NO. 10-16645

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee

vs.

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
HON. SUSAN R. BOLTON
No. CV 10-1413-PHX-SRB

CONSENT BRIEF OF *AMICI CURIAE* THOMAS MORE LAW CENTER, CENTER FOR SECURITY POLICY, AND SOCIETY OF AMERICANS FOR NATIONAL EXISTENCE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Thomas More Law Center, Center for Security Policy, and Society of Americans for National Existence (collectively referred to as "*Amici*") state the following:

Amici are nonprofit corporations. They do not have parent corporations, no publicly held company owns any part of them, and no publicly held company has a financial interest in the outcome of this appeal.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

All parties have consented to the filing of this *amici curiae* brief. Fed. R. App. P. 29.

Amicus Curiae Thomas More Law Center ("TMLC") is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. It supports a strong national defense and an independent and sovereign United States of America. The Law Center accomplishes its mission through litigation, education, and related activities.

TMLC has over 60,000 members nationwide, including members residing in the State of Arizona. TMLC and its members support the sovereign rights and police powers of the States, specifically including the fundamental right of States to protect their citizens from rampant crime and other public concerns associated with illegal immigration. Depriving States the right to protect their citizens from illegal immigration threatens the safety and security of all American citizens.

The *amicus curiae* Center for Security Policy ("CSP") is a Washington, D.C.-based, nonprofit policy think tank dealing with matters relating to national security. CSP provides policy and legal analysis on matters of national security for policy makers, legislatures, and legal professionals. The founder and president of CSP, Frank J. Gaffney, Jr., served under President Ronald Reagan as the Assistant

Secretary of Defense for International Security Policy, the senior position in the Defense Department with responsibility for policies involving nuclear forces, arms control, and U.S.-European defense relations.

Since 9/11, Mr. Gaffney has directed CSP in focusing much of its resources on the underlying enemy threat doctrine known to jihadists as Sharia (i.e., Islamic legal doctrine and system). In turn, this work has lead CSP to investigate the narco-terrorism connection between Middle East arms dealers, Hezbollah, and Central American drug traffickers such as Fuerzas Armadas Revolucionarias de Colombia ("FARC"). *See, e.g., United States v. Jamal Yousef,* No. S3 08 Cr. 1213 (JFK), 2010 U.S. Dist. LEXIS 86281, (S.D.N.Y. Aug. 23, 2010). As set out in the government's indictment in the Yousef prosecution, there is a working conspiracy between the U.S. State Department-designated Hezbollah jihadist group and militaristic drug traffickers who routinely use the Mexican-American border to transport drugs, money, arms, and personnel between the two countries. This jihad presence on our southern border turns an out-of-control immigration problem into an existential security threat beyond measure for individual border States, such as Arizona, and the Nation at large. From a national security policy perspective, it makes no sense for the federal government to prevent Arizona from providing a first layer of defense for itself *and* the Nation.

CSP's specific interest in this case is on behalf of policy and national security professionals who call upon CSP to assist in crafting legislative and regulatory tools to counter the threat from Islamic terrorists who would exploit the federal government's failure to defend our borders. What makes this case all the more important is that the same federal government agencies in charge of carrying out congressional legislation requiring secure borders litigates against State governments along our borders which dare to take minimal steps to act in accordance with their responsibilities to protect and defend their own citizens, which is fully in accord with, and complimentary to, federal immigration law.

Amicus Curiae Society of Americans for National Existence ("SANE") is an Arizona-based, nonprofit policy think tank supporting public interest litigation relating to the protection and defense of this Nation's sovereignty and national security. SANE provides policy and legal analysis on its areas of focus for policy makers, legislatures, and legal professionals. The founder and president of SANE, David Yerushalmi, Esq., also maintains his legal practice in Arizona and graduated from the Arizona State University College of Law in 1984 and has been licensed to practice law before the courts of Arizona since then.

Amici further state pursuant to Rule 29 of the Federal Rules of Appellate Procedure that no party's counsel authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or

submitting this brief; and no person—other than *Amici*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The purpose of this brief is to address two related issues that challenge an underlying assumption of the district court's order granting the United States' motion and preliminarily enjoining certain provisions of the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("S.B. 1070"), which was duly enacted by the Arizona Legislature pursuant to its police powers. And that assumption is that the Constitution, through the Supremacy Clause, grants the federal government the paramount, if not exclusive, authority for enacting and enforcing immigration laws.[1] This underlying assumption is contrary to our Nation's history, its laws, the fundamental principles of federalism, and sound public policy.

While the Constitution grants Congress the authority "[t]o establish an uniform Rule of Naturalization," this authority does not deprive the States of their right to exercise their police powers to protect their citizens from threats arising

[1] Indeed, as noted in Section II, *infra*, the district court took the unprecedented step of finding that Arizona's law was not in fact preempted by an *Act of Congress*, but by an *executive policy* of non-enforcement of federal law that itself has no force of law.

from within and without their physical borders. Moreover, these police powers were expressly reserved for the States by our Founding Fathers through the Tenth Amendment. Indeed, our Republic was designed as a federal system with a limited national government. As James Madison explained in the Federalist Papers: "In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects. . . ." *The Federalist* No. 14, at 65 (James Madison) (Carey & McClellan eds., 1990). Thus, far from depriving States their independent rights as sovereigns, the Constitution expressly preserves those rights in the States vis-à-vis the powers of the federal government. In fact, the States, and not the federal government, have the paramount right to exercise their police powers to provide for the physical protection and safety of persons within their respective borders. As the U.S. Supreme Court stated, "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000) (citations omitted). S.B. 1070 was validly enacted pursuant to this authority.

In sum, the two related issues addressed in this brief are as follows. First, whether a State, as a sovereign, has an independent right pursuant to its police powers as reserved through the Tenth Amendment to enact and enforce laws

regarding immigration that do not directly conflict with the authority of Congress to enact a uniform rule for naturalization. Second, whether a validly enacted state law that does not substantively conflict with federal law and is in fact consistent with congressional intent can otherwise be preempted by an *executive policy* of non-enforcement of federal law that is in fact contrary to congressional intent.

In the final analysis, the State of Arizona retains the independent and paramount authority to enact and enforce laws, including laws related to illegal immigration, for the purpose of protecting its citizens and other persons within its borders, and the executive branch has no authority to tie the hands of Arizona officials and prevent them from exercising this sovereign power by adopting a *policy* of non-enforcement of federal law and thereby failing to secure our Nation's borders.

ARGUMENT

I. Federal Authority to Enact Immigration Laws Does Not Vitiate Concurrent, Sovereign State Authority, Which Has Not Been Delegated to the Federal Government, to Enact and Enforce Immigration Laws Pursuant to the State's Police Powers.

A. Arizona Is a Sovereign with Independent Police Powers to Protect Its Citizens and Other Persons within Its Borders.

As the U.S. Supreme Court acknowledged long ago in *House v. Mayes*, 219 U.S. 270, 281-82 (1910):

> There are certain fundamental principles . . . which are not open to dispute. . . . Briefly stated, those principles are: That the Government

> created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may by implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; ***that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government***; that among the powers of the State, not surrendered—which power therefore remains with the State—***is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good***; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States. The cases which sanction these principles are numerous, are well known to the profession, and need not be here cited.

Id. at 281-82 (emphasis added).

Thus, States, as sovereigns, did not surrender their authority to "guard . . . the public safety" to the federal government.[2] Since that authority has never been

[2] In *United States v. Cruikshank*, 92 U.S. 542, 549 (1876), Chief Justice Waite, writing for the Court, made the following relevant and timeless observation:

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its

delegated, it is, therefore, retained.[3] States need not look to the federal government—and certainly not to the Executive Branch of the federal government—for permission to enact laws that protect the safety of their citizens and other persons within their borders, even if the laws relate to illegal immigration, such as S.B. 1070.[4] Indeed, there is no—nor should there be—federal supremacy over immigration enforcement within a State's borders, particularly when enforcement has nothing to do with establishing a "uniform Rule of Naturalization," but everything to do with public safety. That is particularly true where, as here, the Arizona law at issue is entirely consistent with federal law.

> own who owe it allegiance, and whose rights, within its jurisdiction, it must protect.

[3] Similarly and more recently, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court acknowledged the following:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. *Those which are to remain in the State governments are numerous and indefinite*." This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front*.

Id. at 552 (internal citations and quotations omitted) (emphasis added).

[4] The Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," *restrains* the federal government from interfering with the police powers of the States.

Moreover, history shows that the power to enact laws affecting immigration is not the sole province of the federal government. For example, in 1837, the U.S. Supreme Court upheld a state law that allowed the City of New York to expel arriving aliens it "deemed" likely to become a public burden. As Justice Philip Barbour explained, the State properly passed a law

> with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves. *There can be no mode in which the power to regulate internal police could be more appropriately exercised*. New York, from her particular situation, is, perhaps more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. *It is the duty of the state to protect its citizens from this evil*; they have endeavoured to do so, by passing, amongst other things, the section of the law in question. ***We should, upon principle, say that it had a right to do so***.

New York v. Miln, 36 U.S. 102, 141 (1837).

In 2010, it cannot be gainsaid that Arizona, "from her particular situation, is, perhaps *more than any other* [*state*] *in the Union*, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected," *see id.*, to escalating drug and human trafficking crimes, and serious public safety concerns. Consequently, through the lawful exercise of its police powers, Arizona sought to address this "public safety" concern by enacting S.B. 1070. And it was within its authority to do so.

B. S.B. 1070 Does Not Conflict with Congress' Enumerated Authority to Enact Uniform Rules for Naturalization and Its Attendant Authority in the Areas of Immigration and Foreign Affairs.

The U.S. Constitution grants Congress the authority to establish requirements for the admission of aliens into this country. Art. I, sec. 8, cl. 4 ("To establish an uniform Rule of Naturalization . . . ."). That is a national issue that requires uniformity at the national level. Thus, "the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (striking down the Alien Registration Act adopted by Pennsylvania). Indeed, having such uniformity at the national level is not only consistent with the U.S. Constitution, it makes sense from a policy perspective as well. When addressing matters that affect foreign relations (such as naturalization), it is important to speak with one voice—"we are but one people, one nation, one power." *See, e.g., id.* at 63-65.

The same, however, cannot be said about enforcing laws related to immigration (which apply the uniform standards in the process) that promote the public safety and general welfare of the citizens of a State. Such laws, and the need to enact such laws, involve significant local concerns. For example, the impact of illegal immigration is not felt the same in Nebraska as it is in a border

State such as Arizona. As the undisputed record in this case demonstrates, Arizona has a real, palpable, and compelling interest in protecting its citizens and other persons within its borders (including legal aliens, among others) from the serious public safety issues that result from the non-enforcement of immigration laws. Unlike the Pennsylvania law struck down in *Hines*, S.B. 1070 does not establish any registration requirements for aliens. Rather, through S.B. 1070, Arizona seeks to exercise its police powers to enforce those "uniform" requirements already established by Congress. And the passage and enforcement of S.B. 1070 are not only consistent with Arizona's lawful exercise of its police powers, they are consistent with *congressional* intent in the area of immigration.[5] *See, e.g.*, 8 U.S.C. § 1644; 8 U.S.C. § 1357(g); 8 U.S.C. § 1373(c).

C. There Is No Direct Conflict Between S.B. 1070 and Federal Law.

When the federal government seeks to prevent a State from exercising its inherent police power to protect its citizens and other persons within its borders from public danger through the Supremacy Clause, the application of preemption principles should be sharply circumscribed. As noted previously, States are not precluded from enacting and enforcing laws related to immigration, particularly

[5] As discussed in further detail in this brief, *see* Section II, *infra*, the preemption question addresses whether state law conflicts with the full purposes and objectives of *Congress*, not whether it might conflict with an *executive policy* that lacks the force of law.

when it is necessary to solve local problems arising from illegal immigration. For example, in *De Canas v. Bica*, 424 U.S. 351 (1976), the U.S. Supreme Court upheld California's labor code banning the knowing employment of illegal aliens when such employment harms lawful resident workers. Writing for a unanimous court, Justice Brennan stated,

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. ***These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico***.

Id. at 356-57. The California law was upheld because the State was exercising its "police power" over employment relations within its jurisdiction. *See id*. at 356 (noting that the challenged law was "certainly within the mainstream of such police power regulation"). Similar to Arizona here, California did not enact a "regulation of immigration, which 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," even though "aliens are the subject of [the] state statute." *Id*. at 355. Thus, the California law was validly enacted pursuant to the State's police powers.

Consequently, principles of field preemption, which would essentially foreclose State involvement in the enforcement of immigration laws (or laws in which "aliens are the subject"), do not and should not apply. Indeed, doing so would not only harm the interests of the individual States, it would dramatically weaken our national security. And this is particularly true today in light of the terrorist threats our Nation faces from without. Moreover, because the interests of a State are at their zenith when, as in this case, it is seeking to enact and enforce laws for the physical protection of its citizens and other persons within its borders (laws that are also consistent with congressional intent), conflict preemption principles should be very narrowly applied.

It is generally understood that

> Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 204 (1982) (internal quotations omitted).

Amici contend, however, that when the interests of the State are compelling, as here, and the statute at issue involves the exercise of the paramount police power of the State (i.e., to promote "public safety"), as here, preemption should only arise—if at all—when compliance with both federal and state laws is a

physical impossibility. *See generally Hines*, 312 U.S. at 67-68 (noting that the question of whether a state law is preempted by federal law is not to be determined by "any rigid formula or rule," but depends upon the circumstances). Such is not the case with S.B. 1070. Indeed, under circumstances in which a State enacts a law touching upon immigration that does not involve "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," *see De Canas*, 424 U.S. at 355, but rather is directly related to the State's right to provide for the security of its citizens and other persons within its borders, as in this case, the law should be upheld.

In sum, Arizona, as a sovereign with independent police powers, has the paramount right to provide for the "public safety" and the concomitant power to enact and enforce laws regarding illegal immigration that do not sharply and directly conflict with federal law, such as S.B. 1070.

II. State Law Expressly Drawing Upon the State's Police Power to Protect Its Citizens from Illegal Behavior Cannot Be Preempted by an Executive Agency's Decision Not to Enforce Congressional Statutes.

As set forth in Appellants' filings in the court below and before this court, the Arizona Legislature passed the relevant provisions of S.B. 1070—now rendered unenforceable by the blunt force of the district court's ruling—as an exercise of the State's police powers. The lower court's analysis, when juxtaposed against the actual provisions of S.B. 1070 and the federal legislation purportedly

preempting the state law, reveals a legal proposition that finds no refuge in the Constitution or in any Supreme Court rulings. This new statement of federal preemption envisions a federalism where an Executive Branch agency's decision not to enforce federal law trumps a State's exercise of its police powers even when the state law is patently in accord with and compatible to the federal legislation purportedly at the heart of the preemption. The district court was in error in stretching existing preemption doctrine beyond any reasonable constitutional parameters and should be reversed.

A. An Executive Branch Agency's Failure to Enforce Laws Passed by Congress Does Not Preempt State Law in Accord with and Compatible to Congressional Legislation.

The district court recognized in its opinion that the preemption inquiry is related to the expressed intention of Congress as set forth in legislation and in the implied reach intended by Congress. [Order at 10-11; ER at 10-11.] This implied reach has been discovered by the courts through a judicial analysis focusing on either field or conflict preemption. [Order at 10-11; ER at 10-11.] But, having laid out the correct analytical framework, the lower court simply directed a high-altitude drone to fly over this analysis with little attention to detail.

Specifically, nowhere in the court's opinion is there a hint of expressed preemption. And, this of course is buttressed by the fact that there is no federal legislation that does so. To the contrary, as noted above, there are a host of federal

statutes which require the federal government to accommodate and coordinate with state law enforcement efforts to determine immigration status. *See, e.g.,* 8 U.S.C. § 1644 ("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 [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States."); 8 U.S.C. § 1357(g) (authorizing the Attorney General to enter into agreements with States and their political subdivisions for the purpose of qualifying state and local law enforcement officers to essentially function as immigration officers); 8 U.S.C. § 1373(c) (requiring ICE to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information"). If there is any expression of intent manifest in the federal legislation it is that Congress fully expects the federal agencies to partner with the States in protecting their citizens from the malignant effects of an immigration and border protection system that President Obama described as a "system [which] is broken" and "everybody knows it." [ER at 398.]

Even more specifically, the district court's individual findings of "preemption" for each of the relevant provisions of S.B. 1070 were based upon a

"conflict preemption" doctrine, which, relying primarily on *Hines*, suggests that S.B. 1070 (i) might in the future require or encourage oppressive burdens on suspected aliens, whether lawfully or unlawfully present in the State, and (ii) would impose administrative headaches on the Executive Branch federal agency in charge of enforcing Congress' immigration laws. Appellants' Opening Brief demonstrates the inapplicability of *Hines* to the landscape that is immigration law today and especially as it relates to the purported burden on a suspected alien that is possibly created or encouraged by S.B. 1070. We focus here on the conflict doctrine as it relates to the court's analysis that the relevant provisions of S.B. 1070 create extra-legal burdens on the federal agencies charged with enforcing federal legislation.[6]

B. The District Court's Analysis of Administrative Burden was Vague at Best Because It Accepted as Fact the Naked Assertion by the Executive Branch that S.B. 1070 Interfered with a Regulatory Scheme that Is Itself in Conflict with Congress' Expressed and Implied Intent.

The district court's "burdensome" doctrine amounts to little more than the following proposition expressed in the vernacular: Arizona's concern for its citizens arising from its police powers and its attention to existing federal statutes requiring the federal agencies to coordinate with the States gives the Executive

[6] Consequently, the district court's rulings on preemption relative to Sections 3 and 6 of S.B. 1070 are not relevant to this specific analysis and will not be treated here.

Branch agencies in charge of the "system," which "is broken," a headache. But this "administrative headache" is neither a conflict with the actual laws passed by Congress nor any legitimate regulation or procedure even impliedly flowing from that congressional legislation. To demonstrate this point, we highlight the specific findings of preemption relative to the "administrative headache" doctrine and note the court's "analysis" (in the order provided by the court):

- S.B. 1070, Section 2(b), second sentence: "State laws have been found to be preempted where they imposed a burden on a federal agency's resources that impeded the agency's function. . . . Thus, an increase in the number of requests for determinations of immigration status, such as is likely to result from the mandatory requirement that Arizona law enforcement officials and agencies check the immigration status of any person who is arrested, will divert resources from the federal government's other responsibilities and priorities." [Order at 16-17; ER at 16-17.]

- S.B. 1070, Section 2(b), first sentence: "Federal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status determination that will flow from Arizona if law enforcement officials are required to verify immigration status whenever, during the course of a lawful stop, detention, or arrest, the law enforcement official has reasonable suspicion of unlawful presence in the United States." [Order at 20; ER at 20.]

- S.B. 1070, Section 5 relative to A.R.S. § 13-2928(C): "These 'extant actions,' ***in combination with an absence of regulation*** for the particular violation of working without authorization, lead to the conclusion that Congress intended not to penalize this action, other than the specific sanctions outlined above." [Order at 27; ER at 27.] (emphasis added.)

In each of these instances, the court does not explain how the specific provisions contradict or operate in conflict with congressional intent. Instead, in these instances and even in the "undue burden on the alien" findings relevant to the court's analysis of Sections 3 and 6 of S.B. 1070, the court fails to link the "administrative headache" or "undue burden" to any contrary congressional intent. Instead, the court simply grants the Executive Branch *carte blanche* to ignore the myriad immigration laws which demand federal agency cooperation with State law enforcement agencies. Congress required this partnership with State law enforcement officials because it is not just the President who understands that the "system is broken." Indeed, "everybody knows it," including Congress.

Moreover, Congress has clearly recognized that the nexus between illegal entry into the border States—a national security threat at epidemic levels—and rampant violent crime is not theoretical for Arizona and its citizens.[7] The State's inherent police powers to deal with illicit drug trafficking, human trafficking, kidnapping, and other violent crimes leaves little doubt that the federal government cannot merely assert an implied preemption based upon a nebulous claim of administrative headache. This is all the more so when the federal agencies' claim

[7] The undisputed record below led the district court to conclude that Arizona passed S.B. 1070 as a direct result of "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." [Order at 1; ER at 1.]

of administrative burden is in reality little more than a naked assertion that the federal agencies should not have to do exactly what Congress has expressly ordered them to do: cooperate with State law enforcement authorities in identifying aliens who should not be here.

In essence, it cannot be that preemption applies to decisions by the Executive Branch not to actively enforce the immigration laws passed by Congress resulting in a "system [which] is broken" and "everybody knows it." Federal agencies do not occupy such an elevated and lofty perch that they can bootstrap a federal preemption doctrine based on congressional authority into a nullification of a State's concern—nay, a State's fiduciary responsibility—for the physical safety of its citizens. Thus, in *Wyeth v. Levine*, 129 U.S. 1187 (2009), the Supreme Court set the benchmark for such claims:

> This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements. In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption. We are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives. Because Congress has not authorized the FDA to pre-empt state law directly, *cf.* 21 U.S.C. § 360k (authorizing the FDA to determine the scope of the Medical Devices Amendments' pre-emption clause), the question is what weight we should accord the FDA's opinion.
>
> In prior cases, we have given "some weight" to an agency's views about the impact of tort law on federal objectives when "the subject matter is technica[l] and the relevant history and background are complex and extensive." Even in such cases, however, we have not

> deferred to an agency's conclusion that state law is pre-empted. Rather, we have attended to an agency's explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.

Id. at 1200-01 (citations and footnotes omitted).

There is nothing technical or complex about the regulatory failure of our immigration system. Moreover, beyond the court's rather generic analysis of "administrative headache" and its prescience in foreseeing some anticipated "undue burden" on aliens engendered by S.B. 1070, the court has not explained with any precision at all how the specific provisions of the state law will "pose an 'obstacle to the accomplishment and execution of the full purposes and objectives ***of Congress***.'" How much more so is this true since "everybody knows" "the system is broken."

In sum, the district court's newfound preemption analysis whereby an Executive Branch policy of non-enforcement of federal law can preempt a validly enacted state law that is in accord with Congress' purposes and objectives should be soundly rejected by this court.

CONCLUSION

For the foregoing reasons, this court should reverse the district court's order granting the United States a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32(a)(7), and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,471 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 2, 2010.

/s/ Robert J. Muise
Robert J. Muise, Esq.
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users.

/s/ Robert J. Muise
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