No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The United States of America,

Plaintiff-Appellee,

v.

The 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

BRIEF OF *AMICI CURIAE* CONGRESSMEN ED ROYCE (CA-40), LAMAR SMITH (TX-21), TED POE (TX-2), TOM McCLINTOCK (CA-4); CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE

This brief of *Amici Curiae* is filed pursuant to F.R.A.P. Rule 29(a) with the consent of all parties to the case.

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the nature of our federal system of government and the balance of powers between the national and state governments are at issue. The CCJ has previously appeared as *amicus curiae* before the Supreme Court of the United States in such cases involving questions of federalism, naturalization, and the respective powers of the national and state governments as *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and nonpartisan organization. The IRF is dedicated to supporting litigation involving civil rights, protection of speech and associational rights, and the core principles of free

societies, and it participates in educating the public about the importance of personal liberty, limited government, and constitutional rights. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving significant constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, or speech or associational rights, or to improperly expand federal intrusion on the exercise of state authority to validly exercise their core power under the Constitution to protect the safety of their citizens -- all of which are fundamental components of individual rights in a free and diverse society.

Congressmen Ed Royce (CA-40), Lamar Smith (TX-21), Ted Poe (TX- 2), and Tom McClintock (CA-4) are members of Congress from Border States severely impacted by the under-enforcement by the Executive of immigration law that has been adopted by Congress. As former Chairman of the International Terrorism and Nonproliferation Subcommittee, Mr. Royce held field hearings on the Texas and California borders on 9/11 Commission concerns that border security had become an issue of national security. Mr. Lamar Smith, Ranking Member of the Judiciary Committee, previously chaired the Immigration Subcommittee. He introduced and successfully advanced the passage of the 1996 Immigration Reform Bill, the most far-reaching reform of America's immigration laws since the 1960s. Mr. Poe, a member of the House Judiciary Committee, is a

former prosecutor and judge who has dealt with the impact of illegal immigration on his state and the nation. Mr. McClintock, who serves on the Education and Labor Committee, has studied the impact of illegal immigration on employment. They join this brief to call the Court's attention to the way in which the claims by the Department of Justice below undermine the plenary power Congress has over immigration policy.

ARGUMENT

I. It Is Congress, Not The Executive, Which Has Plenary Power To Set Immigration Policy.

The underlying legal challenge filed by the Department of Justice ("DOJ") in this case is based on the following erroneous contention: Because the federal government has plenary power over immigration policy, the federal executive has exclusive authority to determine how, and even whether, the immigration laws passed by Congress are to be enforced, not just at the border, but within the states, and not just with respect to direct immigration issues, but the collateral impacts imposed on states because of illegal immigration as well. Not surprisingly, the case law does not remotely support such a broad claim of unilateral executive power. Indeed, the very first premise is false, and the legerdemain in DOJ's complaint does not make it otherwise.

A. The DOJ mischaracterizes Congress' plenary power over immigration.

From the very outset of its complaint, the DOJ contends that "the *federal government* has preeminent authority to regulate immigration matters." Complaint ¶ 2, Dkt. #1 (emphasis added). It claims that "The Constitution affords the *federal government* the power to 'establish an uniform Rule of Naturalization,'" Complaint ¶ 15 (emphasis added), deliberately mischaracterizing a power specifically assigned *to Congress*, U.S. Const. art. I, § 8, cl. 4, as though it were shared equally between Congress and the Executive, in order to establish a foundation for its claim that the President has authority not only to *not* enforce the immigration laws passed by Congress but to thwart state efforts to enforce the very laws enacted pursuant to the plenary authority *of Congress*.

The Supreme Court's pronouncements about where the Constitution assigns plenary power over immigration policy have been clear. The power lies with Congress, not with the President, as DOJ contends.

Congress alone is vested with the power to "establish [a] uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. "For more than a century it has been universally acknowledged that *congress* possesses authority over immigration policy as 'an incident of sovereignty.'" *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998) (emphasis added) (*citing Chae Chan Ping v. United States*, 130 U.S. 581 (1889)). In *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972),

the Supreme Court specifically referred to the immigration powers of congress as "plenary," and this court similarly referred to them as "sweeping" in *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1078 (9th Cir. 1998).

The power of exclusion of foreigners is an incident of sovereignty delegated by the Constitution to "the government of the United States, *through the action of the legislative department*." *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (emphasis added). "The [Supreme] Court without exception has sustained *Congress*' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Kleindienst*, 408 U.S., at 766 (emphasis added) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). "[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added). Indeed, the Supreme Court has made it clear that over "'no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

Because the plenary power of Congress over immigration policy is so manifestly clear, the Supreme Court has held that no state can add to or detract

from the congressional plan with different laws of its own. *Hines v. Davidowitz.* 312 U.S. 52 (1941). Had Arizona done that here, *Hines* would have required invalidation of its law to the extent that it established immigration rules different from those adopted by Congress.

But Arizona's SB 1070 does not differ from federal law. It does not even merely mimic the language of federal law. It actually incorporates by reference, in virtually all significant respects, the actual provisions of federal law. *See, e.g.,* ARIZ. REV. STAT. §§ 41-1724(B)-(C) (providing, respectively, that "[t]he terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law"; and that "[t]his act shall be implemented in a manner consistent with federal laws regulating immigration"); *see also* ARIZ. REV. STAT. § 13-2928(G)(2) (defining an unauthorized alien as "an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code section 1324a(h)(3)"); and ARIZ. REV. STAT. § 23-212(H) (providing that "the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c)" to determine "whether an employee is an unauthorized alien").

While Congress cannot compel states to lend an enforcement hand to its immigration policy, *Printz v. United States*, 521 U.S. 898 (1997), it certainly does

not undermine Congress' policy when a state voluntary acts to assist with enforcement of Congress' policy.

Moreover, if *Hines* would have prevented Arizona from pursuing an immigration policy *different from* that adopted by Congress, the DOJ's efforts in this case to prevent Arizona from assisting with the enforcement of Congress' own immigration policy, efforts which, if successful, would leave Congress' policy under- or un-enforced, is equally a threat to the plenary powers of Congress. On the *Hines* rationale, then, it is the DOJ suit, not the Arizona statute that assists with the enforcement of federal law, which must give way.

Nor does the normal exercise of prosecutorial discretion support DOJ's challenge to Arizona's law. While the federal Executive branch undoubtedly has discretion in enforcing the provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*., as it has with enforcing other federal statutes, the DOJ's claim that this discretion is "substantial" enough to apply "both globally and in individual cases," Complaint ¶ 19, cannot be sustained without undermining the plenary power of Congress over immigration policy. A "global" discretion not to enforce would effectively nullify Congress' immigration policy. Not surprisingly, the Supreme Court's precedent does not support such a sweeping claim of executive power in the immigration arena. Indeed, the discretion that has been afforded to the Executive is itself derived from acts of Congress. *See, e.g.*,

Knauff v. Shaughnessy, 338 U.S. 537, 540 (1950) (upholding a determination by the Attorney General, acting pursuant to authority conferred by statute, to bar entry, on national security grounds, to an individual immigrant); *INS. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (upholding determination by the Board of Immigration Appeals, acting pursuant to authority conferred by statute, not to withhold deportation of an individual alien who faced possible political persecution, when that alien had been involved with non-political crimes).

In sum, the authority relied upon by the DOJ regarding executive discretion over immigration simply does not provide a basis for the President to pursue a comprehensive and sweeping immigration scheme that runs counter to the statutory provisions already created by Congress. And although Congress has indeed vested the executive branch with a considerable degree of discretion for purposes of enforcing the INA, this discretion has historically been limited to individual remedies in particular cases. *See, e.g., Knauff*, 338 U.S., at 540; *Aguirre-Aguirre*, 526 U.S., at 431; *INS v. Chadha*, 462 U.S. 919, 923 (1983). Essentially, the DOJ's complaint in this action calls upon the judicial branch to reject comprehensive statutory immigration law created by Congress and replace it with the President's "policy" of non-enforcement. It is hard to fathom how such a claim flows from the plenary power the Constitution bestows *upon Congress*.

B. Even if the President has foreign policy powers sufficient to permit non-enforcement of federal immigration law as a permissible policy, in the face of contrary congressional policy, those decisions must be made more formally than have been done here.

The DOJ has also contended that the President's policy of non-enforcement is permitted by the President's powers in the realm of foreign affairs, and that any attempt by Arizona or any other state to assist in the enforcement of immigration statutes adopted by Congress would interfere with those powers and are therefore necessarily preempted. Complaint ¶¶ 16, 38. While DOJ's premise is undoubtedly correct—the President is clearly the Nation's chief organ in the foreign affairs arena, *see, e.g., United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936)—the superstructure DOJ tries to erect on that premise presses the authority well beyond the breaking point.

The President could negotiate a treaty that touches on immigration policy, for example, and once ratified by the Senate, that treaty would have the force of law. U.S. Const. art. VI, cl. 2. Yet, significantly, even a treaty would give way to a subsequent act of Congress in areas within the legislative authority of Congress, particularly including Congress' plenary power over immigration. *Chae Chan Ping*, 130 U.S., at 600.

This is particularly true in matters affecting domestic laws and the internal policy of the country. As the Supreme Court has recently held, although the President has an array of political and diplomatic means available to enforce

international obligations, "the responsibility for transforming an international obligation arising from a non-self executing treaty into domestic law falls exclusively to Congress, not the executive." *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008) (*citing Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829)). In *Medellin*, the President sought to transform international obligations under a non-self executing treaty into binding federal law, operative against the states, without an act of Congress. *Id.* The court reasoned that "a non-self-executing treaty, by definition, is one that is ratified with the understanding that it is not to have domestic effect of its own force," and such an "understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result." *Id.*, at 527.

The Supreme Court emphasized that the President's authorization to represent the United States in the international context speaks to his international responsibilities, and does not grant him unilateral authority to create domestic law. *Id.*, at 529. The Court clarified that the combination of a non-self-executing treaty without implementing legislation does not mean the President is precluded from complying with an international treaty obligation, only that he is constrained from giving it domestic effect, and cannot rely on it to "establish binding rules of decision that preempt contrary state law." *Id.*, at 530. The Court concluded by holding that in the absence of implementing legislation, the President's

international obligations under a non-self-executing treaty do not create binding domestic law. *Id.*

What was true in *Medellin* is even more true here, since DOJ does not even purport to rely on a treaty obligation, but merely on the President's amorphous authority over foreign affairs and diplomacy. Complaint ¶ 38. Whether such an interest could ever suffice to trump a state's attempt to assist with enforcement of immigration laws duly enacted by Congress, *Medellin* clearly requires more than the President's say so. Yet, absent the more formal process for creating domestic law that *Medellin* holds is required, state judges and other state officials remain obligated to enforce federal law as it is written, not as the President would like it to be. U.S. Const. art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by the Constitution, laws, and treaties of the United States); U.S. Const. art. VI, cl. 3 ("[A]ll executive officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

In short, the President's claim of sweeping discretion to effectively repeal a federal criminal statute, negate a state judge's obligation to enforce federal law, and render the state preempted by amorphous foreign policy objectives, is clearly meritless.

II. Federal Law Actually Encourages Collaborative Assistance From State And Local Law Enforcement.

The federal immigration statutory scheme demonstrates a clear legislative goal of involving state and local law enforcement in the enforcement of federal immigration law. Several provisions codified under Title 8 of the United States Code provide for a cooperative relationship between federal officials, on the one hand, and state and local law enforcement, on the other. Section 1103, for example, permits the Attorney General to deputize local law enforcement if a "mass influx of aliens arriving . . . near a land border[] presents urgent circumstances requiring an immediate Federal response." 8 U.S.C. § 1103(a)(10).[1] Section 1373 requires information sharing between federal immigration officials and state and local law enforcement. 8 U.S.C. § 1373(a)-(c).[2] Sections 1103,

[1] The DOJ argues that the federal statutory provisions granting the Attorney General discretion to deputize local law enforcement officers into federal immigration service marks the extent of permissible state involvement in the enforcement of federal immigration law. However, the U.S. ignores their context. These provisions are designed to facilitate cooperation during emergency situations; they say nothing about, and therefore do not prohibit, day-to-day law enforcement by state and local officials.

[2] The DOJ chose to misrepresent the content of subsections (a) and (b) below by describing them as simply "preempting state and local laws that prohibit information-sharing between local law enforcement and federal immigration authorities and proscribing such a prohibition *[sic]*." Complaint ¶ 30. Actually, these provisions also require federal authorities to share information with local law enforcement to the exact same extent. Section 1373(a)—as applied to federal agents—provides that an "entity or official may not prohibit, or in any way restrict, any government entity or official from . . . receiving from[] the Immigration and Naturalization Service information regarding the citizenship or immigration status,

1369, and 1370 describe federal reimbursement of state expenses related to aliens. *See* 8 U.S.C. §§ 1103(a)(11); 1369(a); 1370. Sections 1226 and 1366 provide for sharing of resources and other information. *See* 8 U.S.C. §§ 1226(d)(1), (3); 1366. And sections 1227 and 1358 provide for additional miscellaneous jurisdictional cooperation. *See* 8 U.S.C. §§ 1358; 1227(a)(2)(B)(i).

In addition, Section 1357 permits the Attorney General to enter into agreements whereby state or local law enforcement may "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of

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lawful or unlawful, of any individual." Section 1373(b) also prohibits barriers to "[m]aintaining such information" or [e]xchanging such information." Finally, Section 1373(c) provides:

> The Immigration and Naturalization Service shall 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.

In other words, Section 1373(a)-(c) collectively requires federal immigration officers to provide local law enforcement officers with detailed information regarding a subject's immigration status, and prohibits federal agents from preventing local law enforcement from maintaining and exchanging the information they receive. If the states may enforce immigration law only to the degree suggested by the DOJ, then Section 1373 is pointless. There is no reason to provide local law enforcement with this information if they may only act upon it by being deputized. The only rational explanation is that federal law anticipates that local law enforcement may enforce federal immigration law—a discretionary authority that the court below acknowledges, *United States v. Arizona*, 2010 WL 2926157, *13 n.12 (July 28, 2010). Section 1373 provides them with the information necessary to accomplish this task.

aliens in the United States." 8 U.S.C. § 1357(g)(1). The myriad cooperation agreements that have been entered into pursuant to this provision demonstrate the collaborative policy goals that Congress sought to achieve. As explained on the website of the United States Immigration and Customs Enforcement (hereinafter "ICE"), "ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) provides local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities." "ICE Agreements of Cooperation in Communities to Enhance Safety and Security," *available at* http://www.ice.gov/pi/news/factsheets/access.htm.

The Asset Forfeiture program, for example, facilitates the seizure of "assets used by criminal organizations in illicit enterprises or acquired through criminal activity." *Id.* Border Enforcement Security Task Forces work to "indentify, disrupt and dismantle criminal organizations posing significant threats to border security." *Id.* Operation Community Shield "brings all of ICE's law enforcement powers to bear in the fight against violent gangs that threatening the public safety of our communities." *Id.* Operation Firewall seeks to "combat the increasing use of Bulk Cash Smuggling (BCS) by criminal organizations." *Id.* The Customs Cross-Designation intends to "disrupt and dismantle transnational criminal organizations by combating narcotics smuggling; money laundering; human smuggling and trafficking; and fraud related activities." *Id.* The Criminal Alien Program

identifies "criminal aliens who are incarcerated" to prevent their release back into the United States. *Id.* Fugitive Operation Teams prioritizes the deportation of alien "fugitives who have been convicted of crimes." *Id.* Intellectual Property Rights defends against "IPR violations and the flow of counterfeit goods into U.S. commerce." *Id.* The Law Enforcement Support Center identifies "aliens suspected, arrested or convicted of criminal activity." *Id.* Operation Predator identifies aliens who are "child predators." *Id.* Secure Communities focuses on "identifying and removing high-risk criminal aliens held in state and local prisons." *Id.* Finally, the Document and Benefit Fraud Task Forces "dismantle and seize illicit proceeds of criminal organizations that exploit the immigration process through fraud." *Id.*[3]

Although the DOJ apparently views all these congressional mandates of federal executive branch cooperation with state and local law enforcement as impliedly prohibiting other efforts by state and local law enforcement to assist with

[3] At least nine of Arizona's major law enforcement agencies are authorized by agreement with the Attorney General to participate in the ICE program, including: the Arizona Department of Corrections, Arizona Department of Public Safety, City of Phoenix Police Department, Maricopa County Sheriff's Office, Pima County Sheriff's Office, Pinal County Sheriff's Office, and Yavapai County Sheriff's Office. In addition to this program, ICE also launched a program in 2005 called Operation Community Shield (OCS) to further cooperate with state and local law enforcement for the purpose of addressing cross-border gang activity. "Delegation of Immigration Authority Section 287(g) Immigration Nationality Act:287g results and participating entities," *available at* http://www.ice.gov/pi/news/factsheets/section287_g.htm.

the enforcement of federal immigration law, *see* Complaint ¶ 32, the opposite is true, as there is nothing in any of these provisions that restricts state and local law enforcement from the normal duties of upholding the law, both federal and state, in their respective jurisdictions.

And the case law is clear. Absent clearly expressed intent *by Congress* to preempt state law, "state law is not preempted." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). When a state exercises its police powers, the presumption is *against* preemption. When Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

Where, as here, the legislative scheme so clearly manifests a policy of cooperative enforcement of federal immigration laws, the requirement of clear intent to preempt the very assistance of state and local law enforcement is even more pronounced. And it simply does not exist in the statutes adopted by Congress.

III. States Have Broad Police-Power Authority To Protect The Health And Safety Of Their Citizens And Other Lawful Residents.

It is a mainstay of our federal system of government that, as James Madison himself observed, "The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist, No. 45, pp. 292-93 (Madison) (Rossiter ed. 1961). While the Supreme Court has held that states cannot add to or detract from Congress' immigration policy, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941), it has also held, quite explicitly and forcefully, that the *Hines* rule does not apply to all state laws that happen to touch on immigration, *De Canas v. Bica,* 424 U.S. 351, 355 (1976). States retain their broad authority to exercise their police powers, and "the fact that aliens are the subject of a state statute does not alone render it a regulation of immigration." *Id.*

In *De Canas*, the respondent challenged a state statute prohibiting employers from knowingly employing unlawful aliens on the grounds that it amounted to state regulation of immigration and thus was preempted by federal law. *Id.* The Supreme Court held that federal immigration law did not preclude state authority to regulate the employment of illegal aliens because states possess broad authority under their police powers to regulate employment and protect workers within the state. *Id.*

Similarly, in *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3498 (June 28, 2010), this Court upheld the Legal Arizona Workers Act on principles of state police power against challenges based on federal immigration law preemption. The Court held that the state law, which penalized employers of illegal aliens by withdrawing permission to do business in the state, a penalty much harsher than the fines imposed under federal immigration law, was not expressly preempted under 8 U.S.C. § 1324a(h)(2), nor was it preempted by implication.

As these and other cases demonstrate, states like Arizona retain the power to police their internal affairs in order to protect their citizens and lawful residents. In this case, Arizona specifically enacted Senate Bill 1070, the "Support our Law Enforcement and Safe Neighborhoods Act," 2010 Arizona Session Laws, Chapter 113 ("SB 1070"), to protect the resident's of Arizona from violent attacks and other harms caused by unlawfully present aliens, and it did so by authorizing its own law enforcement officials to assist with the enforcement of federal immigration law. The Court below correctly upheld a number of the provisions of SB 1070 that clearly fit within this police-power authority of the states, including portions of Section 2, ARIZ. REV. STAT. §§11-1051(A), (C)-(F), (G)-(L) (prohibiting local officials from interfering with enforcement of federal immigration law, requiring cooperation, and allowing citizen suits against

violators); part of Section 5, ARIZ. REV. STAT. § 13-2928(A)-(B) (creating state-law crime of stopping to pick up day laborers, if doing so impedes traffic); Sections 7, 8 and 9, ARIZ. REV. STAT. §§ 23-212, 23-212.1, and 23-214 (prohibiting the knowing employment of illegal immigrants, and establishing requirements for checking eligibility); another portion of Sections 5 and Section 10, ARIZ. REV. STAT. §§ 13-2929, 28-3511 (creating state law crime for transporting or harboring illegal immigrations, and providing for the impounding of vehicles used in such transporting). But the provisions of SB 1070 enjoined by the Court below—a portion of Section 2, ARIZ. REV. STAT. § 11-1051(B) (requiring local law enforcement to verify immigration status upon reasonable suspicion); Section 3, ARIZ. REV. STAT. § 13-1509 (creating state law crime for failure to carry immigration papers as required by federal law); part of Section 5, ARIZ. REV. STAT. § 13-2928(C) (making it illegal for an illegal immigrant to solicit, apply for, or perform work); and Section 6, ARIZ. REV. STAT. § 13-3883(A)(5) (authorizing warrantless arrest where there is probable cause to believe the alien has committed a removable offense)—also involve a proper exercise of the state's police powers to deal with the collateral health, safety and welfare impacts of illegal immigration in the state. They are not direct regulations of immigration, and even if they were, because they do not deviate from the regulatory regime adopted by Congress, there is no conflict with Congressional

policy and hence no pre-emption under *Hines.* The *De Canas* Court upheld a state regulation over illegal alien employment as a necessary exercise of police powers to protect legal residents from depressed wages and job displacement even though it created harsher penalties than existed under federal law; it necessarily follows that a state law such as the provisions of SB 1070 at issue here, which are congruent with federal law, are also a valid exercise of state police powers to protect lawful residents from violence and other collateral impacts of illegal immigration.

CONCLUSION

The District Court's preliminary injunction order should be vacated.

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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 amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 4,633 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: September 2, 2010

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By: /s/ John C. Eastman
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CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the Appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF participants and parties hereto. Service is accomplished thru the Appellate CM/ECF system.

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