No. 11-182

In The
Supreme Court of the United States

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

BRIEF AMICUS CURIAE FOR COCHISE COUNTY SHERIFF LARRY A. DEVER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT SHOULD GRANT REVIEW BECAUSE (1) THE NINTH CIRCUIT WRONGLY FOUND THAT S.B. 1070 IS PREEMPTED BY THIS NATION'S FOREIGN AFFAIRS POWER; AND (2) THE DECISION BELOW MISAPPLIED THIS COURT'S FOREIGN AFFAIRS PREEMPTION DOCTRINE..... 5

A. Foreign Affairs Preemption 6

B. The Ninth Circuit's Foreign Affairs Preemption Analysis Is Erroneous 11

C. What The Ninth Circuit Is Really Doing 12

II. CONFLICT WITH OTHER CIRCUITS REGARDING THE APPLICATION OF *GARAMENDI*: IS AN EXPRESS FOREIGN POLICY REQUIRED OR NOT?..... 14

A. The Ninth Circuit Has Found Preemption Under *Garamendi* In The Absence Of Any Identifiable Foreign Policy 15

B. The First And Eleventh Circuits Require A Clear Conflict With An Express Foreign Policy To Find Preemption Under *Garamendi* 16

TABLE OF CONTENTS – Continued

Page

III. THE NINTH CIRCUIT'S FOREIGN AFFAIRS PREEMPTION ANALYSIS RELIES ON IMPROPER EVIDENCE..... 19

IV. THE COURT SHOULD ADDRESS THIS ISSUE NOW BECAUSE ALL 50 STATES HAVE INTRODUCED LEGISLATION RELATING TO IMMIGRATION 22

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

CASES

American Ins. Ass'n v. Garamendi, 539 U.S. 369 (2003) ..... *passim*

Barclays Bank PLC v. Franchise Tax Bd. Of Cal., 512 U.S. 298 (1994) 7, 10, 20, 21

Beard v. Greene, 523 U.S. 371 (1998) 20

Buquer v. City of Indianapolis, No. 1:11-CV-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011) 20, 22, 23, 24

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) 3, 8, 11, 12, 19

Faculty Senate of Florida Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) 17, 18

Fed. Republic of Germany v. U.S., 526 U.S. 111 (1999) 20

Georgia Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804-TWT, 2011 WL 2520752 (N.D. Ga. June 27, 2011) 20, 22, 23

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 20

Kolovrat v. Oregon, 366 U.S. 187 (1961) 8

Medellin v. Texas, 552 U.S. 491 (2008) ..... *passim*

Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010) 17, 18

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 20

TABLE OF AUTHORITIES – Continued

Page

United State v. Arizona, 641 F.3d 339 (9th Cir. 2011) .....*passim*

Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2009) 15, 16, 19

Zschernig v. Miller, 389 U.S. 429 (1968) ...7, 12, 13, 14

OTHER AUTHORITIES

Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175 19

Julia Preston, "Surge in Immigration Laws Around U.S.," New York Times (August 6, 2007) 25

Nat'l Conference of State Legislatures, *Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (January-June)*, http://ncsl.org (last visited August 18, 2011) 25

U.S. CONST. ART. VI.....7

BRIEF OF COCHISE COUNTY, ARIZONA SHERIFF LARRY DEVER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Sheriff Larry A. Dever has a profound interest in the issue of cooperative state enforcement of federal immigration law. Sheriff Dever is a 34-year Cochise County law enforcement veteran. He was elected to his first term as Sheriff in 1996, following a distinguished 20-year career working in the trenches of the Cochise County Sheriff's Department.

Cochise County occupies approximately 6,200 square miles (about five times the size of Rhode Island) in the southeast corner of Arizona and it shares an 83.5-mile border with Mexico. It is one of four counties that comprise the United States Border Patrol's Tucson Sector. For the past several years, beginning in 1999, this area has led the nation in illegal alien apprehensions and drug seizures, accounting for almost half of both categories.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, 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. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a 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. Monetary contribution to its preparation or submission has been made by The Legacy Foundation, an Iowa-based, non-profit, non-partisan 501(c)(3).

Sheriff Dever's administration has been challenged by the exponential increase in illegal immigration and the concomitant escalation of violence in his community over the past decade. As Sheriff Dever has testified to Congress, the border region is more dangerous today than it ever has been.[2] Criminal aliens, smuggling drugs and weapons, are armed with high capacity assault weapons and are ordered to protect their cargo at all costs. These criminals stand their ground and fight instead of running.

Although state sheriffs are not federal border patrol officers, they possess the obligation to investigate the criminal activities associated with illegal entry, including, murder, kidnapping, drug running, gun smuggling and human trafficking. In an effort to combat this growing epidemic, several states have enacted legislation, such as Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070"). These state efforts seek to empower local law enforcement officers with the additional, reasonable,

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[2] Testimony of Larry A. Dever to the United States Senate Judiciary Subcommittee on Immigration, Border Security, and Citizenship and Terrorism, Technology and Homeland Security (March 1, 2006); Testimony of Larry A. Dever on behalf of the National Sheriff's Association to the United States House of Representatives Subcommittee on Emergency Communications, Preparedness, and Response (April 28, 2009); Testimony of Larry A. Dever to the United States Senate Committee on Homeland Security and Governmental Affairs (April 20, 2010); Testimony of Larry A. Dever to United States House of Representatives Committee on Homeland Security Subcommittee on Border and Maritime Security (May 3, 2011).

tools necessary to combat the adverse effects of illegal immigration.

If the Ninth Circuit's decision in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) is allowed to stand, Sheriff Dever and other local law enforcement officers across the United States will see their authority compromised while their communities continue to be battered by the waves of crime cascading across the southern border. Local law enforcement will be deprived of a vital tool by virtue of a flawed conclusion that states are wholly preempted from taking any action within the realm of immigration for fear that such steps might ruffle foreign feathers. Guidance from the Supreme Court on this important issue is urgently needed to restore the balance of power between the states and the federal government and to prevent the Ninth Circuit's overbroad foreign affairs preemption analysis from spreading through our national court system.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding in *United States v. Arizona* warrants this Court's review because it incorrectly applied the foreign affairs preemption analysis that this Court articulated in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) and *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Those cases stand for the proposition that foreign affairs preemption only exists upon a finding that the state law presents a clear conflict with

express United States policy on foreign affairs. The Ninth Circuit, however, summarily concluded that S.B. 1070 conflicts with this Nation's foreign policy without ever identifying – as required by this Court – any "express" foreign policy being offended.

United States v. Arizona is not the first time that the Ninth Circuit misapplied the foreign affairs preemption doctrine articulated in *Garamendi* and preempted a state law without ever identifying a conflict with an express foreign policy.

Other Circuits, however, correctly followed this Court's direction and have required (1) a clear conflict with (2) an express foreign policy prior to holding that a state law is preempted because it conflicts with a particular foreign policy. The Ninth Circuit's pervasive and consistent misapplication of *Garamendi* has created confusion amongst other Circuits concerning what showing is required before declaring that a state law is preempted by federal foreign policy. This Court's review, therefore, is needed to clarify the proper application of the foreign affairs preemption doctrine as articulated in *Garamendi*.

Unfortunately, the misapplication of *Garamendi* is not the only error committed by the Ninth Circuit. The Ninth Circuit based its reasoning on improper evidence including the opinions of foreign governments and Executive Branch officials. Not only was the use of this evidence an error, but continued judicial acceptance of this sort of evidence impermissibly would operate to establish judges as expositors of

foreign policy. Moreover, further application of the Ninth Circuit's flawed reasoning threatens to unconstitutionally increase the power of the Executive Branch to preempt a state's legislation based on the mere opinion of certain officials and allow foreign governments to "veto" state law because of a mere incidental effect that the law may have outside of the United States.

Finally, all 50 states have passed some sort of immigration law. District courts have followed, and will continue to follow, the Ninth Circuit's reasoning as persuasive authority on the matter. This Court's review is needed to clarify the foreign affairs preemption doctrine in order to avoid further proliferation of incorrectly reasoned cases relating to state-level immigration laws.

ARGUMENT

I. The Court Should Grant Review Because (1) The Ninth Circuit Wrongly Found That S.B. 1070 Is Preempted By This Nation's Foreign Affairs Power; And (2) The Decision Below Misapplies This Court's Foreign Affairs Preemption Doctrine.

Citing *Garamendi*, the Ninth Circuit found that the federal government's foreign affairs power preempted S.B. 1070 because Arizona's law had a "deleterious effect on the United States' foreign affairs" and was causing "actual foreign policy problems." *See Arizona*,

641 F.3d at 352-53. The Ninth Circuit quoted *Garamendi* for the proposition that: "'even . . . the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the national government would require preemption of state law.'" *Id*. (quoting *Garamendi*, 539 U.S. at 420). Thus, the Ninth Circuit concluded, the state legislation "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." *Id*. at 354.

The Ninth Circuit, however, erred by failing to apply the proper foreign affairs analysis that this Court established in *Garamendi* and later clarified in *Medellin v. Texas*, 552 U.S. 491 (2008). Although the Ninth Circuit declared that S.B. 1070 was likely to cause "actual foreign affairs problems" – albeit by improper evidence – the Ninth Circuit failed to articulate what "express" foreign policy was offended by S.B. 1070 and how that conflict arose. This failure directly led to the faulty conclusion that S.B. 1070 conflicted with the national government's foreign affairs power and was, therefore, preempted.

A. Foreign Affairs Preemption.

There is no question that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Garamendi*, 539 U.S. at 413. There is little controversy when a state law conflicts with a federal statute or treaty – in such cases the federal law trumps inconsistent

state laws by virtue of the Supremacy Clause. U.S. CONST. ART. VI. Determining the scope of the national government's preemptive power in the absence of foreign affairs lawmaking through federal statute or treaty, however, is more difficult.

The Supreme Court has defined the scope of the national government's power to preempt state laws implicating foreign relations through its foreign affairs preemption decisions. *See, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994); *Garamendi*, 539 U.S. 396. Three doctrines have emerged from these decisions.

The first doctrine is the dormant foreign affairs doctrine. Preemption under the dormant foreign affairs doctrine requires a judicial determination that a state law or activity is preempted because it has "more than an incidental or indirect effect" on national foreign relations. *Zschernig*, 389 U.S. at 440. This doctrine can be applied to strike down a state law affecting foreign affairs in the absence of a specific conflict with any express federal foreign policy.

The second doctrine is the dormant foreign Commerce Clause doctrine, which preempts state laws that prevent the federal government from speaking with "one voice" in matters relating to foreign commerce. *E.g.*, *Barclays Bank PLC*, 512 U.S. 298.

The third variant of foreign affairs preemption applies standard Supremacy Clause preemption analysis to federal and state laws governing foreign

relations. It emanates from affirmative federal action establishing foreign policy goals in a federal statute (*Crosby*, 530 U.S. 363), a treaty (*Kolovrat v. Oregon*, 366 U.S. 187 (1961)) and, under limited circumstances, an executive agreement (*Garamendi*, 539 U.S. 396).

When articulating its foreign affairs analysis, the Ninth Circuit relied on the third variant of foreign affairs preemption, most recently applied by the Court in *Crosby* and *Garamendi*. Both of these cases involved a state law addressing foreign affairs conflicting with an express foreign policy of the National Government.

In *Crosby*, a Massachusetts law that prohibited state agencies from purchasing goods from companies doing business with a specific country, Burma, conflicted with a federal statute on the same subject. *Crosby*, 530 U.S. at 374-80. Even though the state law essentially was a state's attempt to regulate trade with a foreign government, this Court declined the invitation to rule that the federal statute preempted the field because it concerned foreign affairs. *Id.* at 373-74 n.8. Instead, this Court decided the case on obstacle preemption grounds, the narrowest of grounds presented to it. *Id.* The Court emphasized that the federal purpose and interests frustrated by the state scheme derived not from judicial assessment of national foreign relations, but rather from the federal statute and its purposes. *Id.* at 373-74.

Likewise, in *Garamendi*, the Court found that a California law requiring any insurer doing business

in the state to disclose information about all policies sold in Europe between 1920 and 1945 conflicted with an express foreign policy of the national government regarding the settlement of Holocaust-related claims. *Garamendi*, 539 U.S. at 401, 409-10. In *Garamendi*, however, the express foreign policy was not found in federal statute or treaty, but rather, was found in executive agreements with foreign governments and official correspondence by a high-level member of the Executive Branch. *Id.* at 427. In *Garamendi*, this Court looked beyond federal statutes and treaties for an express foreign policy, however, this Court has not yet established a bright line test as to what constitutes an "express" foreign policy capable of invalidating state legislation. In *Medellin*, 552 U.S. 491, the Court furthered the analysis and offered additional guidance to courts evaluating claims of foreign affairs preemption.

In *Medellin*, the Court clarified that its decision in *Garamendi* was based on a "narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id*. at 531. *Garamendi*'s approval of the President's pronouncement of federal foreign policy in executive agreements derived not from the inherent power of the President in the realm of foreign affairs, but rather, from implicit Congressional approval. This Court emphasized that several executive agreements, coupled with statements from Executive Branch officials, and the "particularly longstanding practice" of Congressional acquiescence

to the President's resolution of international claims disputes were sufficient to demonstrate an express federal policy. *See id.* at 531-32 (quoting *Garamendi*, 539 U.S. at 415). This decision provided the important clarification that an executive agreement or other unilateral action of the Executive Branch, by itself, does not have preemptive force.

Moreover, the Court's decision in *Medellin* brought *Garamendi* in line with *Barclays Bank PLC*. In *Barclays Bank PLC*, the Court rejected an argument that Executive Branch statements carried preemptive force. *Barclays Bank PLC*, 512 U.S. at 328-29. The petitioner in *Barclays Bank PLC* argued for preemption on the basis of several Executive Branch statements articulating foreign policy, including an executive decision to introduce legislation requiring states to apply a particular method of tax calculation, letters from Executive Branch members expressing opposition to California's method of worldwide combined reporting, and "Department of Justice amicus briefs filed in this Court, arguing that the worldwide combined reporting method violates the dormant Commerce Clause." *Id*. at 328 n.30 (internal citations omitted). The Court explained that these kinds of executive statements "cannot perform the service for which [petitioner] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations'. . . . " *Id*. at 328-29. A complete reading of *Garamendi*, *Barclays Bank PLC* and *Medellin* makes clear that the Executive's power to conduct foreign affairs does not provide adequate

basis to preempt state law where the purported foreign policy is found only in Executive Branch statements.

At minimum, preemption under *Garamendi* requires a finding that there exists an "express" policy articulated by either federal statute, treaty, or an executive agreement coupled with implicit congressional approval. *Medellin*, 552 U.S. at 493; *Garamendi*, 539 U.S. at 420.

B. The Ninth Circuit's Foreign Affairs Preemption Analysis Is Erroneous.

The Ninth Circuit's foreign affairs preemption analysis is erroneous because the court failed to identify an express foreign policy that conflicts with S.B. 1070. The Ninth Circuit found only that the national government's foreign affairs power preempted S.B. 1070 because it had a "deleterious effect on the United States' foreign affairs" and was causing "actual foreign policy problems." *Arizona*, 641 F.3d at 352-53.

As discussed above, it is not enough to find preemption on foreign policy grounds because there are supposed "deleterious effects" on foreign relations caused by the state law in question. *Id.* Nor is it enough to show that a state law is preempted because state legislation has caused "actual foreign policy problems" in the opinion of foreign governments. Rather, in order to find that a state law is preempted by foreign policy under *Crosby*, *Garamendi*, and other related cases, there must be a showing that the state

law in question is in conflict with the "*express*" foreign policy of the national government. In *United States v. Arizona*, the Ninth Circuit erred by failing to show how Arizona's S.B. 1070 conflicts with any "*express*" federal foreign policy on immigration. The Ninth Circuit did not identify any federal statute, treaty or executive agreement setting forth the foreign policy. The Ninth Circuit based its decision solely on the opinions of Executive Branch employees and foreign governments.

Thus, review of the Ninth Circuit's decision is necessary because its reasoning is a clear misapplication of the foreign affairs preemption doctrine that this Court articulated in *Garamendi* and *Crosby*.

C. What The Ninth Circuit Is Really Doing.

The Ninth Circuit's analysis did not focus on whether S.B. 1070, on its face, conflicted with an express foreign policy of the National Government. Rather, the Ninth Circuit conjured up a purported foreign policy conflict from the complaints of foreign governments and the self-serving opinions of Executive Branch officials. This kind of analysis is distinctly different from the conflict preemption analysis contemplated by *Garamendi* and *Crosby*. At best, the Ninth Circuit's judicial assessment of unexpressed federal foreign policy represents an effort to apply the dormant foreign affairs doctrine that this Court applied in *Zschernig*. Under *Zschernig*, however, the Ninth Circuit would not have been justified in finding

that S.B. 1070 was preempted by the federal government's foreign affairs power.

In *Zschernig*, this Court struck down an Oregon probate law requiring any real or personal property willed to a non-resident alien to escheat to the state unless the alien's home country granted reciprocal rights of inheritance for Oregon legatees. *Zschernig*, 389 U.S. 429. This Court held that the Oregon probate law violated the federal foreign affairs power without finding a specific conflict with any federal treaty, agreement, or foreign policy because, *as applied*, it was an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id*. at 432. The *Zschernig* Court observed that, although the law on its face may have been a valid probate law, when applying that law courts had engaged in "minute inquiries concerning the actual administration of foreign law . . . " and had made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id*. at 435, 440. The court found that such criticism had a "direct impact upon foreign relations. . . ." *Id*. at 441. Thus, as Justice Ginsburg explained in her dissent to *Garamendi*, this doctrine "resonates most audibly" when a state policy or action is critical of a foreign government and involves "sitting in judgment" of that government. *Garamendi*, 539 U.S. at 439-40 (Ginsburg, J., dissent). In fact, *Zschernig* remains the only case where the Court has applied dormant foreign affairs preemption

to invalidate a state law since it was decided nearly forty-three years ago.

S.B. 1070 exhibits none of the dangers attendant on the statute reviewed in *Zschernig*. On its face, S.B. 1070 is a generally applicable domestic law. Arizona did not enact S.B. 1070 to "sit in judgment" of a foreign government. Furthermore, S.B. 1070 provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. Finally, unlike *Zschernig*, *United States v. Arizona* arose as a facial challenge, so any suggestion that S.B. 1070 will be selectively applied according to a state foreign policy attitude hostile to Mexico or any other foreign county to the south is purely speculative. Even under this Court's broadest and most controversial foreign affairs doctrine, therefore, preemption of S.B. 1070 is improper.

II. Conflict With Other Circuits Regarding The Application Of *Garamendi*: Is An Express Foreign Policy Required Or Not?

There are two distinct interpretations of *Garamendi* that necessarily lead to differing or, in cases like this one, incorrect results. The main difference between the two approaches is whether or not an *express* foreign policy is required to find foreign affairs preemption.

A. The Ninth Circuit Has Found Preemption Under *Garamendi* In The Absence Of Any Identifiable Foreign Policy.

As discussed above, the Ninth Circuit in *United States v. Arizona* found that S.B. 1070 is preempted under *Garamendi*'s foreign affairs conflict preemption without any articulation of an express foreign policy that the state law purportedly offends. The Ninth Circuit reasoned that preemption was appropriate where "foreign policy problems" allegedly caused by a state law appeared to be "far greater than incidental." *See Arizona*, 641 F.3d at 353.

Similarly, in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2009), the Ninth Circuit also cited *Garamendi* and found a state statute preempted by the national government's foreign affairs power even though the state law did not conflict with a treaty, federal statute or "any current foreign policy espoused by the Executive Branch." *Von Saher*, 592 F.3d at 963.

Von Saher evaluated a California law that extended the statute of limitations to allow art owners and their heirs to bring actions against museums to recover Nazi-looted art. The Ninth Circuit explained that "[c]ourts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs." *Id*. at 964. *See*, *e.g.*, *Garamendi*, 539 U.S. at 425-26. Even though the California law was a property regulation "address[ing] the problem of Nazi-looted art

currently hanging on the walls of the state's museums and galleries", the court easily concluded that foreign affairs preemption applied. *Id*. at 964-65. The court stated that, "the recovery of Holocaust-era art affects the international art market, as well as foreign affairs." *Id*. at 967. The court indicated that the federal government's exclusive power to resolve war was also implicated. *Id*. Thus, the Ninth Circuit reasoned that California lacked the power to act in the absence of "some specific action that constitutes authorization on the part of the federal government" because it was "not an area of 'traditional state responsibility.'" *Id*. at 968, 965. Again, nowhere did the court cite to an express foreign affairs policy in disharmony with the California law. As it did in *United States v. Arizona*, the Ninth Circuit invoked preemption solely on the allegations that the state law would interfere with the national government's conduct in foreign affairs.

The Ninth Circuit, therefore, has found that *Garamendi* may preempt state law in the absence of a conflict with, or even in the existence of, an express foreign policy traceable to enacted law.

B. The First And Eleventh Circuits Require A Clear Conflict With An Express Foreign Policy To Find Preemption Under *Garamendi*.

In contrast to the Ninth Circuit, the First Circuit has interpreted *Garamendi* – like *Medellin* – more

narrowly and requires a *clear conflict with an express foreign policy* to find preemption.

In *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), the First Circuit held that a Massachusetts statute of limitations that was applied to bar a claim to recover Nazi-confiscated art was not preempted under *Garamendi*. *Id*. at 14. The First Circuit reasoned, a state law is preempted only when it is in clear conflict with an express foreign policy. *Id*. at 11. The First Circuit further required language to be "sufficiently clear and definite to constitute evidence of an express federal policy." *Id*. at 13. "[A] federal statute and several international declarations signed by the Executive Branch that touch on the subject of Nazi-confiscated art" were not sufficient evidence of "a federal policy disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork." *Id*. at 11-12. Consequently, the court was unable to discern an "express federal policy disfavoring statutes of limitations in the general language of those documents." *Id*. at 13.

Like the First Circuit, the Eleventh Circuit has required "powerful evidence of a clear and express foreign policy" before invoking preemption under *Garamendi*. *Faculty Senate of Florida Int'l Univ. v. Winn*, 616 F.3d 1206, 1211 (11th Cir. 2010). In *Faculty Senate of Florida Int'l Univ.*, the Eleventh Circuit held that a Florida statute restricting the use of state money for travel by state employees to countries identified by the federal government as "State Sponsors of Terrorism" is not "violative of the federal foreign

affairs power." *Id*. at 1212. The Eleventh Circuit explained that *Garamendi* involved, "a *clear federal foreign policy position* on Holocaust-era claims evidenced by, among other things, *international agreements* by our country's Executive Branch, *official correspondence by a high-level member of the Executive Branch*, and the *historical role of the Executive Branch in dealing with wartime claims resolution*." *Id*. at 1211 (emphasis added). Applying this standard, the Eleventh Circuit concluded that the Florida law's "brush with federal law and the foreign affairs of the United States is too indirect, minor, incidental, and peripheral to trigger the Supremacy Clause's-undoubted-overriding power" because there was no evidence of a clear conflict between an express federal foreign policy and state law. *Id*. at 1208 ("No federal statute or regulation expressly requires states to pay for foreign travel for state university employees. No federal law says states cannot differentiate among foreign nations when it comes to spending for academic travel. And Plaintiffs do not contend that the Act has been expressly preempted by a federal statute.").

The Eleventh and First Circuit's interpretation of *Garamendi* is consistent with this Court's narrowing of *Garamendi* in *Medellin*. *See supra* pp. 9-11. Both Circuit Courts searched for a *clear conflict* with an *express foreign policy* derived from specific statements of Congress in treaties and federal statutes, not Executive Branch statements. *See Museum of Fine Arts*, *Boston*, 623 F.3d 1, 11-13; *Faculty Senate of Florida Int'l Univ.*, 616 F.3d 1206, 1211-13.

On the other hand, the broad interpretation of *Garamendi*, expressed by the Ninth Circuit in *United States v. Arizona* and *Von Saher* conflicts with this Court's interpretation of *Garamendi* in *Medellin*. The Ninth Circuit would find preemption under *Garamendi* even when there is no conflict with an identifiable foreign policy of the national government. *See Von Saher*, 593 F.3d at 963. Therefore, this Court should grant review to further clarify the limits of foreign affairs preemption as discussed in *Crosby*, *Garamendi*, and *Medellin* and resolve the confusion that pervades among the other circuit courts by answering the question of whether an express foreign affairs policy must be clearly identified and articulated before finding that a state law is preempted by the national government's foreign affairs power.

III. The Ninth Circuit's Foreign Affairs Preemption Analysis Relies On Improper Evidence.

Furthermore, the evidence on which the Ninth Circuit relied to find that S.B. 1070 conflicts with the national government's foreign affair power was improperly considered. The Ninth Circuit based its conclusion that S.B. 1070 interfered with this nation's conduct of foreign relations on two kinds of evidence. The first kind of evidence was a series of amicus briefs from foreign governments. This Court repeatedly has declined to consider foreign protests in its preemption analysis. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175,

218-19 (citing *Beard v. Greene*, 523 U.S. 371 (1998)); *Fed. Republic of Germany v. U.S.*, 526 U.S. 111 (1999); *Barclays Bank PLC*, 512 U.S. at 324-29; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993); *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992)).

In *United States v. Arizona*, however, the Ninth Circuit permitted the impermissible: it considered foreign protests in its preemption analysis to support its conclusion that S.B. 1070 has "created actual foreign policy problems." 641 F.3d at 353. Not only is this consideration improper under foreign affairs preemption analysis, but it raises very significant questions of national importance. *See Barclays Bank PLC*, 512 U.S. at 324-29. First, it allows foreign governments to weigh in on a State's legislation, essentially granting other "nations' foreign ministries a heckler's veto." *Arizona*, 641 F.3d at 383 (Bea, J., concurring in part, dissenting in part.) Second, other district courts have followed suit and improperly employed the protests of foreign nations to find preemption. *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT, 2011 WL 2520752 (N.D. Ga. June 27, 2011); *Buquer v. City of Indianapolis*, No. 1:11-CV-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011).

The second kind of impermissible evidence used by the Ninth Circuit was statements from "senior United States officials" in the Executive Branch. *Arizona*, 641 F.3d at 354-55. These statements, in and of themselves, are improper evidence to find preemption

on foreign policy grounds. *See Barclays Bank PLC*, 512 U.S. at 328-29; *Crosby*, 530 U.S. at 385. This too leads to issues of great importance. First, reliance on this evidence unconstitutionally expands the power of the Executive Branch, giving it the power to preempt state law by simply issuing statements declaring a law preempted. This practice effectively grants virtually limitless Executive Branch authority in matters implicating a state law and foreign affairs without the need for any textual basis in the Constitution, a particular act of Congress or treaty, or even an executive agreement. In fact, the Ninth Circuit apparently accepts this as a proper allocation of power, as it has preempted state legislation simply because it "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigrations laws on foreign affairs." *Arizona*, 641 F.3d at 354.

The Ninth Circuit cited no other evidence in the record supporting its declaration that S.B. 1070 "is a singular entry into the foreign policy of the United States by a single state." Thus the Ninth Circuit had no proper basis to find that Arizona impermissibly interfered with foreign affairs. *Id*. at 369. Rather, the Court reviewed certain affidavits and amicus briefs of foreign governments and determined that there existed a foreign policy without citing any federal statute, treaty or executive agreement. Despite Justice Ginsberg's warnings in *Garamendi*, judges are becoming the "expositors of the nation's foreign policy" without any relation to an express foreign policy set

forth by statute or treaty. *Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting).

IV. The Court Should Address This Issue Now Because All 50 States Have Introduced Legislation Relating To Immigration.

Not only should this Court grant review to reverse the Ninth Circuit's error as it relates to the foreign affairs preemption discussion, and to resolve the confusion among the other Circuit Courts, but it also should grant review to provide guidance to the lower courts and prevent future confusion concerning the proper application of the foreign affairs preemption doctrine articulated in *Garamendi* and related cases.

The difference between the Ninth Circuit's application of *Garamendi* and the First and Eleventh Circuits' understanding of this case is significant. District courts in other Circuits already are following the lead of the Ninth Circuit. This may result in state laws improperly being enjoined amid shrieks of preemption. For instance, in the wake of *United States v. Arizona*, district courts in Georgia and Indiana have repeated the Ninth Circuit's errant reliance on Executive Branch statements and the opinions of foreign governments in their preemption analysis. *See Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT, 2011 WL 2520752 (N.D. Ga. June 27, 2011); *Buquer v. City of Indianapolis*, No. 1:11-CV-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011).

On April 14, 2011, the Georgia General Assembly enacted House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011 ("HB87"). Like S.B. 1070, HB87 was intended to mirror federal immigration law. *See Georgia Latino Alliance for Human Rights*, 2011 WL 2520752 at *1. On June 27, 2011, the Georgia district court issued a preliminary injunction, blocking two key provisions of the Georgia law. *See id.* In its preemption analysis, the Georgia district court yielded to the complaints of foreign governments and declarations of Executive Branch officials instead of congressional intent. The district court emphasized that "both the United States government and several foreign nations have expressed concern about the international relations impact of HB87." *Id.* at *11. Citing executive department declarations and an amicus brief filed by the President of Mexico, the district court concluded that "international relations concerns underscore the conflict between HB87 and federal immigration law. The conflict is not a purely speculative and indirect impact on immigration. It is direct and immediate." *Id*.

Moreover, on May 25, 2011, a class action was filed challenging Indiana's Senate Enrolled Act 590 ("SEA 590"). *Buquer*, 2011 WL 2532935, at *1. SEA 590 "mirrors a spate of similar laws recently enacted (and challenged in their respective courts) by the states of Alabama, Georgia, South Carolina, Utah and Arizona." *Id*. In its analysis of one section of SEA 590, the court misapplied foreign affairs preemption. Notwithstanding the court's acknowledgement that the

Georgia statute does not conflict with any treaty, identifiable immigration policy or regulation. *See id*. at *14-15. It proceeded to determine that the law was likely preempted because it was "anything but a neutral law of general application that just happens to have a remote and indirect effect on foreign relations" and "has the potential to directly interfere with executive discretion in the foreign affairs field." *Id*. at *15.

In its analysis, the Indiana district court relied upon executive department congressional testimony from 2003 to derive a federal foreign policy. *Id.* at *14. The Court also looked to the United States Treasury Department regulations for an implied foreign policy. *Id*. The court also cited amicus briefs of foreign governments as further evidence of the impact of the Indiana law on foreign affairs. *Id*. at *14 n.6 ("The potential impact that [the state statute] has on the United States' relationship and dealings with foreign countries is reflected in the concerns raised by Mexico, Brazil, Guatemala, El Salvador, and Colombia in their amicus curiae briefs filed in this action."). Based on its independent assessment of this evidence, the court determined that the state statute was preempted because the law has a "direct effect on our nation's interactions with foreign nations." *Id*. at *15.

This issue is at the forefront of an extensive national dialogue. Thousands of laws touching on immigration have been enacted in the past five years. In 2007, state-level lawmaking relating to immigration surged after the federal government failed to

overhaul the nation's broken immigration system.[3] A total of 1,562 bills were introduced that year and 178 were enacted.[4] This marked a dramatic increase from 2005, when only 300 bills relating to immigrants were introduced.[5] State legislative activity in the regulatory area of immigration has remained high since 2007. In the 2011 legislative session that ended June 30, a total of 1,592 bills relating to immigrants were introduced in all 50 states and Puerto Rico.[6] Of these bills, legislatures in 40 states enacted 151 laws.[7]

Given the sheer number of state laws addressing immigration, district courts have followed, and will continue to follow, the lead of the Ninth Circuit. Left uncorrected, the Ninth Circuit's opinion is likely to generate flawed progeny resulting in expansive federal preemption of state efforts to assist in enforcing federal immigration laws without the safeguard of any analysis whatsoever as to what federal foreign policy the laws may or may not offend. This Court, therefore, should accept review to give guidance to lower courts as to the proper invocation of the national

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[3] Preston, Julia, "Surge in Immigration Laws Around U.S.," New York Times (August 6, 2007).

[4] Nat'l Conference of State Legislatures, *Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (January-June)*, http://www.ncsl.org/default.aspx?tabid=23362 (last visited August 18, 2011).

[5] *Id*.

[6] *Id*.

[7] *Id*.

government's preemptive foreign policy-making power as set forth in *Garamendi* and related cases.

CONCLUSION

For the foregoing reasons, and for those stated by Petitioner State of Arizona and Janice K. Brewer, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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