No. 10-16645

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, v. State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants-Appellants	Appeal from the United States District Court for the District Of Arizona No. CV-1413-PHX-SRB

PROPOSED AMICUS CURIAE BRIEF OF LANDMARK LEGAL FOUNDATION

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I. STATEMENT OF AMICUS CURIAE INTEREST

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 district court's improper application of federal preemption and facial constitutional challenge standards and improper application of statutory construction principles.

II. ARGUMENT

Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("SB 1070" or "the Act") does not conflict with or violate any federal immigration law, constitutional principle or provision, federal statute, or relevant judicial precedent. The Act does not supplant the federal government's constitutional authority to regulate the flow of immigrants into, through and 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.

If the federal administration's politically motivated action is successful, rather than bring consistency and certainty to immigration on a national level, it will create even more chaos and confusion. Lawless governments that have adopted sanctuary policies and have not been challenged by the federal government will continue to be lawless. Law-abiding governments that help enforce federal immigration law and have done so traditionally will be without direction or order. The district court abused its discretion in 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 pre-emption claims and facial constitutional challenges.[1]

A. The District Court Abused Its Discretion By Ignoring Arizona's Sovereign Power To Advance The Safety Of 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

[1] The district court's preliminary injunction order is a brazen violation of Supreme Court and Ninth Circuit precedent. In addition to creating legal chaos where a lower court openly defies the rulings of superior courts, the practical implication for the enforcement of immigration statutes resulting from the district court's ruling, should it be upheld, is to potentially call into question an unknown universe of state and local laws that have as their purpose the enforcement of federal immigration statutes.

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 139.

Subsequent courts applying the federal Constitution to state police powers have established firmly 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); *U.S. 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) (alien's arrest for federal immigration criminal violation 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 district court's preliminary injunction is not based on any such demonstration.

Rather, the district court draws a preposterous comparison between SB 1070 and the sweeping regulatory scheme and open-ended inquisitorial provisions struck down in *Hines v. Davidowitz*, 312 U.S. 52 (1941). 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. None of this is done in SB 1070. Moreover, the Act deals only with illegal aliens. Consequently, *Hines* has nothing to do with SB 1070.

The district court's pre-emption and facial challenge analyses, which are in large measure based on the *Hines* analogy, are way off the mark and wholly unsupported by the facts in the record.

B. The District Court Abused Its Discretion By Failing to Require the Federal Government To Satisfy Clear Standards For Federal Pre-Emption and Facial Constitutional Challenges.

"The goal of any pre-emption inquiry is 'to determine the congressional plan'" by examining federal statutes in their full context. *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (quoting *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956). The district court made no meaningful effort to "determine the congressional plan." As such, this is the second Supreme Court precedent the district court failed to honor.

U.S. Const. Art. I, Sec. 8's reservation of the naturalization of aliens to the federal government is in no way diminished by SB 1070. Contrary to the district court's conclusion that the Act imposes new and unreasonable burdens on federal immigration officials and is otherwise inconsistent with federal immigration law, the Act in reality merely requires state officials to cooperate fully with the national government's priorities as declared by Congress. SB 1070 is complimentary of, not conflicting with, federal law. The administration's complaint that SB 1070 will unduly tax federal resources, if true, is a quarrel with Congress, which enacted the Immigration and Nationality Act ("INA"), and not with Arizona, which merely seeks to comply with the INA's mandates. In fact, without the cooperation of

states like Arizona the opposite is true. The federal government's financial and resource burden would increase immeasurably.

SB 1070 does not create any new or additional federal responsibilities. It does not establish any new or inconsistent obligations for aliens legally or illegally residing in or otherwise present in Arizona. There are no new standards for naturalization in Arizona, no new forms to carry or fill out, and no other new or unique standards exclusive to aliens situated in Arizona. Moreover, the law does not in any way apply to citizens or to visitors legally present in Arizona, who are protected in exactly the same manner as they are in all other situations.

Arizona's new law continues the collaborative tradition between federal and state law enforcement respecting immigration and most other criminal laws in the country. Beat cops, cops in cruisers, local detectives etc. – the federal government relies on infinite local and state decisions, actions, and untold resources to enforce federal immigration law. SB 1070 is a legitimate, measured and responsible exercise of Arizona's long-standing authority and duty to provide for the safety and welfare of its inhabitants.

1. SB 1070 is consistent with, rather than preempted by, current immigration law.

"Although the regulation of immigration is unquestionably an exclusive federal power, it is clear that the power does not preempt every state activity affecting aliens." *De Canas v. Bica*, 424 U.S. 351, 354-55. Accordingly, before a

court may reject a duly enacted state statute as preempted by federal immigration law, it must "define precisely the challenged state enforcement activity to determine if 'the nature of the regulated subject matter permits no other conclusion.'" *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (quoting *De Canas*, 424 U.S. at 354-355).

SB 1070 addresses public safety and economic concerns and serves all individuals who are legally in Arizona. Moreover, the enactment codifies existing federal immigration priorities as declared by Congress. Most SB 1070 provisions formalize current voluntary state and local law enforcement practices.

2. The district court's facial challenge analysis is inconsistent with the Supreme Court's, the Ninth Circuit's and its own precedent.

The district court correctly stated the standard for evaluating a facial constitutional challenge, but ignored it in its legal analysis. Facial constitutional challenges must clear the high bar set forth in *United States v. Salerno*, 481 U.S. 739 (1987) by "establish[ing] that *no* set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in *all* of its applications. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (emphasis added). "While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702,

739-740 (1997) (Stevens, J., concurring in judgments)). Here the district court has failed to honor an additional string of Supreme Court decisions.

Facial challenges are disfavored because they rest on speculation, run contrary to the principle that courts should not anticipate questions of constitutional law in advance of the necessity of deciding one, and thwart the will of the people. *Id.* at 450-451. Courts are held to a strict standard as well. "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450 (citing *United States v. Raines*, 362 U.S. 17, 22 (1997)).

The Supreme Court rejected a facial constitutional challenge in *Washington State Grange* in part because "[t]he State has had no opportunity to implement [the voter election initiative], and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions." *Id.* Moreover, the Court stated, in language particularly appropriate here:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that [a] ruling of unconstitutionality frustrates the intent

> of the elected representatives of the people. *Id.* (internal quotations and citations omitted).

The district court was not deterred by these admonitions. Instead, it issued a preliminary injunction based on a factually deficient record steeped in hypothetical and imaginary supposition.

The Ninth Circuit's examination of a facial challenge to another politically charged statute provides the kind of analysis the district court should have employed:

> [P]laintiffs must show that there are no circumstances under which the delegation could be applied constitutionally. Plaintiffs have not submitted any evidence tending to show that any hospitals in Arizona will or do deny admitting privileges to physicians based on their status as abortion providers, or based on any other policies seeking to restrict the right to abortion. Nor has it been shown that this would be legal under Arizona law. Since they have submitted no evidence that any hospitals will exercise the authority delegated to them by Arizona in an unconstitutional manner, plaintiffs cannot show on this record that there is "no set of circumstances" in which the delegation will be constitutional, and we affirm the district court's grant of summary judgment to defendants on this facial challenge. *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1198 (9th Cir. 2004) (citing *Salerno*, 481 U.S. at 745).

Hence, in addition to defying numerous Supreme Court rulings, the district court is also unfazed by this Circuit's holding.

Applying this standard to SB 1070, it is clear that any facial challenge must certainly fail. The record in the present case is devoid of any evidence presented by the federal government tending to show that any law enforcement or other Arizona state officials will exercise the authority delegated to them by SB 1070 in

an unconstitutional manner. Moreover, the record fails to show that there is no set of circumstances in which the delegation will be constitutional.

Finally, not only did the district court fail to follow the U.S. Supreme Court and Ninth Circuit standards for evaluating facial constitutional challenges, but this very district court failed to follow its own ruling in *Berry v. Grau*, 2006 U.S. Dist. Lexis 15019 (March 30, 2006), wherein it stated, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Id.* (citing *Planned Parenthood Ass'n of Kansas City, Mo, Inc. v. Ashcroft*, 462 U.S. 476, 493 (1983)). It is perplexing that the district court embraced a polar opposite standard in this case – refusing any but the most contorted reading of SB 1070's provisions to reach the result sought by the federal administration.

3. SB 1070's state enforcement provisions defeat any facial challenge.

In order to strike down SB 1070's new state policies designed to support federal immigration law enforcement, this Court must conclude that they are not permissible under any set of circumstances or that the provisions do not have a plain legitimate sweep. *See Glucksberg*, 521 U.S. at 739-40. The unambiguous congressional policy objective is that states are encouraged to work collaboratively with federal agencies to assist in the enforcement of federal immigration law. *See* Kris W. Kobach, "The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests," 69 Alb. L. Rev. 179 (2005).

Far from ousting state and local law enforcement from enforcing federal immigration laws, Congress has repeatedly sought state and local cooperation and collaboration. *Id*. at 202-207 (detailing five separate federal statutes relating to, among others, matters from formal cooperative enforcement agreements (18 U.S.C. Section 1357(g)(10)) to federal funding for the Law Enforcement Support Center (LESC), which serves as a 24/7 point of contact to federal immigration authorities for local law enforcement). SB 1070 formalizes the State's collective commitment to ensure that it will do everything it can to protect its citizens and legal residents while enforcing aggressively federal immigration laws.

Moreover, SB 1070's state enforcement provisions address issues that have traditionally been subject to state regulation and upon which federal law is silent. The Act, reasonably read, does not require or even permit any state action unless there is a lawful stop, detention or arrest and reasonable suspicion that a person is an alien unlawfully present in the United States. And an individual always has legal recourse for perceived or real Constitutional or statutory violations. There is no legitimate argument with SB 1070's trigger and certainly not one that can satisfy the stringent requirement for a facial constitutional challenge.

"Reasonable suspicion" is a "commonsense, nontechnical concept[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas v. United States*,

517 U.S. 690, 695 (1996). *See Estrada v. Rhode Island*, 594 F.3d 56, 64 (1st Cir. 2010) (Inquiry into immigration status during traffic stop reasonable where passengers were on their way to work, were unable to produce any identification, and spoke little English.) SB 1070 prudently adopts this sensible standard.[2]

4. SB 1070 is consistent with many other states' immigration enforcement provisions.

Many, if not most, states require individuals incident to lawful stops and questioning to establish who they are and where they're from. This includes citizens and non-citizens. While Arizona's SB 1070 has attracted the federal administration's ire, several other state and local jurisdictions have enacted immigration-related enforcement laws that have not been challenged. For example, Missouri law prohibits municipal sanctuary policies and prohibits unlawfully present aliens from receiving state or local benefits. Public employees are also required to participate in a federal work authorization program. A driver's license may not be issued to illegal aliens and law enforcement officers must inquire as to the citizenship and/or immigration status of any individual under arrest. See Mo. Rev. Stat. § 43.032.2, 208.009.1, 208.009.3, 302.063 and 28.824 (2010).

[2] The U.S. Supreme Court has held that police officers may inquire into a person's immigration status even "when officers have no basis for suspecting a particular individual" of illegal activity – a standard much lower than SB 1070's. *Muehler v. Mena*, 544 U.S. 93, 100 (2005) (internal quotation and citation omitted).

South Carolina requires public and private employers to verify the work authorization of all new employees through the federal online E-Verify system or by checking the individual's driver's license. Transporting or attempting to transport an illegal immigrant within the state can result in a felony charge. Further, possession of a false or fraudulent identity document can result in a criminal charge. See S.C. Code Ann. § 8-14-10, 8-14-20, 16-9-460, 16-13-525 (2010).

Since 2007, Prince William County, Virginia ("PWC") police officers must inquire into the immigration status of all persons who are under physical custodial arrest. PWC officers may also question an individual's immigration status prior to a physical arrest if, during the course of a stop, the officer develops "reasonable articulable suspicion" that such an individual may be in violation of federal immigration laws. Prince William County Police Department, "Manual of General Orders, General Order 45.01."

The fact that these state and local laws go unchallenged is strong evidence that the federal administration's attack on SB 1070 is a frivolous political exercise dressed up as a lawsuit.

C. The District Court Abused Its Discretion By Employing A Contorted Statutory Construction Standard To SB 1070.

The district court's draconian statutory construction analysis far exceeds its proper role. In 1949, Professor Karl Llewellyn's seminal critique of statutory

construction demonstrated the dangers posed when the canons of statutory construction are in the wrong judicial hands. Karl Llewellyn, "Remarks on Theory of Appellate Decision," 3 Vand. L. Rev. 395 (1949). Professor Llewellyn's commentary argued that the statutory construction canons can be manipulated to reach almost any desired result. *Id.* at 399. An appropriate standard is "[i]f language is plain and unambiguous it must be given effect. But not where literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose." *Id*. (internal citations omitted). The fundamental principle here is that "[i]f a statute is to make sense, it must be read [by a reviewing court] in the light of some assumed purpose" advanced by the legislature. *Id*. at 400. The reviewing court's job is to merge statutes into the existing body of laws and in the process take account of "the policy of the statute – or else substitute its own version of such policy." *Id.*

"[I]rresponsible judges will twist any approach to yield the outcomes that he desires and the stupid ones will do the same thing unconsciously." Richard A. Posner, "Statutory Construction – in the Classroom and in the Courtroom," 80 U. Chi. L. Rev. 800, 817 (1983). *See* Frank H. Easterbrook, "Statutes' Domains," 50 U. Chi. L. Rev. 533, 547 (1983) ("Doubtless the 'judge's vote should be limited, to protect against willful judges who lack humility and restraint.'" (Quoting Posner.))

The district court in this case renders a willful and irresponsible reading of SB 1070's provisions. Appellant presents a thoroughly convincing analysis in this regard, but Amicus Curiae emphasizes this point, particularly given the district court's precedent of employing a vastly more deferential statutory construction standard in previous matters. *See Berry v. Grau*, 2006 U.S. Dist. Lexis 15019 (March 30, 2006).

The district court in this case has employed statutory construction tricks "as part of [a] systematic attempt to frustrate legislative policy preferences." *See*, Stephen F. Ross, "Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?" 45 Vand. L. Rev. 561, 561-62 (1992).

Without its distorted reading of SB 1070, the district court would be unable to reach its conclusion that the federal government is likely to ultimately succeed on the merits. Moreover, the district court's interpretation is a prerequisite for the district court's finding of *any* harm, irreparable or otherwise, resulting from the legislation at issue.

III. CONCLUSION

The district court's preliminary injunction order should be vacated.

LANDMARK LEGAL FOUNDATION

Dated: September 2, 2010

By: /s/ Richard P. Hutchison
Richard P. Hutchison
Attorney for Amicus Landmark Legal Foundation

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 3,639 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: September 2, 2010

LANDMARK LEGAL FOUNDATION
Richard P. Hutchison

By: /s/ Richard P. Hutchison
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010 I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, all of whom are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard P. Hutchison
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