

**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.

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No. 10-16645

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
FOUNDATION FOR THE PRESERVATION OF  
CONSTITUTIONALLY RESERVED RIGHTS**

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*Attorney for the Foundation for the  
Preservation of Constitutionally  
Reserved Rights*

The Foundation for the Preservation of Constitutionally Reserved Rights (the “Foundation”) seeks to preserve and advance the powers and rights reserved by the States and the People under the United States Constitution.

On July 6, 2010, just 23 days before it was to become effective, the United States filed suit seeking to enjoin Arizona's enactment of Senate Bill 1070 as amended by House Bill 2162 (collectively “SB 1070”). The United States District Court for the District of Arizona was required to find that the United States cleared two hurdles before it could grant an injunction. First, the United States must have demonstrated (a) that it is likely to succeed on the merits of its argument at trial, (b) that it will suffer irreparable harm absent a preliminary injunction, (c) that the harm it will suffer outweighs the burden to the defendant pending trial, and (d) that a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 U.S. 365, 374 (2008). Second, and equally necessary, since the United States sought facial review of SB 1070, the United States must have establish that no set of circumstances exists where SB 1070 would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

In its haste to enjoin SB 1070 the District Court erred in its preliminary injunction analysis under *Winter* and wholly failed to consider if the United States satisfied its *Salerno* facial review burden. The Foundation's proposed *amicus curiae* brief focuses on the nexus between the United States' two burdens with

respect to the District Court's injunction of SB 1070 sections 2(B) and 5(C).

The District Court erred both in its interpretation of SB 1070 section 2(B) and failed to conclude that no circumstances exist where section 2(B) would be valid. Even if its interpretation has merit, it could preliminarily enjoin section 2(B) only if the United States established that no circumstances exist where section 2(B) could be constitutionally implemented. Arizona's interpretation, and planned implementation, of section 2(B) is clearly a constitutional implementation and requires the preliminary injunction of section 2(B) be vacated.

The District Court erroneously concluded that Congress intended to wholly occupy the field of illegal alien employment relations when it adopted the reasoning that Congressional contemplation is equivalent to Congressional action as it pertains to field preemption. The United States failed to allege or prove that no set of circumstances exists where section 5(C) would be valid. Absent such a showing the district court lacked the discretion to issue a preliminary injunction of section 5(C) and requires the preliminary injunction of section 5(C) be vacated.

For the foregoing reasons, the Foundation respectfully moves the United States Court of Appeals for the Ninth Circuit to accept the concurrently filed *amicus curiae* brief in support of Defendants-Appellants.

Dated: September 1, 2010

Respectfully submitted,

s/ Brian K. Garlitz \_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

The undersigned certifies that he has electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 1st day of September, 2010. The undersigned certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Brian K. Garlitz \_\_\_\_\_  
Brian K. Garlitz