No. 11-182

In the

# Supreme Court of the United States

ARIZONA, et al.,

*Petitioners*,

v.

UNITED STATES,

*Respondent.*

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

## BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, CONGRESSMEN ED ROYCE, TED POE, AND TOM MCCLINTOCK, AND INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS


EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

MANUEL S. KLAUSNER
Individual Rights Foundation
One Bunker Hill Building
601 West Fifth St., Suite 800
Los Angeles, CA 90071

JOHN C. EASTMAN
ANTHONY T. CASO
*Counsel of Record*
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

*Counsel for Amici Curiae*

## QUESTION PRESENTED

1. Does the President have the unilateral power to preempt State laws that are inconsistent with the President's immigration enforcement objectives?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Constitutional Provisions**

**Other Authorities**



**Rules**

## IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the nature of our federal system of government and the balance of powers between the national and state governments are at issue. The CCJ has previously appeared as *amicus curiae* before the Supreme Court of the United States in such cases involving questions of federalism, naturalization, and the respective powers of the national and state governments as *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

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

Congressmen Ed Royce (CA-40), Ted Poe (TX-2), and Tom McClintock (CA-4) are members of Congress from Border States severely impacted by the under-enforcement by the Executive of immigration law that has been adopted by Congress. As former Chairman of the International Terrorism and Nonproliferation Subcommittee, Mr. Royce held field hearings on the Texas and California borders on 9/11 Commission concerns that border security had become an issue of national security. Mr. Poe, a member of the House Judiciary Committee, is a former prosecutor and judge who has dealt with the impact of illegal immigration on his state and the nation. Mr. McClintock, who currently serves on the Budget and Natural Resources Committees and previously served on the Education and Labor Committee, has studied the impact of illegal immigration on em-

ployment. They join this brief to call the Court's attention to the way in which the claims by the Department of Justice below undermine the plenary power Congress has over immigration policy.

## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari filed by Arizona adequately makes the case for review of the entire judgment of the Ninth Circuit Court of Appeals in this action. Amici submit this brief to call attention to the startling argument of the United States that the President has unilateral authority to preempt state enactments that may cause a conflict with the President's enforcement priorities. This claim of power to override the sovereign police power of state governments to enact laws designed to protect public health, safety, and welfare of state citizens requires review from this Court in order to preserve the functions of our federalist system identified by this Court just last term in *Bond v. United States*, 131 S.Ct. 2355 (2011).

## REASONS FOR GRANTING THE PETITION

### I. Congress, Not the President, Has Plenary Power Over Immigration Policy.

Congress alone is vested with the power to "establish [a] uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. More than a century ago, this Court noted that "over no conceivable subject is the legislative power of Congress more complete" than immigration. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), this Court specifi-

cally referred to the immigration powers of congress as "plenary."

The power of exclusion of foreigners is an incident of sovereignty delegated by the Constitution to "the government of the United States, *through the action of the legislative department*." *Chae Chan Ping v. United States,* 130 U.S. 581, 609 (1889) (emphasis added). "The Court without exception has sustained *Congress*' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Kleindienst*, 408 U.S., at 766 (emphasis added) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

"[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added). Indeed, this Court has made it clear that over "'no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell,* 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.*, 214 U.S. at 339).

Arizona, and other states that have enacted similar legislation, do not dispute any of this. The states do not seek to contradict or supplant any statutes enacted by Congress regarding the admission of aliens. Instead, they are exercising their police power to regulate locally for the public health, safety, and welfare of their own citizens in light of the refusal of the President to enforce the laws that Congress has enacted regarding admission of aliens.

Congress exercised its plenary power regarding admission of aliens and has outlawed the employment of aliens who enter the country illegally. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1974 (2011) (citing 8 U.S.C. § 1324(a)(1)(A)). While the Constitution grants Congress the exclusive power to make the law regarding immigration, it is up to the President to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. There may be no judicially manageable standards for enforcement of the President's obligation to execute the laws "faithfully," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999), *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), but there are real consequences to his refusal to enforce the law. In the area of immigration, it is the states that must face those consequences.

## II. Absent Displacement by Federal *Law* (as Opposed to Executive *Prerogative*), the States Retain Police Power Authority to Protect the Health and Safety of Their Citizens.

As noted above, there is no dispute that Congress has plenary power to regulate immigration. Neither the State of Arizona nor any of the other states that have adopted similar legislation have attempted to interfere with that exercise of power or to regulate immigration on its own in any manner.

Instead, this case presents a clash between the President's claim of a power of "global" prosecutorial discretion and the state's undoubted power to regulate for the public health and safety of the its citizens. The Federalist No. 45, pp. 292-93 (Madison)

(Rossiter ed. 1961) (The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."); The Federalist No. 32, p. 198 (Hamilton) (states "retain all the rights of sovereignty."); *Bond*, 131 S.Ct. at 2364.

Because Congress has made it illegal to employ individuals who have entered the country unlawfully, any failure (or refusal) by the President to enforce the laws excluding those individuals from the country – whether through border enforcement or deportation – creates a significant problem for the states.

The conflict between the law and its underenforcement puts the alien in the position of breaking the law again to obtain employment (through forgery of required documents, such as social security cards) or accepting underground employment from unscrupulous employers who can use the alien's immigration status as leverage to avoid federal and state health and safety laws meant to protect workers. An underclass is created with all of its attendant health and safety problems. Nicolas Kanellos, HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: ANTHROPOLOGY 222 (1994) ("Workplace injuries are particularly common among undocumented immigrant workers, whose status often makes them feel compelled to accept unsafe working conditions that others reject."); Robert Reischauer, *Immigration and the Underclass*, 501 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCIENCE 120, 129-30 (1989).

These problems are uniquely felt by the states and have caused a number of states, in addition to Arizona, to adopt measures to address the problems created by the presence of aliens in the country illegally and the President's exercise of what the briefs for the United States have termed "global" prosecutorial discretion. Alabama, Georgia, Indiana, South Carolina, and Utah have all adopted laws attempting to address the same problem as that addressed by Arizona S.B. 1070, 2010 Ariz. Sess. Laws ch. 113. Alabama House Bill No. 56 (Beason-Hammon Alabama Taxpayer and Citizen Protection Act) (2011); Georgia House Bill No. 8 (Illegal Immigration Reform and Enforcement Act of 2011) (2011); South Carolina Act No. 280 (House Bill No. 4400 (Initiative for a Legal Workforce) (2011); Indiana Senate Enrolled Act No. 590 (2011); Utah House Bill No. 497 (Utah Illegal Immigration Enforcement Act) (2011). The Legislatures and citizens in each of these States are expressing their concerns over illegal immigration and the toll it is taking on their economies, constituents, and citizens.

Arizona and these other states have "broad authority under their police powers" to regulate for the public welfare. *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976). This "broad authority" may be forced to give way in the face of "paramount federal legislation," *id.*, but *legislation* is not the problem here. Instead, in this case, the President argues that Arizona's law must give way to the President's enforcement (or rather non-enforcement) discretion.

In the court below, the United States argued that Arizona's law "undermines the pursuit of federal priorities." *United States v. Arizona*, No. 10-16645

(9th Cir.), Brief for the Appellee ("U.S. Brief") at 47. In its argument, the United States relied on this Court's ruling in *Buckman v. Plaintiff's Legal Committee*, 531 U.S. 341 (2001), to argue that a state law that interfered "with the selection of enforcement approaches by the federal agency for violation of federal law" was preempted. U.S. Brief at 35. This theme was echoed in the decision of the court below. *United States v. Arizona*, 641 F.3d 339, 352 (9th Cir. 2011).

The argument is spelled out in greater detail in the Motion for Preliminary Injunction filed in the District Court. The United States argues that the provision of Arizona's law that requires state and local law enforcement to confirm an individual's immigration status whenever there is cause to believe that a person in police custody is in the country unlawfully will impose a burden on federal resources.[2] Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof at 30, *United States v. Arizona*, No. CV 10-1413 (D. Az. 2010). This burden exists because the President asserts a power of "global" prosecutorial discretion – that is, a discretion to refuse to enforce a class of law or a law against a class of persons, rather than on the basis of the particular facts in an individual case. *Id*. at 18. Thus, when Arizona requires state and local law en-

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[2] Of course, the President's real argument is with Congress on this issue. Section 1373(c) of Title 8 specifically requires the Department of Homeland Security to respond to inquiries from state and local law enforcement "seeking to verify or ascertain the citizenship or immigration status" of an individual. As the plurality of this Court noted in *Chamber of Commerce v. Whiting*, *supra*, the legal significance of any such burden on the executive is open to question. 131 S.Ct. at 1986.

forcement officers to check with federal authorities regarding the immigration status of a suspected unlawful entrant, federal resources are diverted to the actual enforcement of the statutory scheme enacted by Congress. According to the United States, such a result is unconstitutional. It creates a conflict between the state law and "federal priorities." *Id*. at 31. It is on the basis of this conflict between states and "federal priorities" that the President seeks to preempt the state law.

This argument seeks to expand federal preemption far beyond the bounds of the constitutional text. It is the "*laws* of the United States" that are the "supreme law of the land" – not the President's enforcement priorities. U.S. Const. Art. VI, cl. 2.

The Constitution clearly provides for preemption of state laws that are contrary to Congressional enactments (on matters within the enumerated powers). Article VI unmistakably places properly enacted federal statutes as the "supreme law of the land." But this provision was meant only to preempt state laws that conflicted with federal *laws*. States retained their sovereign powers and state laws would only be preempted where they were "contradictory and repugnant" to properly exercised federal lawmaking authority. The Federalist No. 32 (Hamilton) at 198. This is to be distinguished from those situations where state law might merely "interfere [with] the *policy* of any branch of administration." *Id*.

The argument raised by the United States and accepted by the court below is one in urgent need of review by this Court. Preemption, it is argued, is no longer an issue of conflict between federal and state statute. Now it can be found in the conflict between

state statute and the President's supposed prerogative to refuse to enforce federal statutes. This is a startling claim by the executive. Not only does it mean that the President is free to ignore any statutory command of Congress. It is also a claim of power to preempt the sovereign authority of the states who attempt to regulate within their police powers to solve local health and welfare problems created by the President's refusal to enforce federal law.

## CONCLUSION

Amici urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

MANUEL S. KLAUSNER
Individual Rights Foundation
One Bunker Hill Building
601 West Fifth St., Suite 800
Los Angeles, CA 90071

JOHN C. EASTMAN
ANTHONY T. CASO
*Counsel of Record*
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

*Counsel for Amici Curiae*

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