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 10-1413-PHX-SRB

APPELLANTS' REPLY BRIEF

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Introduction

The United States fails to demonstrate how sections 2(B), 3, 5(C), and 6 of S.B. 1070 can be enjoined in a *facial* preemption challenge. **Section 2(B)** merely requires Arizona's law enforcement officers to communicate with the federal government regarding the immigration status of individuals whom these peace officers stop, detain, or arrest if reasonable suspicion exists that the individuals are not lawfully present in the United States. The United States does not dispute that this is already the practice of state and local law enforcement officers in many jurisdictions (in Arizona and elsewhere), and that there is nothing impermissible about a law enforcement officer doing this.

Nor does the United States squarely address that this practice is entirely consistent with the express language of laws Congress has passed—laws Congress passed to encourage such communication between federal, state, and local law enforcement officers and to expressly prohibit anyone (including federal officials) from interfering with efforts by state and local law enforcement officers to do just this. Because section 2(B) furthers Congress' objectives, it cannot be preempted.

The United States' position with respect to Sections 3, 5(C), and 6 is also fundamentally flawed. The cases upon which the United States relies for its argument that **section 3** is preempted all involved scenarios where there was an actual conflict between the challenged law and an express congressional objective.

No such conflict exists here. The United States' argument that the Immigration Reform and Control Act of 1986 ("IRCA") preempts **section 5(C)** is based on an argument this Court has expressly rejected—that IRCA brought employment regulation into the field of federal immigration law and, therefore, that Congress must invite states to regulate in the field of employment of unauthorized aliens. The United States' argument that **section 6** is preempted ignores the standard for a facial challenge. The United States has not demonstrated, and cannot demonstrate, that section 6 would be unconstitutional in all of its applications.

Legal Discussion

I

The United States Is Not Likely to Succeed On the Merits

A. Section 2(B) does not conflict with any congressional objective or foreign policy

Section 2(B) does not stand as "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (citation omitted). Congress' explicit objective is to encourage cooperation and communication between federal, state, and local law enforcement agencies in the enforcement of federal immigration laws, which is exactly what section 2(B) requires. *See* 8 U.S.C. §§ 1373 and 1644; Appellant Br. at 27. In furtherance of this objective, Congress has prohibited anyone—including federal agencies and officials—from limiting or restricting "any government entity

or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *See* 8 U.S.C. §§ 1373(a) and 1644.[1]

Congress enacted 8 U.S.C. § 1373 based on its finding that such an exchange of information: "is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act ["INA"]." S. Rep. No. 104-249, at 19-20 (1996). Congress enacted 8 U.S.C. § 1644 "to give State and local officials the authority to communicate with [ICE] regarding the presence, whereabouts, or activities of illegal aliens" based on Congress' belief that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 104-725, at 383 (1996). Section 2(B) clearly furthers these objectives. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1202 (finding no preemption where the state law complemented Congress' legislative goals).

[1] By seeking to invalidate section 2(B) on the grounds that such communications would somehow burden DHS, the United States, in effect, asks this Court to find that DHS is immune or exempt from 8 U.S.C. §§ 1373(a) and 1644.

1. The policy underlying S.B. 1070 does not provide a basis to invalidate section 2(B)

The United States argues that section 2(B) conflicts with federal law because S.B. 1070 is "[p]remised on Arizona's disagreement with federal enforcement priorities" and, therefore, creates a state policy that "bars . . . actual cooperation with the federal officers." *See* Appellee Br. at 43-47, 53-54. This argument fails because "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it." *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005); *see also Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588 (1987).

The United States' argument also fails because the United States has not explained how the Arizona Legislature's purpose "bars" cooperation between Arizona's law enforcement officers and the federal government. Contrary to its claim that section 2(B) "remove[s] discretion of state and local officers to consider federal priorities in their enforcement efforts," there has been no showing that state and local law enforcement officers, in fact, "consider federal enforcement priorities" in determining whether to investigate a person's immigration status. Appellee Br. at 52. To establish conflict preemption, the United States must demonstrate an *actual* conflict. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted by* 130 S. Ct. 3498 (2010).

Moreover, the only way Arizona's officers can know whether DHS considers a particular alien a "priority" is if the officer communicates with the federal government, either through ICE or the Arizona officers qualified to enforce federal immigration laws under Section 287(g) of the INA. For example, Phoenix police officers chose not to investigate the immigration status of Jose Abel Cabrera-Somosa on three occasions when they stopped him for minor violations, and, therefore, did not learn that Cabrera-Somosa was unlawfully present in the United States and had fled El Salvador to escape prosecution for attempted murder. [ER 118-21.] Certainly, Cabrera-Somosa's criminal past would qualify him as one of DHS's "priorities." Because the officers never sought or obtained this information, however, Cabrera-Somosa remained free to shoot and nearly kill a Phoenix police officer. *Id.*

2. Section 2(B) cannot "burden" DHS

Ignoring the express congressional policies set forth in 8 U.S.C. §§ 1373 and 1644, the United States argues that section 2(B) *could* burden DHS because it is inconsistent with enforcement priorities of the current administration and, therefore, "threaten[s] to divert rather than enhance federal resources." *See* Appellee Br. at 49-54. The critical inquiry, however, is *Congress'* priorities. Congress has "exclusive constitutional authority to make the laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of

the United States, or in any Department or Officer thereof.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (quoting U.S. Const., art. I). An executive agency, such as DHS, can preempt state law *only* by acting pursuant to congressionally-prescribed authority and promulgating a regulation or policy that has the force of law. *See Wyeth*, 129 S. Ct. at 1200-01; *see also Youngstown*, 343 U.S. at 588; *North Dakota v. United States*, 495 U.S. 423, 442 (1990). Because DHS's "priorities" do not have the force of law, they have no preemptive force.[2]

DHS's opposition to section 2(B) contravenes *all* evidence of *Congress'* objectives. Congress has clearly expressed its desire for vigorous enforcement of the federal immigration laws. *See, e.g., City of New York v. United States*, 179 F.3d 29, 32-33 (2d Cir. 1999). More importantly, Congress has mandated that DHS "shall" respond to inquiries from state and local law enforcement "regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8

[2] Even if the United States could establish preemption by demonstrating that section 2(B) would "divert resources" from DHS's enforcement priorities, the United States has not shown that enforcement of section 2(B) would drain DHS's resources. *See* Appellant Br. at 37-39; Appellee Br. at 51; [ER 436-38 (statement of David Palmatier confirming that LESC's capacity substantially exceeds the number of inquiries it currently receives)]. In fact, most inquiries can be fielded locally and inquiries to LESC are generally resolved within minutes. [ER 184-85, 260.]

U.S.C. § 1373(c).[3] DHS cannot avoid this obligation simply because this administration considers such inquiries to be a potential "burden."

3. Section 2(B) cannot "burden" lawfully-present aliens

The United States argues that section 2(B) *could* burden certain lawfully-present aliens and citizens who may not "have readily available documentation to demonstrate their status." Appellee Br. at 53-57.[4] But the United States has not rebutted Arizona's arguments that a potential burden to some aliens cannot provide a basis for invalidating a statute *on its face* that is entirely consistent with Congress' express objectives. Nor has the United States demonstrated that the nature of investigations into a person's immigration status (that now occur many times a day in many jurisdictions) will somehow change under section 2(B). *See* Appellant Br. at 24-33. Section 2(B) will not impose any new or different "burden" than presently exists, not only with aliens, but with anyone who does not carry identification. *Id.*

The United States argues only that section 2(B) does not have a "plainly legitimate sweep" because it is "not necessary" to authorize Arizona's law enforcement officers to investigate individuals' immigration status. Appellee Br.

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[3] The United States essentially asks the Court to infer that Congress intended such assistance to be at DHS's discretion, Appellee Br. at 50, but that is contrary to the explicit and non-discretionary directives in 8 U.S.C. §§ 1373 and 1644.

[4] Arizona addressed the factual premise of this argument on pages 24-25 of its Opening Brief. The United States has not rebutted Arizona's arguments.

at 53. This argument only confirms that section 2(B) does not alter Arizona's law enforcement officers' current investigatory authority and that the United States is, instead, improperly attempting to invalidate section 2(B) based solely on this administration's belief that it is inappropriate for a state to have a public policy of assisting federal authorities in enforcing the immigration laws—in this instance, by bringing to the attention of federal officials individuals who are unlawfully in the country.

4. Section 2(B) does not conflict with foreign policy

The United States argues that section 2(B) is preempted because it "antagoniz[es] foreign governments." Appellee Br. at 47-49. The United States made this argument below, but the district court made no factual findings regarding the alleged impact of section 2(B) on foreign policy.[5] [ER 13-21.] The United States has not argued, much less demonstrated, that the district court abused its discretion by failing to make such findings. *See Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004) (factual findings are subject to a clearly erroneous standard). Actually, federal officials have criticized S.B. 1070 so vigorously and openly that it is impossible to determine whether section 2(B) itself (as opposed to the administration's reaction

[5] The United States' argument relies solely on the opinion of Deputy Secretary of State Steinberg, *see* Appellee Br. at 47-49, which Arizona refuted with the declaration of former Ambassador Otto Reich. [ER 279-95.]

to it) has actually had any impact on foreign policy. [ER 279-95.] In any event, because there is a genuine dispute about the effect, if any, section 2(B) would, in fact, have on foreign policy, the United States cannot seek to affirm the preliminary injunction on these grounds. *See Federal Trade Comm'n*, 362 F.3d at 1212.

Moreover, the legal authorities upon which the United States relies do not establish that the alleged antagonism of foreign governments, or the enforcement of federal or state laws dealing with aliens illegally in this country, impacts foreign policy in such a way as to support preemption. *Boos v. Barry*, 485 U.S. 312 (1988) did not involve federal preemption, and the state statute at issue in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-68 (2000) directly regulated commerce with a foreign nation and clearly conflicted with express congressional objectives. Section 2(B), by contrast, only seeks to identify persons who are in the United States in violation of existing federal immigration laws—regardless of the person's country of citizenship. The possibility that section 2(B) could have "some incidental or indirect effect in foreign countries" does not constitute an impermissible intrusion into foreign affairs. *See Clark v. Allen*, 331 U.S. 503, 517 (1947).

B. Section 3 does not impede any congressional objectives

With respect to section 3, the United States largely ignores Arizona's arguments regarding the provision's constitutionality and the cases upon which Arizona relied. *Compare* Appellant Br. at 43-46 *with* Appellee Br. at 32-37. Instead, the United States argues that Arizona is absolutely barred from imposing remedies for violations of federal law. *Id.* at 29. This Court recently rejected an analogous argument by finding that the Fair Labor Standards Act ("FLSA") "does not preempt a state-law . . . claim that 'borrows' its substantive standard from FLSA."[6] *Wang v. Chinese Daily News, Inc.*, Nos. 08-55483 & No. 08-56740, 2010 U.S. App. LEXIS 19929, at *36 (9th Cir. Sept. 27, 2010). In fact, this Court and the Supreme Court have previously rejected several preemption challenges to state remedies for violations of federal laws. *See Medtronic v. Lohr*, 518 U.S. 470, 495 (1996); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984); *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 502-03 & n.10 (9th Cir. 2005).[7]

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[6] The sanctions section 3 imposes on violators are the same sanctions Congress imposed for violations of 8 U.S.C. § 1304(e) and are less than the sanctions Congress imposed for violations of 8 U.S.C. § 1306(a).

[7] The Supreme Court has found "imminent" conflict between state and federal remedies only where a state law could sanction conduct that the federal act would permit. *See Crosby*, 530 U.S. at 380; *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 499 (1953).

The cases upon which the United States relies are inapposite because none involves a preemption challenge under the INA and, in each, the Supreme Court found an *actual* conflict between the challenged statute and Congress' objective. First, in *Hines v. Davidowitz*, the Supreme Court found that the Alien Registration Act of 1940, which protected aliens' confidentiality and did not require aliens to carry cards, preempted a Pennsylvania statute that required aliens to "register once each year; . . . receive an alien identification card and carry it at all times; [and] show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry." 312 U.S. 52 (1941). *Id.* at 56, 73. Because of the stark difference in the way in which the state and federal acts treated *lawfully* present aliens, the Court found that the Pennsylvania statute conflicted with Congress' intent to leave "law-abiding aliens . . . free from the possibility of inquisitorial practices and police surveillance." *Id.* at 74.[8]

Second, in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, the Supreme Court held that the National Labor Relations Act ("NLRA") preempted a Wisconsin law that prohibited private parties within the

[8] The United States' argument that section 3 is inconsistent with federal law because federal law determines "which aliens must register and the details of the registration requirements," Appellee Br. at 34, is puzzling because an alien can only violate section 3 if the alien violates federal law. Section 3 also expressly requires that the aliens' immigration status be determined by the federal government or its authorized agent. *See* S.B. 1070, § 3(B).

state from doing business with repeat labor law violators. 475 U.S. 282, 287 (1986). The issue in that case, however, was preemption under the *Garmon* rule, which "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, *but also* from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 (emphasis added).

Not only are the NLRA and the *Garmon* rule inapplicable here, but the Supreme Court expressly found that the Wisconsin law at issue in *Gould* impeded Congress' purpose in enacting the NLRA's regulatory scheme:

> The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. . . . Wisconsin's debarment sanction, in contrast, functions as a punishment and serves no corrective purpose. Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic.

Id. at 288 n.5 (internal citation omitted). The INA (unlike the NLRA) is not a statutory scheme that has an "essentially remedial" purpose.

Third, in *Crosby*, the Supreme Court held that a Massachusetts law, which "restrict[ed] the authority of its agencies to purchase goods and services from companies doing business with Burma," conflicted with a federal act that imposed specific sanctions on Burma and directed the President, subject to certain conditions, to develop a strategy for improving the political and social climate in

Burma. 530 U.S. at 366-69. After finding that the Massachusetts law "penaliz[ed] individuals and conduct that Congress had explicitly exempted or excluded from sanctions," the Supreme Court held that "[s]anctions are drawn not only to bar what they prohibit, but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force." *Id.* at 377-80.[9]

Fourth, in *Buckman Co. v. Plaintiffs' Legal Committee*, the Supreme Court found that the Federal Food, Drug, and Cosmetic Act ("FDCA") preempted state law fraud-on-the-FDA claims because such state laws would impose burdens on applicants that "were not contemplated by Congress" and would "cause applicants to fear that their disclosures to the FDA, although deemed appropriate by the [FDA], would later be judged insufficient in state court," which would provide an "incentive to submit a deluge of information that the [FDA] *neither wants nor needs*, resulting in additional burdens on the FDA's evaluation of an application." 531 U.S. 341, 350-51 (2001) (emphasis added).

None of these cases supports the United States' argument that section 3 is preempted. The Supreme Court has expressly rejected the possibility that the INA

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[9] The *Crosby* Court rejected Massachusetts' argument that there was no conflict because the state and federal laws had the same goal, finding that "[t]he fact of a common end hardly neutralizes conflicting means." 530 U.S. at 379. Although the United States implies otherwise, *see* Appellee Br. at 30, Arizona has never argued that a common goal can overcome an *actual* conflict. To the contrary, Arizona argues that there is no actual conflict between S.B. 1070 and any provision of federal law or statement of *congressional* intent.

might be so comprehensive that it leaves no room for state action. *See De Canas v. Bica*, 424 U.S. 351, 358 (1976). And the *Hines* Court found that federal law preempts state law only to the extent that the state law is "inconsistent[] with the purpose of Congress." 312 U.S. at 66-67. Although the United States repeatedly argues that section 3 "interferes with" and is "flatly at odds" with federal law, the United States has not identified any actual conflict.[10]

C. The United States has not shown that it was Congress' "clear and manifest purpose" to preclude the regulations in section 5(C)

Section 5(C) was enacted pursuant to Arizona's "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356. There is, thus, a presumption against preemption of section 5(C). *Chicanos Por La Causa*, 558 F.3d at 864. The United States does not address the presumption against preemption and, instead, attempts to avoid it by arguing that Congress has converted the traditional state power over employment into "the INA's framework for regulation of immigration" and, therefore, that states can regulate in the field only if Congress invited or authorized states to do so. *See* Appellee Br. at 37-41. This Court squarely addressed and

[10] Section 3 does not, as the United States contends, criminalize mere unlawful presence. *See* Appellee Br. at 33. Rather, to violate section 3, an unlawfully present alien must: (1) be at least eighteen years old and *willfully* fail to carry a registration card that the federal government has issued to the person; *or* (2) be required by federal law to register and *willfully* fail to do so. *See* S.B. 1070, § 3; 8 U.S.C. §§ 1304(e) and 1306(a).

rejected this argument in *Chicanos Por La Causa*, 558 F.3d at 864; *see also Lozano v. City of Hazleton*, No. 07-3531, 2010 U.S. App. LEXIS 18835, at *96 (3d Cir. Sept. 9, 2010) (finding that the district court erred by failing to apply the presumption against preemption to the employment provisions).

To overcome the presumption, the United States must show that the "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.'" *De Canas*, 424 U.S. at 357. The United States has failed to do so.

1. IRCA does not occupy the field of employee sanctions

The mere fact that Congress has not imposed *federal* sanctions on aliens solely for performing unauthorized work is insufficient to show that it was the "clear and manifest purpose of Congress" to occupy the field of employment of unauthorized aliens. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002). Rather, the United States must show that a majority of Congress intended to prohibit states from enacting such legislation. *Id.* None of the legislative history upon which the United States relies does so.

The United States relies on statements from the five-member Subcommittee on Immigration and Refugee Policy that the best approach for addressing illegal immigration was to *start* with employer sanctions and, if that proved unsuccessful, to "go into other methods," such as sanctioning the alien employees. *See*

Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy, 99th Cong., 1st Sess., S. Hrg. 99-273, at 56-59 (1985).[11] During these hearings, the chair of the same subcommittee also explained that employer sanctions were critical because there was "a 'goofy' situation . . . in the United States where it is illegal for an alien to take a job but not illegal for the employer to hire the person." *Id.* at 159. It is, therefore, difficult to draw a conclusion that this subcommittee (let alone a majority of Congress) had concluded that states could not prohibit aliens from working without authorization.

The United States also relies on a report by the House Judiciary Committee addressing its recommendation regarding *employer* sanctions, but nowhere does the report state that Congress or the Committee discussed, much less dismissed, the possibility of enacting any regulations against undocumented workers. *See* H.R. Rep. No. 99-682, Pt. 1, at 1 (1986). In any event, the statements of congressional committees or committee members have little, if any, bearing on what *Congress* overall intended:

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[11] These are the hearings this Court relied upon in *National Center for Immigrants' Rights v. INS*, to support its finding that Congress had not empowered the INS—a federal agency that derives its power solely from Congress—to sanction employees. 913 F.2d 1350, 1368 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). The district court relied on *National Center* in enjoining section 5(C). [ER 26.]

> [N]either the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor), . . . nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before [the court]. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.

Crosby, 530 U.S. at 390-91 (Scalia, J., concurring).[12]

Here, the best evidence of Congress' intent is IRCA's express preemption provision (the "words of the bill"), which precludes states from enacting employer sanctions other than licensing and similar laws, but is silent on states' authority to impose *employee* sanctions. *See* 8 U.S.C. § 1324a(h)(2). Congress' enactment of a limited express preemption provision is strong evidence that Congress did not intend to occupy the legislative field. *See* Appellant Br. at 47-49. Arizona cited several cases in which this Court and the Supreme Court held that by enacting a limited express preemption provision, Congress did *not* intend to occupy the legislative field.[13] The United States does not address these cases or otherwise

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[12] The United States again relies on *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) to support its argument that a court can infer preemption from Congress' decision to leave certain conduct unregulated. Appellee Br. at 38. As Arizona pointed out, however, the *Puerto Rico* Court recognized that Congress *could* preempt state law by occupying the legislative field, but, for the same reasons that exist here, found that Congress had *not* done so in the case before it. Appellant Br. at 50.

[13] In response, the United States only reiterates its argument that an express preemption provision does not "bar the ordinary working of *conflict* pre-emption principles." Appellee Br. at 41 (emphasis added and citation omitted). Arizona does not dispute this proposition. *See* Appellant Br. at 52 n.31.

demonstrate that IRCA is a "comprehensive federal scheme" that precludes all state regulation in the field of employment of unauthorized aliens.

2. Section 5(C) does not conflict with federal law

The United States has not demonstrated that section 5(C) stands as "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth*, 129 S. Ct. at 1201 (citation omitted). Section 5(C) furthers Congress' objectives by prohibiting aliens from working without authorization. *See* Appellant Br. at 52. Relying solely on the fact that Congress decided not to impose the type of employee sanctions that section 5(C) imposes, the United States argues that Arizona cannot "intrude into an area committed to the national government by choosing a different means, particularly one that Congress expressly considered and rejected in favor of other means." Appellee Br. at 38-39. But employment regulation is *not* "an area committed to the national government." *Id.*; *Chicanos Por La Causa*, 558 F.3d at 864. Nor can the United States establish conflict preemption merely by demonstrating that there is a difference between state and federal law. *See id.* The United States has not identified an *actual* conflict between section 5(C) and federal law because the United States has not shown that it was Congress' purpose to protect unauthorized employees from state sanctions.

None of the cases upon which the United States relies addresses preemption under IRCA or the INA, and each involved a clear conflict between state and federal law in an area in which the federal interest predominates. In *American Insurance Association v. Garamendi*, the Supreme Court found that the challenged California law conflicted with three Executive Agreements by designating a different forum for resolving Holocaust-era insurance claims and imposing more expansive disclosure requirements for Holocaust-era insurance policies. 539 U.S. 396, 404-06, 423-24 (2003).[14] In *Crosby*, the Court found that the Massachusetts law directly conflicted with Congress' stated objective to limit the sanctions imposed on Burma. 530 U.S. at 366-68. And in *Gould*, the Court found that the challenged Wisconsin law interfered with the remedial purposes of the NLRA. 475 U.S. at 288 n.5.

Unlike the interests the states sought to advance in *Garamendi*, *Crosby*, and *Gould*, Arizona has a strong interest in preserving jobs for its lawful residents. *See De Canas*, 424 U.S. at 356-57; *Garamendi*, 539 U.S. at 399; *Crosby*, 530 U.S. at 374-77; *Gould*, 475 U.S. at 291. Arizona has exercised its traditional power to

[14] The Executive Agreements had the power to preempt state law because "the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress." *Garamendi*, 539 U.S. at 415-16.

regulate the employment relationship in a way that does not interfere with *any* congressional purpose.

D. Section 6 is not preempted on its face

With respect to section 6, the United States does not dispute that the Court must: (1) presume that Arizona's law enforcement officers will implement section 6 in a constitutional manner and (2) construe section 6 to avoid constitutional problems. *See* Appellant Br. at 54; Appellee Br. at 59-60. Nor does the United States dispute that it must demonstrate that section 6 is unconstitutional in *all* of its applications.

Rather, the parties' dispute centers on whether there are situations in which probable cause exists that a person has committed a public offense that makes the person removable. *See id*. There are at least three circumstances in which an officer could receive sufficient information from the federal government to make this determination. First, a federal agent responding to an inquiry from an Arizona officer regarding an alien's immigration status could confirm that the alien has committed a public offense that makes him removable. Second, the officer could learn that the person is an alien and has previously been convicted of an aggravated felony, such as rape or murder, for which the alien is presumed deportable under 8

U.S.C. § 1228(c).[15] *See also* 8 U.S.C. § 1226(d)(1)(C) (requiring the federal government "to maintain a current record of aliens who have been convicted of an aggravated felony"). Third, the officer could learn that the alien had previously been convicted of a public offense and that an immigration judge had already found the alien removable, but the alien had absconded before he or she could be removed. *See id.* (requiring the federal government "to maintain a current record of aliens . . . who have been removed"). Section 6 merely authorizes the officer to assist the federal government by arresting aliens in these scenarios, instead of setting them free. Because section 6 has valid applications, it cannot be invalidated on its face.

II

The United States Bases Its Arguments on Several Flawed Premises

A. The United States overstates the federal government's exclusive power to regulate immigration

Despite the limited scope of this appeal and the severability provision in section 12 of S.B. 1070, the United States continues to argue that the Act, as a whole, is invalid because it intrudes upon the federal government's exclusive authority to "regulate" immigration. Appellee Br. at 27-32. What the United States fails to acknowledge, however, is that the Supreme Court has narrowly

[15] The United States fails to recognize that a felony conviction would constitute a "public offense." *See* A.R.S. § 13-105(26).

defined this authority as the power to define "who should or should not be admitted into the country, and the conditions under which *a legal entrant* may remain." *De Canas*, 424 U.S. at 354-55 (emphasis added). The Supreme Court has also expressly held that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *see also De Canas*, 424 U.S. at 355.

Sections 2(B), 3, 5(C), and 6 do not purport to regulate who may enter the country or the terms upon which a legal entrant may remain. Nevertheless, the United States argues that S.B. 1070's policy of deterrence impermissibly intrudes upon federal territory and that "[t]he Constitution does not permit a patchwork of . . . state immigration schemes."[16] *See* Appellee Br. at 24, 28-31. The United States fails to explain how these arguments can be reconciled with the Supreme Court's clear holdings in *Plyler* and *De Canas* that states *can* act with respect to illegal aliens. Instead, the United States relies on *Lozano*, 2010 U.S. App. LEXIS 18835,

[16] It is axiomatic that no two jurisdictions will assist in the enforcement of the federal immigration laws or regulate crime and employment in the exact same way. But that is markedly different than the circumstances in which the Supreme Court and this Court have found that federal law preempted state-specific regulations imposing distinct, affirmative obligations on a single entity so as to avoid the risk that a "patchwork" of state laws would develop. *See, e.g.*, *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 373 (2008) (state regulation of delivery services used by tobacco companies); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007) (state regulation requiring passenger warnings on planes).

at *41, in which the Third Circuit found that an ordinance prohibiting illegal aliens from renting property in the city was an improper attempt to determine who could or could not be in the country. But no provision of S.B. 1070 addresses a person's right to reside in Arizona and "[r]estrictions on residence directly impact immigration in a way that restrictions on employment or public benefits do not." *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010).

B. The United States' conclusory assertions regarding Arizona's alleged "enforcement scheme" misstate how the enjoined provisions will operate in practice

The United States' arguments regarding the constitutionality of sections 2(B), 3, 5(C), and 6 are built upon a factual premise that bears little, if any, relationship to how Arizona's law enforcement officers would enforce the enjoined provisions. Section 2(B)[17] is triggered only in connection with a lawful stop, detention, or arrest, during which law enforcement officers (in Arizona or elsewhere) invariably ask for the person's identification. *See* S.B. 1070, § 2(B); Appellant Br. at 31-32. If the person does not have identification and other factors

[17] Although the United States attacks all of section 2, *see* Appellee Br. at 43-57, the only issue before this Court is whether the district court properly enjoined section 2(B). *See id.* at 2, 5-6; Appellant Br. at 3-4.

suggest that the person may be unlawfully present in the country,[18] it is undisputed that state and local law enforcement officers can (and often do) investigate the person's immigration status. *See id.*; Appellee Br. at 51; [ER 20 n.12].

In Arizona, however, sanctuary city policies have discouraged this practice. [ER 129, 176-78.] Even though 8 U.S.C. § 1373, 8 U.S.C. § 1644, and section 2(A) all prohibit sanctuary city policies, many law enforcement officers choose not to assist in the enforcement of federal immigration laws and others "fear that [their law enforcement agency] may negatively react to them working with ICE because of the [agency's] past comments [and policies opposing inquiries] about a person's immigration status." [ER 114.]

Section 2(B) alleviates this problem by making it clear that Arizona expects its law enforcement officers to investigate a person's immigration status if reasonable suspicion exists that the person is an alien who is unlawfully present in the country (unless the officer determines that the investigation is not practicable or would impede or hinder another investigation).[19] Not only is Arizona entitled to

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[18] *See, e.g., United States v. Rodriguez-Arreola*, 270 F.3d 611, 613-16 (8th Cir. 2001) (no eye contact, unexplained nervousness, no luggage for road trip, and admission of unlawful presence); *United States v. Santana-Garcia*, 264 F.3d 1188, 1190-91 (10th Cir. 2001) (driver could not speak English or produce a driver's license and passenger stated that the driver was unlawfully present in the country).

[19] It is clear on the face of section 2(B) that it does not "direct[] state and local officers to demand resolution of immigration status resulting from all routine encounters." *Compare* Appellee Br. at 48 *with* S.B. 1070, § 2(B).

establish priorities for its law enforcement officers, but Arizona's expectation that its officers will uphold federal law complies with the Supremacy Clause. *See Haywood v. Drown*, 129 S. Ct. 2108, 2114-17 (2009) ("Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State . . .'").

If an officer actually arrests the person, section 2(B) clarifies that an officer should make more than a "reasonable attempt" to investigate the person's immigration status and, instead, that the officer should determine the person's immigration status and verify it with the federal government. This, too, will have little effect on current practice because officers currently investigate the citizenship status of all incarcerated arrestees—which generally includes any arrestee who cannot provide information to verify his or her identity. [ER 115-17.][20]

The only real effect section 2(B) would have on the federal government's immigration enforcement efforts would be better communication between Arizona's law enforcement officers and federal agents regarding potential immigration violations. The federal government retains full discretion to

[20] Although the United States disputes, in a footnote, Arizona's argument that the second sentence of section 2(B) should not be read to require law enforcement officers to investigate the immigration status of *every* person arrested (rather than all arrestees for whom officers have reasonable suspicion of unlawful presence), the United States neither addresses the authorities Arizona cited to support its argument nor provides any contrary authority. *See* Appellee Br. at 51 n.11. Nor does the United States dispute that this sentence is severable. *See* S.B. 1070, § 12.

determine whether it will do anything about an alien Arizona has brought to its attention.[21]

As for sections 3 and 5(C), these laws simply create new misdemeanors for which unlawful presence is only an element, not a crime in and of itself. Section 3 prohibits willful failure to register or carry registration documents when existing federal law requires the person to register or to carry registration documents. *See* S.B. 1070, § 3. Section 5 prohibits unauthorized aliens from taking jobs from Arizona's lawful residents. S.B. 1070, § 5. Section 6 authorizes Arizona's law enforcement officers to conduct arrests in certain circumstances, such as if the officer receives confirmation from the federal government that a person has been previously convicted of a felony and has either been deported or has left the United States after the conviction and returned.[22]

III

The Non-Merits Factors Do Not Support an Injunction

The United States argues that the non-merits factors support the issuance of a preliminary injunction for essentially three reasons. First, the United States argues that "allowing the enjoined provisions to take effect would . . . divert

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[21] If Arizona has an independent basis to prosecute the person, Arizona may do so, but that will have no effect on either the federal government's enforcement efforts or its resources.

[22] Congress expressly authorized such arrests in 8 U.S.C. § 1252c, but only if state law provides such authority.

resources from federal enforcement priorities, and impose an impermissible burden on lawfully present aliens." Appellee Br. at 62. However, these are the same arguments that the United States made in support of its arguments as to why section 2(B) is preempted and, thus, should be enjoined. As demonstrated in Section I.A above and in Arizona's Opening Brief, *see* Appellant Br. at 23-43, the enjoined provisions do not divert resources from federal enforcement priorities as established and set by *Congress*, and the enjoined provisions do not change the alleged "burden" that lawfully present aliens already face under established law and practice.

Second, the United States argues that the enjoined provisions would somehow "undermine foreign policy." Appellee Br. at 62-63. The district court made no factual findings regarding the alleged foreign policy issues and, as demonstrated in Section I.A above, the record demonstrates that there is a robust disagreement about this issue.[23]

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[23] The United States' arguments on this issue also strain reason. For example, the United States argues that the "Arizona law creates a risk of 'reciprocal and retaliatory treatment of U.S. citizens abroad.'" Appellee Br. at 62. United States citizens, however, do not reasonably expect that they can unlawfully enter or remain in a foreign country and not be investigated when law enforcement officers in that country have reasonable suspicion that they are, in fact, not lawfully present in that country. United States citizens do not enter foreign countries with the expectation that they will not be required to comply with those countries' registration requirements. United States citizens do not reasonably expect that they can work in any country they choose without authorization from the countries or the jurisdictions in those countries.

Finally, the United States remarkably argues that Arizona has not shown why reversal of the preliminary injunction "is required to avoid irreparable harm" to Arizona. Appellee Br. at 60. Putting aside that it is burden of the United States (as the party seeking an injunction) to establish irreparable harm, the record nevertheless before this Court could not be clearer about which of these parties is the party that is incurring *actual* irreparable harm while this injunction remains in place. As the district court observed in the very first sentence of its Order, S.B. 1070 was enacted "[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." [ER 1.]

This "backdrop" is the *status quo* that the Arizona Legislature concluded was not acceptable for the health, safety, and welfare of its citizens. This "backdrop" is what has resulted in Arizona's peace officers being shot by illegal aliens who likely would have been detected and removed by the *federal* government if provisions such as the enjoined provisions of S.B. 1070 had been in effect. [ER 118-21.] This "backdrop" includes the *federal* government effectively ceding vast areas of territory within the State of Arizona to illegal aliens and the criminal activity associated therewith. [ER 161-67.] This "backdrop" has resulted in Arizona ranchers living near the border living under conditions of fear that are unacceptable in a civilized society. [ER 222-32.]

Issuing a preliminary injunction that hand-cuffs Arizona in its efforts to address these issues is not in the public interest and the balance of *actual* harms in this analysis tips sharply against, not in favor of, the United States.

Conclusion

For the foregoing reasons, the preliminary injunction should be vacated.

Dated: October 12, 2010

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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 opening 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 6,993 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: October 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 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 following CM/ECF registrants:

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