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

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF 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, strict 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.

[1] The parties were notified prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

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.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case will determine whether the Constitution reserves to a state the sovereign authority to protect its citizens free from interference from the national and foreign governments alike where the state's action comports with congressional directives.

The federal Constitution expressly grants Congress, not the President, the power to regulate naturalization of individuals from foreign nations. U.S. Const. Art. I, Sec. 8, Cl. 4 ("The congress shall have Power To . . . establish an uniform Rule of Naturalization . . . .") 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, congressionally condoned exercise of [state sovereignty]. *Barclays Bank PNC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994). The Ninth Circuit's ruling, however, usurps Congress's authority to carry out its constitutional charge and interferes with Arizona's sovereign authority to protect its citizens and legal residents 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 addressed repeatedly the issue of immigration and naturalization. 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 large or small from foreign nations when weighing questions related to state efforts to cooperate with and support federal immigration law enforcement.

In addition to the reasons stated in Petitioner's Brief, the Ninth Circuit's decision, in particular to the extent it is based on a "foreign relations" preemption analysis, should be reviewed immediately because it applies the wrong legal standard to the wrong facts presented in the wrong forum. The resulting decision poses an immediate danger to the citizens of Arizona in general and to the state's law enforcement personnel in particular.

Immediate consideration by this Court is also warranted because other federal courts are following the Ninth Circuit's (and the Arizona District Court's) lead by enjoining similar state measures across the

country.[2] 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, had the Circuit Court conducted even a cursory examination of the protesting countries' credibility to protest SB 1070, it would have found a group of nations with a tremendous financial stake in the *status quo* – countries dependent on remittances from their citizenry living and working (in large numbers illegally) in the United States. Moreover, the Ninth Circuit majority would have (and should have anyway) found the notion absurd that these nations, which in large number have atrocious records of ongoing human rights abuses, are in any position to lecture the United States on "what if" scenarios.

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. Lawless state and local governments that have adopted sanctuary policies and have not been challenged by the federal government will continue to be

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[2] *See Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-cv-1804-TWT (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD (S.D. Ind. 2011); *Hispanic Interest Coalition of Alabama v. Bentley*, No. 5:11-cv-02736 (N.D. Ala. 2011); *United States v. State of Alabama*, No. 2:11-cv-02746-WMA (N.D. Ala. 2011).

lawless. Law-abiding governments that help enforce federal immigration law, however, will be without direction or order. The District Court abused its discretion by entering a preliminary injunction order supported by an utterly deficient factual record and a grossly insufficient 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. Certiorari should be granted.

I. ARGUMENT

The U.S. Constitution vests full authority in Congress for the naturalization of new citizens. *See* U.S. Const. Art. I, Sec. 8, Cl. 4. Congress, in turn, has enacted the INA in its various components establishing the nation's policies and priorities for immigration and naturalization. In 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 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.[3] In addition, the state legislature and governor have sought to provide informal support. Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("SB 1070") is representative of Arizona's commitment.

Contrary to the Ninth Circuit panel's decision, the law 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. 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 the authority to grant, deny or condition anyone's legal immigrant status. Nor does the law allow Arizona to deport anyone. 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. SB 1070.

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

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

More than 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 federal Constitution to state police powers have established firmly and beyond question the sovereign power of states to protect the public and that 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. DiRe*, 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.

The Supreme Court has held that "we 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 is not based on any such demonstration.

Rather, 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 at 353. 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.[4]

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[4] 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 Certiorari should be granted to review that defect in the lower courts' decisions, but will not repeat those arguments here.

B. 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 (internal quotations and citation omitted).

1. *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 of and protest against (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 the kind of taxation challenged. However, because Congress declined to act, the Supreme Court upheld the California tax. The Court did so 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 its intention to ensure state participation in INA enforcement crystal clear: 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

objections to SB 1070 as being inconsistent with agency priorities are 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.

2. The Ninth Circuit's Reliance On *Crosby* Is Inapposite And Its Citation To *Garamendi* Erroneous.

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, shoe-horned *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).

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." 641 F.3d at 352 (citing 539 U.S. at 420 (emphasis added by panel)).

But the Ninth Circuit fundamentally misunderstands *Garamendi* and misapplies its holding to the panel's "foreign relations" preemption analysis. *Garamendi* considered whether "executive agreements" entered into by the President with foreign nations absent congressional direction or input would preempt conflicting state statutes. The Court held that because Congress had not exercised any authority in the relevant area and because the agreement was within the President's traditional foreign relations authority, a conflicting state statute was preempted. 539 U.S. at 427.

The Ninth Circuit misapprehends the holding in *Garamendi*, erroneously applying to SB 1070 irrelevant language from Justice Harlan's concurring opinion in the earlier preemption case of *Zschernig v. Miller*, 389 U.S. 429 (1968). 641 F.3d at 352. Properly read, however, Justice Harlan's opinion supports Arizona in this case.

In *Zschernig*, Justice Harlan took exception to the Court majority's preemption analysis because he thought it went too far. Indeed, he 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)). Finally, Justice Harlan argued that "preemption of the entire field of foreign relations was at odds with some other cases suggesting that in the absence of positive federal action 'the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.'" *Id.* at 459.

Accordingly, the Ninth Circuit gets Justice Harlan's analysis exactly backwards. Read correctly, the language supports Petitioner and not the Ninth Circuit's reasoning, which applies the kind of farfetched preemption analysis criticized in *Zschernig*.

3. Executive Branch And Foreign 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 precedence. "[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. The Ninth Circuit majority disregards this Court's precedence, however, and concludes from 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." 641 F.3d at 352 (citing *Garamendi*, 539 U.S. 396).

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 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.

C. 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 SB 1070 based on the record in this case, *Amicus Curiae* urges consideration of the concerns it raised in the District Court. Simply put, Mexico and its colleagues come to this controversy with unclean hands and their politically and financially motivated arguments utterly lack credibility.

1. Mexico's Human Rights Abuses Towards Its Own People And Individuals Illegally Found In Mexico Belie Its Purported Humanitarian Concerns.

a. Mexican citizens endure frequent human rights abuses.

The Congressional Research Service's 2011 report to Congress on Mexico provides an eye-opening examination of human rights abuses inside that country. Citing U.S. State Department 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, 22 (citing U.S. Department of State, 2010 Human Rights Report: Mexico (April 2011)).

Additional human rights abuses perpetrated on Mexico's citizens in their homeland include:

> [M]ultiple cases of forced disappearances allegedly committed by army and police forces, a problem which the United Nations has also recently identified as a serious human rights issue that Mexico needs to address . . . . Corruption was reported to be a major problem particularly at the state and local level, with police involved in kidnapping, extortion, or providing protection for organized crime and drug traffickers. Impunity was pervasive . . . and was a reason that many victims were reluctant to file complaints.

Id.

Ironically, Mexico asserted in its *amicus* brief submitted to the District Court that it sought to protect the rights and dignity of Mexican citizens in Arizona. Landmark respectfully submits that Mexico's

efforts would be better suited to protecting the rights of Mexicans *in Mexico*.

b. Illegal immigrants face grave dangers in Mexico.

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. The frightening reality facing transient individuals while in Mexico exposes that nation's incredible hypocrisy.

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 ten women and girl migrants experience sexual violence during the journey [through Mexico]." *Invisible Victims: Migrants on the Move in Mexico*, Amnesty International, April 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 appalling record for mistreatment of immigrants – legal or otherwise. Yet, the Ninth Circuit deferred to Mexico's diplomatic pressure. 641 F.3d at 353.

2. Other Foreign *Amici* Have Dismal Human Rights Records.

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

In El Salvador, the Department of State reported that in 2010 the following human rights problems continued:

> isolated unlawful killings by security forces; harsh, violent, and overcrowded prison conditions; lengthy pretrial detention; high levels of impunity for crime and abuse of

> official authority; official corruption; violence and discrimination against women; child abuse and forced child prostitution; trafficking in persons; violence and discrimination against sexual minorities; child labor; and inadequate enforcement of labor laws.

U.S. Department of State Human Rights Report: El Salvador, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154505.htm.

The State Department reported similarly distressing ongoing abuses in Ecuador during 2010 including:

> isolated unlawful killings and use of excessive force by security forces, sometimes with impunity; poor prison conditions; arbitrary arrest and detention; corruption and other abuses by security forces; a high number of pretrial detainees; and corruption and denial of due process within the judicial system. President Correa and his administration continued verbal and legal attacks against the independent media. Societal problems continued, including physical aggression against journalists; violence against women; discrimination against women, indigenous persons, Afro-Ecuadorians, and lesbians and gay men; trafficking in persons and sexual exploitation of minors; and child labor.

U.S. Department of State Human Rights Report: Ecuador, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154504.htm.

In Guatemala, perhaps most atrocious of all, the State Department's 2010 assessment detailed ongoing human rights abuses including:

> the government's failure to investigate and punish unlawful killings committed by members of the security forces; widespread societal violence, including numerous killings; corruption and substantial inadequacies in the police and judicial sectors; police involvement in serious crimes, including unlawful killings, drug trafficking, and extortion; impunity for criminal activity; harsh and dangerous prison conditions; arbitrary arrest and detention; failure of the judicial system to ensure full and timely investigations and fair trials; failure to protect judicial sector officials, witnesses, and civil society representatives from intimidation; threats and intimidation against, and killings of, journalists and trade unionists; discrimination and violence against women; trafficking in persons; discrimination against indigenous communities; discrimination on the basis of sexual orientation and gender identity; and ineffective enforcement of labor laws and child labor provisions.

U.S. Department of State Human Rights Report: Guatemala, available at http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154507.htm.

3. 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, "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.

4. Mexico's Opposition To SB 1070 Is Economic Rather Than Humanitarian In Nature.

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, 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* 8 Immigrant Remittances 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.)[5]

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[5] 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," March 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," January 5, 2011,

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States such as Arizona, Georgia, Alabama, South Carolina, Kansas, Indiana, Utah, and many others, which have enacted or proposed laws like SB 1070, pose a dramatic economic and political threat to Mexico. The Ninth Circuit's conclusion 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 submission.

II. 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 President. In this case, Congress has specifically reserved authority to the states to undertake 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

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available at http://www.reuters.com/article/2011/01/06/guatemala-remittances-idUSN053752620110106.

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 precedence and certiorari should be granted.

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