civil provisions that render an alien deportable . . . is within the inherent authority of the states." Att'y Gen., U.S. Dep't of Justice, *Prepared Remarks on the National Security Entry-Exit Registration System* (June 6, 2002), available at http://www.usdoj.gov (last visited Sept. 20, 2011). Though non-binding, the OLC's opinion supports the conclusion that making civil arrests is within the inherent authority of the states.

b. The court of appeals' decision would produce an impractical result.

The court of appeals' novel distinction in immigration law between civil and criminal violations has as little basis in principle as it has in precedent. It has the practical effect of confusing state and local law enforcement officers around the country. The court assumes that local law enforcement is capable of discerning the subtle differences between civil and criminal law in the field. But their similarities outweigh their differences. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010) (observing a growing trend of civil immigration violations becoming intimately related to the criminal process).

The subtle difference between civil and criminal provisions is further blurred by the various offenses triggering both civil and criminal penalties. Kobach, *Quintessential Force Multiplier*,

[4] The OLC serves as general counsel for the Department of Justice.

supra, at 223. For example, creating counterfeit immigration documents is a civil violation of immigration law under 8 U.S.C. § 1324c(d)(3), but also a criminal violation under 18 U.S.C. § 1546(a). 8 U.S.C. § 1324c(d)(3) (2006); 18 U.S.C. § 1546(a) (2006). Some provisions of immigration law even include civil and criminal penalties in the same sentence. *See* 8 U.S.C. § 1306 (2006) ("Any alien . . . who files an application for registration containing statements known by him to be false . . . shall be guilty of a misdemeanor . . . and any alien so convicted shall . . . be taken into custody and be removed . . . ."). So while it may be reasonable for state and local officers to understand the basic concepts of immigration law, it is impractical to expect them to quickly and easily differentiate between civil and criminal violations in the field.

CONCLUSION

This Court should REVERSE the Ninth Circuit Court of Appeals' judgment in all respects.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

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APPENDIX "A"

UNITED STATES CONSTITUTIONAL PROVISION

U.S. Const. art. VI, cl. 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX "B"

FEDERAL STATUTORY PROVISIONS

§ 1304. Forms for registration and fingerprinting

(e) Personal possession of registration or receipt card; penalties

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both.

§ 1306. Penalties

(a) Willful failure to register

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

§ 1324a. Unlawful employment of aliens

(h)(2) Preemption

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

§ 1357. Powers of immigration officers and employees

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to

detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law. 8 U.S.C. § 1357(g)(1).

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General. 8 U.S.C. § 1357(g)(3).

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

§ 1373. Communication between Government agencies and the Immigration and Naturalization Service

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service 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.

§ 1644. Communication between State and local government agencies and Immigration and Naturalization Service

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

APPENDIX "C"

ARIZONA STATUTORY PROVISIONS

Section 2. Cooperation and assistance in enforcement of immigration laws; indemnification

(A) No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

(B) For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code § 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

(1) A valid Arizona driver license.

(2) A valid Arizona nonoperating identification license.

(3) A valid tribal enrollment card or other form of tribal identification.

(4) If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

(C) If an alien who is unlawfully present in the United States is convicted of a violation of state or local law, on discharge from imprisonment or on the assessment of any monetary obligation that is imposed, the United States immigration and customs enforcement or the United States customs and border protection shall be immediately notified.

(D) Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present in the United States and who is in the agency's custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this state.

(E) In the implementation of this section, an alien's immigration status may be determined by:

(1) A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

(2) The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code § 1373(c).

(F) Except as provided in federal law, officials or agencies of this state and counties, cities, towns and other political subdivisions of this state may not be prohibited or in any way be restricted from sending, receiving or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state or local governmental entity for the following official purposes:

(1) Determining eligibility for any public benefit, service or license provided by any federal, state, local or other political subdivision of this state.

(2) Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding in this state.

(3) If the person is an alien, determining whether the person is in compliance with the federal registration laws prescribed by title II, chapter 7 of the federal immigration and Nationality act.

(4) Pursuant to 8 United States Code § 1373 and 8 United States Code § 1644.

(G) This section does not implement, authorize or establish and shall not be construed to implement, authorize or establish the REAL ID act of 2005 (P.L. 109-13, division B; 119 Stat. 302), including the use of a radio frequency identification chip.

(H) A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Code §§ 1373 and 1644, to less than the full extent permitted by federal law. If there is a judicial finding

that an entity has violated this section, the court shall order that the entity pay a civil penalty of not less than five hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection.

I. A court shall collect the civil penalty prescribed in subsection H of this section and remit the civil penalty to the state treasurer for deposit in the gang and immigration intelligence team enforcement mission fund established by § 41-1724.

J. The court may award court costs and reasonable attorney fees to any person or any official or agency of this state or a county, city, town or other political subdivision of this state that prevails by an adjudication on the merits in a proceeding brought pursuant to this section.

K. Except in relation to matters in which the officer is adjudged to have acted in bad faith, a law enforcement officer is indemnified by the law enforcement officer's agency against reasonable costs and expenses, including attorney fees, incurred by the officer in connection with any action, suit or proceeding brought pursuant to this section in which the officer may be a defendant by reason of the officer being or having been a member of the law enforcement agency.

L. This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

Section 3. Willful failure to complete or carry an alien registration document; exception; authenticated records; classification

(A) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).

(B) In the enforcement of this section, an alien's immigration status may be determined by:

(1) A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

(2) The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

(C) A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

(D) A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or the person is eligible for release pursuant to § 41-1604.07.

(E) In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs.

(F) This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

(G) Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.

(H) A violation of this section is a class 1 misdemeanor, except that the maximum fine is one hundred dollars and for a first violation of this section the court shall not sentence the person to more than twenty days in jail and for a second or subsequent violation the court shall not sentence the person to more than thirty days in jail.

Section 5. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

(A) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(B) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(C) It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.

(D) A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

(E) In the enforcement of this section, an alien's immigration status may be determined by:

(1) A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

(2) The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code § 1373(c).

(F) A violation of this section is a class 1 misdemeanor.

(G) For the purposes of this section:

(1) "Solicit" means verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.

(2) "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3).

Section 6. Arrest by officer without warrant

(A) A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe:

(1) A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

(2) A misdemeanor has been committed in the officer's presence and probable cause to believe the person to be arrested has committed the offense.

(3) The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28,[1] and that such violation occurred prior to or immediately following such traffic accident.

(4) A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under § 13-3903.

(5) The person to be arrested has committed any public offense that makes the person removable from the United States.

(B) A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.