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.

On Appeal from the United States District Court
for the District of Arizona, Civil Action No. CV-10-1413,
The Honorable Susan R. Bolton, District Judge

BRIEF OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28(a)(3) and 26.1, the undersigned attorney for Mountain States Legal Foundation ("MSLF") certifies that MSLF has no parent corporation and, because it has never issued stock, there is no publicly held corporation that owns ten percent or more of its stock.

Dated this 2nd day of September, 2010.

/s/ J. Scott Detamore
J. Scott Detamore

Attorney for Amicus Curiae
Mountain States Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation dedicated to preserving and defending individual liberty, limited and ethical government, the right to own and use property, and the free enterprise system. MSLF believes strongly in the individual freedoms and liberties of individuals that are preserved by the constitutional structure of federalism and separation of powers, which are both intended to preserve and protect the freedom and liberty of the people.

If a court determines that State law is preempted by federal law because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, this decision implicates federalism and separation of powers, and thereby, individual liberty of the people. This preemption theory, if not narrowly and circumspectly applied, encourages courts to preempt State statutes that Congress did not intend to preempt, thereby depriving the States of the powers constitutionally reserved to them, and confers those powers on the Federal Government. It also encourages courts to engage in judicial legislation, contrary to separation of powers.

MSLF believes that the district court, as have many other courts, improperly applied this preemption theory and that its decision here altered the delicate

[1] Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

balance of power between the States and the Federal Government and constituted judicial legislation. MSLF believes that this Court will be assisted in its evaluation of this case by a discussion of these issues.

SUMMARY OF ARGUMENT

The district court preliminarily enjoined parts of Arizona Senate Bill 1070 ("S.B. 1070"), finding that the United States was likely to prevail on the merits because those parts enjoined constituted an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and, therefore, were preempted by federal law. Only the district court's determination to preempt Section 2(B) of S.B. 1070 (A.R.S. § 1051(B)) is addressed here.

"Obstacle preemption" is often used to describe the prong of implied conflict preemption that the district court employed in its analysis. The application of obstacle preemption implicates important constitutional concerns relating to federalism and separation of powers, which were designed by the Framers of the Constitution to preserve individual liberty. Therefore, the use of obstacle preemption has serious constitutional ramifications because "[t]he preemption doctrine . . . is almost certainly the most frequently used doctrine of constitutional law in practice." Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 768 (1994). Consequently, courts must apply obstacle preemption very narrowly and with caution, finding obstacle preemption only if Congress intended obstacle preemption to apply to State law based upon its intent derived from the text of the statute in question.

The district court's analysis and decision in the instant case demonstrates the constitutional dangers of applying obstacle preemption without these constraints. The district court did not determine or even discuss whether Congress intended to preempt A.R.S. § 11-1051(B). Nor did the district court begin with the presumption that Congress did not intend to preempt A.R.S. § 11-1051(B), which falls within the sphere of the traditional police powers of the State, as does all of S.B. 1070. Finally, by failing to identify the federal statute or statutes that it believed preempted A.R.S. § 11-1051(B), the district court did not construe the text of those statutes to determine if Congress intended to preempt State law that constituted an obstacle to the purposes and objectives of the appropriate federal statute.

Had the district court construed the appropriate federal statutes, it would have determined that A.R.S. § 11-1051(B) was entirely consistent with the purposes and objectives of Congress, complementing, promoting and advancing those purposes and objectives. Therefore, it should have ruled that Congress did not intend to preempt A.R.S. § 11-1051(B). Instead, the district court engaged in a sweeping, freewheeling, extra-textual analysis of the purposes and objectives of Congress thereby judicially manufacturing congressional policies and objectives. Based upon this flawed analysis, the district court ruled that A.R.S. § 11-1051(B)

stood as an obstacle to the full accomplishment and execution of its judicially manufactured purposes and objectives and was, therefore, preempted.

Finally, the district court erred by finding that A.R.S. § 11-1051(B) was preempted because it constituted an obstacle to the enforcement priorities of the Executive Branch, which conflicted with the enforcement priorities of Congress.

ARGUMENT

I. THE SUPREMACY CLAUSE PRESERVES FEDERALISM.

The concept of federalism posits that the Federal Government is one of limited, enumerated powers, whereas the powers retained by the States are numerous and indefinite:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I § 8. As James Madison wrote: "The powers delegated the proposed Constitution of the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292–293 (C. Rossiter ed., 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

United States v. Lopez, 514 U.S. 549, 552 (1995). The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The Supremacy Clause may operate only in accordance with its terms; that is, only those federal laws that are "made in Pursuance" of "[t]his Constitution" may have "supreme" status. By restricting the reach of the Supremacy Clause to statutes enacted pursuant to Congress's enumerated powers, the balance of powers between States and the Federal Government is maintained.

II. THOUGH CONGRESS HAS THE EXCLUSIVE POWER TO REGULATE IMMIGRATION, STATES MAY LEGISLATE CONCERNING UNLAWFULLY PRESENT ALIENS WITHOUT ENCROACHING UPON THAT POWER.

The federal power over immigration derives primarily from the Naturalization Clause: "[The Congress shall have the power] . . . [t]o establish an uniform Rule of Naturalization[.]" U.S. Const., art. I, § 8, cl. 4. The Supreme Court has held that the "[power to regulate immigration [pursuant to that Clause] is . . . exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

The power to regulate immigration pursuant to the Naturalization Clause is limited: Congress may only "determine[e] what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1948); *see DeCanas*, 424 U.S. at 355 ("power to regulate immigration is essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain").

But the "Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." *DeCanas*, 424 U.S. at 355. That is, the "fact that aliens are the subject of state statutes does not render [the statutes] a regulation of immigration." *Id*. Particularly notable in the instant

case, "States are [not] without any *power to deter the influx of persons entering the United States against federal law* and whose numbers might have a *discernible impact on traditional state concerns*." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) (all emphasis added).

There has been no contention in this case that S.B. 1070, including A.R.S. § 11-1051(B), is a regulation of immigration within the exclusive power of Congress. Indeed, as demonstrated below, all of S.B. 1070 is an exercise of the inherent police power reserved to the States to address areas of traditional state concerns.

III. ONLY CONGRESS MAY PREEMPT STATE LAWS AND IT MUST CLEARLY MANIFEST ITS INTENT TO DO SO.

A. Congress's Preemption Of State Law May Be Either Express Or Implied.

Under current case law, "[p]reemption may either be expressed or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992). The Supreme Court has recognized two types of implied conflict preemption, but only the second is involved here:

> [Implied] [c]onflict preemption [is] . . . where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 98 (internal citations omitted).

B. Congress Must Clearly Manifest Its Intent To Preempt State Law.

There are "two cornerstones of . . . pre-emption jurisprudence." *Wyeth v. Levine*, ___ U.S. ___, 129 S.Ct. 1187, 1194 (2009). The first is that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("ways in which federal law may pre-empt state law . . . turn on congressional intent").

The second cornerstone of preemption analysis is that "in *all* preemption cases" there is a presumption "that the historic police powers of the States were not to be superseded by [federal law] unless [this result] was the clear and manifest purpose of Congress." *Wyeth*, 129 S.Ct. at 1194–95 (emphasis added). The "presumption against pre-emption is rooted in the concept of federalism." *Geier v. American Honda Motor Comp., Inc*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). Moreover, this presumption serves to place preemption in the hands of Congress, not the Judiciary:

> The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance . . . and its requirement that Congress speak clearly when exercising that power.

Id. (internal quotations omitted).

C. S.B. 1070 Addresses Traditional Matters Of State Concern Within The Police Powers Of The States.

Justice Holmes described early on the broad scope of the police power: "[T]he police power extends to all the great public needs [and] may be put forth in aid of what is . . . held by . . . preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). The "concept of the public welfare is broad and inclusive [and] . . . public safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power, . . .

[y]et they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker*, 384 U.S. 26, 32–33 (1954).

The people of Arizona passed S.B. 1070 as a statewide initiative designed to address "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." District Court Order at 1. The "preponderant opinion" of Arizonians, as expressed by their votes, was that S.B. 1070 was "greatly and immediately necessary to the public welfare." *Noble*, 219 U.S. at 188. It is undoubtedly within the historic police powers of a State to protect its residents and its economy from the adverse impact of rampant illegal immigration, escalating crime and serious public safety concerns, all areas of traditional concern to the States.

In the instant case, no party or the district court contended that S.B. 1070 constituted a regulation of immigration. Rather, S.B. 1070 relates to matters in which the States may exercise its police power and legislate concurrently with Congress, unless preempted by Congress. Indeed, as recognized in *Plyler*, "States are [not] without any power to deter the influx of persons entering the United States against federal law and whose numbers might have a discernible impact on traditional state concerns." 457 U.S. at 228 n.23.

IV. OBSTACLE PREEMPTION DISRUPTS THE DELICATE BALANCE BETWEEN STATE AND FEDERAL POWER AND ENCOURAGES THE JUDICIARY TO ASSUME LEGISLATIVE POWERS.

A. The Federal Structure Of The U.S. Constitution Is Essential To Preserve The Personal Liberty Of The People.

The "Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under this federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

The Framers adopted this system of dual sovereignty to "reduce the risk of tyranny and abuse from either front" and because "[i]n the tension between federal and state power *lies the promise of liberty*." *Gregory*, 501 U.S. at 458–59 (emphasis added); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the *protection of our fundamental liberties*") (internal quotations omitted) (emphasis added). Thus, this federal structure secures the liberties that derive from this diffusion of power:

> The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the *liberties that derive from the diffusion of sovereign power*.

New York v. United States, 505 U.S. 144, 181 (1992) (internal quotations omitted) (emphasis added).

Additionally, a "federalist structure of joint sovereigns preserves to the people numerous advantages," such as "a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and "increases[d] opportunity for citizen involvement in democratic processes." *Gregory*, 501 U.S. at 458. Finally, as the Framers observed, the "compound republic of America" provides "a double security . . . to the rights of the people" because "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." *The Federalist* No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

B. The Constitution's Separation Of Governmental Power Is Also Essential To Preserve The Liberty Of The People.

"The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). That is, the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id.* (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S.

440, 468 (1989) (Kennedy, J., concurring) ("Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers"); *see The Federalist* No. 51, at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961) (the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty").

Thus, none of the branches may assume the role of any of the others because "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers," *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring), because "power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it." *The Federalist* No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961).

The Judiciary may not legislate. "From its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Raines v. Byrd*, 511 U.S. 811, 819 (1997) (internal quotations omitted). The Supreme Court has recognized an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere[.]" *Id*. at 820. Thus, separation of powers operates to "exclude[] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the

halls of Congress[.]" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Consequently, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be *the legislator*." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring) (quoting *The Federalist* No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961)) (emphasis in original).

C. Obstacle Preemption, If Not Limited To Congress's Intent, As Clearly Manifested In The Statutory Text, Violates Federalism And Separation Of Powers.

Whether a State law is displaced by obstacle preemption depends on whether Congress—notwithstanding its silence on the issue—intended to displace that law because it constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Wyeth*, 129 S.Ct. at 1194. Moreover, courts should presume that Congress did not intend to preempt statutes, such as S.B. 1070, that are related to the traditional police powers of States. *Id*. at 1194–95.

The nature of obstacle preemption tends to avoid the central question of congressional intent to preempt State law. Instead, it tends to focus on the general purposes and objectives Congress intended the law to accomplish and whether State law interferes with these purposes in any way. Thus, the concept of obstacle preemption must assume that, though silent, Congress would have wanted to

displace State law if it creates an obstacle to the accomplishment and execution of the full purposes and objectives behind the statute. But this assumption is flawed. At the outset, a test that requires courts to identify the "full purposes and objectives" behind federal statutes faces significant obstacles:

> As commentators across the political spectrum have pointed out, each House of Congress is a collective body, and its individual members each have their own purposes. Many statutes are the products of compromise; members of Congress who want to pursue one set of purposes agree on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective "purposes and objectives" may be naive, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.

Caleb Nelson, *Preemption*, 86 Va. L. Rev 225, 280–81 (2000).

Even assuming that all members of Congress could agree on the "full purposes and objectives," there is still no reason to assume that they would want to displace whatever State law makes achieving those purposes more difficult. As the Supreme Court has acknowledged outside the context of preemption, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Pension Benefit Guar. Corp. v. LTV Corp*. 496 U.S. 633, 646–47 (1987).

Consequently, the mere fact that Congress enacts a statute to serve certain purposes does not necessarily imply that Congress wants to displace all State law that constitutes some obstacle to those purposes. "It follows that a general doctrine of 'obstacle preemption' will displace more state law than its rationale warrants . . . [and] will read federal statutes to imply preemption clauses that the enacting Congress might well have rejected." Nelson, *Preemption*, 86 Va. L. Rev. at 281. Indeed, referring to this process as "imaginative reconstruction," Professor Nelson explains that "[t]he Court is trying to reconstruct how the enacting Congress would have resolved questions about the statute's preemptive effect if it had considered them long enough to come to a collective agreement." *Id*. at 277. This approach clearly upsets the delicate balance between State and federal power, skewing it in favor of federal power.

Obstacle preemption not only tends to usurp State power and allocate it to the Federal Government, but it invites judges "to step in[to] legislative shoes where Congress has not expressed a clear and manifest intent." Robert S. Peck, *A Separation of Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1196 (2010). Accordingly, "because preemption depends so heavily on congressional intent, a freewheeling inquiry that ends up supplying missing legislative intent implicates separation of powers." *Id.* at 1197.

This process of "imaginative reconstruction" is less a matter of determining congressional intent to preempt and more a form of accidental preemption:

> Traditionally, courts determine congressional intent on the basis of a statute's text, structure, and purpose. *Altria Group, Inc. v. Good*, ___ U.S. ___, 129 S. Ct. 538, 543–44 (2008). The Court has said that, because of the presumption against preemption, it "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).
>
> Where that is not determinative, judges often rely upon history or a seemingly apt analogy in the face of legislative inscrutability. *See e.g. Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 249 n.17 (4th Cir. 1994); *Ga.-Pac. Corp. v. EPA*, 671 F.2d 1235, 1240 (9th Cir. 1982). Where it lacks sufficient legislative direction, the Court tends to rely on the most general assessment of congressional purpose and then extrapolate from there to give "application to congressional incompletion." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 240 (1959). The result then is less a reflection of congressional intentions and more a form of *accidental preemption, based solely on the sensibilities of the Justices*.

Id. at 1198–99 (emphasis added).

Accordingly, because obstacle preemption implicates both federalism and separation of powers, this freewheeling excursion into statutory purpose when none is clearly and manifestly expressed must be curtailed and courts must confine themselves to the ordinary canons of statutory construction to glean Congress's intent. Thus, courts should first begin with the text and "[w]hen the statutory language is plain, the sole functions of the courts . . . is to enforce it according to

its terms. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 480 U.S. 522, 625–26 (1987). In other words, courts must not expand the implied preemption analysis into isolated floor statements, legislative history, broad policy objectives, or generalized notions of congressional purposes that are not contained within the text of federal law.

D. Certain Justices Of The Supreme Court Have Been Highly Critical Of Obstacle Preemption If The Preemption Inquiry Is Not Limited To Congress's Intent As Manifested In The Statutory Text.

Justice Kennedy recognized that there is a presumption that "the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress" and that "the purpose of Congress is the ultimate touchtone in all pre-emption cases." *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). Therefore, "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Id*. Moreover, he wrote that the "pre-emptive scope of the Act is . . . *limited to the language of the statute*[.]" *Id*. (emphasis added). Thus, in Justice Kennedy's view, obstacle preemption "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress's primary objectives, as conveyed with clarity in the federal legislation." *Id*. at 110.

Justice Stevens, the author of *Wyeth*, was also been highly critical of obstacle preclusion. He wrote:

> [T]he presumption [against preemption] serves as a limiting principle that prevents federal judges *from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption* based on frustration of purposes—*i.e.*, that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Geier, 529 U.S. at 907–08 (Stevens, J., dissenting) (emphasis added). Justice Stevens also appeared to endorse rejecting obstacle preemption altogether were it not for precedent:

> Recently, one commentator has argued that our doctrine of frustration-of-purposes . . . pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it.

Id. at 908 n.22 (citing *Preemption*, 86 Va. L. Rev. at 231–32). But Justice Stevens believed that "as matters now stand [in our precedent]" even if obstacle preemption were not eliminated, the presumption against preemption "reduces the risk that federal judges will draw too deeply on *malleable and politically unaccountable sources* . . . in finding pre-emption based on frustration of purposes." *Id*. (emphasis added). Justice Stevens concluded that "preemption analysis is, or ought to be, a matter of *precise statutory* . . . *construction* rather than an exercise in *free-form judicial policymaking*." *Id*. at 911 (emphasis added).

Justice Thomas also has long been a critic of obstacle preemption and advocates abandoning this prong of the preemption doctrine. In his most recent analysis, Justice Thomas emphasized the critical importance of federalism to individual liberty. *Wyeth*, 129 S.Ct. at 1205–06 (Thomas, J., concurring in judgment). He then opined that "in light of these constitutional principles" he had become "increasingly reluctant to expand federal statutes beyond their terms through doctrines of implied preemption." *Id*. at 1206 (internal quotations omitted). Justice Thomas believed that obstacle preemption is a fatally flawed doctrine:

> This Court's entire body of "purposes and objectives" pre-emption jurisprudence is inherently flawed. The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.

Id. at 1211. As a result, obstacle preemption "requires inquiry into matters *beyond the scope of proper judicial review*." *Id*. at 1216. (emphasis added).

Justice Thomas opined that obstacle preemption "facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law." This in turn leads to "decisions giving improperly broad pre-emptive effect to *judicially manufactured policies rather than the statutory text* enacted by Congress[.]" *Id*. at 1217. Justice Thomas concluded that such an approach leads to the unconstitutional invalidation of State laws:

> Because such a sweeping approach to pre-emption leads to the *illegitimate—and thus, unconstitutional—invalidations of state laws,* I can no longer assent to a doctrine that pre-empts state laws merely because they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law[.]

Id. (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941) (emphasis added).[2]

Justice Thomas believed, as did Justice Stevens in *Geier* and Justice Kennedy in *Gade*, that "'evidence of pre-emptive purpose [must be] sought in the text and structure of the [provision] at issue,' utilizing standard rules of statutory construction, to comply with the Constitution." *Wyeth*, 129 S.Ct. at 1207–08 (quoting *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Therefore, preemption "must turn on whether state law conflicts with the text of the relevant federal statute[.]" *Wyeth*, 129 S.Ct. at 1208.

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[2] In fact, Justice Thomas argued that *Hines*, which first iterated the obstacle preemption doctrine, was fatally flawed and an example of the unconstitutional incursion into State power and the judicial assumption of legislative power that he decried. *Wyeth*, 129 S.Ct. at 1211–12 (Thomas, J., concurring in judgment). Justice Thomas explained that *Hines* did not confine itself to "considering merely the terms of the relevant federal law[,]" but instead "looked far beyond . . . statutory text and embarked on its own freeranging speculation about what the purposes of the federal law must have been." *Id.* at 1212. For example, Justice Thomas pointed out that in *Hines* the Court considered "public sentiment," "statements of particular Members of Congress," and the "nature of the power exerted by Congress, the object sought to be attained, and the character of the obligation imposed by law." *Id*. Justice Thomas agreed with Justice Stone's dissent in *Hines* that obstacle preemption "is driven by the Court's own conceptions of a policy which Congress had not expressed and which is not plainly to be inferred from the legislation which it had enacted." *Id*. (internal quotations omitted).

V. THE DISTRICT COURT'S ERRONEOUS CONCLUSION THAT SECTION 2(B) OF S.B. 1070 (A.R.S. § 11-1051(B)) WAS PREEMPTED IS A QUINTESSENTIAL EXAMPLE OF THE CONSTITUTIONAL INFIRMITIES OF OBSTACLE PREEMPTION.

A. The District Court Erred By Ruling That A.R.S. § 11-1051(B) Was Preempted Because It Burdened Lawfully Present Aliens.

A.R.S. § 11-1051(B) provides:

> For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be *verified with the federal government* pursuant to [8 U.S.C. § 1373(c)]. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution[.]

The district court erroneously determined that the purpose and objective of Congress's regulation of aliens was to protect lawfully present aliens from undue burdens and discrimination on account of their status and then determined that A.R.S. § 11-1051(B) unduly burdened lawfully present aliens: "Requiring Arizona law enforcement officials and agencies to determine [from federal officials] the immigration status of every person who is arrested burdens lawfully-present aliens

because their liberty will be restricted while their status is checked." District Court Order at 16.

The district court also found that, even when a person is lawfully stopped, or detained, and reasonable suspicion exists that the person is in this country unlawfully, verifying that person's immigration status with federal officials also "imposes an unacceptable burden on lawfully present aliens." *Id.* at 20. The district court concluded that A.R.S. § 11-1051(B) constituted an obstacle to the full accomplishment of the purposes and objectives of Congress, which it had found was to protect legally present aliens from discriminatory burdens, relying almost exclusively on *Hines* for that conclusion. District Court Order at 15–16, 19–20.

1. The district court failed to identify any particular federal statute or statutes that preempted A.R.S. § 11-1051(B), failed to determine whether Congress intended to preempt A.R.S. § 11-1051(B), and relied on an inapposite case for its conclusions.

The District Court focused only on the alleged interference of A.R.S. § 11-1051(B) with congressional purposes and objectives, without addressing the first cornerstone of preemption analysis, i.e., congressional intent. *See Wyeth*, 129 S.Ct. at 1194. The district court also ignored the second cornerstone of preemption analysis and failed to accord A.R.S. § 11-1051(B) the presumption against preemption to which it is entitled. *Id*. Indeed, far from construing the text of the federal statute to determine congressional intent to preempt A.R.S.

§ 11 1051(B), the district court failed to identify any particular statute or statutes whose text it might construe to determine that intent.

Instead, the district court erroneously relied on the finding in *Hines* that the Alien Registration Act of 1940 preempted a conflicting registration scheme in Pennsylvania because Congress's purpose in enacting that Act, according to *Hines*, was to protect lawfully resident aliens from burdensome and discriminatory registration schemes that singled out lawfully present aliens on account of their status. District Court Order at 15–16, 19–20; *Hines*, 312 U.S. 52 at 64–72. The district court extrapolated the holding in *Hines* to resolve the instant case.

But *Hines* has no application here. S.B. 1070 did not create a comprehensive State system for the registration of lawfully present aliens that discriminatorily singles out those aliens on account of their status, contrary to the purposes and objectives of the federal registration scheme, as was the case in *Hines*. To the contrary, A.R.S. § 11-1051(B) aimed only at verifying that persons who have been lawfully stopped, detained, or arrested on non-immigration matters were lawfully present in the United States, and it treated all persons so detained similarly. Thus, Congress's statutes regulating the registration of lawfully present aliens are irrelevant here.

The district court erred because it judicially manufactured a non-existent congressional purpose and objective for a statute or statutes that it did not identify,

it failed to address Congress's intent to preempt, and it relied on a case that has no application. Consequently, the district court's finding that A.R.S. § 11-1051(B) is preempted because it conflicts with the judicially manufactured congressional purpose to protect lawfully present aliens from discrimination is in error. Furthermore, the district court's approach to obstacle preemption unconstitutionally interfered with the delicate balance of power between the Federal Government and the States and unconstitutionally usurped legislative power, contrary to separation of powers.

2. Arizona Revised Statute § 11-1051(B) fosters and assists Congress's purposes and objectives set out in the proper federal acts.

In 1996, Congress enacted two comprehensive acts to strengthen immigration enforcement relating to unlawfully present aliens: the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"); and the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996) ("Welfare Reform Act"). Section 642(a) of the former, codified as 8 U.S.C. § 1373(a), and Section 434 of the latter, codified as 8 U.S.C. § 1644, provide:

> **8 U.S.C. § 1373 - Communication between Government Agencies and the Immigration and Naturalization Service**.
>
> (a) In general
>
> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> * * *
>
> **8 U.S.C. § 1644 - Communication between Government Agencies and the Immigration and Naturalization Service.**
>
> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

Thus, detecting and apprehending unlawfully present aliens is a high enforcement priority for Congress:

> "The conferees believe 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."

City of New York v. United States, 179 F.3d 29, 33 (2nd Cir. 1999) (quoting H. Rep. No. 104-725 at 383 (1996)). Indeed, the assistance provided by State and local governments in detecting and apprehending unlawfully present aliens is consistent with Congress's immigration enforcement policy and of considerable assistance to Congress in accomplishing that policy:

> "The acquisition, maintenance, and exchange of immigration-related information by State and local agencies 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."

City of New York, 179 F.3d at 32–33 (quoting S. Rep. No. 104-249, at 19-20 (1996)).

Consequently, A.R.S. § 11-1051(B), rather than standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, is fully consistent with those purposes and objectives.

B. The District Court Erred By Ruling That A.R.S. § 11-1051(B) Was Preempted Because It Constituted An Obstacle To The Accomplishment Of The Enforcement Priorities Of The Executive Branch.

The district court alternatively found that A.R.S. § 11-1051(B) was preempted because it was an obstacle to the enforcement policies of the Executive Branch: "Federal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status[.]" District Court Order at 20. That is, these requests will "divert resources from the federal government's other responsibilities and priorities." *Id.* at 17.

Thus, in this alternative preemption theory, the district court, in finding obstacle preemption, considered only whether the Arizona law interfered with the purposes and objectives of the *Executive Branch*, which may change from

administration to administration and from year to year.[3] *See* District Court Order at 17, 20. As demonstrated above, however, the Executive Branch policies are themselves an obstacle to the full accomplishment and execution of the purposes and objectives of Congress as set forth in IIRIRA and the Welfare Reform Act. The district court, by judicial fiat, has unconstitutionally uprooted the power to "establish an uniform Rule of Naturalization," U.S. Const. art. 1, § 8, cl. 4, from Article I and planted it firmly in Article II, thereby allowing the Legislative Branch to determine whether a State law is preempted, rather than Congress, as required by the Supremacy Clause.

[3] Indeed, an administration may decide not to enforce certain federal laws for political reasons, particularly in election years. Such a decision has little to do with the purposes and objectives of Congress and is in direct violation of those purposes and objectives.

CONCLUSION

For all these reasons, this Court should dissolve the preliminary injunction issued by the district court and declare A.R.S. § 11-1051(B) effective and operational immediately.

Dated this 2nd day of September 2010.

/s/ J. Scott Detamore
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CERTIFICATE OF COMPLIANCE

This amicus curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and 29(d). It contains 6,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced 14 point Times New Roman typeface using Microsoft Word 2003.

Dated this 2nd day of September 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on this 2nd day of September 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

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