No. 11-182

In the
Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioners

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

NOTE: *Amicus* American Unity Legal Defense Fund believes that the following Question is fairly encompassed within Petitioner's Question Presented:

Whether the lower courts may find state laws preempted based on the Ninth Circuit's reversed interpretation in *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS,* 913 F.2d 1350 (9th Cir. 1990), *rev'd,* 502 U.S. 183 (1991), that immigration law enforcement must be "balanced" and "tempered" and not "harsh."

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chamber of Commerce v. Whiting* ("*Whiting*"), No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011), *City of Hazleton v. Lozano* ("*Hazleton*"), *cert. granted, vacated and remanded,* No. 10-772, 2011 WL 2175213 (June 6, 2011), and *Horne v. Flores*, __ U.S. __, __ n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief). AULDF filed amicus briefs in the District Court and Ninth Circuit in this case.

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss the growing confusion over whether the lower courts can rely on a "balance" or "tempered enforcement" interpretation of congressional intent in the Immigration Reform and Control Act of 1986, even though this Court rejected that interpretation in *INS v. Nat'l Cen. for Immigrants' Rights*, 502 U.S. 183 (1991), and again twice this year in *Whiting* and *Hazleton*.

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[1] Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and all counsel of record consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

"The objective of this Act[2] was to stop illegal aliens from working, period."
Nat'l Ctr. for Immigrants' Rights, Inc. v. INS ("*NCIR*"), 913 F.2d 1350, 1375 (9th Cir. 1990) (Trott, J. dissenting), *rev'd,* 502 U.S. 183 (1991).

At first glance, this case, like other nearly identical ones percolating through the courts, seems to include many different complex issues. These cases, however, can be distilled to a simple challenge to this Court's precedents protecting American workers:[3]

Did Congress instead intend enforcement of the immigration laws to be "fair and humane,"[4] "tempered,"[5] and "measured,"[6] with courts stopping immigration enforcement so that illegal immigrants do not "starve"[7] or "go homeless"?[8]

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[2]The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA").

[3] *See, e.g., NCIR*, 502 U.S. at 194 (protecting American workers is an "established concern of immigration law"); *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

[4]*NCIR*, 913 F.2d at 1369 (evaluating regulations denying illegal immigrants the right to work pending immigration proceedings).

[5]*Id*., 913 F.2d at 1366.

[6]Plaintiff United States' Motion for Preliminary Injunction ("P.I. Motion"), in *United States v. Alabama*, No. 2:11-cv-02746-SLB, (M.D.Ala., Aug. 1, 2011) (Doc. 2), at 4 ("measured enforcement . . . of the immigration laws.").

[7]*United States v. Arizona,* 641 F.3d 339, 357, n. 17 (9th Cir. 2011) *citing, NCIR*, 913 F.2d at 1368.

[8]*Lozano v. City of Hazleton*, 620 F.3d 170, 224 (3rd Cir. 2010), *vacated and remanded*, No. 10-772 (June 6, 2011).

Judge Bea below noted the centrality of this issue: "[I]t is the **enforcement** of immigration laws that this case is about, not whether a state can decree who can come into the country, what an alien may do while here, or how long an alien can stay in this country."[9]

This Court faced the same question soon after passage of IRCA. *NCIR*, 502 U.S. 183 (1991). The Ninth Circuit in *NCIR* said that a regulation imposing a "no-work" bond condition on illegal immigrants awaiting deportation proceedings was invalid because IRCA was "a carefully crafted political compromise" which "states a tempered enforcement policy." *NCIR*, 913 F. 2d at 1366; *see also id*., at 1369 (The INS "no-work" regulation "override[s] the clear policy choice that Congress made in IRCA, and … upset[s] the careful balance which Congress achieved ….").

The Ninth Circuit said that IRCA "at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected". *NCIR*, 913 F.2d at 1366. It found that "[t]he emphasis [in IRCA] on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the … harsh and inhumane measures at issue[10] here." 913 F.2d at 1369.

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[9] *Id*., 641 F.3d at 369 (Bea, J., concurring and dissenting)(Emphasis added).

[10] The "harsh and inhumane measures at issue" in *NCIR* were the "no-work" bond conditions on illegal immigrants waiting immigration adjudication.

Judge Stephen Trott[11] vigorously dissented: "The objective of [IRCA] was to stop illegal aliens from working, period." *NCIR*, 913 F.2d at 1375 (Trott, J. dissenting). He explained:

> The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the primary thrust of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

Id.

Unanimously rejecting the *NCIR* panel majority's interpretation, this Court reversed and remanded. 502 U.S. at 188, 196. It observed that the "stated nature and purpose" of the regulation was "'to protect against the displacement of workers in the United States,'" a "policy forcefully recognized most recently in the IRCA." *Id*., at 194 (quoting 41 FED. REG. 51142 (1983)) and 194, n. 8. It concluded, "The contested regulation is wholly consistent with this established concern of immigration law, and thus

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[11] Judge Trott was Assistant Attorney General of the United States during the development of IRCA and Associate Attorney General during the three years after passage. www.fjc.gov/servlet/nGetInfo?jid=2416&cid=999.

squarely within the scope of the Attorney General's statutory authority." 502 U.S. at 194.

By enacting IRCA, Congress intended to preserve a generous immigration system for all, not to promote "harsh" enforcement for its own sake: "The major purpose of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are actually implemented through adequate enforcement." S. Rep. 99-132, at 3. "Unless illegal immigration is brought under control, I and many others, fear an increasing public intolerance - a lack of compassion if you will - to all forms of immigration - legal and illegal. It is this unwanted and wretched result that this bill today attempts to avoid." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson). The Senate Judiciary Committee summarized IRCA's "Purpose" in one sentence: "The Committee bill is intended to increase control over illegal immigration." S. Rep. 99-132, at 1.

Congress continued to "increase control" in 1996, by increasing penalties for harboring illegal immigrants to include lengthy prison terms and, in some cases, possibly the death penalty. 8 U.S.C. § 1324(a)(1)(B). Also in 1996, Congress amended the list of RICO[12] predicate crimes to include "any act which is indictable under the Immigration and

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[12]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) ... if the act ... was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).[13]

For a time after the 1986 enactment of IRCA, the federal enforcing agencies seemed to abide by the statutory priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law."[14] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration."[15]

By 1996, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an

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[13] The addition of RICO liability also exposes employers of illegal immigrants to state-level RICO suits. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Williams v. Mohawk Industries*, 465 F.3d 1277, 1293-94 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007). This concurrent, non-administrative enforcement structure undercuts arguments that immigration enforcement is intended to be exclusively federal.

[14] Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37.

[15] *Id*.

efficient and effective capability to bar unauthorized workers from employment in any given sector.").

In 1998, however, INS abandoned the "effective" strategy of "Operation Vanguard" *because* it was effective. "When the capability was realized, it was stopped." CRS, *Immigration Enforcement*, at 39; *see, also, id.*, at 61-62 (describing May 1998 INS "Immediate Action Directive for Worksite Enforcement Operations" ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id*. at 38, 62, not because Congress changed the law.

As a result, the reality of worksite immigration enforcement is substantially different from Congress' "adequate enforcement" intention: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ."[16]

GAO's bland language masks the true extent of the "decline." Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%.[17]

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[16] U.S. Government Accountability Office ("GAO"), Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, ("Immigration Enforcement Weaknesses"), August 2005, GAO-05-813, at 30 (emphasis added).

[17] This decline is discussed in more detail in AULDF's *amicus* brief in *Whiting*, No. 09-115, pp. 29-34. Sources: 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.

The workplace enforcement figures have not rebounded since.[18] This is a continuing pattern by the federal agency charged with enforcing the immigration laws in the interior of the country.

On June 30, 2010, for example, John Morton, the head of ICE, issued a memorandum[19] that reduced immigration law enforcement as a federal priority. This Memorandum left ICE enforcement agents "wondering who … is responsible for tracking down and detaining the millions of other illegal border-crossers and fugitive aliens now in the country".[20]

The Morton memo resulted in a unanimous "no confidence" condemnation vote by the labor

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[18] Since FY 2005, there have been increases in worksite immigration law enforcement, but even the highest recent level (5,184 in FY2008) is still a "decline" of 70% from the FY1997 peak level. "Fact Sheet: Worksite Enforcement," April 29, 2010, www.ice.gov/news/library/factsheets/worksite.htm.

ICE says on its "Fact vs. Fiction" page that: "For two years running, ICE has removed more aliens than it did under the prior Administration. Additionally, ICE removed 70 percent more convicted criminals than it did in 2008 under the prior Administration." www.ice.gov/news/fact-fiction.

It's not clear why ICE makes these claims. *Amicus* AULDF filed a FOIA request for the workplace immigration law enforcement data for FY 2009 and 2010 (ICE FOIA Case Number 2010 FOIA5627, *reprinted* in AULDF's *amicus* brief in *Whiting*, No. 09-115, App. 1); the figures for FY 2009 and FY 2010 were both lower than FY 2008 (444 and 297 criminal arrests, respectively, and 1654 and 814 administrative arrests, respectively).

[19] Available at www.cis.org/articles/2010/civil_enforcement_priorities-1.pdf.

[20] Jerry Seper, "Lack of resources curtails ICE tracking of illegals," *The Washington Times*, Aug. 8, 2010, A1.

union representing ICE agents and employees. "The resolution said ICE leadership had 'abandoned the agency's core mission of enforcing U.S. immigration laws and providing for public safety'."[21]

A second Morton memo[22] landed on August 20, 2010: once illegal immigrants are apprehended, they are to be let go, unless they have serious criminal records or are national security risks. "Immigration enforcement officials have started to cancel the deportations of thousands of immigrants they have detained".[23]

> The Department of Homeland Security is systematically reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal immigrants who have no serious criminal records, according to several sources familiar with the efforts. Culling the immigration court system dockets of noncriminals started in earnest in Houston about a month ago and has stunned local immigration attorneys, who have reported coming to court anticipating clients' deportations only to learn that the government was dismissing their cases.[24]

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[21] Jerry Seper, "Agents' Union Disavows Leaders of ICE," *The Washington Times*, Aug. 9, 2010, A1.

[22] Available at http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

[23] Julia Preston, "Immigration Agency Ends Some Deportations," *The New York Times*, Aug. 27, 2010, A14.

[24] Susan Carroll, "Feds Moving to Dismiss Some Deportation Cases," *The Houston Chronicle*, August 24, 2010, www.chron.com/disp/story.mpl/special/immigration/7169978.html.

The August 20, 2010, Morton memo suspending deportations generated ICE employee disapproval similar to that sparked by the June 30, 2010, Morton memo. Chris Crane, president of the American Federation of Government Employees' National Council 1800, the union that issued the earlier no-confidence vote, said, "We can't find a supervisor or manager that supports Morton or his initiatives."[25]

Then on June 11, 2011, a third Morton memo "greatly expanded" the priority guidance. "In a fix likely to have broad practical effect, Mr. Morton issued a memorandum that greatly expanded the factors immigration authorities can take into account in deciding to defer or cancel deportations."[26]

Most recently, on August 17, 2011, the Administration announced that it would not deport other illegal immigrants:

> Bowing to pressure from immigrant rights activists, the Obama administration said Thursday that it will halt deportation proceedings on a case-by-case basis against illegal immigrants who meet certain criteria, such as attending school, having family in the military or having primary responsible for other family members' care. … "The Obama administration should enforce immigration laws, not look for ways to ignore them," said [House Judiciary Committee Chairman] Rep.

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[25] Andrew Becker, "Tension Over Obama Policies Within Immigration and Customs Enforcement," *The Washington Post*, August 27, 2010, B3.

[26] Julia Preston, "U.S. Pledges to Raise Deportation Threshold," *The New York Times*, June 17, 2011, A14.

> Lamar Smith, Texas Republican. "The Obama administration should not pick and choose which laws to enforce."[27]

Thus, there is effectively no interior immigration law enforcement for millions of illegal immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. In general, if other illegal immigrants are apprehended, they are to be released, not deported.

In response to this collapse of interior immigration law enforcement, several states enacted legislation to ensure that – as required by Congress – effective steps are taken to prevent the employment of illegal immigrants.[28] Litigants, including the United States, immediately challenged these laws, typically by claiming that these laws were too "harsh" and attempted "maximum enforcement." Paragraph 4 of the United States' Complaint in *United States v. Alabama*, for example, reads:

> 4. By emphasizing one goal — maximum enforcement — H.B 56 ignores the many other objectives that Congress has established for the federal immigration system. This failure to abide by the set of interests animating federal immigration law provides sufficient reason that H.B. 56 is preempted. But just as importantly, even where Alabama appears to pursue *one* of the goals of the federal system, it does so to the detriment of other federal

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[27] Stephen Dinan, "Obama to Deport Illegals by 'Priority'", *The Washington Times*, August 18, 2011, A1.

[28] *See,* Pet. at 22-23.

> immigration priorities, thereby disrupting federal immigration enforcement and burdening resources that focus on aliens who pose a threat to national security or public safety.

Complaint, *United States v. Alabama*, No. 2:11-cv-02746-SLB, (M.D.Ala., Aug. 1, 2011) (Doc. 1), at 4, ¶ 4 (emphasis in original).

Some courts are agreeing with these challenges and so reviving *NCIR*'s "fair and humane enforcement" interpretation of the immigration laws. The opinion below, for example, says: "we are bound by our holding in [*NCIR*] regarding congressional intent." 641 F.3d at 357.

Thus, looked at historically and in the context of Congress' intention to protect American workers by enforcing the immigration laws, this case is not so much about a collection of challenges to individual provisions of state laws, but a revival of the question this Court faced in *NCIR*: did Congress intend to prohibit "maximum enforcement" of the immigration laws so that illegal immigrants would not "starve in the United States"?

Or in light of the 99% collapse of interior immigration law enforcement, perhaps the question should be whether Congress intended the immigration law enforcement agencies to decide whether the immigration laws should be enforced at all?[29]

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[29] The District Court in the case that was ultimately affirmed here in *Whiting* faced a similar question:

> [I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it –

Since the enforcing agencies and some lower courts believe that non-enforcement is consistent with Congressional intentions, it is apparently necessary for this Court to revisit whether *NCIR* should control the interpretation of immigration law enforcement.

SUMMARY OF ARGUMENT

The decision below offers a simple challenge to this Court's precedents: did Congress intend to "balance" immigration law enforcement so that it is "fair and humane," and illegal immigrants do not "starve" while awaiting possible immigration proceedings? This premise was first offered by the Ninth Circuit in *NCIR* and unanimously reversed by this Court. Nevertheless, the panel below said it was bound by *NCIR* and its analysis of IRCA's legislative history. This Court should grant the Petition to review the continuing viability of the reversed Ninth Circuit decision in *NCIR*.

In addition, litigants, including the United States, are continuing to ask courts to adopt the *NCIR* interpretation, even after this year's rejection of that doctrine in *Whiting* and *Hazleton*. Last month, only a few weeks after *Whiting* and *Hazleton,* the United States, for example, told the District Court reviewing a similar Alabama law that *Hazleton*, even

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> **unless we take ineffective enforcement to be the "real" federal policy from which state law must not deviate**.

Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008) (emphasis added). *See, also*, *Whiting*, 131 S.Ct. at 1983 ("Congress did not intend to preserve only those state laws that would have no effect.").

though vacated, should still govern. Some courts are using the "balance" and "tempered enforcement" interpretation to find that state laws are preempted; others have rejected the interpretation. In light of the conflict among circuits raised by the continuing proffers of the "balance" interpretation, this Court should grant the Petition to determine whether federal and state immigration law enforcement should be "tempered" so illegal immigrants do not "starve" or become "homeless."

Finally, the majority of the panel below equated the enforcing agency's interpretation of this enforcement "balance" with congressional intention. Judge Bea pointed out this error, but was outvoted. Other lower courts have also been conflicted over who strikes the "balance" in the immigration laws and where the "balance," if any, is to be struck. In light of the collapse of immigration law enforcement, adopting the agency's interpretation means that the immigration laws will not be enforced in the interior of the country as Congress has repeatedly directed. This Court should grant the Petition to determine whether the agency's failure to enforce the immigration laws can preempt state laws which are otherwise consistent with Congressional intent to stop illegal immigration.

ADDITIONAL REASONS TO GRANT THE WRIT

I. The Decision Below Relies on *NCIR*, a Reversed Ninth Circuit Opinion.

From the beginning of this case, the United States has asserted that Arizona's SB 1070 focuses

too much on stopping illegal immigration,[30] and that state immigration-related laws must "balance the purposes and objectives of federal law."[31] This view comes from *NCIR*. This Court unanimously reversed that decision. 502 U.S. at 188, 196.

Twenty years later, the Ninth Circuit panel below raised the issue of reliance on *NCIR* at oral argument, and AULDF and the parties discussed the issue in post-argument Rule 28(j) supplemental filings (*reprinted* in AULDF's amicus brief in *Hazleton*, No. 10-772, at App. 1). The panel said it was bound by this reversed interpretation. 641 F.3d at 357 ("we are bound by our holding in [*NCIR*] regarding congressional intent").

The decision below challenges this Court's determination in *NCIR* of the fundamental question of whether immigration enforcement must be "humane" and whether courts must step in to stop "maximum enforcement" so that illegal immigrants do not "starve in the United States"?[32] Petitioners disagree, *citing* this Court's reversal of the case, but, as they did below, say that the reversal was "on other grounds". Pet. at 12-13.

The panel's (and the parties') reasoning seems to conflict directly with this Court's analysis in *NCIR*

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[30] Complaint, ¶¶ 3, 4; Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, 13 ("Arizona's monolithic 'attrition through enforcement' policy pursues only one goal of the federal immigration system – maximum reduction of the number of unlawfully present aliens – to the exclusion of all other objectives").

[31] *Id*., 3.

[32] 641 F.3d at 357, n. 17, *citing, NCIR*, 913 F.2d at 1368.

that Congress "forcefully" intended enforcement of immigration sanctions against illegal immigrants, even if it seems "harsh" to some observers. 502 U.S. at 194 & n. 8. The Court should grant the Petition to review the extent to which the reversed Ninth Circuit opinion in *NCIR* should control immigration law preemption decisions.

II. The United States Still Asserts the *NCIR* Interpretation In This and Other Cases, Raising Conflicts in Lower Courts.

After this Court reversed *NCIR* in 1991, no court raised *NCIR*'s "balance" interpretation of IRCA until the District Court opinion in *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 528 (M.D. Pa. 2007)("The two laws, however, strike a different balance between these interests. The laws, therefore, conflict.").

Some courts have upheld state laws against preemption challenges based on the "balance" interpretation. *See, e.g.*, *Chicanos Por La Causa*, 558 F.3d 856, 866-67, (9th Cir., 2009), *affirmed*, *sub nom.*, *Whiting*, No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011); *Gray v. City of Valley Park, Mo.*, 2008 WL 294294 (E.D.Mo. Jan 31, 2008) (No. 4:07CV00881 ERW), *19 ("the emphasis on preventing the hiring of illegal aliens is a goal shared by the Federal and local law").[33] One district court found a local ordinance preempted as a regulation of immigration and an

[33] Although the District Court in *Valley Park* ruled on the preemption question, the only questions appealed were standing and preclusion, on which the Eighth Circuit affirmed. *Gray v. City of Valley Park, Mo.,* 567 F.3d 976, 980 (8th Cir. 2009).

obstacle to uniform application of federal law, but without discussing the "balance" theory. *Villas at Parkside Partners v. City of Farmers Branch, Tex.,* 701 F.Supp.2d 835 (N.D.Tex., 2010).

Other lower courts, however, have used the *NCIR* interpretation of the immigration laws to preempt what they saw as unduly vigorous enforcement. *See, e.g.*, *City of Hazleton v. Lozano* ("*Hazleton*"), 620 F.3d 170, 211 (3rd Cir. 2010), *cert. granted, vacated and remanded*, No. 10-772, 2011 WL 2175213, (June 6, 2011); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 767, 768 (10th Cir. 2010) (*NCIR* "rev'd on other grounds" and "We conclude that Section 9 similarly upsets Congress' carefully constructed balance by interfering with its chosen methods.").

These lower court decisions were handed down prior to this Court's 2011 decisions in *Whiting* and *Hazleton*. In *Whiting* and *Hazleton,* this Court reviewed two of the decisions involving the "measured enforcement" or "balance" theory, offering it the opportunity to reconsider immigration law priorities. In both decisions, the *NCIR* theory was argued to the Court directly, and rejected.

> In the Chamber's view, IRCA reflects Congress's careful balancing of several policy considerations—deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination. According to the Chamber, the harshness of Arizona's law "'exert[s] an extraneous pull on the scheme established by Congress'" that impermissibly upsets that balance.
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> …

> As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions—those imposed "through licensing and similar laws."

Whiting, 131 S.Ct. at 1983.

As the lower court's opinion here demonstrates, *NCIR*'s "balance" and "harsh enforcement" interpretation is not limited to the situation faced in *Whiting*, where a state-level sanction on employers of illegal immigrants was upheld against both express and implied preemption attacks. Here, *NCIR* was cited as blocking state laws providing penalties on illegal immigrants (as opposed to employers) that might be considered equivalent of the "no work" bond conditions upheld by this Court. 641 F.3d at 357.

The Third Circuit's opinion in *Hazleton* also strongly advocated the "balance" theory, saying: "**it is indisputable** that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as 'foreign' from discrimination." *Hazleton,* 620 F.3d at 210-11 (emphasis added). As did the Ninth Circuit here, the Third Circuit applied the "balance"

interpretation beyond employment issues, finding that the federal agencies' exercise of prosecutorial discretion preempted the City's ordinance. 620 F.3d at 224.

The Ninth Circuit here was concerned that illegal immigrants not "starve." 641 F.3d at 357. In *Hazleton,* the Third Circuit was quite concerned that:

> Although the federal government does not intend for aliens here unlawfully to be harbored, it has never evidenced an intent for them to go homeless. Cf. 8 U.S.C. § 1229(a)(1)(F)(i) (explaining that an alien noticed to appear for a removal proceeding must immediately provide the Attorney General "with a written record of an address ... at which the alien may be contacted respecting [the] proceeding."). Common sense, of course, suggests that Hazleton has absolutely no interest in reducing aliens without legal status to homelessness either.

620 F.3d at 224.

This Court apparently did not see the *NCIR* theory as so obvious, since it vacated the entire decision and remanded for reconsideration in light of *Whiting*. 2011 WL 2175213 (June 6, 2011).

Nevertheless, the United States is still making the rejected argument in other cases. *See, e.g.*, Plaintiff United States' Motion for Preliminary Injunction ("P.I. Motion"), in *United States v. Alabama*, No. 2:11-cv-02746-SLB, (M.D.Ala., Aug. 1, 2011) (Doc. 2), at 4 ("**measured enforcement** . . . of the immigration laws.") (emphasis added). "Congress's desire that the federal government balance competing immigration objectives while effectively prioritizing its enforcement resources is

reflected in the federal administration and enforcement of the immigration laws". *Id.*, at 53. Thus, the United States proposed that the District Court for the Northern District of Alabama adopt the same theory struck down twice just a few weeks earlier in *Whiting* and in *Hazleton*.[34]

This Court should grant the Petition to clarify whether the *NCIR* interpretation can be used in immigration preemption cases.

III. The Lower Court's Use of Federal Agency Choices as "Federal Priorities" Conflicts With Decisions of This and Other Courts.

In using the reversed *NCIR* "balance" interpretation, the lower court chose to accept the "balance" struck by the Executive agencies in their setting of priorities, as opposed to the balance set by Congress. Judge Bea, in partial dissent, highlighted this issue:

> It is Congress's intent we must value and apply, not the intent of the Executive Department, the Department of Justice, or the United States Immigration and Customs Enforcement.

641 F.3d at 369 (Bea, J., concurring and dissenting).

The difference between these two balances becomes much more pointed in light of the collapse in enforcement of the immigration laws since 1997, described *supra*. The effect of this enforcement

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[34] Echoing its view that the reversed *NCIR* opinion should still govern, the United States suggests in its Motion to the *United States v. Alabama* District Court that even though *Hazleton* was vacated, it should still govern. P.I. Motion, at 33, n. 7.

collapse falls most heavily on low-income and young American workers.[35] This enforcement collapse cannot be what Congress intended as "federal priorities."

This Court has historically protected those most vulnerable American workers.[36] Thirty-five

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[35] "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, at 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

This wage decrease is not equally shared. Professor Borjas noted that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24. *See, also*, Steven Camarota, *From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007 to 2010*, Center for Immigration Studies, Aug. 27, 2010, www.cis.org/bad-to-worse.

[36] *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984); *See also,* Judge Wake's unreported opinion in *Ariz. Contractors Ass'n v. Napolitano,* 2007 WL 4570303, *6, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW (D. Ariz. Dec. 21, 2007) (emphasis added), one of the original trial court rulings in the case that became *Whiting* here:

> People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. **It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests**. . . . The

years ago, Justice Brennan rejected a preemption attack on California's attempt to protect its citizens from the deleterious effects of uncontrolled illegal immigration, saying:

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

De Canas v. Bica, 424 U.S. at 356-57.

The choice to harm low-income Americans in favor of illegal immigrants is Congress', not the enforcing agency's. *Sprietsma v. Mercury Marine,* 537 U.S. 51, 67 (2002) ("[A]lthough the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it

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> balance now struck is in favor of an economy for those who may work in the United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) . . . The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized alien labor.

does not convey an 'authoritative' message of a federal policy").

Preemption analysis does not credit mere agency pronouncements. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979) (internal agency rules without certain safeguards do not have the force of law). "For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Id., quoting NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 764 (1969); *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187 (2009) (no preemption based on agency regulations prologue that did not go through notice and comment procedure).

ICE did not undertake any steps necessary to effectuate a legislative rule when it promulgated the Morton memoranda. Even if it had attempted to issue a legislative rule, ICE does not have the authority to decide not to enforce the immigration laws. *See, Lousiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986) ("[W]e simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."). ICE simply decided on its own and without authorization to cease interior immigration law enforcement and deportations.

The lower court should not credit an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and

defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.*, *quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Only Congress should decide to cease enforcement. Congress has not done so. The agency is acting *ultra vires*. As Judge Bea pointed out in dissent, the court below held that the agency's reluctance to enforce the law is what preempts the state law:

> The majority's arguments … [are] consistent with only one premise: the complaining federal authorities do not want to enforce the immigration laws regarding the presence of illegal aliens, and do not want any help from the state of Arizona that would pressure federal officers to have to enforce those immigration laws. With respect, regardless what may be the intent of the Executive, I cannot accept this premise as accurately expressing the intent of Congress.

641 F.3d at 382 (Bea., J., concurring and dissenting).

The Ninth Circuit's ruling that those "priorities" supersede State law is tantamount to saying that an agency's unauthorized decision not to enforce the law operates as a "clear and manifest purpose of Congress" sufficient to preempt State law. *De Canas,* 424 U.S. at 357. This will confuse the lower courts. The Court should grant the Petition and review the Ninth Circuit's decision to use the agency's non-enforcement of immigration laws as equivalent to Congressional intent.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

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