No. 11-182

In The
Supreme Court of the United States

STATE OF ARIZONA and
JANICE K. BREWER, Governor of the
State of Arizona, in her Official Capacity,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF SECURE STATES INITIATIVE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

Amicus the Secure States Initiative (SSI) is an organization of state elected officials and concerned citizens from various States. The Chairman of SSI and its counsel of record is Kris W. Kobach, the Kansas secretary of state and the co-author of Arizona's SB 1070 – the law at the heart of this case.

Amicus is committed to the preservation of the sovereign authority and autonomy of the States in the American constitutional framework. *Amicus* is also committed to the principle that the States may act to protect their citizens, secure their budgets, and restore the rule of law by discouraging illegal immigration, provided that such actions are not clearly prohibited by the Constitution or by an act of Congress. This principle and the federalist structure of the United States Constitution are directly undermined by the Ninth Circuit's sweeping decision holding that Sections 2(B), 3, 5(C), and 6 of SB 1070 are preempted.

[1] The parties have filed blanket consents to the filing of amicus briefs. SSI is a project of its parent corporation, Citizen Guardian, Inc., a section 501(c)4 advocacy organization. No counsel for a party authored this brief in whole or in part. No person or entity aside from SSI and Citizen Guardian, Inc., their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The fundamental problem with the decision of the Ninth Circuit below is that it did not identify a single federal statute that unmistakably expresses congressional intent to preempt state laws like SB 1070. The Court filled this void by impermissibly finding that the policies and preferences of the executive branch preempt SB 1070. This holding threatens to drastically alter the constitutional framework of preemption, which is based on the principle that *only Congress can preempt*. Moreover, the Ninth Circuit failed to recognize that Congress in 1996 took multiple steps to *reduce* executive branch discretion in the enforcement of immigration laws.

In addition, the Ninth Circuit ignored or misconstrued multiple congressional actions supporting the opposite conclusion – that Congress has *encouraged* state laws like SB 1070 – including 8 U.S.C. §§ 1373(c) and 1357(g)(10), and the creation of the Law Enforcement Support Center.

The Ninth Circuit also created an unsustainable distinction between state arrest of aliens who have violated criminal provisions of the Immigration and Nationality Act ("INA"), and state arrests of aliens who have violated civil provisions of the INA that render the aliens removable. The Court found the former to be unpreempted, but not the latter. There is no basis in the structure of the INA for such a distinction.

Finally, with respect to the registration provisions of SB 1070, which precisely mirror federal law, the Ninth Circuit ignored the doctrine of concurrent enforcement. This doctrine holds that there is no implied preemption where a state law prohibits the same conduct that is already prohibited by federal law.

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY IGNORING THE PRINCIPLE THAT ONLY CONGRESS CAN PREEMPT.

This lawsuit is one of several lawsuits that the current Administration has filed against states that seek to discourage illegal immigration by enacting statutes that reinforce federal immigration laws. The Administration has made it clear that it does not wish to fully enforce all federal immigration laws and that it does not welcome state assistance in immigration enforcement. The problem for the Administration is that preemption cannot occur unless "Congress has *unmistakably* so ordained." *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (*quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). However, neither the Administration, nor the Ninth Circuit below, has been able to identify a single federal statute that preempts SB 1070, much less one that does so "unmistakably."

A. The Executive Branch Cannot Preempt Unilaterally.

Unable to find a federal statute that preempts SB 1070, the United States has resorted to looking for preemption in executive branch actions. Indeed, the United States argued before the Ninth Circuit below that the decision by this Administration not to fully enforce certain federal immigration law, or to place a higher priority on the enforcement of other immigration laws, should have preemptive effect. In other words, if this Administration does not wish to fully enforce a particular law, such non-enforcement should preclude the states from taking action to reinforce that federal law.

The Court below accepted this reasoning, finding preemption in the enforcement "priorities and strategies" of whatever Administration is in power. "By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement...." *United States v. Arizona*, 641 F.3d 339, 351 (9th Cir. 2011). Judge Bea in dissent correctly pointed out the weakness of this argument:

> The majority also finds that state officers reporting illegal aliens to federal officers, Arizona would interfere with ICE's "priorities and strategies." ... It is only by speaking in such important-sounding abstractions – "priorities and strategies" – that such an argument can be made palatable to the

> unquestioning. How can simply informing federal authorities of the presence of an illegal alien, which represents the full extent of Section 2(B)'s limited scope of state-federal interaction, possibly interfere with federal priorities and strategies – unless such priorities and strategies are to avoid learning of the presence of illegal aliens? What would we say to a fire station which told its community not to report fires because such information would interfere with the fire station's "priorities and strategies" for detecting and extinguishing fires?
>
> The internal policies of ICE do not and cannot change this result. The power to preempt lies with Congress, not with the Executive....

Id. at 379-80 (Bea, J., dissenting). Only *Congress* can displace the states through the constitutionally-momentous act of preemption. The Supremacy Clause of Article VI of the Constitution gives preemptive force to *only* the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under the Authority of the United States." U.S. Const. art. VI, cl. 2. The executive branch cannot, by itself, preempt the States.

This principle is well-established in the precedents of this Court and in those of the inferior Article III Courts. "It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws...." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Further and significantly,

the Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 131 (2d Cir. 2007) (reversed in part on other grounds, *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S.Ct. 2710, (2009)). "Executive orders, in and of themselves, do not preempt state law. Congress has the exclusive power to make laws necessary and proper to carry out the powers vested by the United States Constitution in the federal government." *In re NSA Telecoms. Records Litig.*, 633 F. Supp. 2d 892, 908 (N.D. Cal. 2007) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

To be sure, an executive regulation can have preemptive effect, but only if the regulation operates within the four corners of an act of Congress authorizing the regulation in the first place. In the case at bar, by declining to fully enforce particular immigration statutes, the current Administration is acting in a manner that is contrary to the intent of Congress, as spelled out in federal law. The Administration is claiming that its own decision to de-emphasize the enforcement of certain federal laws should have the constitutionally significant impact of removing state authority. This Court has rejected the theory of unilateral executive preemption before. An executive agency's policy preference about how to enforce (or not enforce) an act of Congress has no preemptive effect: a Court may not, "simply ... accept an argument that the [agency] may ... take action which it thinks

will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

The logical implications of the Ninth Circuit's approach to preemption are ominous. If this argument is accepted, then future presidents may displace States from all sorts of policy-making areas by merely declaring their intentions to exercise "prosecutorial discretion" not to enforce certain laws, or by declaring that state enforcement efforts are not consistent with federal "priorities and strategies." Judge Bea noted this problem with the Ninth Circuit's holding:

> [A]n agency such as ICE can preempt state law only when such power has been delegated to it by Congress.... Otherwise, evolving changes in federal "priorities and strategies" from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action. Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy.

Arizona, 641 F.3d at 380 (Bea, J., dissenting) (*citing North Dakota*, 495 U.S. at 442). The position taken by the United States in this matter represents a breath-taking assertion of executive power at the expense of Congress. This approach threatens not only to alter the constitutional balance between state and federal power, but also to upset the balance between executive and legislative power.

B. Executive Non-Enforcement Defies Congressional Intent.

The Ninth Circuit attempted to dress up this executive discretion as a *congressional* objective, calling it "Congressionally-granted Executive discretion" and "a discretionary role that Congress delegated to the Executive." *Arizona*, 641 F.3d at 352. Revealingly, however, the Court *did not identify any provision in the INA* suggesting that Congress actually wanted its immigration laws to be less than fully enforced. On the contrary, Congress in 1996 sought to radically reduce executive discretion in the enforcement of federal immigration laws.

As a conference committee report in 1996 succinctly stated: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No. 104-725 (1996), at 383 (Conf. Rep.). To effectuate the congressional objective of maximizing the removal efforts of the executive

branch, Congress inserted several interlocking provisions into the INA *to require removal* when executive officials become aware of illegal aliens. 8 U.S.C. § 1225(a)(1) provides that "an alien present in the United States who has not been admitted ... shall be deemed for purposes of this chapter an applicant for admission."[2] This designation of all aliens who have entered the country without inspection as "applicant[s] for admission" triggers 8 U.S.C. § 1225(a)(3), which requires that "[a]ll aliens ... who are applicants for admission ... *shall be inspected* by immigration officers." 8 U.S.C. § 1225(a)(3) (emphasis added). This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that if the immigration officer determines that the alien is unlawfully present, the alien *must be placed in removal proceedings*: "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained for a proceeding under section 1229a of this title*." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). The proceedings described in 8 U.S.C. § 1229a are the removal proceedings of the United States immigration courts.

Congress in 1996 also inserted an entirely new provision into the INA, intended to significantly circumscribe executive branch discretion to release

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[2] Prior to 1996, the INA required inspection only of "aliens arriving at ports . . . at the discretion of the Attorney General." 8 U.S.C.S. § 1225 (Act of June 27, 1952, § 235, 66 Stat. 198).

aliens during their removal proceeding. 8 U.S.C. § 1226.[3] Congress ordered *mandatory* detention of certain criminal aliens. 8 U.S.C. § 1226(c). And Congress limited the discretion of the executive branch regarding other aliens to (1) detention, (2) release on bond of at least $1,500 with security conditions, or (3) conditional parole. 8 U.S.C. § 1226(b)(1)-(2). As the INS itself recognized, it had been put on a tight leash: "Congress made it clear in IIRIRA that, in order to ensure the removal of certain aliens, *it intended to limit the enforcement discretion previously provided by the INA* to INS decisions to not detain aliens under the INA's detention authority." Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion, Memorandum for the Commissioner, Legal Opinion No. 99-5, 2001 WL 1047687 (INS), at 5 (emphasis added).

In sum, Congress in 1996 sought to bind the executive branch to remove virtually all of the illegal aliens that immigration officers encountered. Admittedly, that congressional objective is not being met, particularly by the current Administration. However, the Ninth Circuit adopted the tenuous theory that the executive branch's *failure* to meet its statutory obligations because of worries about "a deleterious effect on

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[3] Prior to 1996, 8 U.S.C. § 1226 contained a provision governing "exclusions of aliens" that became obsolete after the consolidation of exclusion and deportation into unified "removal" proceeding. 8 U.S.C.S. § 1226 (Act of June 27, 1952, § 266, 66 Stat. 200).

... foreign relations" should have preemptive effect. *Arizona*, 641 F.3d at 352.

That proposition cannot stand. As this Court made abundantly clear when sustaining Arizona's Legal Arizona Workers Act against a similar conflict preemption challenge: "Implied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (*quoting Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)). The Ninth Circuit engaged in such a free-wheeling inquiry, searching for tension between SB 1070 and ephemeral executive branch preferences. The Court should have remembered that conflict preemption can only be found where *congressional* intent is *unmistakable*. "[F]ederal regulation ... should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has *unmistakably* so ordained." *De Canas*, 424 U.S. at 356 (1976) (*quoting Paul*, 373 U.S. at 142) (emphasis added).

II. CONGRESS HAS REPEATEDLY ENCOURAGED STATE ASSISTANCE IN MAKING IMMIGRATION ARRESTS.

The central question in conflict preemption is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Amer. Honda Motor Co., Inc.*, 529 U.S. 861, 899 (2000). "[T]he purpose of Congress is the ultimate touchstone" of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress has consistently encouraged states and municipalities to assist in restoring the rule of law to immigration. "[I]n the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999). The Ninth Circuit below attempted to minimize the importance of two federal statutes in this regard – 8 U.S.C. § 1373 and 8 U.S.C. § 1357(g)(10) – but in doing so, it misread both, as explained below. *See Arizona*, 641 F.3d at 348-52. The Ninth Circuit also failed to take into account Congress's creation of the Law Enforcement Support Center (LESC). All three of these congressional actions are explained in detail below.

A. 8 U.S.C. §§ 1373 and 1644.

One of the most important statutes that Congress passed in order to facilitate State efforts to discourage illegal immigration was 8 U.S.C. § 1373, along with nearly identical statutory language found at 8 U.S.C. § 1644. By enacting this provision in 1996,

Congress created a federal statutory structure to facilitate state programs that would discourage illegal immigration. Congress placed the executive branch of the federal government under a statutory obligation to respond to *all* local inquiries about any alien's immigration status, "for any purpose authorized by law." 8 U.S.C. § 1373(c). This federal statute provides the foundation for SB 1070. Congress wanted to assure States that if they enacted programs to discourage illegal immigration and inquire about aliens' immigration statuses, then the federal government *must* respond. Where a city or State relies upon the federal government's determination of an alien's immigration status, no preemption exists. As this Court held, referring to 8 U.S.C. § 1373(c), "[a]s a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage." *Whiting*, 131 S.Ct. at 1981 (emphasis added).

The Ninth Circuit attempted to brush off 8 U.S.C. § 1373 and 8 U.S.C. § 1644 in a footnote, asserting that "[t]hese sections are anti-sanctuary provisions" that "[do] not constitute an invitation for states to affirmatively enforce immigration laws outside Congress's carefully constructed § 1357(g) system." *Arizona*, 641 F.3d at 351 n.11. *However, the Ninth Circuit failed to take into account the entirety of 8 U.S.C. § 1373*. In the same section, Congress also recognized the interest of states in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any indi-

vidual." 8 U.S.C. §§ 1373(b)(1)-(2). The fact that Congress wanted states to be able to *send* and *maintain* information – not just receive it – about an alien's legal status is definitive proof that Congress expected state governments to implement programs under which they would make inquiries about the legal status of aliens. The Senate Report accompanying this legislation reiterated Congress's objective of encouraging states to make their own efforts to assist in immigration enforcement:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. 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*.

S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996) (emphasis added). SB 1070 was built around 8 U.S.C. § 1373 and the cooperative effort that it envisions.

B. The Law Enforcement Support Center.

Another action that demonstrated Congress's objective of facilitating local efforts to stop illegal immigration took place in 1994. In that year, Congress created and began appropriating funds for the Law Enforcement Support Center (LESC). "The

primary mission of the LESC is to support other law enforcement agencies by helping them determine if a person they have contact with, or have in custody, is an illegal, criminal, or fugitive alien. The LESC provides a 24/7 link between federal, state, and local officers and the databases maintained by the INS."[4]

Congress created the LESC to ensure that state law enforcement agencies would always have an efficient mechanism for verifying with the federal government the immigration status of any alien. Two years later, Congress would make those federal responses mandatory, with the enactment of 8 U.S.C. § 1373(c). The number of inquiries that are made each day by state and local police departments to the LESC is truly staggering. According to the LESC website, "The number of requests for information sent to the LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008, to 1,133,130 in FY 2010 setting a new record for assistance to other law enforcement agencies."[5] Stated differently, in FY 2010, the LESC responded to an average of 3,104 inquiries per day from law enforcement agencies around the country.

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[4] Testimony of Joseph R. Green, Acting Dep. Exec. Assoc. Comm'r for Field Operations, INS, before Subcommittees of the House Comm. on Gov. Reform, 107th Cong., 1st Sess. 97 (2001).

[5] http://www.ice.gov/lesc/ (Feb. 1, 2012).

Those inquiries came from thousands of law enforcement agencies spread across all fifty States, the District of Columbia, two U.S. territories, and Canada.[6] Section 2(B) of SB 1070 merely standardizes the practice of calling the LESC, thereby requiring officers to call the LESC where previously such calls were made at the discretion of the individual officer.

C. 8 U.S.C. § 1357(g)(10)

In 1996, Congress also enacted 8 U.S.C. § 1357(g), a provision allowing States, counties, and municipalities to enter into agreements to deputize specially-trained officers to exercise the full "function[s] of an immigration officer" of the United States. In doing so, Congress affirmed that *no such agreement was necessary for States to act*. The States retained unpreempted authority to otherwise assist in immigration enforcement: "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision ... otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10).

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[6] *Id.*

In its attempt to minimize the importance of this statutory language, the Ninth Circuit below completely misconstrued U.S.C. § 1357(g). *The Court's error lay in its failure to understand the difference between the scope of authority conveyed to a state law enforcement agency under an 8 U.S.C. § 1357(g) Memorandum of Agreement (MOA) and the inherent arrest authority routinely exercised by law enforcement agencies that have no such MOA*. The scope of authority under an MOA is vastly greater than the inherent authority to make an arrest of an alien and transfer custody of the alien to ICE. In contrast, 8 U.S.C. § 1357(g) authority includes not only the power to arrest, but also the power to investigate immigration violations, the power to access and manipulate DHS immigration databases, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved in immigration law.[7]

Apparently oblivious to this distinction, the Court treated the two as if they were the same. Thus, in assessing Section 2(B) of SB 1070, the Court asked "[i]f subsection g(10) meant that state and local officers could routinely perform *the functions of DHS officers* outside of the supervision of the Attorney General...." *Arizona*, 641 F.3d 339, 350. The Court

[7] Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests,* 69 Albany L. Rev. 179, 204 (2005).

was wrongly assuming that the inherent authority Arizona officers exercise by simply arresting an illegal alien and transferring him to ICE custody under Section 2(B) is the same as the much broader "function of an immigration officer" conveyed in 8 U.S.C. § 1357(g)(1). The latter authority is vastly greater than the former, which is why a formal MOA is required to exercise it. The language of 8 U.S.C. § 1357(g)(10) was added by Congress to make clear that state officers retained their unpreempted (but narrower) authority to make immigration arrests and transfer those aliens to ICE. It is that authority that Section 2(B) utilizes, not the broader authority to exercise the "functions of an immigration officer" under an 8 U.S.C. § 1357(g) MOA.

Finally, the Ninth Circuit notably failed to explain how an *ad hoc* policy, in which state officers exercise their own discretion to contact the LESC, is more consistent with 8 U.S.C. § 1357(g) than a uniform policy applied by all state officers when certain factors apply. The state officer can be equally responsive to federal enforcement strategies after he contacts the LESC, regardless of whether he initiated the call based on an *ad hoc* decision or based on a uniform policy. If the LESC issues an "immigration detainer" request and directs the officer to transfer custody of the illegal alien to ICE, the officer can do so in either scenario. Likewise if the LESC tells the officer that ICE has no interest in detaining the illegal alien, or that the alien is lawfully present, the officer can respond accordingly in either scenario.

Taken together, these congressional actions constitute overwhelming evidence of congressional intent to facilitate State programs to reduce illegal immigration.[8] Finally, it must be remembered that to prevail on a conflict preemption claim, a party must demonstrate that Congress "unmistakably" intended to preempt the ordinance at issue. *De Canas*, 424 S.Ct. at 356. The fact that multiple congressional enactments *invite* State assistance strongly suggests otherwise. Moreover, the Ninth Circuit could not identify a single federal statute indicating preemptive intent, much less one that does so in "unmistakable" terms.

III. THE NINTH CIRCUIT ERRED IN FINDING PREEMPTION OF LOCAL ARRESTS TO ASSIST THE FEDERAL GOVERNMENT WHERE ALIENS HAVE COMMITTED CIVIL IMMIGRATION OFFENSES RENDERING THEM REMOVABLE.

The Ninth Circuit also erred in its analysis of Section 6, which simply makes clear that when a state police officer arrests an alien for the purpose of

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[8] *See also* 8 U.S.C. § 1226(d)(1) (ICE must assist state police by identifying aliens arrested for aggravated felonies); § 1226(d)(3) (ICE must assist state courts by identifying unlawfully present aliens in pending prosecutions); § 1357(d) (ICE must "promptly" determine whether to issue detainer for any alien arrested by state police for violation of controlled substances law); § 1358 (recognizing state law enforcement jurisdiction in federal immigration facilities).

transferring the alien to federal custody, it does not matter whether alien is unlawfully present because of a violation of a criminal provision of the INA or because of a violation of a civil provision of the INA that renders the alien removable. The Court held that, while state officers may arrest aliens for criminal violations of the INA, they may not arrest aliens for civil violations of the INA that render the aliens removable. *See Arizona*, 641 F.3d at 360-66.

A. The Inherent Authority of a Sovereign State to Make an Immigration Arrest to Assist Another Sovereign.

The Ninth Circuit's approach to this preemption issue was wrong from the outset. In conclusory fashion, the Court simply declared the following: "Arizona suggests, however, that it has the inherent authority to enforce federal civil removability without federal authorization, and therefore that the United States will not ultimately prevail on the merits. We do not agree." *Id*. at 362. However, the Court did not even bother to analyze the source of such inherent authority. All that the Court offered in support of its conclusion was a faltering attempt to distinguish *Muehler v. Mena*, 544 U.S. 93 (2005), and *United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008). *See Arizona*, 641 F.3d at 362-63. However, the Court pointedly failed to begin its analysis at the appropriate starting point – the *source* of the States' inherent authority.

In assessing the authority of local police to make immigration arrests, the initial question is whether the States have inherent power to make arrests for violations of federal law. That is, may state police, exercising state law authority only, make arrests for violations of federal law, or do they possess the power to make such arrests only if they are exercising delegated federal power? The answer to this question is plainly the former.

The source of this authority flows from the States' status as sovereign governments possessing all residual powers not abridged by the Constitution. The source of the States' power is entirely independent of the Constitution. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (finding "powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before"). It is axiomatic that the States possess broad police powers, which are "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people." *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

Contrary to the apparent assumption of the Ninth Circuit, the authority of State police officers to make arrests for violations of federal law is not limited to situations in which they are exercising power delegated by the federal government to the States. Rather, it is a general and inherent authority based on the fact that the States retain their sovereignty in our constitutional framework. *The States'*

arrest authority is derived from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

Even though Congress has never authorized state police officers to make arrests for federal offenses without an arrest warrant, such arrests occur routinely. This Court has recognized that state law controls the validity of such an arrest: "No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law.... Therefore the New York statute provides the standard by which this arrest must stand or fall." *United States v. Di Re*, 332 U.S. 581, 591 (1948). This conclusion rested on the assumption that state officers possess the inherent authority to make warrantless arrests of individuals who have committed federal offenses. The same assumption guided this Court in *Miller v. United States*, a case concerning an arrest for federal offenses by an officer of the District of Columbia. 357 U.S. 301, 303-05 (1958). No delegation of federal arrest authority was necessary; "[b]y like reasoning the validity of the arrest ... [was] to be determined by reference to the law of the District of Columbia." *Id.* at 305-06. As the Seventh Circuit has explained, "[state] officers have

implicit authority to make federal arrests." *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

In 1983, the Ninth Circuit reached the same conclusion in the immigration context specifically, holding with respect to criminal immigration arrests that "[t]he general rule is that local police are not precluded from enforcing federal statutes." *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citations omitted). The Tenth Circuit has reviewed this question on several occasions, concluding that "[a] state trooper has general investigatory authority to inquire into possible immigration violations." *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984). There is a "preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999). "[S]tate and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (*quoting Vasquez-Alvarez*, 176 F.3d at 1295). None of these Tenth Circuit holdings drew any distinction between criminal violations of the INA and civil provisions that render an alien deportable. Indeed, in all of the cases, the officers involved inquired generally into possible immigration violations, often arresting without certainty as to whether the aliens' immigration violations were

of a civil or criminal nature. Thus, the Court described an inherent arrest authority that extends generally to all immigration violations.

B. The States' Inherent Authority Has Never Been Preempted.

Having established that this inherent state arrest authority exists, the next question is whether such authority has been preempted by Congress. "In *all* pre-emption cases, and particularly in those in which Congress has 'legislated ... 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.'" *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009) (emphasis added) (*quoting Medtronic,* 518 U.S. at 485 (1996), and *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). The Ninth Circuit below erred in failing to apply the presumption against preemption. *See Arizona*, 641 F.3d at 361. Contrary to the Ninth Circuit's assertion, States have been exercising this inherent arrest authority from the beginning of the Republic. In the immigration context, a large percentage of the approximately 3,104 LESC inquiries made by police officers every day are made in the context of an alien who has committed a civil

immigration violation that renders the alien deportable.[9]

In the context of state arrests for violations of federal law, which are made with the intention of possibly transferring the arrestee to federal custody, there is a particularly strong presumption against preemption. The starting presumption must be that the federal government did not intend to deny itself any assistance that the States might offer. As Judge Learned Hand put it, "[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

At this point in its analysis, the Ninth Circuit should have asked whether there was any federal statute that demonstrated an "unmistakable" congressional intent to preempt state officers from making such arrests. *See De Canas*, 424 U.S. at 356 (*quoting Paul*, 373 U.S. at 142). "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade*, 505 U.S. at 111-12 (Kennedy, J., concurring) (*citing Rice*, 331 U.S. at 230; *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977); and *English v. General Electric Co*., 496 U.S. 72, 79 (1990)).

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[9] *See supra* text at note 2.

Instead of looking for a *direct and unmistakable* congressional statement of intent to preempt, the Ninth Circuit tried to find preemption *by implication* in 8 U.S.C. § 1252c, a statute that simply made clear that state law enforcement officers have the authority to make arrests of certain illegal aliens who are previously-deported felons. The Court concluded that Congress, by clarifying that state arrest authority exists in such cases, implicitly preempted all other state immigration arrests other than those authorized by 8 U.S.C. § 1252c or those made by state officers exercising 8 U.S.C. 1357(g) authority. *See Arizona*, 641 F.3d at 361-62. However, in reaching this conclusion, the Ninth Circuit misread 8 U.S.C. § 1252c, transforming it from a statute that was intended to *affirm* state arrest authority into a statute that was intended to *restrict* state arrest authority.

A much more plausible understanding of 8 U.S.C. § 1252c – and one that was actually grounded in evidence of congressional intent – was provided by the Tenth Circuit. The Tenth Circuit correctly held that 8 U.S.C. § 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. Instead, § 1252c merely creates an additional vehicle for the enforcement of federal immigration law." *Vasquez-Alvarez*, 176 F.3d at 1295. The Court rejected the alien's contention that all arrests by local police not authorized by § 1252c are prohibited by it. *Id*. at

1299. The Court reviewed the legislative history of § 1252c, including the comments of Representative John T. Doolittle, who sponsored the floor amendment containing the text that would become § 1252c. The Court concluded that the purpose of the amendment was to overcome a perceived federal limitation on the States' arrest authority. *Id*. at 1298-99. The intent of Congress, which was to encourage more, not less, state involvement in the enforcement of federal immigration law. Reading into the statute an implicit congressional intent to preempt existing state arrest authority would have been utterly at odds with this purpose. Moreover, such an interpretation would have been inconsistent with subsequent congressional actions. As the Court noted, "in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Id.* at 1300 (*citing* 8 U.S.C. §§ 1103(a)(9), (c), 1357(g)(1)). Put succinctly, the "legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Id*. at 1299.

The Ninth Circuit below also failed to mention that its reading of 8 U.S.C. § 1252c was at odds with its 1983 holding in *Gonzales v. Peoria* that States possess general, inherent authority to make immigration arrests in *all* cases where the alien has violated criminal provisions of the INA, not just aliens who are previously-deported felons. 722 F.2d at 475.

However, in *Gonzales*, the Ninth Circuit assumed in *dicta* that state arrests of aliens who have committed civil violations of the INA were preempted. The basis of this assumption was weak. The *Gonzales* Court supposed that it might be possible to regard civil immigration law as a "pervasive regulatory scheme" – therefore evincing a congressional intent to preempt – while criminal provisions in the INA "are few in number and relatively simple in their terms." *Gonzales*, 722 F.2d at 475. Therefore, the Ninth Circuit supposed, this difference in scope and complexity might justify different answers to the preemption question.

The Ninth Circuit's speculation in *Gonzales v. City of Peoria* was faulty in 1983, and it is even more faulty today. The statement that the criminal provisions of immigration law are "few in number" and "simple" revealed a surprising lack of familiarity with immigration law. The *Gonzales* Court identified *only three* criminal sections of federal immigration law.[10] In fact, there are *at least forty-seven criminal provisions in federal immigration law*.[11]

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[10] The Court referred to "the specific statutes regulating criminal immigration activities, 8 U.S.C. §§ 1324, 1325, and 1326." *Gonzales,* 722 F.2d at 475. Although the three sections actually included seventeen distinct crimes, the Court still failed to identify even half of the criminal provisions of immigration law.

[11] *See* table of criminal provision of federal immigration law in Kobach, *The Quintessential Force Multiplier*, at 220-21.

The criminal provisions of immigration are also every bit as complex as the civil provisions. One illustration of the complexity of the criminal provisions of immigration law can be seen in the crime of reentry after removal on security grounds. 8 U.S.C. § 1326(b). This crime applies to aliens removed under the specific expedited removal proceedings for arriving aliens who are inadmissible on security and related grounds – a civil removal process defined in 8 U.S.C. § 1225(c). However, it only applies to those aliens removed because of their inadmissibility stemming from terrorist activity, defined at considerable length in 8 U.S.C. § 1182(a)(3)(B). This immigration crime, which is defined with reference to a specific set of civil immigration proceedings and which involves a complex definition of applicable terrorist activities, can hardly be described as "simple."

This example also illustrates the substantial overlap of civil and criminal provisions of federal immigration law. Numerous other immigration crimes are defined with specific reference to civil violations or civil proceedings.[12] This interweaving of criminal and civil provisions makes it impossible to regard them as completely separate regulatory schemes in any meaningful sense. The overlap between civil and criminal provisions of immigration law is also demonstrated by the many actions in the immigration arena that trigger both civil and criminal penalties. For

[12] *See, e.g.*, 8 U.S.C. §§ 1253(a), 1255a(c)(6), 1326(b)(4).

example, the creation of fraudulent or counterfeit immigration documents is a civil violation of immigration law under 8 U.S.C. § 1324c(d)(3), but it is also a criminal violation under 18 U.S.C. § 1546(a). The same may be said of employing unauthorized aliens. This action carries civil penalties administered through the civil proceedings described in 8 U.S.C. § 1324a(e). However, the employment of unauthorized aliens under certain circumstances is also a crime. *See* 8 U.S.C. §§ 1324a(f), 1324(a)(3).

Some provisions of immigration law include civil and criminal penalties *in the same sentence*. For example, making false statements in a registration document is a criminal misdemeanor, punishable by a fine of up to $1000 and a prison term of up to six months. 8 U.S.C. § 1306(c). The sentence defining this criminal penalty continues with civil consequences in administrative proceedings: " ... and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed." *Id*. The suggestion that the first half of the sentence, delineating criminal penalties, invites state assistance, while the second half of the sentence, delineating civil consequences, demonstrates preemptive intent, is plainly absurd. *See Gonzales*, 722 F.2d at 474-75. The Ninth Circuit's notion that Congress created one simple set of criminal provisions, demonstrating an intent not to preempt, while also creating a parallel but distinct set of complex regulatory provisions, evincing an intent to preempt, simply is not reflected in the structure of immigration law.

C. A Civil v. Criminal Distinction Would Be Completely Unworkable and Would Hobble Law Enforcement in Practice.

The Ninth Circuit failed to even contemplate how its holding would affect the everyday practice of law enforcement officers. If the Ninth Circuit's distinction between preemption of state officer arrests for criminal violations of the INA and civil violations of the INA were to be affirmed by this Court, state assistance in making immigration arrests would necessarily grind to a halt across the country. The distinction is utterly unsustainable in practice, because it is not intuitively determinable which immigration violations are criminal and which violations are civil. For example, overstaying a visa is a civil violation of immigration law, *see* 8 U.S.C. § 1182(a)(9)(B)(ii), while entering without inspection is a criminal violation. 8 U.S.C. § 1325(a). Yet both are means by which millions of illegal aliens have entered and remain in the United State.[13] Therefore, while it is reasonable to expect a police officer to understand generally what the indicators of unlawful presence in the United States may be, it is not practical to expect the police officer to remember which

[13] According to the Pew Hispanic Center, in 2006, out of an illegal alien population of 11.5 million to 12 million in the United States, about 4 million to 5.5 million were overstays. Pew Hispanic Center, *Modes of Entry for the Unauthorized Migrant Population* (Washington, D.C.: May 22, 2006).

immigration violations carry criminal penalties and which violations trigger civil proceedings.

In some scenarios, distinguishing between civil and criminal violations at the time of arrest may be impossible. For example, consider a common scenario that occurs hundreds of times every week throughout the border states: a police officer pulls over a vehicle for speeding, but discovers that the vehicle is being used to transport a group of illegal aliens. In this situation, the aliens may be unable or unwilling to explain to the officer whether they overstayed their visas (a civil violation, 8 U.S.C. § 1182(a)(9)(B)(ii)), entered without inspection (a criminal violation, 8 U.S.C. § 1325(a)), or presented fraudulent documents at the port of entry (a criminal violation, 18 U.S.C. § 1546(b)). And there is no guarantee that the LESC would be able to immediately make this determination over the telephone while the officer and the aliens wait at the side of the road. *Indeed, the immigration arrest already would have occurred*, if the duration of the inquiry to the LESC exceeded the time necessary to write a citation for the traffic offense that led to the stop. If after 30 minutes of waiting, the officer learned that some of the illegal aliens in the vehicle were cases of visa overstays, he would only then become aware (after the fact) that his arrest of those aliens had been unlawful. And even if the ICE agents at the LESC wanted the officer to hold those aliens and transfer them to ICE custody, such an action would be impermissible – since *all* arrests for civil offenses, even those made at the

request of LESC, are impermissible under the Ninth Circuit's view.

The Ninth Circuit also failed to consider that in a very large percentage of encounters between state police officer and illegal aliens, the aliens simply *admit* to the officer that they are unlawfully present in the United States. *See*, *e.g.*, *Vasquez-Alvarez*, 176 F.3d at 1296; *Santana-Garcia*, 264 F.3d at 1194; *United States v. Rodriguez-Arreola*, 270 F.3d 611, 613 (8th Cir. 2001); *United States v. Favela-Favela*, 41 F.App'x 185 (10th Cir. 2002). The aliens do not know exactly which immigration laws they have violated, but they know that they are in the United States illegally; and they freely admit it. Under the Ninth Circuit's logic, the police officer would nevertheless be powerless to make an immigration arrest at that point in order to determine whether ICE wished to take the illegal aliens into federal custody. Only if the officer were an expert in immigration law, and he could somehow *instantly* ascertain which aliens were violators of criminal immigration laws, could the arrest of those aliens lawfully occur.

For these reasons, maintaining a criminal-civil distinction in arrest authority would be utterly unworkable in practice. Fortunately, no Circuit other than the Ninth has attempted to compel state police officers to do so. Every other Circuit to address the question has recognized an inherent arrest authority that extends generally to all immigration violations, without any distinction between civil and criminal violations. *See Estrada v. Rhode Island*, 594 F.3d 56,

63-64 (1st Cir. 2010); *United States v. Alvarado-Martinez*, 2007 U.S. App. LEXIS 27547, **3-4 (3d Cir. 2007); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001); *Santana-Garcia*, 264 F.3d at 1193 (10th Cir. 2001).

D. The Ninth Circuit Misunderstood the Meaning of Section 6.

Ironically, the sole reason that Section 6 was inserted into SB 1070 *was to respond to a prior Ninth Circuit opinion*. In 1983, the Ninth Circuit noted the absence of such a provision in *Gonzales*, 722 F.2d at 476. In that case, the Court held that Peoria police officers had the authority to make arrests for violations of the criminal provision of federal immigration law that was at issue – 8 U.S.C. § 1325 (entry without inspection). In addition to rejecting the plaintiffs' federal preemption claim, *id*. at 474-75, the *Gonzales* Court also considered whether Arizona *state law* authorized such arrests. *Id*. at 476-77. The Court looked specifically at Ariz. Rev. Stat. Ann. § 13-3883(A) and noted that state law authorized police to make arrests for criminal violations of federal immigration law, but that no equivalent clause authorized arrests for civil violations of federal immigration law. 722 F.2d at 476-77.

Section 6 of SB 1070 was simply intended to fill this gap in state law that the Ninth Circuit had

identified in *Gonzales*. It provides that "[a] peace officer, without a warrant, may arrest a person the officer has probable cause to believe ... [t]he person to be arrested has committed any public offence that makes the person removable from the United States." Ariz. Rev. Stat. Ann. § 13-3883(A)(5). It simply defines an additional category of legal violations for which a warrantless arrest may be made, without violating state law, in order to transfer unlawfully present aliens to federal custody. The procedures under which such immigration arrests can be made are specified in Section 2(b) of SB 1070, which ensures that only "[t]he person's immigration status shall be verified with the federal government pursuant to 8 U.S.C. § 1373(c)." Ariz. Rev. Stat. Ann. § 11-1051(B).

Inexplicably, the Ninth Circuit completely misunderstood this simple purpose behind Section 6. Indeed, the Court did not even consider this explanation. Instead, the Court accepted, without questioning, the district court's misinterpretation of Section 6: "we conclude, as the district court did, that Section 6 'provides for the warrantless arrest of a person where there is probable cause to believe that the person *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States.'" *Arizona*, 461 F.3d at 361 (*quoting* 703 F. Supp. 2d 980, 1005 (D. Ariz. 2010)) (emphasis in original).

The phrase in Section 6, "public offense that makes the person removable from the United States," is simply another way of saying "violation of any provision – civil or criminal – of the Immigration and Nationality Act that makes the person removable from the United States." The Office of Legal Counsel ("OLC") of the United States Department of Justice had adopted this standard in its 2002 Opinion on the subject, and Arizona was seeking to replicate this standard in its laws.[14] However, the current Administration has completely ignored the 2002 OLC opinion, because it undermines this Administration's purpose of blocking state efforts to reduce illegal immigration.

IV. THE DOCTRINE OF CONCURRENT ENFORCEMENT STRONGLY SUPPORTS SECTION 3 OF SB 1070.

Section 3 of SB 1070 provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. § 13-1509(A). As the Ninth Circuit below correctly stated, "Section 3 essentially makes it a state crime for [aliens unlawfully present in the United

[14] The 2002 OLC opinion was the subject of a Freedom of Information Act lawsuit; http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041.

States] to violate federal registration laws." *Arizona*, 641 F.3d at 355.

It is important to recognize that Section 3 precisely conforms to federal law. An alien can only violate Arizona law if he is also violating one of the cited provisions of federal law. Section 3 imposes the same misdemeanor penalties as those imposed by federal law for violations of 8 U.S.C. § 1304(e): a maximum fine of $100 and a maximum imprisonment of 30 days. Ariz. Rev. Stat. Ann. § 13-1509(A).

The preemption doctrine of "concurrent enforcement" makes clear that 8 U.S.C. §§ 1304(e) and 1306(a) do not impliedly preempt Section 3. Where a state law prohibits the same conduct that is prohibited by federal law, state and congressional interests are in harmony. As the Ninth Circuit recognized in *Gonzales*, but refused to acknowledge in the case at bar: "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales*, 722 F.2d at 474 (*citing Paul*, 373 U.S. at 142) (emphasis added). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Id*. Because Section 3 proscribes precisely the same conduct that is prohibited by 8 U.S.C. §§ 1304(e) and 1306(a), Arizona law and federal law are in perfect concurrence. A.R.S. § 13-1509(A). It is what this Court in *De Canas* described as "harmonious state regulation touching on aliens in general." *De Canas*, 424 U.S. at 358. Where a state law mirrors a federal provision, the State provides an additional incentive for

compliance with federal law; such a state law promotes rather than impairs federal interests. *California v. Zook*, 336 U.S. 725 (1949); Indeed, Section 3 is the paradigm of concurrent enforcement.

"No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch*, 810 F.2d at 1367. As the Arizona Court of Appeals held in a preemption challenge to a 2005 Arizona law that tracked the smuggling provision of federal law in 8 U.S.C. § 1324(a)(1)(A):

> *The same act may offend the laws of both the state and the federal government and may be prosecuted and punished by each*. *Abbate v. United States*, 359 U.S. 187, 194-95 (1959). Thus, Arizona may prosecute and punish a person who knowingly transports illegal aliens within its borders for profit or commercial purpose under its human smuggling law, just as the federal government may prosecute and punish a person who knowingly or recklessly transports such illegal aliens within the United States under its laws.

State v. Flores, 218 Ariz. 407, 412-13 (Ariz. Ct. App. 2008) (emphasis added).

In *Whiting*, this Court reaffirmed that concurrent enforcement by state and local governments is permissible in the immigration arena. "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects." *Chamber*

of Commerce v. Whiting, 131 S.Ct. 1968, 1981 (2011). The Arizona statute "trace[d]" federal law:

> From this basic starting point, the Arizona law continues to trace the federal law. Both the state and federal law prohibit "knowingly" employing an unauthorized alien.... But the state law does not stop there in guarding against any conflict with federal law. The Arizona law provides that ... the "term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations." § 23-211(8).

Whiting, 131 S.Ct. at 1982. Section 3 of SB 1070 does the same thing: it precisely traces federal law by making a violation of the state law dependent upon a violation of the federal law.

Finally, it must be remembered that concurrent enforcement is not necessary to avoid conflict preemption. Rather, it is merely an indicator that the local law and federal law point in the same direction. All that is necessary to avoid conflict preemption is to avoid obstructing the objectives of Congress that are unmistakably spelled out in federal statute. That threshold is clearly met here.

CONCLUSION

For all of these reasons, *Amicus* respectfully requests this Court to reverse the decision of the Ninth Circuit.

Respectfully submitted,

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