No. 11-182

In The
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the Ninth Circuit's improper application of federal preemption standards. In particular, Landmark explains the Ninth Circuit's misapprehension and misapplication of *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). Moreover, Landmark demonstrates that the Ninth Circuit erred in giving deference to the foreign *Amicus Curiae* as part of that Court's "foreign relations" preemption analysis.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case will determine whether the Constitution reserves to a state the sovereign authority to protect

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of *Amicus Curiae* briefs.

its citizens from interference from the national and foreign governments when the state's action is consistent with and advances congressional directives. Moreover, this case will determine whether Congress or the Executive Branch has authority to establish priorities for "a uniform Rule of Naturalization."

The Constitution expressly grants Congress, not the President, the power to regulate naturalization of individuals from foreign nations. U.S. Const. Art. I, Section 8, Cl. 4. Where, as in this case, Congress has focused its attention on the issue and invited state cooperation in the exercise of a granted power, Executive Branch preferences for a contrary policy "are merely [wishful thinking] and cannot render unconstitutional" a state's otherwise valid and congressionally condoned exercise of state sovereignty. *Barclays Bank PNC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994). The courts below, however, have embraced a different standard that usurps Congress's authority to carry out its constitutional charge and interferes with Arizona's sovereign authority to protect its inhabitants through the enactment of SB 1070, the Support Our Law Enforcement and Safe Neighborhoods Act ("SB 1070"). *See United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

Congress has repeatedly addressed the issue of immigration and naturalization and has encouraged and relied upon assistance from state and local law enforcement agencies. The Immigration and Nationality Act, 8 U.S.C. Section 1101 *et seq.* ("the INA"), sets forth Congress's current policies. With the incorporation of

the Immigration Reform and Control Act, 100 Stat. 3359, Congress enacted: 1) a specific invitation to the states that they assist in the enforcement of federal immigration law; and 2) a directive that the Executive Branch cooperate with state efforts to identify individuals illegally in the country. 8 U.S.C. Section 1357(g)(10)(A) and (B). The INA expressly prohibits the Executive Branch from disregarding Congress's mandate for state and federal cooperation. 8 U.S.C. Section 1373(c). Moreover, the INA does not contain any provision authorizing federal courts to defer to protests from foreign nations when weighing questions related to state efforts to cooperate and support federal immigration law enforcement.

In addition to the reasons stated in Petitioner's Brief, the Ninth Circuit's decision, specifically to the extent it is based on a "foreign relations" preemption analysis, should be reversed. The decision poses an immediate danger to the citizens of Arizona in general and to the state's law enforcement personnel in particular. The extraordinarily low bar set by the Ninth Circuit's deference to complaints raised by foreign nations is in direct conflict with Supreme Court precedent and must not be allowed to stifle individual states from exercising their sovereign power to protect their citizens.

Finally, the Circuit Court gave unwarranted deference to objections to SB 1070 raised by certain foreign nations. Each of these nations has a tremendous financial stake in the perpetuation of the current flow of remittances from their citizenry living and working (in large numbers illegally) in the United

States. Moreover, these nations, as a group, and Mexico in particular, have long records of human rights abuses against their own citizens and immigrants alike. The Ninth Circuit majority should have found absurd the notion that these nations would use our judicial system to lecture the United States on human rights abuses.

If the federal government's politically motivated challenge of SB 1070 is successful, rather than bring consistency and certainty to immigration on a national level, it will create even more chaos and confusion. The federal Executive Branch's selective and inconsistent application of field preemption in immigration law must not be given this Court's imprimatur. Otherwise, lawless state and local governments that have adopted sanctuary policies that directly violate federal immigration law and have not been challenged by the Executive Branch will continue to be lawless. Conversely, law-abiding governments that help enforce federal immigration law will be without direction.

The District Court abused its discretion by entering a preliminary injunction order supported by a deficient factual record and an erroneous legal analysis that disregards Arizona's sovereign authority and ignores clearly established standards for both federal preemption claims and facial constitutional challenges. The Ninth Circuit compounded the District Court's error with its "foreign relations" preemption analysis.

ARGUMENT

The U.S. Constitution vests full authority in Congress for the naturalization of new citizens. *See* U.S. Const. Art. I, Section 8, Cl. 4. Congress, in turn, has enacted the INA with its various components establishing the nation's policies and priorities for immigration and naturalization. Within the INA, Congress has declared that effective enforcement of immigration and naturalization laws must include cooperation between federal, state and local law enforcement authorities. *See* 8 U.S.C. Section 1357(g). This cooperation may be by way of formal partnerships or of an informal nature. *Id*. (Formal agreements are provided for in Sections 1357(g)(1)-(8); informal cooperation is provided for in Section 1357(g)(10).)

The State of Arizona seeks to be a full partner in INA enforcement. Formal agreements are in place with certain local law enforcement agencies.[2] Furthermore, Arizona's legislature and governor have sought to provide additional support through, among other statutes, SB 1070.

No individual's immigration status will be changed or otherwise affected by the enforcement of Arizona's statute. SB 1070 does not confer on Arizona

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[2] *See*, *e.g.*, Memorandum of Agreement Between United States Immigration and Customs Enforcement and Maricopa County, Arizona, Oct. 26, 2009, available at http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf.

the authority to grant, deny or condition anyone's immigrant status. Nor does the law allow Arizona to deport anyone. In short, SB 1070 does not conflict with or violate any federal immigration law, any constitutional principle or provision, any federal statute, or any relevant judicial precedent. SB 1070 does not supplant the federal government's constitutional authority to regulate the flow of immigrants into, through or out of the country. The most that can be done by Arizona state or local law enforcement officials is, after due process, incarcerate or otherwise punish an individual for violations of state statutes.

I. The Ninth Circuit's Preemption Analysis Erroneously Deprives Arizona's Exercise Of Its Sovereign Duty To Protect Its People.

A. Illegal border crossings threaten Arizona's inhabitants.

Arizona is the "main gateway for illegal border crossers" from Mexico. Daniel González, "Big Cut Set For Border Troops," *The Arizona Republic*, Dec. 21, 2011, p. A1. The U.S. Department of Justice (DOJ) also reports that Arizona is "a major entry point for illicit drugs, particularly marijuana and heroin, transported from Mexico to the United States." Drug Market Analysis for Arizona 2011, at 2, available at http://www.justice.gov/ndic/dmas/Arizona_DMA-2011(U).pdf. Nearly half of the marijuana smuggled from Mexico into the U.S. crosses Arizona. *Id.* Mexican drug trafficking organizations operating in Arizona have become so brazen that they have "begun to threaten

local police officers [in Arizona] to deter their enforcement activities. Violent criminal groups often referred to as border bandits, rip crews, or bajadores, operate along trafficking corridors in remote locations, preying upon law enforcement officers and smugglers who transit their territories." *Id.* at 6. Furthermore, they "often dress in tactical gear in an attempt to appear to be legitimate law enforcement personnel." *Id.* The Mexican drug cartels travel in both directions, smuggling currency and illegal weapons back out of the U.S. through Arizona. *Id.* at 4.

Away from the international border in the northern part of the state, where there is little federal focus, human-traffickers transport tens of thousands of illegal immigrants each year on Arizona's highways. They create "a public-safety hazard because they are overloaded with passengers or operate with faulty equipment," resulting in highway deaths. Daniel González, "Migrants Caught In N. Arizona Often Freed; Federal Enforcement Lacking North Of Valley," *The Arizona Republic*, Aug. 3, 2007, p. A1. Local law enforcement must often release them, however, because there is no federal presence north of Phoenix and they have no state authority to detain them if the federal government is not able to respond. "It's a fairly frequent event that we encounter them," said Lt. Jim Gerard, commander of the Arizona Department of Public Safety's Flagstaff region. "If ICE (Immigration and Customs Enforcement) is unable to respond, then we release them." *Id.*

Illegal immigration in Arizona involves not just individuals who have overstayed their visas or migrant workers looking for jobs. It is inextricably connected to the trafficking of human beings, illicit drugs, weapons and currency. It is connected to some of the most violent criminal organizations in the world. Simply put, illegal immigration is a threat to the safety of the people of Arizona.

B. Arizona has a sovereign duty and the constitutional authority to protect its inhabitants.

Only 50 years after the Constitution's ratification, the U.S. Supreme Court declared in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), that states not only retain their sovereignty, but maintain solemn responsibilities to their citizens:

> [A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those

> powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.

36 U.S. at 133.

Subsequent courts applying the Constitution to state police powers have established firmly and beyond question the sovereign power of states to protect the public. Furthermore, this police power extends to protecting the public from individuals who are in violation of federal statutes. *See*, *e.g.*, *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *United States v. Di Re*, 332 U.S. 581, 591 (1948). Moreover, this police power extends to the enforcement of federal immigration statutes despite the Constitution's grant of exclusive federal authority to establish immigration standards and regulations. *See Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (holding that the arrest of an alien for violation of federal immigration criminal provisions permitted if arrest is authorized under state law). "[W]here state enforcement activities do not impair federal regulatory interests, concurrent enforcement activity is authorized." *Id*. at 474.

This Court has held that:

> [W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws. Only a

> demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was "the clear and manifest purpose of Congress' would justify that conclusion."

De Canas v. Bica, 424 U.S. 351, 357 (1976) (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

The Ninth Circuit's decision upholding the District Court's preliminary injunction against SB 1070, Arizona's legislative attempt to protect the public, is not based on any such demonstration.

C. SB 1070 is in no way similar to the kind of state registration system rejected in *Hines v. Davidowitz*.

The Ninth Circuit endorsed the District Court's preposterous comparison between SB 1070 and the sweeping registration and open-ended inquisitorial provisions struck down in *Hines v. Davidowitz*, 312 U.S. 52 (1941). *United States v. Arizona*, 641 F.3d 339, 353 (9th Cir. 2011). In *Hines*, Pennsylvania required *legal aliens* to file an annual state registration form, carry at all times and produce on demand an alien registration card, pay an annual registration fee, and submit to an annual open-ended "interview" with state officials covering any and all topics at the interviewer's discretion. *Hines*, 312 U.S. at 59. Nothing remotely similar is found in SB 1070, which

applies *only* to aliens reasonably suspected of being *unlawfully* in Arizona and who are only subject to the law under specific, limited circumstances. SB 1070.

The Ninth Circuit compounded the District Court's error, employing a flimsy and clearly erroneous "foreign relations" preemption analysis that is in no way consistent with applicable Supreme Court precedence.[3]

III. Congress Intends Cooperation Between The States And The Federal Government In Immigration Matters.

There are over 11 million illegal immigrants in the United States, as of March 2010. Jeffrey Passel and D'Vera Cohn, Unauthorized Immigrant Population: National and State Trends, 2010, Pew Research Center, Feb. 1, 2011, available at http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/. There are approximately 18,000 Border Patrol agents assigned to the Southwest border of the United States. Any suggestion that Congress intends the immigration laws to be enforced by the federal government alone without state and local cooperation is ludicrous.

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[3] The Ninth Circuit panel also erred in its approval of the District Court's defective facial challenge analysis. *Amicus Curiae* Landmark Legal Foundation agrees with Petitioner that defects on this topic exist in the lower courts' decisions, but will not repeat those arguments here.

A. The Ninth Circuit misconstrued the plain meaning of the INA to find that congressional intent preempts SB 1070.

The INA invites the states to assist in the enforcement of federal immigration law. It also directs the Executive Branch to cooperate with state efforts to identify individuals illegally in the country. 8 U.S.C. Section 1357(g)(10). In addition, the INA expressly prohibits the Executive Branch from disregarding Congress's mandate for state and federal cooperation in the communication of immigration-related information. 8 U.S.C. Section 1373(c). Despite this clear evidence of congressional intent for federal and state cooperation, however, the Ninth Circuit engaged in a tortured analysis to avoid the plain meaning of the statute.

Section 1357(g) provides for the "Performance of immigration officer functions by State officers and employees." It begins with a provision allowing the states to voluntarily enter into agreements with the Attorney General of the United States so that local law enforcement officers can become trained and qualified to perform the same duties as federal immigration officers:

> . . . [T]he 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. Section 1357(g)(1) (emphasis added).

Further subsections of 1357(g) provide detail to the operation of such formal agreements. However, to reinforce the notion that this provision allowing formal but voluntary state/federal agreements did not preclude the states from acting independently of such agreements, Section 1357(g) concludes with several important points. First, it states that "[n]othing in this subsection shall be construed to *require* any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection." 8 U.S.C. Section 1357(g)(9) (emphasis added). Furthermore, the absence of such an agreement does not affect local law enforcement's ability to communicate with the Attorney General regarding immigration status or to cooperate with the Attorney General in the enforcement of immigration law. The law states:

> *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.

8 U.S.C. Section 1357(g)(10) (emphasis added).

The Ninth Circuit, however, parsed Section 1357(g)(10) so narrowly that it was nearly read out of the statute. The Ninth Circuit majority reasoned that:

> Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of § 1357(g), which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision.

United States v. Arizona, 641 F.3d 339, 349 (9th Cir. 2011).

To the Ninth Circuit, federal and state cooperation only occurs pursuant to formal agreement or limited circumstances under the direct supervision of the Attorney General. Yet the Ninth Circuit ignores the key language of Section 1357(g)(10) stating that *nothing* in the subsection should be read to require formal agreement for state enforcement of immigration law.

As the dissent noted, the Ninth Circuit majority interpreted "nothing" to mean "everything." *United States v. Arizona*, at 372. Only an illogical reading of the statute can support the idea that the INA preempts SB 1070.

B. Multiple federal statutes demonstrate congressional intent that the states and federal government cooperate in immigration law enforcement.

Congress's intent that the federal government must operate in cooperation with the states and local government on immigration matters can be determined by a review of the many federal statutes and programs touching on this issue. As demonstrated above, Section 1357(g) provides for state officer performance of immigration enforcement, even in the absence of formal agreement. There are many more examples.

Section 1373(c) requires the Executive Branch to respond to immigration status inquiries from state and local law enforcement:

> 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.

8 U.S.C. Section 1373(c) (emphasis added).

It is critical that the statute makes the federal response mandatory and not otherwise subject to Executive Branch discretion. *Id.*[4]

Section 1252c provides that state and local law enforcement officers can arrest and detain certain illegal aliens previously convicted of a felony after confirming their status with the INS. It further mandates that the Attorney General provide such status information to state and local law enforcement:

> The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties [of arrest and detention] is made available to such officials.

8 U.S.C. Section 1252c(b).

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[4] As with Arizona's mandate that all employers in the state utilize the voluntary federal E-Verify system for confirming a potential employee's immigration status recently upheld by this Court in *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968 (2011), SB 1070's mandate that state and local law enforcement utilize Congressionally directed, but voluntary resources does not conflict with the federal statute. 131 S.Ct. at 1973.

As noted by the Tenth Circuit, the purpose of § 1252c was "to displace a perceived federal limitation on the ability of state and local officers to arrest aliens in the United States in violation of Federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298-99 (10th Cir. 1999).

The operation of state statutes in conjunction with federal immigration statutes has recently been considered and approved by this Court. In *Whiting*, the interplay of a federal statute prohibiting the employment of unauthorized aliens, the Immigration Reform and Control Act (IRCA), and an Arizona statute was at issue. The IRCA prohibits knowingly hiring unauthorized immigrants and preempts state laws imposing sanctions on those who hire illegal immigrants. 8 U.S.C. Section 1324a. The Arizona statute, the Legal Arizona Workers Act, provides for the suspension and/or revocation of the business licenses of Arizona employers who knowingly or intentionally employ illegal aliens. This Court ruled that the Legal Arizona Workers Act was not expressly preempted by the IRCA, finding that the Arizona statute falls within the federal law's exception preserving state authority to impose sanctions through licensing and other similar laws. *Chamber of Commerce*, 131 S.Ct. at 1973. SB 1070 is similarly condoned by Congress.

It is important to note that Congress's mandates do not apply to the Executive Branch alone. Section 1373 not only requires the INS to respond to inquiries from state and local government, it also provides clear instruction that Federal, state and local governments

cannot restrict their officials from communicating with the INS on such information. 8 U.S.C. Section 1373. This reinforces the notion that the federal immigration laws contemplate a dual responsibility among the federal government and the states.

The abundance of examples within the federal statutes showing Congress's intent that the federal government work in conjunction with state and local law enforcement to enforce this country's immigration laws stands as a powerful argument against federal preemption of SB 1070.

C. The Executive Branch has ignored Congress's clear intent for cooperative immigration enforcement.

The Executive Branch is attempting to thwart Congress's clear intent for immigration policy by challenging SB 1070. Its decision to prevent Arizona from protecting its citizens is even more galling in light of its willful failure to stop more egregious actions by state and local governments around the country that are in violation of and contrary to federal law. Certain states and local governments have decided to flout federal law and declare themselves "sanctuary cities" where immigration status is concealed from federal authorities. Many have also decided to provide in-state tuition benefits to illegal aliens, in direct contravention of federal law.

Section 1373, as noted above, requires that the Executive Branch provide immigration status

information to the states when requested. It also provides a clear instruction that state and local governments cannot restrict law enforcement from communicating with the federal government about immigration status.

> (a) . . . [N]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) . . . [N]otwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. Section 1373.

Many states and local governments are ignoring this mandate. Some localities have even declared that they will not respond to ICE detainer requests. Among such localities is President Obama's former home, Cook County, Illinois, where a local ordinance states:

> Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.

Cook County Code, Section 46-37(b).

Congress has attempted to discourage illegal immigration by directing the states not to provide in-state tuition benefits to illegal immigrants unless other U.S. citizens are also eligible.

> [A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope)

> without regard to whether the citizen or national is such a resident.

8 U.S.C. Section 1623.

Yet, twelve states currently provide illegal aliens with in-state tuition rates (California, Texas, New York, Utah, Washington, Oklahoma, Illinois, Kansas, New Mexico, Nebraska, Maryland, and Connecticut). Hans A. von Spakovsky and Charles D. Stimson, "Providing In-State College Tuition for Illegal Aliens: A Violation of Federal Law," The Heritage Foundation, Nov. 22, 2011, available at http://thf_media.s3.amazonaws.com/2011/pdf/lm_0074.pdf. Some observers have noted that this policy actually encourages further illegal immigration. *Id.*

The Executive Branch is thus perversely attempting to prevent Arizona from protecting its citizens while turning a blind eye to willful violations of federal law. This Court should consider the validity of the Executive Branch's argument that Congress has intended to "occupy the field" of immigration law in Arizona's case while unambiguous violations of immigration law are unaddressed. If the Executive Branch succeeds in this case, and SB 1070 is preempted, illegal immigration will only fester.

III. The Ninth Circuit's "Foreign Relations" Preemption Analysis Is Contrary To Applicable Supreme Court Precedent.

The consideration of foreign relations concerns in legal controversies is subject to guidelines governed by first principles. *Medellin v. Texas*, 552 U.S. 491, 524 (2008). "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Id*. (quoting *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). *Medellin* set forth the general principles controlling in the present case:

> Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, [w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. Second, [w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. In this circumstance, Presidential authority can derive support from congressional inertia, indifference or quiescence. *Finally, [w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb and the Court can sustain his actions only by*

> *disabling the Congress from acting upon the subject.*

552 U.S. at 637-38 (emphasis added, internal quotations and citation omitted). It is this third consideration that applies to this case

A. *Barclays Bank* controls this case's preemption analysis.

The preemption analysis applicable in this case is found in *Barclays Bank PNC v. Franchise Tax Board of California*, 512 U.S. 298 (1994). Despite the foreign relations-based objections of the Executive Branch and in the face of widespread foreign disapproval (including the enactment of retaliatory tariffs and the registration of formal diplomatic protests), the Supreme Court upheld the constitutionality of a California state taxation statute. *Id*. at 326.

In *Barclays Bank*, Congress had considered myriad legislative proposals aimed at prohibiting states from determining state franchise taxes from a company's worldwide sales. However, because Congress declined to act, the Supreme Court upheld the California tax, despite the Executive Branch's assertion that the tax prevented the nation from speaking with one unified voice concerning matters of foreign commerce.

In explaining its decision, this Court noted that:

> The Constitution expressly grants Congress, not the President, the power to regulate

> Commerce with foreign Nations. As we have detailed, Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting. That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation's ability to speak with one voice, but is rather evidence that *the preeminent speaker decided to yield the floor to others*.

512 U.S. at 329 (internal quotations omitted, emphasis added).

This Court concluded that it was required to adhere to constitutional principles and that "[t]he judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'" *Id.* at 328. In the *Barclays Bank* context, the Court rightfully held that the power lies with Congress. *Id*. The same analysis must apply to Congress's authority to regulate immigration, which is also expressly granted by the Constitution. Congress is the preeminent speaker on matters of immigration and it has decided *not* to yield the floor to the Executive Branch, the Judicial Branch, or to foreign governments.

Rather, Congress has made crystal clear its intention to ensure state participation in INA enforcement. Section 1357 not only encourages state efforts

to cooperate in immigration law enforcement, but also mandates federal cooperation with the kind of activities contemplated in SB 1070. The Executive Branch's "agency priorities" objection to SB 1070 is irrelevant as a matter of law because agency priorities cannot trump statutory directives. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in part and concurring in judgment) (Even if the President is "better able to decide than [the courts] which state regulatory interests should currently be subordinated to our national interest in foreign commerce . . . [u]nder the Constitution . . . neither he nor we were to make that decision, but only Congress.") *See also Barclays Bank*, 512 U.S. at 326.

As a matter of law, *Barclays Bank* stands as an obstacle to the Ninth Circuit's decision. But the panel's majority ignores it, relying instead on *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for the proposition that SB 1070 conflicts with federal immigration priorities and thus is preempted by federal law. The state statute rejected in *Crosby*, however, is easily distinguishable from SB 1070.

B. The Ninth Circuit's reliance on *Crosby* is inapposite as SB 1070 does not include provisions contrary to any congressional directive or Executive Branch treaty or agreement.

In *Crosby*, Massachusetts enacted a sweeping state statute prohibiting state agencies from transacting business with Burma and penalizing private parties that did so. 530 U.S. at 367-68. The statute conflicted directly with a federal statute enacted shortly thereafter that imposed limited targeted sanctions, specifically exempting certain sanctions included in the Massachusetts law. *Id.* at 368-69. In addition, the federal law delegated extensive authority to the President to exercise his discretion in managing the sanctions program. *Id.* The law also directed the President to develop, implement and report on a broad diplomatic effort to bring about human rights improvements in Burma. *Id.*

The Massachusetts law conflicted with the federal scheme "by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions." *Id.* at 378. Moreover, unlike SB 1070, the Massachusetts law conflicted with the federal act's grant of authority to the President to develop a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." *Id.* at 380. "As with Congress's explicit delegation to the President of power over economic sanctions, Congress's express command to the President to take the initiative for the United

States among the international community invested him with the maximum authority of the National Government, in harmony with the President's own constitutional powers." *Id.* at 381 (citing *Youngstown Sheet & Tube*, 343 U.S. at 635).

Massachusetts's Burma sanctions statute was challenged and ultimately overturned by this Court for conflicting with a statutory text delegating authority both to manage a uniform sanctions program and to direct diplomatic efforts. *Id*. at 380. Of course, no such conflicts are present here, where the INA's federal-state cooperative provisions stand in obvious contrast to Congress's sweeping delegation of power to the President present in *Crosby*.

Congress has declared that in the field of immigration law enforcement there is to be no restriction on state communication with federal law enforcement concerning the status of any individual or any restriction on state cooperation with federal authorities in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States. 8 U.S.C. Section 1357(g)(10). Moreover, federal officials may not place restrictions on state and local inquiries into, and must respond to state inquiries concerning, any individual's immigration status. 8 U.S.C. Section 1373(a) and (c).

The Ninth Circuit, however, erroneously applied *Crosby*'s preemption standard to SB 1070, concluding that Arizona's statute was preempted because "Congress clearly intended the federal Act to provide

the President with flexible and effective authority," and that the state law's "unyielding application undermines the President's intended statutory authority." 641 F.3d at 352 (quoting *Crosby*, 530 U.S. at 374, 377). This conclusion, however, undermines Congress's authority and should be rejected by this Court.

C. The Ninth Circuit's "foreign relations" preemption analysis is not supported by the cases cited.

The Ninth Circuit panel went on to declare that "[i]n addition to Section 2(B) standing as an obstacle to Congress' statutorily expressed intent, the record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption." *Id.* The panel cited *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) for the proposition that "even . . . the *likelihood* that state legislation will produce something more than *incidental* effect in conflict with express foreign policy of the National Government would require preemption of the state law." *United States v. Arizona*, 641 F.3d at 352 (citing *Garamendi*, 539 U.S. at 420 (emphasis added by panel)). Yet, as shown below, the Ninth Circuit's incomplete quotation of *Garamendi*, which cites the earlier case *Zschernig v. Miller*, 389 U.S. 429 (1968), lacks its necessary context. The Ninth Circuit fundamentally misunderstands *Garamendi* and misapplies its holding to the panel's "foreign relations" preemption analysis.

In *Garamendi*, this Court considered whether "executive agreements" entered into by the President with foreign nations, absent congressional direction or input, would preempt a conflicting state statute. The Court held that because Congress had not exercised any authority in the relevant area and because the executive agreement was within the President's traditional foreign relations authority, the conflicting state statute was preempted. 539 U.S. at 427.

Justice Souter looked to Justice Harlan's discussion of field and conflict preemption in *Zschernig* for guidance. *Garamendi*, 539 U.S. at 418-20 (citing *Zschernig*, 389 U.S. at 457-59). In *Zschernig*, the majority held that an Oregon statute providing for escheat where nonresident alien heirs claimed property was an unconstitutional intrusion by the state into foreign affairs. 389 U.S. at 432. In his concurrence, Justice Harlan took exception to the *Zschernig* majority's preemption analysis because he thought it was too expansive. Harlan argued for "conflict" preemption, as opposed to the majority's adoption of a very broad application of "field" preemption.

Harlan considered it "farfetched" to preempt every state statute that has "some incidental or indirect effect in foreign countries. . . . [because] that is true of many state laws which none would claim cross the forbidden line." *Zschernig*, 389 U.S. at 458 (Harlan, J., concurring) (citing *Clark v. Allen*, 331 U.S. 503, 517 (1947)). Where the state passed a law in an area of a traditional state responsibility, but that law affected foreign relations, Harlan argued that a mere incidental effect was insufficient to invalidate the

law. Instead, further inquiry should be made into the level that the law conflicted with federal policy or "the express mandates of the Constitution." *Id.* at 459.

Justice Souter considered Harlan's concurrence but ultimately decided that it was unnecessary to choose between the two theories – field or conflict preemption – when deciding the case based on a clear conflict between state statute and executive agreement. As Justice Souter explained,

> For even under Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law. And since on his view it is legislation within "areas of . . . traditional competence" that gives a State any claim to prevail . . . it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.

Garamendi, 539 U.S. at 420 (citing *Zschernig*, 389 U.S. at 459) (internal citations omitted).

The Ninth Circuit thus cited *Zschernig*'s concurrence as authority for strict field preemption without mentioning the circumstances where a weighing of state interest was necessary. The Ninth Circuit also confused what were clear instances of "express foreign policy" in *Crosby* (congressional delegation to the Executive Branch) and *Garamendi* (formal executive

agreement) to the instant case. Here, there is no "express foreign policy" by way of treaty or executive agreement between the United States and Mexico or other South American nation regarding the treatment of resident aliens. In fact, the express policy on immigration is the prerogative of Congress, not the Executive Branch. That policy, furthermore, specifically calls for state involvement. SB 1070 acts in harmony, not conflict, with Congress's policy. Accordingly, the Ninth Circuit gets Justice Harlan's analysis exactly backwards. Read correctly, the language supports SB 1070 and not the Ninth Circuit's reasoning, which applies the kind of farfetched preemption analysis criticized in *Zschernig*.

D. Given congressional directives to the contrary, Executive Branch and foreign policy objections to SB 1070 are irrelevant as a matter of law.

Even assuming foreign relations had some bearing on this case, the Ninth Circuit's analysis did not comport with this Court's precedents. "[T]he reactions of foreign powers and the opinions of the Executive [are] irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments and the Executive." *Crosby*, 530 U.S. at 385 (citing *Barclays Bank*, 512 U.S. at 324-28).

Moreover, the Court acknowledged that courts in general are not well-equipped to weigh foreign policy assertions: "We have, after all, not only recognized

the limits of our own capacity to 'determine precisely when foreign nations will be offended by particular acts, but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'" *Id*. at 386 (quoting *Barclays Bank*, 512 U.S. at 327; *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983)).

In this case, foreign reaction is irrelevant as a matter of law. In fact, the foreign governments cite to no violation of any treaty or laws of any kind. The Ninth Circuit majority disregards this Court's precedents and concludes from what can charitably be characterized as paper thin evidence that "the record unmistakably demonstrates that SB 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption." *United States v. Arizona*, 641 F.3d at 352 (citing *Garamendi*, 539 U.S. 396).[5]

Even if relevant, the foreign objections raised against SB 1070 pale in comparison to the official protests, retaliatory measures and orders from international courts that have met with this Court's

[5] SB 1070's sole purpose is to contribute to the advancement of statutory priorities that Congress has declared. It is not in any way aimed at influencing any other nation's policies. Moreover, SB 1070 does not conflict in any way with the terms of any treaty or other formal agreement between the United States and any other country.

demurrer in, *inter alia*, *Barclays Bank* and *Medellin*. But none of it should have mattered had the Ninth Circuit conducted the proper legal analysis. Instead, the Circuit Court has established a dangerous and disruptive precedent for states struggling to deal with a tremendous public safety crisis.

IV. Mexico And Its Co-*Amici* Come To This Court With Unclean Hands And Lack Credibility.

While the judiciary does not have the jurisdiction or expertise to weigh the relative merit of foreign complaints against legislative enactments, the Ninth Circuit concluded, in part, that SB 1070 should be stricken because it damages foreign relations between the nations and the United States. *United States v. Arizona*, 641 F.3d at 352. The lower courts also abused their discretion by preliminarily enjoining SB 1070 in any part on the basis of foreign objections because the credibility of the foreign objectors was not examined. *See Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 381 (2008). Had the lower courts conducted such an examination and tested the credibility of the foreign governments concerning the issues in this case, they would have found that Mexico and its supporting group of countries come to this controversy with unclean hands – motivated by political and financial interests rather than humanitarian and legal concerns.

A. Mexico's human rights abuses towards its own people and immigrants found in Mexico belie its purported humanitarian concerns.

The Congressional Research Service's 2011 report to Congress on Mexico examines human rights abuses inside that country. Citing U.S. Department of State data, CRS details serious human rights problems remaining in Mexico:

> These included unlawful killing by security forces; kidnappings; physical abuse; poor and overcrowded prison conditions; arbitrary arrests and detention; corruption, inefficiency and lack of transparency that engendered impunity in the judicial system; confessions coerced through torture; and violence against journalists leading to self-censorship. In 2010, nine Mexican journalists died and four disappeared. Societal problems highlighted in the report included domestic violence; trafficking in persons; social and economic discrimination against some members of the indigenous population; and child labor.

Clare Ribando Seelke, "Mexico: Issues for Congress," Congressional Research Service, RL32724, June 9, 2011 (hereinafter CRS Report) (citing U.S. Department of State, 2010 Human Rights Report: Mexico (Apr. 2011)).

Moreover, immigrants traveling in Mexico face dangers as well. The Congressional Research Service report notes, "[t]he Mexican government has actively promoted migrants' rights internationally and the

rights of Mexican migrants in the United States, but has been criticized by human rights organizations for failing to protect migrants from other countries who transit its territory." CRS Report, at 25.

Beatings, kidnapping, rape and murder are common dangers for individuals illegally present in Mexico. "Although few cases are officially registered and virtually none are ever prosecuted, some human rights organizations and academics estimate that as many as six in 10 women and girl migrants experience sexual violence during the journey [through Mexico]." "Invisible Victims: Migrants on the Move in Mexico," Amnesty International, Apr. 2010.

Like tens of thousands of Mexicans, additional tens of thousands of Central Americans flee the lack of economic opportunity resulting from government controls and public corruption of their homelands. According to Amnesty International:

> [T]heir journey is one of the most dangerous in the world. . . . Riding precariously on the tops of freight trains, many are met with discrimination and xenophobia, targeted by people smugglers and prey to kidnapping by criminal gangs. Every year thousands of migrants are ill-treated, abducted or raped. Arbitrary detention and extortion by public officials are common.

Id.

Arizona does not share Mexico's distressing record for the mistreatment of immigrants – legal or

otherwise. Yet, the Ninth Circuit deferred to Mexico's diplomatic pressure. *United States v. Arizona*, 641 F.3d at 353.

B. Other foreign *Amici* also have disturbing human rights records that undermine their credibility in this matter.

Mexico is not the only foreign nation participating in this matter with unclean hands. For example, the Department of State reports that El Salvador, Ecuador and Guatemala (among others) have long records of widespread human rights abuses in their countries.

The Department of State reported that in 2010 unlawful killings by state security forces, abuse of detainees, violence and discrimination against immigrants (especially woman and children), human trafficking, and other human rights abuses are ongoing and serious problems in those nations. *See* U.S. Department of State Human Rights Report: Ecuador, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154504.htm; U.S. Department of State Human Rights Report: El Salvador, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154505.htm; U.S. Department of State Human Rights Report: Guatemala, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154507.htm.

Yet, none of these facts were considered by the lower courts when weighing the foreign country objections to SB 1070. Moreover, Mexico's internal

immigration laws betray a vastly more restrictive and, in practice, oppressive set of immigration laws.

C. Mexico's immigration laws demonstrate hypocrisy.

Mexican immigration law is highly selective and provides for harsh penalties for foreigners who enter the country illegally. Under Mexico's "General Law on Population" foreigners are admitted only "according to their possibilities of contributing to national progress." General Law on Population, Article 32. Mexico maintains a national catalog of foreigners in which each admitted alien is assigned a unique tracking number. Aliens who are in possession of false immigration papers can be fined or imprisoned. Article 116. An alien who has been deported and attempts to re-enter the country without authorization can be imprisoned for up to ten years. Article 118. If an individual enters Mexico illegally the individual can serve up to two years in prison and pay a fine of 300 to 5,000 pesos. Finally, Mexican law provides that if a Mexican national marries a foreigner with the sole objective of aiding the foreigner to live in Mexico, that Mexican national can be imprisoned for up to five years. Article 127.

In response to whether aliens from countries such as Guatemala, Honduras, El Salvador or Nicaragua could "just walk in [to] Mexico," Mexican President Felipe Calderon said:

> *No. They need to fulfill a form. They need to establish their right name. We analyze if they have not a criminal precedent. And they coming into Mexico. Actually . . .*
>
> Do Mexican police go around asking for paper of people they suspect are illegal immigrants?
>
> *Of course. Of course, in the border, we are asking the people, who are you?*

Felipe Calderon, transcript interview with Wolf Blitzer, CNN, "The Situation Room," May 19, 2010, available at http://transcripts.cnn.com/TRANSCRIPTS/1005/19/sitroom.01.html.

When asked about the deportation policies of Mexico, President Calderon responded, "*If – if somebody [enters the country] without permission, we send back – we send back them* [sic]." *Id.* Of course, Mexico has every right to deport illegal aliens, but so does the United States of America. Moreover, individual states have the sovereign duty to protect their citizens and law enforcement personnel. To the extent they do so in a manner consistent with and complementary of federal immigration law, the several states are fully within their rights.

In addition to human rights abuses and Mexico's example of oppressive immigration laws, each of the complaining neighbor nations has a significant economic interest in seeing the perpetuation of a porous U.S. border and lax enforcement of federal immigration laws.

D. Mexico's opposition to SB 1070 is motivated by, among other things, economic interests rather than humanitarian concerns.

Between $19 billion and $29 billion in illicit proceeds annually flow from the United States to Mexican drug trafficking organizations. *See* CRS Report, "Mexico: Issues for Congress," at 18. The U.S. and Mexico work together through a Bilateral Money Laundering Working Group to investigate and prosecute money laundering crimes. *Id.* However, Mexico appears unconcerned about the nearly equal amount of American cash flowing into the country each year from Mexican nationals – legally and illegally – residing in the United States.

Second only to oil revenues, remittances from the United States exceeded $21 billion in 2010 and are expected to total $22.5 billion in 2011. *See* Immigrant Remittances, Vol. 8, No. 1, May 2011 (United States Association of Immigrants), at 2. Remittances provide vital income for Mexico's poor families. "Remittances to Mexico Climbed 8.5% in November," Fox News Latino, Jan. 4, 2011, available at http://latino.foxnews.com/latino/money/2011/01/04/remittances-mexico-climbed-pct-november/. Political stability for the Mexican government is a crucial by-product. *See* CRS Report, p. 25-26. (In addition to remittances, Mexico benefits from unauthorized migration as it is a "safety valve"

that dissipates the political discontent that could arise from higher unemployment in Mexico.)[6]

Given the absence of any consideration of Mexico's economic stake in perpetuating the status quo, the Ninth Circuit's finding that Mexico expressed legitimate foreign relations concerns is unreasonable and the Court abused its discretion in upholding the District Court's preliminary injunction order in any way based on Mexico's and its supporting nation's objections.

CONCLUSION

The relevant first principles analysis begins with Congress's authority to regulate immigration and the extent to which it has delegated that authority to the Executive Branch. In this case, Congress has specifically reserved authority to the states to undertake

[6] Remittances (primarily from individuals illegally in the United States) to foreign *Amici* included $3.78 billion in 2008 to El Salvador (17% of GNP); $2.32 billion to Ecuador (5.2% of GNP); and $4.13 billion to Guatemala in 2010 (11% of GNP). *See* Raul Gutierrez, "Many swapped farming for (shrinking) remittances," Mar. 11, 2009, available at http://ipsnews.net/news.asp?idnews=46072; "Ecuador Worker's Remittances and Compensation of Employees," available at http://www.tradingeconomics.com/ecuador/workers-remittances-and-compensation-of-employees-received-us-dollar-wb-data.html; Herbert Hernandez, "Guatemala remittances rise 5.5% in 2010," Jan. 5, 2011, available at http://www.reuters.com/article/2011/01/06/guatemala-remittances-idUSN053752620110106.

the kinds of activities contemplated in SB 1070. The Executive Branch's complaint that the Arizona law creates burdens on the national government that are inconsistent with federal agency priorities is lodged with the wrong body. Congress is the appropriate venue for that discussion. And to the extent SB 1070 displeases our nation's neighbors, Congress again is the responsible party. The Ninth Circuit erred in basing its decision in any part on those concerns. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, and the Court can sustain his actions only by disabling the Congress from acting upon the subject." *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (quoting *Youngstown*, 343 U.S. at 635). The Ninth Circuit's decision is inconsistent with this Court's precedents and should be overruled.

Respectfully submitted,

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