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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition ("Opp.") only underscores the need for this Court's review. Respondent does not deny the importance of the question presented here; nor could it. The question—whether States that bear a disproportionate burden of the costs of illegal immigration are powerless to use their own resources to enforce federal immigration standards without the express blessing of the federal executive—goes to the heart of our Nation's system of dual sovereignty and cooperative federalism. Moreover, respondent's own actions—in bringing this extraordinary injunctive action and in pursuing similar litigation against other States—highlight the pressing significance of the issue and that its importance extends far beyond Arizona or the Ninth Circuit.

What is more, respondent's principal argument against certiorari depends on a conception of the executive branch's ability to preempt state action that cannot be squared with this Court's precedents or any recognizable notion of cooperative federalism, much less the plain language of the statute upon which respondent relies (8 U.S.C. § 1357(g)(10)). Cherry-picking a few statutory provisions, respondent appears to suggest that the federal executive gets to determine how States instruct their officers and to dictate which state law enforcement efforts are "cooperative" and thus saved from preemption. But it is a bedrock principle that preemption turns on judicial interpretation of congressional intent, not on what the executive branch unilaterally deems cooperative. And

multiple statutory provisions make clear that Congress' judgment was to facilitate—not preempt—state efforts to enforce federal immigration laws. *See, e.g.,* 8 U.S.C. §§ 1357(g)(10)(A), 1373, and 1644.

Respondent also suggests that while incidental state efforts to enforce federal immigration laws may be permissible, an intentional state effort to augment federal efforts is uncooperative and impermissible, especially if a State has the temerity to criticize federal efforts as inadequate. This is an astonishing proposition. Cooperative federalism is not a one-way street. States are not consigned to being silent partners who can enforce federal standards only if they do not complain about the federal government's efforts.

This argument fails to respect the dignity and inherent sovereignty of the States. Moreover, it is at odds with two other premises of the Court's preemption jurisprudence—namely, the baseline assumption of dual sovereignty in which state officials are free to enforce federal law and the notion that parallel state provisions that enforce a federal standard are not preempted.

Of course, there will be ample opportunity to explore the difficulties with respondent's novel theory of preemption after the Court grants certiorari. The salient point for present purposes is that the federal government is employing this newly-minted theory as part of an extraordinary and concerted effort to enjoin state laws across the Nation. That extraordinary litigation—with the federal government seeking to enjoin the duly enacted laws of three sovereign States and more

suits threatened—hardly serves the interests of cooperative federalism. Denying certiorari to allow such extraordinary confrontations between sovereigns to proliferate is not an attractive prospect and leaves States impotent to deal with the real and present consequences flowing from illegal immigration. The far better course would be for this Court to resolve whether respondent's unprecedented theory of preemption is correct and whether immigration is so different from every other area of the law that States can enforce federal prohibitions only to the extent the federal executive grants them permission.

I. This Concededly Important Case Warrants the Court's Review.

Respondent wisely concedes that the Petition "presents issues of compelling, nationwide importance." Opp. 15. Respondent's own actions highlight that importance. As the Petition made clear, the very act of initiating this remarkable effort to enjoin Arizona's law before it went into effect made the importance of this case and its impact on federal-state relations crystal clear. Since the filing of the Petition, the federal government has continued its efforts to enjoin Alabama's law and initiated litigation seeking to enjoin South Carolina's immigration enforcement statute. *United States v. South Carolina*, No. 11-cv-02958 (D.S.C.); *see id.*, Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. (D.S.C. Nov. 7, 2011) (Doc. 16-1). Recent reports suggest further litigation against other state laws may be in the offing. *See, e.g., Justice Dep't, Alabama in Standoff on Immigration*, Wash. Post, Nov. 18, 2011, at A3. The fact that numerous other States have

adopted similar provisions, *see* Pet. at 23–24, itself supports plenary review. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011) ("[S]everal States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens"). Although respondent suggests that some state efforts differ in their particulars, Opp. 16, respondent overstates the differences. Many of the statutory provisions at issue in these cases track portions of S.B. 1070 virtually word for word; others differ only in minor detail. Whatever the minor differences, they reflect a shared judgment that federal efforts have proven inadequate, and respondent seeks to preempt them all based on its sweeping theory of preemption by the executive.

Not only have numerous States adopted similar provisions, but they have almost all engendered significant litigation, often initiated by respondent. The proliferation of highly unusual efforts by the federal government to enjoin duly-enacted state statutes, perhaps more clearly than any other development, underscores the need for this Court's review. The choice between the multiplication of such confrontational federal actions and a definitive resolution by this Court is not a close one.

The litigation that has arisen underscores both the similarity of the state laws and the need for this Court's guidance. In *United States v. Alabama*, for instance, the district court refused a preliminary injunction against Alabama statutory provisions virtually identical to Sections 2(B) and 3 of S.B. 1070, expressly disagreeing with the panel decision here and instead relying heavily on Judge

Bea's dissent. *Alabama*, ___ F. Supp. 2d ___, No. 11-cv-2746-SLB, 2011 WL 4469941, at *15–*16, *30–*37 (N.D. Ala. Sept. 28, 2011). The Alabama court incorporated this same analysis in declining to enjoin provisions mandating immigration status verifications for persons arrested for failing to carry a driver's license, *id.* at *52–*53, and for persons charged with certain crimes or detained in jail. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 11-cv-2484-SLB, slip op. at 25–36 (N.D. Ala. Sept. 28, 2011). And in enjoining a provision barring unauthorized work, the Alabama court also relied on the lower courts' treatment of Section 5(C). *Alabama*, 2011 WL 4469941, at *23. The Eleventh Circuit subsequently enjoined enforcement of the registration-card provision but not the status-verification requirements pending appeal. *Id.*, Nos. 11-14532-CC & 11-14535-CC, 2011 WL 4863957 (11th Cir. Oct. 14, 2011). Thus, the status-verification provisions are in force in the Eleventh Circuit, but not in the Ninth.

Likewise, the district court in Georgia relied extensively on the opinions below in preliminarily enjoining a Georgia statute that authorizes status verifications of certain criminal suspects. *Ga. Latino Alliance for Human Rights v. Deal*, No. 11-CV-1804-TWT, 2011 WL 2520752, at *9–*10 (N.D. Ga. June 27, 2011). And the opinion below was cited to enjoin Indiana's authorization of arrests for a category of aliens including those subject to removal orders. *Buquer v. City of Indianapolis*, No. 11-cv-708-SEB-MJD, 2011 WL 2532935, at *11–*12 (N.D. Ind. June 24, 2011).

Finally, the plaintiffs challenging Utah's immigration enforcement statute contend that it "suffer[s] from the same constitutional defects as provisions in Arizona's similar immigration law, S.B. 1070, which has been preliminarily enjoined by the federal district court in Arizona and the Ninth Circuit." Mem. in Supp. of Pls.' Mot. for Prelim. Inj., *Utah Coal. of La Raza v. Utah*, No. 11-cv-00401-CW, 5 (D. Utah May 6, 2011) (Doc. 37).

II. Respondent's Theory of Preemption Is Unprecedented, Meritless, and Differs From the Approaches of the Circuits, Which Are Already Split.

Respondent does not defend much of the reasoning of the court below, such as its misguided approach to facial challenges. *See* Pet. 30–32. Instead, respondent emphasizes the absence of a circuit split as to certain aspects of S.B. 1070 and advances a novel theory of preemption. But the Petition never asserted a direct conflict as to every provision in S.B. 1070. And respondent's preemption theory has no support in this Court's precedents and only underscores the need for plenary review.

A. Respondent's Adoption of an Unprecedented and Erroneous Legal Theory Heightens the Need for Review.

Respondent advances a novel theory of preemption and corresponding reading of 8 U.S.C. § 1357(g)(10)(B). Respondent concedes that some cooperative efforts by States to enforce federal immigration laws are permitted, but only to the extent the federal executive branch deems them "cooperative." States that are candid about the

federal government's inadequate efforts are deemed uncooperative, and their laws are preempted. Respondent attempts to superimpose this novel theory on 8 U.S.C. § 1357(g)(10)(B), which uses the word "cooperate" in a savings clause that makes clear that the provisions for deputizing state officials set forth in the remainder of § 1357(g) should not be construed as requiring an agreement for state officials to check the status of an individual "or otherwise to cooperate" with federal authorities.

Indeed, respondent reports that it has recently (after the Petition was filed) formalized its theory in guidance that purports to dictate what state officers may do to enforce immigration laws—on pain of having their activity declared "uncooperative" and hence unlawful by DHS. *See* Dep't of Homeland Sec., *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* ("*Guidance*"); Opp. 6, 27, 30. The *Guidance* did not result from any formal rulemaking, and respondent does not claim it should receive any deference. The *Guidance* does, however, make clear the government's remarkable position that to "cooperate" means to submit to DHS's exclusive and unquestioned control: "State or local laws or actions that are not responsive to federal control or direction . . . do not constitute the requisite 'cooperation[.]'" *Guidance* 8.

There are several problems with respondent's contrived theory of "cooperation." First, the courts below did not even mention, let alone adopt, it. While the Ninth Circuit erred in interpreting § 1357(g)(10)(B)—as permitting state enforcement efforts only on "necessity" or request by federal

officials, and even then only "on an incidental and as needed basis"—that error did not depend on this theory or turn on the statutory term "cooperate." App. 15a. Thus, on an issue on which the circuits were already split, respondent offers yet another theory. That only enhances the case for certiorari.

The far bigger problem with respondent's theory is its lack of merit. Ignoring the bedrock principle that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted), respondent focuses almost exclusively on the executive's opinion of a particular state immigration enforcement effort. But Congress' intent here is clear: state and local efforts are expressly preserved, not preempted.

Respondent is fundamentally mistaken in ascribing preemptive force to statutory language that self-evidently *authorizes* state enforcement activity, rather than *prohibits* it. Although § 1357(g) creates formal mechanisms for federal-state cooperation in immigration enforcement, it is plain Congress did *not* intend these relationships to be the exclusive source of state enforcement authority, or that § 1357(g) should prevent states from independently exercising any preexisting enforcement power. The savings clause in § 1357(g)(10) and Congress' independent recognition of state enforcement authority in other contexts, *e.g.*, 8 U.S.C. §§ 1252c, 1324(c), both illustrate the point. Respondent's attempt to conjure preemptive effect out of the language of a savings clause thus must fail.

That view of congressional intent is not only consistent with the statutory text and structure but also with the background assumptions of dual sovereignty. States have an inherent ability to enforce their own distinct laws *and* to enforce federal law. That is the default. Congress can expressly limit that baseline assumption if it is sufficiently clear, but the default assumption favors state enforcement. The United States recognizes this in other contexts. Indeed, earlier this Term it argued that state efforts to enforce parallel federal standards were permissible even in a pervasively regulated and preempted field like nuclear safety. *See, e.g.,* Br. of the United States as *Amicus Curiae* Supporting Petitioners, *Kurns v. R.R. Friction Prods. Corp.*, No. 10-879, 8 (U.S. Aug. 19, 2011) ("Congress's preemption of the field of nuclear safety concerns does not preclude state tort remedies for those injured by nuclear incidents."). But here respondent, like the Ninth Circuit below, lost sight of this fundamental default assumption and mistakenly demands express federal authorization for a state role.

B. The Acknowledged Circuit Split Cannot Be Dismissed.

The decision below conflicts with decisions of the Tenth Circuit and other courts of appeals. Pet. 24–29. Respondent's attempt to deny the existence of the circuit split—which the panel below expressly acknowledged it was creating—and to minimize its importance are unpersuasive.

The split cannot be regarded as limited to the narrow question of Section 6's constitutionality, as

respondent wishes. Opp. 28–30. Rather, as the Ninth Circuit acknowledged, its disagreement with the Tenth Circuit goes to the fundamental question of whether States enjoy the inherent authority to enforce non-criminal aspects of immigration law, as the Tenth and other Circuits hold, or whether congressional authorization is required, as the Ninth Circuit concluded. App. 45a–52a. At a minimum, this dispute also directly impacts the validity of S.B. 1070 § 2(B) and other States' analogous provisions: because the panel assumed that States have no inherent enforcement authority, it found the lack of any express congressional authorization dispositive. App. 12a–22a.

Respondent's effort to wish away the circuit split entirely, Opp. 28–30, as opposed to merely dismissing its importance, fares no better. The Ninth Circuit expressly stated that "[w]e recognize that our view conflicts with the Tenth Circuit's." App. 48a (citing *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999)). Respondent can only deny the split because its unprecedented theory draws a distinction between incidental state efforts the federal executive deems cooperative and avowed state efforts to supplement federal under-enforcement. The Ninth Circuit's candid acknowledgement of a circuit split thus underscores that respondent's novel theory played no role in the Ninth Circuit's analysis.

C. Sections 3 and 5(C) Are Legitimate Exercises of the States' Long-Recognized Authority to Create State Remedies Complementary to Federal Ones.

With respect to Sections 3 and 5(C), respondent attempts to distinguish this case from this Court's general approach permitting state remedies that parallel federal-law prohibitions, *see* Pet. 38–39, by invoking *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), and *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986). Opp. 20–21. Neither case is on point.

This Court's holding in *Buckman*—that state-law "fraud-on-the-FDA" claims are preempted—was based on federal primacy in ensuring the integrity of its own processes and the possibility that state adjudication of such questions would lead to standards of conduct for the federal process different from what the FDA would require. 531 U.S. at 348–51. By contrast, Sections 3 and 5(C) do not purport to police efforts to deceive federal officials and there is absolutely no risk of creating alien registration or work-authorization standards inconsistent with federal law. Arizona's provisions apply only when violations of federal law have occurred—and only in contexts where ascertaining the federal violation is straightforward. Indeed, Section 5(C) relies exclusively on a federal determination of employment authorization to establish the state-law offense, and Section 3 relies on a federal determination of immigration status as an element of the offense. *Buckman* is wholly inapposite.

Gould is, if anything, further afield as it reflects a rule limited to the National Labor Relations Act and the unique preemption jurisprudence thereunder, as opposed to any general rule of preemption. There is no indication that immigration is a context in which even parallel state remedies are prohibited and *Whiting* suggests the contrary. *See Whiting*, 131 S. Ct. at 1983 (distinguishing *Buckman*).

III. The Optimal Time for this Court's Review Is Now.

Finally, contrary to respondent's suggestion, the fact that this Petition arises from the issuance of a preliminary injunction is not a reason to defer review. *See* Opp. 32. Respondent itself regularly seeks and obtains Supreme Court review when a case is at the preliminary injunction stage. *See*, *e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Geren v. Omar,* 552 U.S. 1074 (2007), *cert. granted*; *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Gonzales v. Raich*, 545 U.S. 1, 9 (2005); *Ashcroft v. ACLU*, 535 U.S. 564 (2002) and 542 U.S. 656 (2004); *SEC v. Edwards*, 540 U.S. 389 (2004); *Dep't of HUD v. Rucker*, 535 U.S. 125 (2002); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). The same is true of non-federal petitioners. *See*, *e.g.*, *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460 (2009); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003) (granting certiorari in preemption case "because the questions presented are of national importance").

There is no reason to defer review here. The decisions below with respect to the enjoined provisions of S.B. 1070 turned entirely on the issues of law presented in the Petition. Moreover, the alternative to plenary review is not the benign prospect of further percolation, but the proliferation of extraordinary confrontations between the federal government and other States. It is extraordinary enough that Arizona's duly-enacted law was enjoined at the behest of the federal government before it could take effect. This Court should clarify the principles that govern cooperative federalism in this area rather than accepting respondent's invitation for further confrontation.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the petition for certiorari should be granted.

Respectfully submitted,

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