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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA**

United States of America,
Plaintiff

v.

State of Arizona, *et al.*,
Defendants

CV-10-1413-PHX-SRB

LODGED: PROPOSED
 BRIEF *AMICUS CURIAE*
 OF THE AMERICAN
 UNITY LEGAL DEFENSE
 FUND IN OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION
 ATTACHED

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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 United States of America
16 *Plaintiff*

17 v.

18 State of Arizona, *et al.*
19 *Defendants*

CV-10-1413-PHX-SRB

MEMORANDUM OF POINTS
AND AUTHORITIES OF
AMICUS CURIAE AMERICAN
UNITY LEGAL DEFENSE
FUND IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

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1 **Introduction and Summary:**

2 [*I*]t is hard to see how state employer sanctions provisions that are
3 carefully drafted to track the federal employer sanctions law can be inconsistent
4 with it – **unless we take ineffective enforcement to be the ‘real’ federal**
5 **policy from which state law must not deviate.**

6 *Ariz. Contractors Ass’n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008)
7 (Wake, J.) (emphasis added).

8 The United States (“Plaintiff”) says that Arizona’s SB 1070 focuses too much
9 on stopping illegal immigration, Plaintiff’s Motion for a Preliminary Injunction and
10 Memorandum of Law in Support Thereof (“P. Mem.”), 13, and that it must “balance
11 the purposes and objectives of federal law.” P. Mem., 3. Yet Plaintiff has it backwards:
12 it is Arizona which is pursuing the “purposes and objectives of federal law,” and
13 Plaintiff’s “balance” which violates it.

14 Plaintiff, for example, doesn’t mention that its “balance” means not enforcing
15 Congress’s expressed “primary purpose” of protecting American workers through
16 vigorous immigration enforcement. In particular, Plaintiff doesn’t admit immigration
17 law enforcement in the interior of the country collapsed – declining 99% between
18 Fiscal Year 1997 and FY 2005 – and still has not recovered.

19 The immigration enforcement collapse was not accidental, and it was not
20 ordered or approved by Congress. It doesn’t even match official rhetoric. It was the
21 deliberate abandonment of a new “efficient and effective capability to bar
22 unauthorized workers from employment in any given sector.” Congressional Research
23 Service (“CRS”), *Immigration Enforcement Within the United States*, April 6, 2006,
24 CRS RL 33351 (“*Immigration Enforcement*”), at 39. “When the capability was
25 realized, it was stopped.” *Id.* It was “stopped” by agency internal memo, *id.*, at 61-62,

1 because of “complaints” that it was too effective at stopping the employment of illegal
2 immigrants. *Id.* This is the opposite of the text and avowed purpose of the statute.

3 Plaintiff is asking this Court to approve not a “balance” of “purposes and
4 objectives of federal law,” P. Mem. 3, but a violation of the spirit and letter of both.
5 The consequences of this “‘real’ federal policy” are the opposite of what Plaintiff’s
6 Motion suggests: under the applicable Supreme Court standard of review, the failure
7 of federal illegal immigration law enforcement is not support for preemption, but a
8 major ground for rejecting preemption.

9 **Interior Immigration Law Enforcement Is a “Primary Purpose” of the**
10 **Immigration Laws:** It is the expressed position of the federal government to stop
11 illegal immigration:

12 [B]usinesses must be held accountable if they break the law by
13 deliberately hiring and exploiting undocumented workers. We’ve already
14 begun to step up enforcement against the worst workplace offenders. And
15 we’re implementing and improving a system to give employers a reliable way
16 to verify that their employees are here legally. But we need to do more. We
17 cannot continue just to look the other way as a significant portion of our
economy operates outside the law. It breeds abuse and bad practices. It
punishes employers who act responsibly and undercuts American workers.
And ultimately, if the demand for undocumented workers falls, the incentive for
people to come here illegally will decline as well.

18 President Barack Obama, *Remarks by the President on Comprehensive Immigration*
19 *Reform*, July 1, 2010, [http://www.whitehouse.gov/the-press-office/remarks-president-](http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform)
20 [comprehensive-immigration-reform](http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform).

21 Stopping illegal immigration is also the unchanged statutory position of the
22 federal government. Congress decided in 1986 to “close the back door on illegal
23 immigration so that the front door on legal immigration may remain open.” H. Rep.
24 99-682 (I), at 46. Congress chose a combination of increased border enforcement with
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1 “employer sanctions” – prohibitions on hiring illegal immigrants¹ – as “the only
2 effective way to reduce illegal entry and in the Committee’s judgment it is the most
3 practical and cost-effective way to address this complex problem.” *Id.*, at 49.

4 As we have previously noted, [the Immigration Reform and Control Act
5 of 1986] “forcefully” made combating the employment of illegal aliens **central**
6 **to “[t]he policy of immigration law.”** *INS v. National Center for Immigrants’*
7 *Rights, Inc.*, 502 U.S. 183, 194, and n. 8 (1991). It did so by establishing an
8 extensive “employment verification system,” § 1324a(a)(1), designed to deny
employment to aliens who (a) are not lawfully present in the United States, or
(b) are not lawfully authorized to work in the United States, § 1324a(h)(3).

9 *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147-48 (2002) (emphasis
10 added). That focus on combating illegal immigration² remains “central” to
11 immigration law.

12 For a time, the Executive Branch seemed to be following this policy. A 1991
13 INS memorandum ordered an enhanced worksite enforcement initiative: “The message
14 to employers must be unequivocal – INS is prepared to vigorously enforce
15 administrative and criminal sanctions against those who violate the law.” CRS,
16 *Immigration Enforcement*, at 37. In 1995, President Clinton issued “a memorandum
17 which identified worksite enforcement and employer sanctions as a major component
18 of the Administration’s overall strategy to deter illegal immigration.” *Id.* In Fiscal
19 Year 1996, President Clinton requested, and Congress approved, “significant funding
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22 ¹ In its brief *amicus curiae* in *Friendly House v. Whiting*, No. 2:10-cv-1061-PHX-SRB
23 (Doc. 326), at 4-5, *Amicus American Unity Legal Defense Fund, Inc.* (“AULDF”) discussed this legislative history of employer sanctions.

24 ² As AULDF showed in its *Friendly House amicus* brief, *supra*, at 8, Congress did not
25 intend the Executive Branch to be the sole enforcer of illegal immigration laws. For example, in 1996, Congress provided a RICO cause of action to States and individuals against employers of illegal immigrants. *Id.*

1 increases for interior enforcement, including worksite enforcement and employment
2 eligibility verification.” *Id.*

3 By 1996, there appeared to be a breakthrough: INS developed a new and
4 “effective” interior enforcement strategy – auditing employment verification forms
5 required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39
6 (“[Operation] Vanguard demonstrated an efficient and effective capability to bar
7 unauthorized workers from employment in any given sector.”).

8 **Federal Agencies Chose to Let Employer Sanctions Fail:** By 1998, however,
9 INS abandoned the “effective” strategy, *because* it was effective. “When the capability
10 was realized, it was stopped.” *Id.*; *see, also, id.*, at 61-62 (describing May 1998
11 “Immediate Action Directive for Worksite Enforcement Operations” memorandum by
12 INS Executive Associate Commissioner for Field Operations Michael Person ordering
13 a cutoff of worksite enforcement). INS abandoned the “effective” policy because of
14 “complaints,” *id.* at 38, 62, not because Congress changed the law.

15 **Interior Immigration Law Enforcement Has Collapsed:** As a result, the
16 reality of worksite immigration enforcement is substantially different from Congress’s
17 intention and the Executive’s rhetoric: “Since fiscal year 1999, the number of notices
18 of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the
19 number of administrative worksite arrests have **declined**. . .” U.S. Government
20 Accountability Office (“GAO”), *Immigration Enforcement: Weaknesses Hinder*
21 *Employment Verification and Worksite Enforcement Efforts*, (“*Immigration*
22 *Enforcement Weaknesses*”), August 2005, GAO-05-813, at 30 (emphasis added).

23 GAO’s bland language masks the true extent of the “decline[.]” Between 1996
24 and 2005, workplace arrests for violations of the prohibitions on hiring illegal
25 immigrants “declined” 99.1%, and penalties to employers “declined” 99.7%:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3
2005 ³	81	N/A ⁴
2006	3,667	N/A
2007	4,077	N/A
2008	5,184	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. 2006-2008 data from ICE, “Fact Sheet: Worksite

³ ICE, which uses different criteria than GAO, later reported a higher number (1,116) for FY 2005. Immigration and Customs Enforcement, “Fact Sheet: Worksite Enforcement,” April 30, 2009, www.ice.gov/pi/news/factsheets/worksite.htm. This reduces the “decline” to only 93.4%.

⁴ ICE no longer makes its enforcement statistics publicly available in the same format.

1 Enforcement,” April 29, 2010, www.ice.gov/pi/news/factsheets/worksite.htm. Since
2 FY 2005, there have been increases in worksite immigration law enforcement, but the
3 level (5,184 in FY2008) is still a “decline” of 70% from the FY1997 peak level.

4 **The Enforcement Collapse Hurts Americans:** Given the obvious economic
5 incentives to hire cheaper illegal immigrant workers and the lack of any realistic
6 enforcement threat, employers apparently choose to preferentially hire illegal
7 immigrants. “A startling new study⁵ shows that all of the growth in the employed
8 population in the United States over the past few years can be attributed to recently
9 arrived immigrants.” Bob Herbert, “Who’s Getting the New Jobs,” *The New York*
10 *Times*, July 23, 2004, A23, col. 6,
11 [http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894D](http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482)
12 [C404482](http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482).

13 This job “capture” has also decreased the wages paid to native-born workers.
14 “[Professor George J.] Borjas [of Harvard University] calculated that the average
15 weekly earnings of native-born men as a group would be reduced by 3 percent to 4
16 percent,” Congressional Budget Office, *The Role of Immigrants in the U.S. Labor*
17 *Market*, (“CBO Study”), November 2005, at 23, *citing*, George J. Borjas, “The Labor
18 Demand Curve Is Downward Sloping: Re-examining the Impact of Immigration on the
19 Labor Market,” 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374. This
20 wage decrease is not equally shared. Professor Borjas noted that “high school

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23 ⁵Sum, Fogg, Khatiwada and Palma, “Foreign Immigration and the Labor Force
24 of the U.S.,” Center for Labor Market Studies, Northeastern University, July 2004.
25 The study does not distinguish between legal and illegal immigrants. *See, also*, Steven
Camarota, *A Jobless Recovery?* Center for Immigration Studies, October 2004,
www.cis.org/articles/2004/back1104.html.

1 dropouts” would experience the “largest adverse impact [on wages] . . . about nine
2 percent lower than they would be in the absence of increased competition from
3 foreign-born workers.” CBO Study, *supra*, 23-24.

4 **To Preempt State Illegal Immigration Laws, Congress Must Act**

5 **“Unmistakably:”** The enforcement collapse has constitutional significance. The
6 Supreme Court has established two standards for review of state immigration laws:⁶
7 one for legal immigrants; a lower one for illegal immigrants. States may only regulate
8 LEGAL immigration when Congress permits them to do so,⁷ but States may regulate
9 ILLEGAL immigrants consistently with federal law unless Congress has expressly or
10 “unmistakably”⁸ preempted them.

11 It is not enough to have “strong evidence” of “congressional intent to preempt.”
12 *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982). To preempt a State law against illegal
13 immigrants, Congress must have made its purpose “clear and manifest”:

14 But we will not presume that Congress, in enacting the INA, intended to
15 oust state authority to regulate the employment relationship covered by §
16 2805(a) in a manner consistent with pertinent federal laws. Only a
17 demonstration that complete ouster of state power including state power to
18 promulgate laws not in conflict with federal laws was “the **clear and manifest
purpose of Congress**” would justify that conclusion. *Florida Lime & Avocado
Growers v. Paul*, [373 U.S. 132] at 146 [1963].

19 ⁶ In its brief *amicus curiae* in *Friendly House v. Whiting*, No. 2:10-cv-1061-PHX-SRB
20 (Doc. 326), *Amicus American Unity Legal Defense Fund, Inc.* (“AULDF”) discussed
21 the standard for reviewing SB 1070 in more detail.

22 ⁷ “[S]tate regulation not congressionally sanctioned that discriminates against aliens
23 lawfully admitted to the country is impermissible if it imposes additional burdens not
24 contemplated by Congress.” *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982), *quoting*, *De
Canas v. Bica*, 424 U.S. 351, 358 n. 6 (1976); *Takahashi v. Fish & Game Comm’n*,
334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971).

25 ⁸ *De Canas*, 424 U.S. at 356.

1 *De Canas*, 424 U.S. at 357 (emphasis added).

2 **States Have the “Right” to “Protect” Their People When the Federal**
3 **Government Does Not:** States have “the right” to regulate illegal immigration when
4 the federal government has not done so:

5 And [*Pennsylvania v. Nelson*], 350 U.S. 497, 500 (1956)] stated that
6 even in the face of the general immigration laws, States would have the **right**
7 ‘to enforce their sedition laws at times when the Federal Government has not
8 occupied the field and **is not protecting the entire country** from seditious
9 conduct.

8 *De Canas*, 424 U.S. at 362-63 (emphasis added).

9 State laws affecting illegal immigrants, however, must “mirror federal
10 objectives and further[] a legitimate state goal.” *Plyler v. Doe*, 457 U.S. 202, 225
11 (1982). “Mirror” does not mean identical; the California statute upheld in *De Canas*
12 added penalties and local enforcement beyond those permitted by federal law. 424

13 U.S. at 356-65. As to “legitimate state goals,” Justice Brennan gave examples:

14 Employment of illegal aliens in times of high unemployment deprives
15 citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs
16 on substandard terms as to wages and working conditions can seriously depress
17 wage scales and working conditions of citizens and legally admitted aliens; and
18 employment of illegal aliens under such conditions can diminish the
19 effectiveness of labor unions. These local problems are particularly acute in
20 California in light of the significant influx into that State of illegal aliens from
21 neighboring Mexico. In attempting to protect California’s fiscal interests and
22 lawfully resident labor force from the deleterious effects on its economy
23 resulting from the employment of illegal aliens, § 2805(a) focuses directly upon
24 these essentially local problems and is tailored to combat effectively the
25 perceived evils.

21 *De Canas*, 424 U.S. at 356-57.

22 The effects of the enforcement collapse described *infra* exactly mirror Justice
23 Brennan’s explanation of “perceived evils” which States may address. Thus, in light
24 of *De Canas*, the collapse of federal immigration law enforcement shows the opposite
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1 of what Plaintiff argues: The failure to enforce federal law is not a policy “balance”
2 justifying preemption, but one of the major grounds for rejecting preemption.

3 **Plaintiff Turns the Immigration Laws Upside-Down:** Aside from one brief
4 mention, P. Mem. at 12,⁹ Plaintiff overlooked the Supreme Court’s standards for State
5 illegal immigration-related laws, instead repeatedly citing the different standard for
6 reviewing laws relating to legal immigration. *See, e.g.*, P. Mem. 11-12 (citing legal
7 immigration cases such as *Hines v. Davidowitz*, 312, U.S. 52 (1941), and *Toll*, without
8 distinguishing the legal and illegal immigration standards). Nor does Plaintiff ever
9 mention the inherent State “right” to “protect” their interests when federal enforcement
10 efforts collapse.

11 But Plaintiff’s essential failure is the attempt to convince the Court that it can
12 “balance” various “objectives” to the exclusion of immigration enforcement. P. Mem.
13 at 13 (“In pursuing that goal [reducing the number of illegal immigrants], Arizona’s
14 policy will disrupt federal enforcement priorities and divert federal resources”).
15 Immigration law enforcement is not one of a number of equal items which can be
16 balanced; it is “central” to “[t]he policy of immigration law.” *INS v. National Center*
17 *for Immigrants' Rights, Inc.*, 502 U.S. at 183, 194, and n. 8; *Hoffman Plastic*
18 *Compounds*, 535 U.S. at 147-48. As Congress said in 1986, the reason for
19 immigration law enforcement is to “close the back door to keep the front door open,”
20 exactly what Plaintiff claims to want. Plaintiff not only misleads the Court, but
21 demonstrates no understanding of the very “balance” it purports to enforce.

22 Arizona’s SB 1070 focuses directly on illegal immigration, mirrors federal law,
23 and is narrowly tailored to protect its own interests. Once Congress established

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25 ⁹ “Although this federal power does not preclude ‘every state enactment which in any way deals with aliens,’ *De Canas v. Bica*, 424 U.S. at 355.”

1 “appropriate standards for the treatment of an alien subclass, the States may, of
2 **course**, follow the federal direction.” *Plyler v. Doe*, 457 U.S. at 219 n. 19 (emphasis
3 added). It is Arizona which is pursuing the “purposes and objectives of federal law,”
4 and Plaintiff’s “balance” which threatens to cut off authorized immigration. Plaintiff is
5 asking this Court to approve not a “balance” of “purposes and objectives of federal
6 law,” P. Mem. 3, but a violation of the spirit and letter of both.

7 **Conclusion:** Plaintiff’s failure to mention, much less observe, the standard of
8 review suggests its Motion for Preliminary Injunction is not well-grounded. It cannot
9 prevail on the merits of its claim, and the public interest does not favor the
10 immigration enforcement collapse or the violation of a central policy of immigration
11 law. The Motion should be denied.

12 RESPECTFULLY SUBMITTED,

13 /s Barnaby Zall

14 Barnaby Zall (*admitted pro hac vice*)
15 *Counsel for Amicus American Unity*
16 *Legal Defense Fund*

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CERTIFICATE OF SERVICE

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I hereby certify that on July 19, 2010, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing, and sent a Notice of Electronic Filing to the ECF registrants on record.

A COPY was also sent with Notice of Electronic Filing, via overnight Express Mail, the 19th day of July, 2010, to:

The Honorable Susan R. Bolton
United States District Court
Sandra Day O’Connor U.S. Courthouse, Suite 522
401 West Washington Street, SPC 50
Phoenix, AZ 85003-2153

/s/ Barnaby Zall

Signed: Barnaby Zall