No. _____

In the Supreme Court of the United States

STATE OF ARIZONA and JANICE K. BREWER,
Governor of the State of Arizona, in her official capacity,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDINGS

Petitioners, the State of Arizona and Governor Janice K. Brewer, were the appellants in the court below. Respondent, the United States, was the appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Arizona and Governor Janice K. Brewer, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 641 F.3d 339, and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Arizona is reported at 703 F. Supp. 2d 980, and reproduced at App. 116a.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 11, 2011. App. 1a. On June 30, 2011, Justice Kennedy extended the time for filing a petition for certiorari to and including August 10, 2011. App. 205a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have power "To establish an uniform Rule of Naturalization."

Article VI, Clause 2, of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."

The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Pertinent provisions of Title 8 of the United States Code and of the Arizona Revised Statutes are reproduced in the Appendix.

INTRODUCTION

Arizona bears the brunt of the problems caused by illegal immigration. It is the gateway for nearly half of the nation's illegal border crossings. 9th Cir. Excerpts of Record ("ER") 380. Unlawful entrants include criminals evading prosecution in their home countries and members of Mexican drug cartels—organizations the federal government has characterized as "more sophisticated and dangerous than any other organized criminal enterprise."[1] Beyond the obvious safety issues, the fiscal burdens imposed by the disproportionate impact of illegal immigration on Arizona are daunting. Arizona spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens who entered and reside in the country in violation of federal law. ER 429. By 2005, the

[1] Majority Staff of the House Committee on Homeland Security Subcommittee on Investigations *A Line in the Sand: Confronting the Threat at the Southwest Border*, http://www.house.gov/sites/members/tx10_mccaul/pdf/Investigations-Border-Report.pdf

illegal immigration problem was so severe that then-Governor Janet Napolitano (currently the Secretary of Homeland Security) declared a state of emergency in Arizona.[2] Arizona has repeatedly asked the federal government for more vigorous enforcement of the federal immigration laws, but to no avail.

To address the unique and disproportionate impact of illegal immigration on Arizona, Governor Brewer signed the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070") on April 29, 2010. S.B. 1070, as amended, aims to ensure more effective enforcement of the federal immigration laws in Arizona, consistent with the requirements of federal law and the U.S. Constitution. Arizona was acutely aware of the need to respect federal authority over immigration-related matters. The legislation authorizes cooperative law enforcement and imposes sanctions that consciously parallel federal law. Despite that effort, the United States took the extraordinary step of initiating a suit to enjoin the law on its face before it ever took effect. That extraordinary federal effort to enjoin a duly enacted state law underscores the importance of this case. Moreover, the Ninth Circuit opinion enjoining four crucial provisions of Arizona's law creates an express split among the Courts of Appeals on an issue of vital importance, casts constitutional doubt on dozens of

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[2] Ralph Blumenthal, *Citing Border Violence, 2 States Declare a Crisis*, N.Y. Times, Aug. 17, 2005, http://query.nytimes.com/gst/fullpage.html?res=9C0CE2DF133EF934A2575BC0A9639C8B63&pagewanted=all.

statutes enacted by other States, and conflicts with this Court's precedents in several respects. This Court's review is clearly warranted.

STATEMENT OF THE CASE

A. Federal Immigration Law

The federal immigration laws expressly contemplate and authorize cooperative law enforcement efforts between federal and state officials. Indeed, they mandate federal cooperation with state and local efforts to ascertain individuals' immigration status.

The principal federal statute dealing with immigration is the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("the INA"), which has been amended on numerous occasions, including by the Immigration Reform and Control Act, 100 Stat. 3359 ("IRCA"), which addressed the employment of aliens in the United States. The INA "set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). IRCA addressed the employment of aliens not authorized to work, a field the original INA had largely left to the States. *See Whiting*, 131 S. Ct. at 1974-75.

The INA both expressly authorizes specific cooperative law enforcement and acknowledges that such cooperative efforts do not require express federal statutory authorization. In particular, the INA

includes provisions to deputize state officials to perform the functions of federal immigration officers. 8 U.S.C. § 1357(g)(1)-(9). But it also includes a savings clause underscoring that this specific authorization neither excludes other cooperative efforts nor suggests that federal statutory authorization is necessary for state and local officials to assist in the enforcement of federal immigration laws. § 1357(g)(9)-(10). Subsection 1357(g)(10) specifically provides that

> [n]othing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State (A) to communicate with the Attorney General regarding the immigration status of any individual . . . ; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Another provision, 8 U.S.C. § 1373(c), mandates federal officials to respond to inquiries generated by state and local law enforcement. That section provides that federal authorities "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." And § 1373(a) prohibits any restriction on the authority of state and local gov-

ernments to send to or receive from "the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." *See also* §§ 1373(b), 1644. In order to fulfill these statutory mandates, for more than a decade the federal government has maintained a Law Enforcement Support Center (LESC), a 24-hour-a-day, 365-day-per-year centralized database and response service, which "provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity."[3]

The INA also requires every alien present in the United States for longer than 30 days (except for foreign diplomats and members of their households, *see* 8 U.S.C. § 1303(b)) to apply for registration documents verifying their lawful status, and to carry those documents at all times. 8 U.S.C. § 1302. Failure to apply is a federal misdemeanor punishable by up to six months' imprisonment and a $1000 fine, § 1306(a), and failure to carry the registration documents is a misdemeanor punishable by up to 30 days' imprisonment and a $100 fine. § 1304(e).

The INA authorizes the Attorney General to investigate, apprehend and detain removable aliens.

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[3] U.S. Immigration and Customs Enforcement, *Law Enforcement Support Center*, www.ice.gov/lesc/.

8 U.S.C. §§ 1226, 1357. Federal law is largely silent regarding state enforcement authority in this regard, but 8 U.S.C. § 1252c expressly authorizes state and local officials, if acting with confirmation from the INS, to arrest unlawfully-present aliens who have reentered the country after leaving or being deported following the commission of a felony.

IRCA addresses the problem of the unlawful employment of illegal immigrants from the demand side. It prohibits employers from hiring or employing aliens who are not authorized to work. 8 U.S.C. §§ 1324a(a) & 1324a(e)(4). IRCA also requires employers to follow certain employment-authorization verification procedures, *see* § 1324a(b), compliance with which provides an affirmative defense to the hiring of an unauthorized alien, § 1324a(a)(3). IRCA permits the use of these verification documents for the enforcement of federal work-authorization law, or federal perjury and similar laws, but prohibits their use for other purposes. § 1324a(b)(5) & (d)(2)(F). IRCA contains an express preemption provision, § 1324(h)(2):

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

IRCA does not address unlawful employment on the supply side, *i.e.*, by imposing sanctions on illegal immigrants who seek and obtain work in violation of

federal law, and IRCA's preemption provision does not reach such state laws.

B. Arizona's S.B. 1070

S.B. 1070 was signed by Governor Brewer on April 23, 2010, and was clarified and revised a week later by Arizona H.B. 2162, 2010 Ariz. Sess. Laws ch. 211. The statute reflects a comprehensive effort to deal with the disproportionate impact of illegal immigration on Arizona. While the United States initially sought to enjoin numerous sections of S.B. 1070, it was only successful in enjoining the four provisions at issue here: Sections 2(B), 3, 5(C), and 6.

Section 2, Ariz. Rev. Stat. § 11-1051, is designed to facilitate communications between federal, state and local officials regarding potential violations of the federal immigration laws. Section 2(B) provides that "[f]or any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person." Section 2(B) further provides that "[a]ny person who is arrested shall have the person's immigration status determined," *i.e.*, verified by the federal government pursuant to 8 U.S.C. § 1373(c), "before the person is released." Section 2 must be implemented "in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons

and respecting the privileges and immunities of United States citizens." § 2(L).

Section 3, Ariz. Rev. Stat. § 13-1509, reinforces the federal alien registration laws by providing that "[i]n addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)." § 3(A). Subsection 3(H) imposes the same maximum penalties for violations of subsection (A) that Congress has imposed for violations of 8 U.S.C. § 1304(e), which in turn are less than the penalties for violations of § 1306(a). The only substantive difference between Section 3 and the federal statutes is that Section 3 has no application at all to persons authorized to be in the United States. § 3(F).

Section 5(C) of S.B. 1070, Ariz Rev. Stat. § 13-2928(C), reinforces the federal prohibitions on unauthorized employment directed to the demand side of employers by addressing the supply side of would-be employees. That provision makes it a misdemeanor under Arizona law for "a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state."

Section 6, Ariz. Rev. Stat. § 13-3883(A)(5), adds to Arizona peace officers' warrantless arrest authority by authorizing such arrests when "the officer has probable cause to believe . . . [t]he person to be

arrested has committed any public offense that makes the person removable from the United States."

C. Proceedings Below

1. On July 6, 2010, the United States took the extraordinary step of seeking to enjoin S.B. 1070 before it could take effect. On July 28, 2010, just a day before S.B. 1070's effective date, the district court preliminarily enjoined enforcement of Sections 2(B), 3, 5(C), and 6. App. 122a-23a.

2. Arizona appealed the injunction to the Ninth Circuit under 28 U.S.C. § 1292(a)(1). The panel divided with respect to Sections 2(B) and 6, but unanimously affirmed the District Court regarding Sections 3 and 5(C).

The Ninth Circuit began its legal analysis by acknowledging both that the federal government had brought a facial challenge and that under *United States v. Salerno*, 481 U.S. 739 (1987) a successful facial challenge requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." App. 132a. Nonetheless, the majority expressly declined to determine whether there were constitutional applications of S.B. 1070's contested provisions and instead concluded that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent." *Id.* at 7a & n.4.

As to Section 2(B), the Ninth Circuit began its analysis by rejecting Arizona's interpretation of its own statute, and interpreting it instead to maximize the number of situations in which state law enforcement authorities would contact federal officials. Then, despite the express savings clause in 8 U.S.C. § 1357(g)(10), the majority interpreted § 1357(g)(1)-(9)'s grant of authority to the Attorney General to deputize state law enforcement officers in certain circumstances as precluding other state efforts. The Ninth Circuit held that this grant "demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General." App. 17a (emphasis added). The majority acknowledged the savings clause, and that 8 U.S.C. §§ 1373 and 1644 expressly permit communications between state and federal authorities regarding possible immigration violations. Nonetheless, the majority focused on 8 U.S.C. § 1357(g)(1)-(9), and concluded that state authorities can communicate with federal authorities only "when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis." App. 15a. Accordingly, Section 2(B) was preempted.

The Ninth Circuit then found Section 3 likely preempted by viewing 8 U.S.C. §§ 1304 and 1306 as "a comprehensive scheme for immigrant registration." App. 28a. The Court concluded that Congress

did not "intend[] for states to participate in the enforcement or punishment of federal immigration registration rules." App. 29a.

As to Section 5(C), the Ninth Circuit began by acknowledging that this employment provision addresses an area of traditional state authority and so the presumption against preemption applies. App. 41a. Nevertheless, it relied on Circuit precedent to construe Congress' decision to focus on the demand side and sanction only employers as precluding States from enacting complementary sanctions directed to employees. "Congress's inaction" in IRCA "in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers," according to the majority, implies Congress necessarily "intended to prohibit states from criminalizing work." App. 39a. The court did not discuss the reach and implications of the limited express preemption provision in 8 U.S.C. § 1324a(h).

The panel professed itself bound by the Ninth Circuit's decision in *National Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) ("*NCIR*"), that Congress had not empowered the INS to prohibit work by aliens pending their deportation proceedings, because Congress intended to sanction employers only. The panel did not acknowledge this Court's holding in reversing *NCIR*—that the no-work bond conditions at issue there *were* consistent with Congress' intent "to preserve jobs for American workers,"

which "was forcefully recognized . . . in the IRCA." 502 U.S. at 194 & n.8. Nor did the panel explain why a limitation on the INS, which like all federal agencies depends on statutory authorization, would apply to States who enjoy both plenary power and the presumption against preemption in areas of traditional state authority. App. 34a-35a ("[W]e do not believe that we can revisit our previous conclusion about Congress' intent simply because we are considering the effect of that intent on a different legal question.").

Finally, in addressing Section 6, the panel majority held that "states do not have the inherent authority to enforce the civil provisions of federal immigration law," App. at 45a. The Ninth Circuit acknowledged the contrary view of the Tenth Circuit, but disagreed and created an acknowledged and open conflict with *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). Because the majority found inherent or plenary authority lacking, it demanded express federal statutory authority for Section 6. It found such authority absent because 8 U.S.C. § 1252c permits state officers to arrest aliens who have been convicted of crimes and deported (or have voluntarily departed) but returned to the United States, but only in more limited circumstances. "Section 6 significantly expands the circumstances in which Congress has allowed state and local officers to arrest immigrants." App. 44a-45a. Based on its unusual approach to facial challenges in the preemption context, the majority did not address Arizona's

argument that, because § 1252c clearly authorized *some* arrests permitted by Section 6, the latter had constitutional applications and could not be facially invalidated.

The majority buttressed its preemption conclusion by referring to criticisms of S.B. 1070 "attributable to foreign governments," which the majority viewed as demonstrating that S.B. 1070 "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." App. 26a.

3. Judge Noonan issued a concurring opinion emphasizing that S.B. 1070 had engendered complaints from foreign governments, which should, in his view, weigh heavily in the preemption analysis. App. 55a.

4. Judge Bea dissented as to Sections 2(B) and 6 and specifically distanced himself from some of the panel majority's broader reasoning. As to Section 2(B), Judge Bea emphasized that both the savings clause in § 1357(g)(10) and §1373(c)'s mandatory duty on federal officials to respond to requests by state law enforcement foreclosed the majority's effort to read the express authorization for deputization in § 1357(g)(1)-(9) as implicitly precluding other cooperative efforts. App. 93a. Judge Bea further recognized that "because this is a facial challenge, [the court] must assume that Arizona police officers will comply with federal law and the Constitution in executing Section 2(B)." App. 86a.

Judge Bea also dissented as to Section 6. He took issue with the majority's reasoning that States lack inherent authority to enforce federal civil immigration laws. He found the majority's view inconsistent with, *inter alia*, this Court's decision in *Muehler v. Mena*, 544 U.S. 93, 101 (2005), upholding the authority of state officers to ask individuals they encounter about their immigration status even absent any reasonable suspicion of unlawful conduct. App. 104a. Judge Bea regarded § 1252c as simply codifying a portion of this pre-existing inherent authority without impliedly negating the balance. Judge Bea also noted that Section 6 should survive a facial challenge even under the majority's understanding of state authority, because some of the arrests it authorizes are also expressly permitted by § 1252c. App. 114a.

Finally, Judge Bea disagreed with the panel majority that complaints from foreign officials about S.B. 1070 are relevant to the preemption analysis because they "ha[ve] had a deleterious effect on the United States' foreign relations." App. 22a. Judge Bea argued that "the Executive's desire to appease foreign governments' complaints cannot override Congressionally-mandated provisions," that S.B. 1070 does not conflict with any "established foreign relations policy goal," and that the majority's finding of preemption in this case gave a "heckler's veto" to "other nations' foreign ministries." App. 95a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has completely foreclosed Arizona's effort to address the disproportionate impact of unlawful immigration in a State with a 370-mile border with Mexico. Without even considering whether Arizona's statute was capable of any constitutional application, and expressly rejecting Arizona's limiting construction of its own statute, the Court of Appeals invalidated four key provisions of S.B. 1070 on their face before the statute ever took effect. The Ninth Circuit did not conclude that the entire field of immigration enforcement was preempted. Nor could it have, in light of this Court's precedents and the plain text of the federal immigration statutes expressly inviting cooperative enforcement efforts and compelling federal officials to respond to state and local inquiries about immigration status. Nor does the decision below turn on any express preemption provision. Rather, the Ninth Circuit found Arizona's efforts impliedly preempted on their face, because they conflicted with the congressional purpose the Ninth Circuit divined from various immigration statutes.

That decision turns well-established principles of federalism and facial challenges upside down, and implicates issues of the most fundamental importance. The baseline assumptions of our federal system are that States have inherent, plenary police power and that cooperative law enforcement is the norm. States, unlike federal agencies, are not crea-

tures of the federal Congress and do not depend on federal statutes for authorization. It is, moreover, commonplace for state and federal law to prohibit the same conduct, and this Court has repeatedly emphasized that state officials are primarily governed by state law even when they cooperate with federal law enforcement officials. Thus, a conclusion that States are completely foreclosed from enforcing federal law or from enacting state laws that prohibit conduct made unlawful by Congress could be supported only by the clearest of congressional statements. Here, far from foreclosing such cooperative law enforcement efforts, the federal immigration laws expressly contemplate such cooperation and go so far as to compel federal cooperation with state efforts. The Ninth Circuit nonetheless condemned Arizona's efforts *ab initio* by ignoring savings clauses and a presumption against preemption, and without even considering whether the laws were susceptible of constitutional application.

This Court should review and reverse that decision for three basic reasons. First, this case implicates issues of extraordinary importance, as underscored by the federal government's extraordinary decision to initiate a facial challenge to Arizona's law before it could take effect. No one can deny that the problem of unlawful immigration is significant or that it has a disproportionate impact on border States. It is thus no small matter to conclude, as the Ninth Circuit did, that only the national government in Washington can address this problem.

Second, the decision below creates an express and acknowledged circuit split over the preemptive force of the federal immigration laws. The Tenth Circuit views those laws as affirmatively encouraging cooperative enforcement by States; the Ninth Circuit reads such authorization for specific cooperation as negating any inherent state law enforcement authority.

Third, the decision below is wrong and flatly inconsistent with this Court's precedents. While this Court has repeatedly emphasized that outside of the First Amendment context a law capable of constitutional application is not facially invalid, the Ninth Circuit refused to even consider whether the relevant provisions of S.B. 1070 were capable of any constitutional application. While this Court has emphasized that state efforts to cooperate with the enforcement of federal law are primarily governed by state law and are a healthy component of our federal system, the Ninth Circuit viewed such efforts with what amounts to a presumption of unconstitutionality. And while this Court has routinely viewed parallel prohibitions—where state and federal law prohibit the exact same conduct—as not implicating issues of preemption whether express or implied, the Ninth Circuit held that state efforts to facilitate enforcement or impose parallel prohibitions on conduct prohibited by federal immigration law are verboten.

I. Arizona's Authority to Enact S.B. 1070 Is a Matter of Pressing Importance

It is widely recognized that the federal immigration laws are not adequately enforced; the President himself has described the federal immigration system as "broken." ER 398. This broken system leaves the people and government of Arizona to bear a disproportionate share of the burden of a national problem.[4] The Arizona border is so porous that an estimated 50% of illegal aliens entering the United States come through the State. ER 384. Its status as a conduit for human and drug smuggling has rendered large areas of southern Arizona highly dangerous. Significant swaths of public lands have become so dangerous that National Park rangers have been forced to patrol with M-16 carbines[5] and public access is forbidden or sternly discouraged. Strongly-worded warning signs are posted as far as 80 miles from the border and only 30 miles from the

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[4] *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. L.F. 57, 80 (2007) (costs of illegal immigration are mostly local while benefits are mostly national).

[5] Ralph Vartabedian, The Law Loses Out at U.S. Parks, L.A. Times, Jan. 23, 2003, http://articles.latimes.com/2003/jan/23/nation/na-ranger23; *see also* Monica Yancy, Our National Parks, May 10, 2007, http://ournationalparks.us/index.php/site/story_issues/budgetwoes_reduce_patrols_assistance_in_parks/ (park rangers voted Organ Pipe Cactus National Monument the nation's most dangerous national parkland, seizing 14,000 pounds of marijuana and engaging in more than 30 car chases there in 2001 alone).

City of Phoenix.[6] Police officers in the border town of Nogales, Arizona have received death threats from Mexican drug cartels. ER 255-56. Private ranchers living near the border constantly face the problems and safety risks associated with a steady flow of illegal crossings of their land. ER 223-31, 405.

Approximately six percent of Arizona's total inhabitants—an estimated 400,000 individuals—are aliens who are unlawfully present and not authorized to work.[7] Nonetheless, over half—230,000—engage in work, composing 7.4% of all Arizona workers.[8]

Moreover, the Arizona Department of Corrections has estimated that criminal aliens now make up more than 17% of Arizona's prison population, and the Maricopa County Attorney's Office notes that 21.8% of the felony defendants in the Maricopa County Superior Court are illegal aliens. ER 264-74 & 419. Arizona spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens who

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[6] *See* ER 162, 165, 167 (photo of warning sign stating "travel not recommended" and that "visitors may encounter armed criminals and smuggling vehicles moving at high rates of speed").

[7] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, p. 15 tbl.5, pewhispanic.org/files/reports/133.pdf.

[8] *Id.* at 21 tbl. A1.

entered and reside in the country in violation of federal law. ER 429.

While no one can deny that Arizona bears the brunt of the impact of unlawful immigration, the federal government has largely ignored Arizona's pleas for additional resources and help. ER 380-97. Between 2000 and 2010, the number of aliens unlawfully present in Arizona increased an average of 10,000 per year,[9] and yet the federal efforts remain demonstrably inadequate. Thus, while Arizona suffers disproportionate and distinct problems, the Ninth Circuit decision suggests that there is almost nothing Arizona can do to supplement the inadequate federal efforts. The injunction against S.B. 1070 leaves Arizona and its people to suffer from a serious problem without any realistic legal tools for addressing it. Such a conclusion is irreconcilable with the basic tenets of Our Federalism, and border States should not be placed in such an untenable position unless this Court determines that the Constitution and the federal immigration laws demand such a counterintuitive result.

The legal significance of the question presented here extends well beyond Arizona and its particularly dire straits. Although the burden placed on Arizona by illegal immigration is unique, many other

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[9] The unauthorized-alien population rose and fell roughly in line with the fortunes of the economy, peaking at 500,000 between the years 2005 and 2009 before receding somewhat to 400,000 in 2010. Passel & Cohn, n.7 *supra*, at 23 tbl. A3.

States and localities have enacted laws and policies designed to reduce the effects of illegal immigration. At least nine other States have begun requiring that law enforcement officers conduct immigration status checks in various circumstances surrounding investigations, arrests and jail bookings.[10] Many local agencies routinely check the immigration status of suspects or arrestees.[11] At least seven States have

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[10] *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535 (hereinafter "Alabama TCPA"), § 12 (on reasonable suspicion or booking into custody); *id.* § 19(a) (for persons "charged with a crime for which bail is required" or confined in any "state, county, or municipal jail"); Ga. Code § 42-4-14(b) & (c) (persons confined in jail); Ind. Code § 11-10-1-2(a) ("committed criminal offender[s]"); Mo. Rev. Stat. § 577.680(1) (persons "charged and confined to jail"); Okla. Stat. tit. 22 § 171.2(A) & (B) (felony and DUI suspects confined in jail); Tenn Code. § 40-7-123(a) & (b) (persons confined in jail); S.C. Code § 23-3-1100 (same); S.C. Code § 17-13-170 (on "reasonable suspicion" of unlawful presence during any lawful stop or investigation); Utah Code § 17-22-9.5 (detainees charged with felonies or DUI); Utah Code § 76-9-1003(1)(a)(i) (persons arrested for felonies or serious misdemeanors); R.I. Exec. Order 08-01, ER 147-49 (arrestees and investigatees); David W. Chen & Kareem Fahim, *Immigration Checks Ordered in New Jersey*, N.Y. Times, August 22, 2007 ("criminal suspects"), http://www.nytimes.com/2007/08/23/nyregion/23immig.html.

[11] ER 135-36 (individual officer); 340-41 (59 surveyed State and local jurisdictions "generally" inquire into arrestees' immigration status, while only 34 do not—and many others ask for serious criminals or later in the booking process); *e.g.,* Prince William Cnty., Va. Police Dept. Gen. Order 45.01, *Local Enforcement Response to Illegal Immigration,* http://www.pwcgov.org/docLibrary/PDF/008333.pdf.

expressly empowered their officers to enforce the immigration laws in other contexts as well.[12] In addition to Arizona (in Section 5(C) of S.B. 1070), Alabama and Mississippi have targeted the supply side of the unlawful employment problem by prohibiting the unauthorized acceptance or performance of work by an alien.[13] And like Section 3 of S.B. 1070, Alabama and South Carolina have added state-law prohibitions of violations of the federal alien registration laws.[14] Many of these statutes have become the subject of legal challenges similar to the one against S.B. 1070, although only Arizona and Alabama have prompted the United States to file a declaratory action seeking to enjoin their statutes. *See Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-cv-1804-TWT (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD (S.D. Ind. 2011); *Hispanic Interest Coalition of Alabama v. Bentley*, No. 5:11-cv-02484-SLB (N.D. Ala. 2011); *Parsley v. Bentley*, No. 5:11-cv-

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[12] Alabama TCPA, § 5(b); Ga. Code § 17-5-100(b); Ind. Code. §§ 5-2-18.2(7)(2), 35-33-1-1(11) & (12); S.C. Code § 23-6-60; Utah Code § 17-22-9.5(3)(b)(ii); Va. Code § 19.2-81.6; Co. Rev. Stat. 29-29-103(2)(a)(I).

[13] *See* Alabama TCPA, § 11(a); Miss. Code § 71-11-3(c)(i) (unauthorized work a felony).

[14] Alabama TCPA, § 10(a); S.C. Code § 16-17-750(A). A number of other States have enacted criminal offenses mirroring other federal immigration offenses, such as human smuggling. *E.g.*, S.C. Code § 16-9-460(C); Okla. Stat. tit. 21, § 446, Utah. Stat. Ann. § 76-10-2701; Ga. Code § 16-5-46.

02736, (N.D. Ala. 2011); *United States v. State of Alabama*, No.2:11-cv-02746-WMA (N.D. Ala.); *Utah Coalition of La Raza v. Herbert*, No. 2:11-cv-401 CW (D. Utah).

The federal government's own response to S.B. 1070 underscores the importance of this case. The President publicly criticized the statute.[15] The Justice Department launched this extraordinary effort to enjoin a duly-enacted state statute on its face before it could take effect and then dispatched its senior Deputy Solicitor General to argue a preliminary injunction motion in district court. Nothing about this lawsuit and these issues is ordinary. These issues strike at the heart of our federal balance. They self-evidently merit this Court's attention.

II. The Decision Below Creates a Split Among the Courts of Appeals.

Over Judge Bea's dissent, the decision below opens an acknowledged and unambiguous split of authority over the power of state law enforcement officers to enforce the civil provisions of immigration law. The split in authority is not limited to that question, but goes to the proper reading of the federal immigration statutes and the fundamental question of the extent

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[15] *E.g.*, White House Office of the Press Secretary, *Remarks by President Obama and President Calderón of Mexico at Joint Press Availability*, May 19, 2010, *available at* www.whitehouse.gov/the-press-office/remarks-presidentobama-and-president-calder-n-mexico-joint-press-availability

to which state law enforcement efforts depend on authorization from federal law.

Courts have long held that state officers may effect arrests based on the commission of an immigration-related crime itself, such as illegal entry or human trafficking. *See, e.g., United States v. Villa-Velasquez*, 282 F.3d 553, 555-56 (8th Cir. 2002). The panel majority here, however, held that state and local officers are not permitted to enforce "the civil provisions of the INA regulating authorized entry, length of stay, residence status, and deportation." App. 46a (emphasis and brackets omitted). This bar includes a prohibition on state investigation or detention of persons based on their status of "civil removability." App 45a.

The majority expressly "recognize[d] that [its] view conflicts with the Tenth Circuit's," App. 48a (citing *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999)). In *Vasquez-Alvarez* the Tenth Circuit considered an arrest that "was based solely on the fact that Vasquez was an illegal alien." 176 F.3d at 1295. The court held that the long-standing rule "that state and local law enforcement officers are empowered to arrest for violations of federal law" gives them "the general authority to investigate and make arrests for violations of federal immigration laws," and that 8 U.S.C. § 1252c's express authorization of arrests in certain circumstances "did not affect this preexisting authority" in other situations. 176 F.3d at 1296-97; *see also United States v. Sali-*

nas-Calderon, 728 F.2d 1298, 1301 & n.3 (10th Cir. 1984) ("A state trooper has general investigatory authority to inquire into possible immigration violations."); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001); *United States v. Soto-Cervantes*, 138 F.3d 1319, 1324 (10th Cir. 1998). The Tenth Circuit found its conclusion buttressed by 8 U.S.C. § 1357(g)(10). The Tenth Circuit read that savings clause as a savings clause and viewed it as "a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1300.

The Ninth Circuit here started from fundamentally different premises and reached the opposite conclusion. Rather than begin with the premise that States enjoy plenary power and state law enforcement officers do not require authorization from the federal Congress, the Ninth Circuit took the opposite approach. It concluded that States have no inherent enforcement power, App. 46a, and that, far from inviting state cooperation, "8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General," App. 17a (emphasis added). Based on that reading of federal law – a reading irreconcilable with the Tenth Circuit's view – the panel found Sections 2(B) and 6 preempted because of an absence of federal authorization for the State's enforcement role. Analogously, the panel found Section 5(C) to be

preempted because nothing in IRCA expressly invites state enforcement of federal work authorization rules, App. 35a, and Section 3 to be preempted because Congress had not authorized States to incorporate federal criminal alien-registration requirements into their own criminal codes. App. 28a-29a.

The Ninth Circuit's rule—that States may not take any investigative or enforcement action against aliens based on their civil violations of the immigration laws without an express permission slip from Congress—directly conflicts with the approach not only of the Tenth Circuit but also of other Circuits. *See*, *e.g.*, *Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010) (passengers' admission "that they were in the country illegally" permitted extension of traffic stop by Rhode Island officer based on reasonable suspicion that they "had committed immigration violations"); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001) (statement by one occupant of a stopped vehicle that another "was not legally present in the United States" provided reasonable suspicion for South Dakota officer "to inquire into [the other's] alienage"); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007) (Virginia State Police officer could contact ICE and extend traffic stop on being told that "passengers were illegal aliens") *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) (Port of New Orleans

Harbor Police had authority to detain alien stowaways in incoming vessel).[16]

This Court has not directly spoken on this question, although its decision in *Muehler* suggests that the Ninth Circuit's view is mistaken. In *Muehler*, this Court held that no independent justification was required under the Fourth Amendment for a state officer's questioning of an arrestee regarding her immigration status, but did not address whether the questioning was consistent with the federal immigration laws. 544 U.S. at 100-01. In light of the

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[16] The panel majority found support for its view in the Sixth Circuit's decision in *United States v. Urrieta*. App. 46a. There, the court considered an argument that an investigation was justified by the state officer's suspicion that the subject was an unlawful alien, and suggested that the investigation had to be supported by "a reasonable suspicion that [the suspect] was engaged in some nonimmigration-related illegal activity." 520 F.3d 569, 574 (6th Cir. 2008). Although it is debatable whether this was part of the court's holding, as it noted that the government had withdrawn the argument, *id.*, *Urrieta* does illustrate the divergent approaches being taken to these questions, as do the conflicting opinions issued by the Department of Justice Office of Legal Counsel in the last decade. *See* App. at 52a n.24 ("OLC's conclusion about the issue in the 2002 memo was different in 1996 under the direction of President Clinton, and was different in 1989, under the direction of President H.W. Bush."); Memorandum for the Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations* (Apr. 3, 2002), ER 346.

Ninth Circuit's decision, it has become urgent that the Court answer this question definitively. In hundreds or thousands of incidents every day, state and local law enforcement officers are given reason to suspect that persons they have encountered are in violation of the federal immigration laws. There is absolutely no reason the legal authority of those state and local officers should turn on the Circuit in which the incident arises. This Court therefore should grant certiorari to resolve the split between the Courts of Appeals on this important issue.

III. The Ninth Circuit's Decision Is Wrong and Conflicts With This Court's Precedents.

This Court has long recognized that "federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State . . .'" *Haywood v. Drown*, 129 S. Ct. 2108, 2114-15 (2009). There is no "immigration exception" to this rule. This Court has consistently declined to find field preemption in the immigration context, rejecting the possibility that the INA might be so comprehensive as to leave no room for state action, *De Canas*, 424 U.S. at 354-63, and instead focusing on whether an "additional or auxiliary regulation[]" by a State "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 68 (1941). It has expressly upheld States' "authority

to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). And as a general matter, this Court has recognized that state law enforcement may enforce federal laws as part of cooperative law enforcement that is a salutary aspect of Our Federalism. *See, e.g., United States v. Di Re*, 332 U.S. 581, 589-90 (1948). The Ninth Circuit's opinion cannot be reconciled with these fundamental tenets of this Court's jurisprudence.

A. The Panel Majority Misapplied This Court's Precedents Concerning Facial Challenges

The Ninth Circuit's approach to this facial challenge cannot be reconciled with this Court's precedents. Under *United States v. Salerno*, 481 U.S. 739, 745 (1987), it is clear that a plaintiff who elects to bring a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." App. 65a. That principle applies with full force in the preemption context. Where a state statute confers discretionary authority on its executive officers—as is obviously the case here—the statute will not be facially preempted unless "there is no possible set of conditions" under which the authority could be exercised "that would not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579-80 (1987).

While the Ninth Circuit acknowledged *Salerno*, it expressly declined to consider whether the challenged provisions of S.B. 1070 had constitutional applications. Instead, it inverted the facial-challenge standard by stating that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." App. 7a.

Not only is the conflict with this Court's precedent stark; it is almost certainly outcome-determinative. With respect to Section 2(B), for example, even the panel majority "agree[d] that . . . Congress contemplated state assistance in the identification of undocumented immigrants" in some circumstances even without the direction of the Attorney General. App. 18a. Under *Salerno* and *California Coastal Commission* that should have been sufficient to reject the facial challenge. Under the Ninth Circuit's novel inverted rule, a few indisputably constitutional applications were not enough.

The majority's mistake was even more stark with respect to Section 6: despite acknowledging that § 1252c expressly permits state authorities to arrest unlawfully-present aliens under some circumstances, App. 43a, the majority found Section 6 preempted solely because it would *permit* (but does not require) some arrests that "expand the scope of § 1252c," App. 44a n.20. The Ninth Circuit likewise failed to consider constitutional applications of

Sections 3 and 5(C) in light of its inverted rule for facial challenges.

The Ninth Circuit's analysis cannot be reconciled with *Salerno* and *California Coastal Commission*. The Court should grant certiorari to vindicate its facial challenge precedents.

B. The Ninth Circuit's Decision Conflicts With This Court's Immigration Preemption Decisions

This Court has already rejected the argument that States have no role in enforcing federal immigration law in *Plyler* and just last Term in *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011). The decision below cannot be reconciled with those precedents or with other preemption precedents of this Court.

At every turn, the Ninth Circuit viewed state enforcement of the federal immigration laws as an anomaly that required express authorization in federal law. Because cooperative law enforcement is the norm, not some anomaly, the Ninth Circuit approach could only be justified if immigration were an area of quasi-field preemption that States could only enter with express federal permission. This Court has never adopted that view, and it has articulated the contrary view, including quite dramatically in *Whiting*.

In *Whiting*, the Court considered the validity of another Arizona statute intended to combat unau-

thorized employment by aliens—this time by suspending or revoking the licensures of any businesses that knowingly employed unauthorized aliens—in light of IRCA's express preemption of "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The Arizona statute contained a broad definition of the "licenses" subject to suspension or revocation, including "articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State," *Whiting*, 131 S. Ct. at 1978 (quoting Ariz. Rev. Stat. § 23-211(9)(a)). This Court held "that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." *Whiting*, 131 S. Ct. at 1981.

The Court also rejected an implied preemption argument premised on the view that immigration is a matter of nearly exclusive federal concern. The court found conflict preemption concerns misplaced. Because "Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.* The Court found particularly relevant that "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects," having "adopt[ed] the federal definition of who

qualifies as an 'unauthorized alien,'" and expressly defined work authorization and the substantive prohibitions on employment by federal standards in order to prevent "conflict between state and federal law as to worker authorization." *Id.* The Court also rejected a contention that "the harshness of Arizona's law . . . impermissibly upsets [the] balance" of sanctions struck by Congress in IRCA. *Id.* at 1983.

As in *Whiting*, each section of S.B. 1070 at issue here avoids conflict concerns by adopting the relevant federal definitions of unlawful presence, work authorization, and registration requirements, and requires Arizona law enforcement officials to follow federally-established procedures for identifying unauthorized aliens. Moreover, as in *Whiting*, Sections 2(B) and 6 of S.B. 1070 are intended to operate within the scope of an express savings clause in the federal immigration statutes, § 1357(g)(10), which expressly reserves the authority of state officials "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

C. The Ninth Circuit's Decision Conflicts With This Court's Preemption Precedents

The decision below conflicts with this Court's preemption precedents in at least three respects. It misapplies the presumption against preemption;

inverts a savings clause; and finds conflict preemption of state laws that parallel federal requirements.

One of the "cornerstones of [this Court's] preemption jurisprudence" is the rule that

> in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks and alterations omitted)). The Ninth Circuit wrongly found this rule inapplicable with respect to Sections 2(B), 3, and 6 of S.B. 1070, and gave it only lip service with respect to Section 5(C).

With respect to Sections 2(B), 3, and 6, the panel majority concluded that "[t]he states have not traditionally occupied the field of identifying immigration violations," App. 12a (discussing Section 2(B)), "punishing unauthorized immigrants for their failure to comply with federal registration laws," App. 28a (Section 3), or "arresting immigrants for civil immigration violations," *id.* at 43a (Section 6). This approach fundamentally distorts the state function involved. If one views the relevant field at a level of generality that focuses on the federal issue – *e.g.*, not

law enforcement or arrest authority but law enforcement and arrest authority for federal crimes – then the relevant field can always be stated in ways that minimize state authority.

That view is mistaken in general and cannot be reconciled with the federal immigration statutes. In 8 U.S.C. §§ 1373, 1357(g), and 1252c, Congress has indisputably recognized that the States have substantial authority to enforce the federal immigration laws in conjunction with their broad, pre-existing law enforcement duties. In light of the States' traditional authority over law enforcement matters, including the cooperative enforcement of federal law, and the numerous recognitions of that state role in federal immigration law, the presumption against preemption should have applied to Sections 2(B), 3, and 6. Nonetheless, the Ninth Circuit found it wholly inapplicable.

Although the panel acknowledged the applicability of the presumption against preemption with respect to Section 5(C) of S.B. 1070, it then proceeded to ignore it. It noted that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of nonpreemption applies." App 33a. Nonetheless, and even though IRCA itself is silent on complementary supply side efforts to address would-be employees, the Ninth Circuit professed itself bound by its previous holding in *NCIR* that IRCA does not permit the *federal* INS to prohibit work pending the

determination of an alien's deportability. App. 35a. Even putting to one side the reality that *NCIR* was reversed by this Court on other grounds, the Ninth Circuit's reliance on *NCIR* was mistaken for reasons that demonstrate its failure to honor the presumption. States, unlike federal agencies, do not depend on federal statutes for their authority. If the presumption against preemption means anything, it means that States and federal agencies are not similarly situated when it comes to the negative implication to be drawn from an express authorization of particular conduct.[17]

The conflict with this Court's preemption precedents runs far deeper than just the Ninth Circuit's misapplication of the presumption against preemption. The court also violated the cardinal principle of preemption analysis – that congressional intent governs – by reading a savings clause expressly preserving state authority out of the statute. "[T]he purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth*, 129 S. Ct. at 1194 (quoting *Lohr,* 518 U.S. at 485). The presence of a

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[17] As further evidence of its complete abandonment of the presumption, the panel relied on preemption cases from the foreign-relations context—the opposite end of the federalism continuum—for the proposition that Section 5(C)'s supposed "adopt[ion] of a different technique" from IRCA "undermines the congressional calibration of force," and is therefore preempted. App. 40a (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); citing *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 369-80 (2000)).

saving clause reflects a congressional determination in favor of nonuniformity within its scope. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000). Despite these well-settled principles and Congress' clear direction in 8 U.S.C. § 1357(g)(10) that the deputization provisions in § 1357(g)(1)-(9) not be construed to limit pre-existing state efforts at cooperative law enforcement, the Ninth Circuit did precisely what Congress warned against. That conclusion is irreconcilable with both Congress' intent and this Court's preemption precedents.

Finally, the Ninth Circuit further departed from this Court's precedents by treating state law provisions that expressly parallel federal law requirements as the basis for finding conflict preemption. This Court's cases have routinely rejected the argument that state law requirements that parallel federal law prohibitions are a basis for preemption. *See Medtronic*, 518 U.S. at 481 (quoting 21 U.S.C. § 360k(a)(1)); *id.* at 495 (*no* preemption of state "requirements" that duplicate FDA requirements); *Wyeth*, 127 S. Ct. at 1187; *Altria Group v. Good,* 129 S. Ct. 538, 541 (2008). Instead, this Court has been quite reluctant to find preemption in the absence of a divergence in substantive requirements and based only on a conflict with the "federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 267 (1984); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (States may "provid[e] a damages remedy for claims premised on a violation of FDA regulations;" the state duties in such a case "parallel,

rather than add to, the federal requirement"). The one exception has been in the realm of sanctions against foreign governments, but as explained *infra*, the Ninth Circuit's invocation of such cases is just one more way in which its approach is in conflict with this Court's precedents.

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

Finally, over Judge Bea's strenuous dissent, the panel majority deviated from this Court's precedents by allowing complaints by foreign government officials and the disagreement of the Executive Branch to trump congressional intent. This approach is in conflict with this Court's decision in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994).

In *Barclays*, as here, a number of foreign governments and officials had "deplor[ed] [a California statute] in diplomatic notes, *amicus* briefs, and even retaliatory legislation," *id.* at 320; and the Secretary of State himself had noted the volume of complaints, *id.* at 324 n.22. This Court nonetheless rejected the relevance of these protests to the preemption analysis, holding that in the absence of evidence of preemptive Congressional intent, the contention that the statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28. The Court also rejected the contention that "a series of Executive Branch actions, statements, and *amicus*

filings . . . constitute a 'clear federal directive proscribing States' use of [the tax method in question]," *id.* at 328, noting that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations,'" *id.* at 329, and that therefore "Executive Branch communications that express federal policy but lack the force of law" cannot preempt an otherwise-valid state statute in that field. *Id.* at 330.

The Ninth Circuit invoked this Court's decision in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383-84 (2000). But *Crosby* involved sanctions against foreign governments. Immigration is different. Like the tax context of *Barclays*, but unlike the context of sanctions against Burma, immigration has serious (and disproportionate) domestic consequences and is not solely a matter of the vast external realm. Allowing foreign protests to trump the plenary power of the States in a matter with such profound domestic consequences as immigration would fundamentally reshape our federalist system. Such a significant reordering should not come from the Court of Appeals. This case clearly merits this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 2011

APPENDIX

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10–16645

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

STATE OF ARIZONA; JANICE K. BREWER, Governor of the State of Arizona, in her official capacity,

Defendants-Appellants.

Appeal from the United States District Court for the
District of Arizona, Eastern Division
No. 2:10-cv-01413-SRB
Susan R. Bolton, District Judge

Argued Nov. 1, 2010
Decided Apr. 11, 2011

Before NOONAN and PAEZ and BEA, Circuit Judges.

OPINION

PAEZ, Circuit Judge.

In April 2010, in response to a serious problem of unauthorized immigration along the Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy. Support Our Law Enforcement and Safe Neighborhoods Act, as amended by H.B. 2162 ("S.B. 1070"), "make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers.

Before Arizona's new immigration law went into effect, the United States sued the State of Arizona in federal district court alleging that S.B. 1070 violated the Supremacy Clause on the grounds that it was preempted by the Immigration and Nationality Act ("INA"), and that it violated the Commerce Clause. Along with its complaint, the United States filed a motion for injunctive relief seeking to enjoin implementation of S.B. 1070 in its entirety until a final decision is made about its constitutionality. Although the United States requested that the law be enjoined in its entirety, it specifically argued facial

challenges to only six select provisions of the law. *United States v. Arizona*, 703 F. Supp. 2d 980, 992 (D. Ariz. 2010).

The district court granted the United States' motion for a preliminary injunction in part, enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6, on the basis that federal law likely preempts these provisions. *Id.* at 1008. Arizona appealed the grant of injunctive relief, arguing that these four sections are not likely preempted; the United States did not cross-appeal the partial denial of injunctive relief. Thus, the United States' likelihood of success on its federal preemption argument against these four sections is the central issue this appeal presents. [1]

We have jurisdiction to review the district court's order under 28 U.S.C. § 1292(a)(1). We hold that the district court did not abuse its discretion by enjoining S.B. 1070 Sections 2(B), 3, 5(C), and 6. Therefore, we affirm the district court's preliminary injunction order enjoining these certain provisions of S.B. 1070.

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[1]A party seeking a preliminary injunction has the burden to demonstrate that (1) it is likely to succeed on the merits of the claim, (2) it will suffer irreparable harm absent injunctive relief, and (3) that the balance of the equities and the public interest favor granting the injunction. *Winter v. Natural Res. Def. Council Inc.*, 129 S. Ct. 365, 374 (2008). Our analysis here begins and focuses on the critical issue of the United States' likelihood of success on the merits of its preemption claim.

Standard of Review

We review the district court's grant of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). A preliminary injunction "should be reversed if the district court based 'its decision on an erroneous legal standard or on clearly erroneous findings of fact.' " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (*quoting FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004)). We review de novo the district court's conclusions on issues of law, including "the district court's decision regarding preemption and its interpretation and construction of a federal statute." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

Discussion

I. *General Preemption Principles*

[1] The federal preemption doctrine stems from the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the "fundamental principle of the Constitution [ ] that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Our analysis of a preemption claim [M]ust be guided by two cornerstones of [the Supreme Court's] pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. . . . Second, [i]n all preemp-

tion cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (internal quotation marks and citations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[2] Even if Congress has not explicitly provided for preemption in a given statute, the Supreme Court "ha[s] found that state law must yield to a congressional Act in at least two circumstances." *Crosby*, 530 U.S. at 372. First, "[w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Id.* (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989)). Second, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Id.* Conflict preemption, in turn, has two forms: impossibility and obstacle preemption. *Id.* at 372-373. Impossibility preemption exists "where it is impossible for a private party to comply with both state and federal law." *Id.* Obstacle preemption exists "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). To determine whether obstacle preemption exists, the Supreme

Court has instructed that we employ our "judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.*[2]

We recently applied the facial challenge standard from *United States v. Salerno*, 481 U.S. 739 (1987), to a facial preemption case. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579-80 (9th Cir. 2008) (en banc). In *Sprint*, the appellant argued that a federal law "preclud[ing] state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" facially preempted a San Diego ordinance that imposed specific requirements on applications for wireless facilities. *Id.* At 573-74. We explained in *Sprint* that "[t]he Supreme Court and this court have called into question the continuing validity of the Salerno rule in the context of First Amendment challenges. . . . In cases involving federal preemption of a local statute, however, the rule applies with full force." *Id.* at 579, n.3.[3]

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[2] The Supreme Court has recognized "that the categories of preemption are not "rigidly distinct." *Crosby*, 530 U.S. at 372 n.6 (quoting *English v. Gen. Elec., Co.,* 496 U.S. 72, 79 n.5 (1990)).

[3] Although we use the *Salerno* standard in a preemption analysis, it is not entirely clear from relevant Supreme Court cases the extent to which the *Salerno* doctrine applies to a facial preemption challenge. *Crosby*, 530 U.S. 363, and *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003) are both facial preemption cases decided after *Salerno* and—

[3] Thus, under *Salerno*, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Sprint*, 543 F.3d at 579 (quoting *Salerno,* 481 U.S. at 745). We stress that the question before us is not, as Arizona has portrayed, whether state and local law enforcement officials can *apply* the statute in a constitutional way. Arizona's framing of the *Salerno* issue assumes that S.B. 1070 is not preempted on its face, and then points out allegedly permissible applications of it. This formulation misses the point: there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause.[4]

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on this point—are the most analogous Supreme Court cases available to guide our review here. Neither case cites *Salerno* nor mentions its standard in the opinions, concurrences, or dissents. Indeed, the *only* Supreme Court preemption case that we have found which references the *Salerno* standard is *Anderson v. Edwards*, 514 U.S. 143 (1995), which we cited in *Sprint*.

But *Edwards* does not cite *Salerno* in the *preemption* section of the opinion. Rather, the Court references *Salerno* in the section of the *Edwards* opinion holding that "the California Rule does not *violate* any of the three federal regulations on which the Court of Appeals relied." 514 U.S. at 155 (emphasis added). *Edwards* continues on, in another section, to hold that the California regulation at issue is also not preempted by federal law; this analysis includes no mention of the *Salerno* standard.

[4] Here, we conclude that the relevant provisions of S.B. 1070 facially conflict with Congressional intent as expressed in provisions of the INA. If that were not the case, as in *Sprint*, we would have next considered whether the statute could be applied in a constitutional manner.

II. *Section 2(B)*[5]

S.B. 1070 Section 2(B) provides, in the first sentence, that when officers have reasonable suspicion that someone they have lawfully stopped, detained, or arrested is an unauthorized immigrant, they "shall" make "a reasonable attempt . . . when practicable, to determine the immigration status" of the person. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010). Section 2(B)'s second and third sentences provide that "[a]ny person who is arrested shall have the person's immi-

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[5] Section 2(B) of Arizona's law provides:

For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town [of] this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c) . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

gration status determined before the person is released," and "[t]he person's immigration status shall be verified with the federal government." *Id.* The Section's fifth sentence states that a "person is presumed to not be an alien who is unlawfully present in the United States if the person provides" a form of identification included in a prescribed list.[6]

A. *Interpretation of Section 2(B)*

To review the district court's preliminary injunction of Section 2(B), we must first determine how the Section's sentences relate to each other. Arizona argues that Section 2(B) does not require its officers to determine the immigration status of every person who is arrested. Arizona maintains that the language in the second sentence, "[a]ny person who is arrested shall have the person's immigration status determined," should be read in conjunction with the first sentence requiring officers to make "a reasonable attempt . . . when practicable, to determine the immigration status" of a person they have stopped, detained, or arrested, *if there is reasonable suspicion* the person is an unauthorized immigrant. That is,

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[6] We have carefully considered the dissent and we respond to its arguments as appropriate. We do not, however, respond where the dissent has resorted to fairy tale quotes and other superfluous and distracting rhetoric. These devices make light of the seriousness of the issues before this court and distract from the legitimate judicial disagreements that separate the majority and dissent.

Arizona argues that its officers are only required to verify the immigration status of an arrested person before release if reasonable suspicion exists that the person lacks proper documentation.

On its face, the text does not support Arizona's reading of Section 2(B). The second sentence is unambiguous: "*Any* person who is arrested *shall* have the person's immigration status *determined* before the person is released." Ariz. Rev. Stat. Ann. § 11-1051(B) (2010) (emphasis added). The all-encompassing "any person," the mandatory "shall," and the definite "determined," make this provision incompatible with the first sentence's qualified "reasonable attempt . . . when practicable," and qualified "reasonable suspicion."

In addition, Arizona's reading creates irreconcilable confusion as to the meaning of the third and fifth sentences. The third sentence, which follows the requirement of determining status prior to an arrestee being released, provides that "[t]he person's immigration status shall be verified with the federal government." The fifth sentence enumerates several forms of identification that will provide a presumption that a person is lawfully documented. These two sentences must apply to different—and unrelated—status-checking requirements since one mandates contact with the federal government and a definite verification of status, while the other permits a mere unverified presumption of status, assuming the presumption is not rebutted by other facts. Arizona's reading would give law enforcement officers conflict-

ing direction. That is, under Arizona's reading, if an officer arrests a person and reasonably suspects that the arrestee is undocumented, but the arrestee provides a valid Arizona driver's license, is the officer no longer bound by the third sentence's requirement that he or she "shall" verify the arrestee's status with the federal government?

[4] We agree with the district court that the reasonable suspicion requirement in the first sentence does not modify the plain meaning of the second sentence. Thus, Section 2(B) requires officers to verify—with the federal government—the immigration status of *all* arrestees before they are released, regardless of whether or not reasonable suspicion exists that the arrestee is an undocumented immigrant. Our interpretation gives effect to "arrest" in the first sentence and "arrest" in the second sentence. The first and second sentences apply to different points in the sequential process of effecting an arrest, and at some later point, releasing the arrestee. The mandate imposed in the first sentence applies at the initial stage of an encounter or arrest, which is evident by the fact that the status-checking requirement does not override an officer's need to attend to an ongoing and immediate situation: "a reasonable attempt shall be made, *when practicable*, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation." (emphasis added). The mandatory directive in the second sentence applies at the end of the process:

an arrestee's immigration status "shall . . . [be] determined before the person is released."[7]

B. *Preemption of Section 2(B)*

As the Supreme Court recently instructed, every preemption analysis "must be guided by two cornerstones." *Wyeth*, 129 S. Ct. at 1194. The first is that "the purpose of Congress is the ultimate touchstone." *Id.* The second is that a presumption against preemption applies when "Congress has legislated. . . in a field which the States have traditionally occupied." *Id.* The states have not traditionally occupied the field of identifying immigration violations so we apply no presumption against preemption for Section 2(B).

We begin with "the purpose of Congress" by examining the text of 8 U.S.C. § 1357(g). In this section of the INA, titled "Performance of immigration

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[7] The dissent claims that Section 2(B) "merely requires Arizona officers to inquire into the immigration status of suspected" undocumented immigrants; that "simply informing federal authorities of the presence of an [undocumented immigrant]. . . represents the full extent of Section 2(B)'s limited scope." Dissent at 4873-74. Section 2(B) requires much more than mere inquires—it requires that people be detained until those inquiries are settled, and in the event of an arrest, the person may not be released until the arresting agency obtains verification of the person's immigration status. Detention, whether intended or not, is an unavoidable consequence of Section 2(B)'s mandate.

officer functions by State officers and employees," Congress has instructed under what conditions state officials are permitted to assist the Executive in the enforcement of immigration laws. Congress has provided that the Attorney General "may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function." 8 U.S.C. § 1357(g)(1). Subsection (g)(3) provides that "[i]n performing a function under this subsection, an officer . . . of a State . . . shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(3). Subsection (g)(5) requires that the written agreement must specify "the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." 8 U.S.C. § 1357(g)(5).

These provisions demonstrate that Congress intended for states to be involved in the enforcement of immigration laws under the Attorney General's close supervision. Not only must the Attorney General approve of each *individual* state officer, he or she must delineate which functions each individual officer is permitted to perform, as evidenced by the disjunctive "or" in subsection (g)(1)'s list of "investigation, apprehension, or detention," and by subsec-

tion (g)(5). An officer might be permitted to help with investigation, apprehension *and* detention; or, an officer might be permitted to help only with one or two of these functions. Subsection (g)(5) also evidences Congress' intent for the Attorney General to have the discretion to make a state officer's help with a certain function permissive or mandatory. In subsection (g)(3), Congress explicitly required that in enforcing federal immigration law, state and local officers "shall" be directed by the Attorney General. This mandate forecloses any argument that state or local officers can enforce federal immigration law as directed by a mandatory state law.

We note that in subsection (g)(10), Congress qualified its other § 1357(g) directives:

> Nothing in this subsection shall be construed to require an agreement . . . in order for any officer or employee of a State . . . (A) to communicate with the Attorney General regarding the immigration status of any individual . . . or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present.

8 U.S.C. § 1357(g)(10). Although this language, read alone, is broad, we must interpret Congress' intent in adopting subsection (g)(10) in light of the rest of § 1357(g). Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of

§ 1357(g), which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision. Subsection (g)(10) does not operate as a broad alternative grant of authority for state officers to systematically enforce the INA outside of the restrictions set forth in subsections (g)(1)-(9).

The inclusion of the word "removal" in subsection (g)(10)(B) supports our narrow interpretation of subsection (g)(10). Even state and local officers authorized under § 1357(g) to investigate, apprehend, or detain immigrants do not have the authority to remove immigrants; removal is exclusively the purview of the federal government. By including "removal" in § 1357(g)(10)(B), we do not believe that Congress intended to grant states the authority to remove immigrants. Therefore, the inclusion of "removal" in the list of ways that a state may "otherwise [ ] cooperate with the Attorney General," indicates that subsection (g)(10) does not permit states to opt out of subsections (g)(1)-(9) and systematically enforce the INA in a manner dictated by state law, rather than by the Attorney General. We therefore interpret subsection (g)(10)(B) to mean that when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for *syste-*

matic and *routine* cooperation.[8] Similarly, we interpret subsection (g)(10)(A) to mean that state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties. But subsection (g)(10)(A) does not permit states to adopt laws dictating how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual. Subsection (g)(10) does not exist in a vacuum; Congress enacted it alongside subsections (g)(1)-(9) and we therefore interpret subsection (g)(10) as part of a whole, not as an isolated provision with a meaning that is unencumbered by the other constituent parts of § 1357(g).[9]

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[8] In a footnote, the dissent constructs an imaginary scenario where officers in the Pima County Sheriff's Office are confused by our holding that they must have a § 1357(g) agreement to cooperate with federal officials in immigration enforcement on a systematic and routine basis. Dissent at 4866, n.9. We trust that law enforcement officers will make good faith efforts to comply with our interpretation of federal law and will carry out their duties accordingly.

[9] Our interpretation of subsection (g)(10) is also supported by 8 U.S.C. § 1103(a)(10), which states that "[i]n the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service." If

[5] In sum, 8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General—to whom Congress granted discretion in determining the precise conditions and direction of each state officer's assistance. We find it particularly significant for the purposes of the present case that this discretion includes the Attorney General's ability to make an individual officer's immigration enforcement duties permissive or mandatory. 8 U.S.C. § 1357(g)(5). Section 2(B) sidesteps Congress' scheme for permitting the states to assist the federal government with immigration enforcement. Through Section 2(B), Arizona has enacted a mandatory and systematic scheme that conflicts with Congress' explicit requirement that in the "[p]erformance of immigration officer functions by State officers and employees," such officers "shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(3). Section 2(B) therefore interferes with Congress' scheme because Arizona has assumed a role in directing its officers how to enforce the INA. We are not aware of any INA provision demonstrating that Congress intended to permit states to usurp

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subsection (g)(10) meant that state and local officers could routinely perform the functions of DHS officers outside the supervision of the Attorney General, there would be no need for Congress to give the Attorney General the ability, in § 1103(a)(10), to declare an "actual or imminent mass influx of aliens," and to authorize "any State or local law enforcement officer" to perform the functions of a DHS officer.

the Attorney General's role in directing state enforcement of federal immigration laws.

Arizona argues that in another INA provision, "Congress has expressed a clear intent to *encourage* the assistance from state and local law enforcement officers," citing 8 U.S.C. § 1373(c). Section 1373(c) creates an obligation, on the part of the Department of Homeland Security ("DHS"), to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law."

We agree that § 1373(c) demonstrates that Congress contemplated state assistance in the identification of undocumented immigrants.[10] We add, however, that Congress contemplated this assistance within the boundaries established in § 1357(g), not in a manner dictated by a state law that furthers a

[10]We also agree with the dissent that "Congress envisioned, intended, and encouraged inter-governmental cooperation between state and federal agencies, at least as to information regarding a person's immigration status." Dissent at 4879. We are convinced, however, that this cooperation is to occur on the federal government's terms, not on those mandated by Arizona. In light of the dissent's extensive discussion of the word "cooperate," we note what would seem to be fairly obvious: given that the United States has had to sue the State of Arizona to stop it from enforcing S.B. 1070, it is quite clear that Arizona is not "cooperating" with the federal government in any sense of the word. Arizona does not seek intergovernmental cooperation—it seeks to pursue its own policy of "attrition through enforcement." S.B. 1070 § 1.

state immigration policy. Congress passed § 1373(c) at the same time that it added subsection (g) to § 1357. *See* Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104- 208, §§ 133, 642 (1996). Thus, Congress directed the appropriate federal agency to respond to state inquiries about immigration status at the same time that it authorized the Attorney General to enter into § 1357(g) agreements with states. Arizona and the dissent urge a very broad interpretation of § 1373(c): because DHS is obligated to respond to identity inquiries from state and local officers, they argue, Arizona must be permitted to direct its officers how and when to enforce federal immigration law in furtherance of the state's own immigration policy of attrition. This interpretation would result in one provision swallowing all ten subsections of § 1357(g), among other INA sections. Our task, however, is not to identify one INA provision and conclude that its text alone holds the answer to the question before us. Rather, we must determine how the many provisions of a vastly complex statutory scheme function together. Because our task is to interpret the meaning of many INA provisions as a whole, not § 1373(c) and § 1357(g)(10) at the expense of all others, we are not persuaded by the dissent's argument, which considers these provisions in stark isolation from the rest of the statute.[11]

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[11]Arizona also cites 8 U.S.C. §§ 1373(a) and 1644 in support of its argument that "Congress has expressed a clear intent to *encourage* the assistance from state and local law enforcement officers." These sections are anti-sanctuary provisions. That the federal government prohibits States from *impeding* the enforcement of federal immigration laws does not constitute an

In addition to providing the Attorney General wide discretion in the contents of each § 1357(g) agreement with a state, Congress provided the Executive with a fair amount of discretion to determine how *federal* officers enforce immigration law. The majority of § 1357 grants powers to DHS officers and employees to be exercised within the confines of the Attorney General's regulations; this section contains few mandatory directives from Congress to the Attorney General or DHS. The Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement within DHS has explained the purpose of this Congressionally-granted discretion: "DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities" which "necessitates prioritization to ensure ICE expends resources most efficiently to advance the goals of protecting national security, protecting public safety, and securing the border."

[6] By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement, turning Arizona officers into state-directed DHS agents. As a result, Section 2(B) interferes with Congress' delegation of discretion to the Executive branch in enforcing the INA. To assess the impact of this interference in our preemption analysis, we are guided by the Supreme

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invitation for states to affirmatively enforce immigration laws outside Congress' carefully constructed § 1357(g) system.

Court's decisions in *Crosby,* 530 U.S. 363, and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). *In Crosby*, where the Court found that a state law was preempted because it posed an obstacle to Congress' intent, the Court observed that "Congress clearly intended the federal Act to provide the President with flexible and effective authority," and that the state law's "unyielding application undermines the President's intended statutory authority." 530 U.S. at 374, 377. In *Buckman,* the Court found that state fraud-on-the-Food And Drug Administration claims conflicted with the relevant federal statute and were preempted, in part because "flexibility is a critical component of the statutory and regulatory framework" of the federal law, and the preempted state claims would have disrupted that flexibility. 531 U.S. at 349. The Court observed that "[t]his flexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives." *Id.*

[7] In light of this guidance, Section 2(B)'s interference with Congressionally-granted Executive discretion weighs in favor of preemption. Section 2(B)'s 'unyielding" mandatory directives to Arizona law enforcement officers "undermine[ ] the President's intended statutory authority" to establish immigration enforcement priorities and strategies. *Crosby*, 530 U.S. at 377. Furthermore, "flexibility is a critical component of the statutory and regulatory framework under which the" Executive "pursues [the] difficult (and often competing) objectives," *Buckman*,

531 U.S. at 349, of—according to ICE—"advanc[ing] the goals of protecting national security, protecting public safety, and securing the border." Through Section 2(B), Arizona has attempted to hijack a discretionary role that Congress delegated to the Executive.

In light of the above, S.B. 1070 Section 2(B) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the aforementioned INA provisions. *Hines,* 312 U.S. at 67. The law subverts Congress' intent that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General. Furthermore, the mandatory nature of Section 2(B)'s immigration status checks is inconsistent with the discretion Congress vested in the Attorney General to supervise and direct State officers in their immigration work according to federally-determined priorities. 8 U.S.C. § 1357(g)(3).

[8] In addition to Section 2(B) standing as an obstacle to Congress' statutorily expressed intent, the record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption. *See generally Garamendi*, 539 U.S. 396 (finding obstacle preemption where a State law impinged on the Executive's authority to singularly control foreign affairs); *Crosby*, 530 U.S. 363 (same). In *Garamendi*, the Court stated 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 the state law." 539 U.S. at 420 (emphasis added).[12]

[9] The record before this court demonstrates that S.B. 1070 does not threaten a "*likelihood* . . . [of] produc[ing] something more than *incidental* effect;" rather, Arizona's law has created *actual* foreign policy problems of a magnitude far greater than incidental. *Garamendi,* 539 U.S. at 419 (emphasis added). Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.

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[12]The Court's decision in *Hines*, 312 U.S. 52, demonstrates that the Court has long been wary of state statutes which may interfere with foreign relations. In *Hines,* the Court considered whether Pennsylvania's 1939 Alien Registration Act survived the 1940 passage of the federal Alien Registration Act. *Id.* at 59-60. The Court found that the Pennsylvania Act could not stand because Congress "plainly manifested a purpose. . . to leave [law-abiding immigrants] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations." Id. at 74.

In addition to criticizing S.B. 1070, Mexico has taken affirmative steps to protest it. As a direct result of the Arizona law, at least five of the six Mexican Governors invited to travel to Phoenix to participate in the September 8-10, 2010 U.S.-Mexico Border Governors' Conference declined the invitation. The Mexican Senate has postponed review of a U.S.-Mexico agreement on emergency management cooperation to deal with natural disasters.

In *Crosby*, the Supreme Court gave weight to the fact that the Assistant Secretary of State said that the state law at issue "has complicated its dealings with foreign sovereigns." 530 U.S. at 383-84. Similarly, the current Deputy Secretary of State, James B. Steinberg, has attested that S.B. 1070 "threatens at least three different serious harms to U.S. foreign relations."[13] In addition, the Deputy Assistant Secretary for International Policy and Acting Assistant Secretary for International Affairs at DHS has attested that Arizona's immigration law "is affecting DHS's ongoing efforts to secure international cooperation in carrying out its mission to safeguard America's people, borders, and infrastructure." The Supreme Court's direction about the proper use of

[13]Arizona submitted a declaration from Otto Reich, who served in previous Administrations as, among other things, the U.S. Ambassador to Venezuela, former Assistant Administrator of USAID, and the Assistant Secretary of State for Western Hemisphere Affairs. Mr. Reich currently works in the private sector, and as a result, the district court could properly give little weight to his rebuttal of Mr. Steinberg's assertions about the impact of S.B. 1070 on current foreign affairs.

such evidence is unambiguous: "statements of foreign powers necessarily involved[,] . . . indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act." *Crosby*, 530 U.S. at 385.[14] Here, we are presented with statements

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[14]Thus, Arizona's extensive criticism of this court for permitting foreign governments to file Amicus Curiae briefs is misguided. These briefs are relevant to our decision-making in this case insofar as they demonstrate the *factual* effects of Arizona's law on U.S. foreign affairs, an issue that the Supreme Court has directed us to consider in preemption cases.

Similarly, the dissent asserts that our reasoning grants a "heckler's veto" to foreign ministries and argues that a "foreign nation may not cause a state law to be preempted simply by complaining about the law's effects on foreign relations generally." Dissent at 4880. As a preliminary matter, we disagree with the dissent's characterization of our opinion, as we do not conclude that a foreign government's complaints *alone* require preemption. Our consideration of this evidence is consistent with the Supreme Court's concern that we not disregard or minimize the importance of such evidence. *Garamendi*, 539 U.S. at 419; *Crosby*, 530 U.S. at 385-86. Moreover, the dissent implies that S.B. 1070 is merely an internal affair, which is contrary to the Supreme Court's opinion in *Hines*. In striking down the Pennsylvania 1939 Alien Registration Act, the Court stated that:

> The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." Our system of government is such that the in-

*attribut*able to foreign governments necessarily involved and opinions of senior United States' officials: together, these factors persuade us that Section 2(B) thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs.

[10] Finally, the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption. In *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 288 (1986), where the Court found conflict preemption, the Court explained that "[e]ach additional [state] statute incrementally diminishes the [agency's] control over enforcement of the [federal statute] and thus further detracts from the integrated scheme of regulation created by Congress." (internal citations omitted). *See also Buckman*, 531 U.S. at 350 ("[a]s a practical matter, complying with the [federal law's] detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants-burdens not contemplated by Congress in enacting the [federal laws]").

> terest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Hines, 312 U.S. at 62 (quoting *The Chinese Exclusion Cases (Chae Chan Ping v. United States)*, 130 U.S. 581, 606 (1889)).

[11] In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 2(B) would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

III. *Section 3*

[12] S.B. 1070 Section 3 provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)."[15] Ariz. Rev. Stat. Ann. § 13-1509(A) (2010). The penalty for

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[15]8 U.S.C. § 1304(e) provides: "Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both."

8 U.S.C. § 1306(a) further provides: "Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both."

violating Section 3 is a maximum fine of one hundred dollars, a maximum of twenty days in jail for a first violation and a maximum of thirty days in jail for subsequent violations. Ariz. Rev. Stat. Ann. § 13 1509(H). Section 3 "does not apply to a person who maintains authorization from the federal government to remain in the United States." Ariz. Rev. Stat. Ann. § 13-1509(F) (2010). Section 3 essentially makes it a state crime for unauthorized immigrants to violate federal registration laws.

Starting with the touchstones of preemption, punishing unauthorized immigrants for their failure to comply with federal registration laws is not a field that states have "traditionally occupied." *Wyeth*, 129 S. Ct. at 1194 (internal quotations and citations omitted); *see generally Hines*, 312 U.S. 52. Therefore, we conclude that there is no presumption against preemption of Section 3.

[13] Determining Congress' purpose, and whether Section 3 poses an obstacle to it, first requires that we evaluate the text of the federal registration requirements in 8 U.S.C. §§ 1304 and 1306. These sections create a comprehensive scheme for immigrant registration, including penalties for failure to carry one's registration document at all times, 8 U.S.C. § 1304(e), and penalties for willful failure to register, failure to notify change of address, fraudulent statements, and counterfeiting. 8 U.S.C. § 1306 (a)-(d). These provisions include no mention of state participation in the registration scheme. By contrast, Congress provided very specific directions for state

participation in 8 U.S.C. § 1357, demonstrating that it knew how to ask for help where it wanted help; it did not do so in the registration scheme.

Arizona argues that Section 3 is not preempted because Congress has "invited states to reinforce federal alien classifications." Attempting to support this argument, Arizona cites INA sections outside the registration scheme where Congress has expressly indicated how and under what conditions states should help the federal government in immigration regulation. *See* 8 U.S.C. §§ 1621-25, 1324a(h)(2). The sections Arizona cites authorize states to limit certain immigrants' eligibility for benefits and to impose sanctions on employers who employ unauthorized immigrants. We are not persuaded by Arizona's argument. An authorization from one section does not—without more—carry over to other sections. Nothing in the text of the INA's registration provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules.

[14] In addition, S.B. 1070 Section 3 plainly stands in opposition to the Supreme Court's direction: "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regula-

tions." *Hines*, 312 U.S. at 66-67. In *Hines*, the Court considered the preemptive effect of a precursor to the INA, but the Court's language speaks in general terms about "a complete scheme of regulation,"—as to registration, documentation, and possession of proof thereof— which the INA certainly contains. Section 3's state punishment for federal registration violations fits within the Supreme Court's very broad description of proscribed state action in this area—which includes "complement[ing]" and "enforc[ing] additional or auxiliary regulations."[16] *Id.*

The Supreme Court's more recent preemption decisions involving comprehensive federal statutory schemes also indicate that federal law preempts S.B. 1070 Section 3. In *Buckman*, the Supreme Court held that the Food Drug and Cosmetics Act ("FDCA")

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[16]We are also unpersuaded by Arizona's contention that our decision in *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492 (9th Cir. 2005), permits the State to impose a requirement that is the same as the federal standard. In *Air Conditioning,* we considered the effect of an express preemption provision in a federal statute that regulated activity in an area "where there is no history of significant federal presence." *Id.* at 494-96. Therefore, we applied a presumption against preemption which required us to give the express preemption provision "a narrow interpretation." *Id.* at 496. By contrast, there *is* a "history of significant federal presence" in immigration registration, so there is no presumption against preemption of Section 3. Moreover, there is no express preemption provision in the federal registration scheme for this court to interpret—narrowly or otherwise. Therefore, our decision in *Air Conditioning* is not relevant here.

conflict preempted a state law fraud claim against defendants who allegedly made misrepresentations to the Food and Drug Administration ("FDA"). 531 U.S. at 343. The Court explained that private parties could not assert state-fraud on the FDA claims because, "the existence of the[ ] federal enactments is a critical element in their case." *Id.* at 353. The same principle applies here to S.B. 1070 Section 3, which makes the substantive INA registration requirements "a critical element" of the state law.

By contrast, the Supreme Court found that state law claims were not preempted in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (holding that an express preemption provision in the federal Medical Device Amendments to the FDCA did not preclude a state common law negligence action against the manufacturer of an allegedly defective medical device), *Altria Grp., Inc. v. Good*, 129 S. Ct. 538 (2008) (holding that the federal Labeling Act did not expressly preempt plaintiffs' claims under the Maine Unfair Trade Practices Act alleging that Altria's advertising of light cigarettes was fraudulent), or *Wyeth*, 129 S. Ct. at 1193 (holding that the FDA's drug labeling judgments pursuant to the FDCA did not obstacle preempt state law products liability claims). In these cases, the state laws' "generality le[ft] them outside the category of requirements that [the federal statute] envisioned." *Medtronic*, 518 U.S. at 502. The state law claim in *Medtronic* was negligence, 518 U.S. at 502, the state statute in *Altria* was unfair business practices, 129 S. Ct. at 541, and the state law claim in *Wyeth* was products liability, 129 S. Ct.

at 1193. All of the state laws at issue in these cases had significantly wider applications than the federal statutes that the Court found did not preempt them. Here, however, Section 3's "generality" has no wider application than the INA.

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 3.

[15] In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 3 would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

IV. *Section 5(C)*

[16] S.B. 1070 Section 5(C) provides that it "is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." Ariz. Rev. Stat. Ann. § 13-2928(C) (2010). Violation of this provision is a class 1 misdemeanor, which carries a six month

maximum term of imprisonment. Ariz. Rev. Stat. Ann. §§ 13-2928(F), 13-707(A)(1) (2010). Thus, Section 5(C) criminalizes unauthorized work and attempts to secure such work.

We have previously found that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009), *cert. granted*, *Chamber of Commerce of the U.S. v. Candelaria*, 130 S. Ct. 3498 (2010). Therefore, with respect to S.B. 1070 Section 5(C), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194 (internal quotations and citations omitted) (quoting *Medtronic*, 518 U.S. at 485).

Within the INA, Congress first tackled the problem of unauthorized immigrant employment in the Immigration Reform and Control Act of 1986 ("IRCA"). We have previously reviewed IRCA's legislative history and Congress' decision not to criminalize unauthorized work. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). In this case, we are bound by our holding in *National Center* regarding Congressional intent.

[17] In *National Center*, we considered whether the INA, through 8 U.S.C. § 1252(a), authorized the

Immigration and Naturalization Service ("INS") to promulgate regulations which "imposed a condition against employment in appearance and delivery bonds of aliens awaiting deportation hearings." *Id.* at 1351. To decide this question, we carefully reviewed the history of employment-related provisions in the INA's legislative scheme—including the legislative history of the IRCA amendments. *Id.* at 1364-70. We concluded that "[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals . . . Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work."[17] *Id.* at 1367-68.

[18] At oral argument, Arizona asserted that National Center does not control our analysis of Section 5(C) because it addressed the limited issue of whether the INS could require a condition against working in appearance and delivery bonds, which—according to Arizona—has no application to whether a state statute can criminalize unauthorized work. We agree that the ultimate legal question before us in *National Center* was distinct from the present dispute. Nonetheless, we do not believe that we can revisit

[17]We find it particularly relevant here that during the hearings which shaped IRCA, the Executive Assistant to the INS Commissioner stated that the INS did "not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the [INA] gives him." *National Center*, 913 F.2d at 1368.

our previous conclusion about Congress' intent simply because we are considering the effect of that intent on a different legal question. *See Overstreet v. United Bhd. of Carpenters and Joiners of America, Local Union No. 1506*, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005) ("Ordinarily, a three-judge panel 'may not overrule a prior decision of the court.' " (quoting *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)). Therefore, our decision in *National Center* requires us to conclude that federal law likely preempts S.B. 1070 Section 5(C), since the state law conflicts with what we have found was Congress' IRCA intent.

[19] The text of the relevant IRCA statutory provision—8 U.S.C. § 1324a—also supports this conclusion. Section 1324a establishes a complex scheme to discourage the employment of unauthorized immigrants—primarily by penalizing employers who knowingly or negligently hire them. The statute creates a system through which employers are obligated to verify work authorization.[18] 8 U.S.C. §

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[18] In *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom., Chamber of Commerce of the U.S. v. Candelaria*, 130 S. Ct. 3498 (2010), we held that IRCA did not preempt the Legal Arizona Workers Act, Ariz. Rev. Stat. Ann. § 23-211 *et seq*. IRCA contains an express preemption provision, as well as a savings clause: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." 8 U.S.C. § 1324a(h)(2). In *Chicanos*, we held that the Legal Arizona Workers Act —which targets employers who hire

1324a(b). The verification process includes a requirement that potential employees officially attest that they are authorized to work. 8 U.S.C. § 1324a(b)(2). The statute provides that the forms potential employees use to make this attestation "may not be used for purposes other than for enforcement of this chapter and" 18 U.S.C. §§ 1001, 1028, 1546 and 1621. 8 U.S.C. § 1324a(b)(5). These sections of Title 18 criminalize knowingly making a fraudulent statement or writing; knowingly making or using a false or stolen identification document; forging or falsifying an immigration document; and committing perjury by knowingly making a false statement after taking an oath in a document or proceeding to tell the truth. This is the exclusive punitive provision against unauthorized workers in 8 U.S.C § 1324a. All other penalties in the scheme are exacted on employers, reflecting Congress' choice to exert the vast majority of pressure on the employer side.

In addition, other provisions in 8 U.S.C. § 1324a provide affirmative protections to unauthorized workers, demonstrating that Congress did not intend to permit the criminalization of work. Subsection 1324a(d)(2)(C) provides that "[a]ny personal infor-

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undocumented immigrants and revokes their state business licenses—fits within Congress' intended meaning of "licensing" law in IRCA's savings clause and is therefore not preempted. 558 F.3d at 864-66. We also held that the INA, which makes the use of E-Verify voluntary, does not impliedly preempt Arizona from mandating that employers use the E-Verify system. *Id.* At 866-67.

mation utilized by the [authorization verification] system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien." This provision would prohibit Arizona from using personal information in the verification system for the purpose of investigating or prosecuting violations of S.B. 1070 Section 5(C). Subsection 1324a(d)(2)(F) provides in even clearer language that "[t]he [verification] system may not be used for law enforcement purposes, other than for enforcement of this chapter or" the aforementioned Title 18 fraud sections.

Subsection 1324a(g)(1) demonstrates Congress' intent to protect unauthorized immigrant workers from financial exploitation—a burden less severe than incarceration. This section provides that "[i]t is unlawful for a person or other entity, in the hiring . . . of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring . . . of the individual." Subsection 1324a(e) provides for a system of complaints, investigation, and adjudication by administrative judges for employers who violate subsection (g)(1). The penalty for a violation is "$1,000 for each violation" and "an administrative order requiring the return of any amounts received . . . to the employee or, if the employee cannot be located, to the general fund of the Treasury." 8

U.S.C. § 1324a(g)(2). Here, Congress could have required that employers repay only authorized workers from whom they extracted a financial bond. Instead, Congress required employers to repay any employee —including undocumented employees. Where Congress did not require undocumented workers to forfeit their bonds, we do not believe Congress would sanction the criminalization of work.

We therefore conclude that the text of 8 U.S.C. § 1324a, combined with legislative history demonstrating Congress' affirmative choice not to criminalize work as a method of discouraging unauthorized immigrant employment, likely reflects Congress' clear and manifest purpose to supercede state authority in this context. We are further guided by the Supreme Court's decision in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). There, the Court explained:

> [D]eliberate federal inaction could always imply preemption, which cannot be. There is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.

Id. at 503. Given the facts in *Isla*, the Court could not draw this preemptive inference because "Congress ha[d] withdrawn from all substantial involvement in petroleum allocation and price regulation." *Id.* at 504.

The present case, however, presents facts likely to support the kind of preemptive inference that the Supreme Court endorsed, but did not find, in *Isla.* Here, Congress' inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work. Far from the situation in *Isla*, Congress has not "withdrawn all substantial involvement" in preventing unauthorized immigrants from working in the United States. It has simply chosen to do so in a way that purposefully leaves part of the field unregulated.

We are also guided by the Supreme Court's recognition, even before IRCA, that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Sure- Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). As Arizona states, "Section 5(C) clearly furthers the strong federal policy of prohibiting illegal aliens from seeking employment in the United States." The Supreme Court has cautioned, however, that "conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Gould*, 475 U.S. at 286 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)). *In Crosby*, the Court explained that "a common end

hardly neutralizes conflicting means." 530 U.S. at 379-80. Similarly, in *Garamendi*, the Court explained that a state law was preempted because "[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves." 539 U.S. at 427. The problem with a state adopting a different technique in pursuit of the same goal as a federal law, is that "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions . . . undermines the congressional calibration of force." *Crosby*, 530 U.S. at 380.

In the context of unauthorized immigrant employment, Congress has deliberately crafted a very particular calibration of force which does not include the criminalization of work. By criminalizing work, S.B. 1070 Section 5(C) constitutes a substantial departure from the approach Congress has chosen to battle this particular problem. Therefore, Arizona's assertion that this provision "furthers the strong federal policy" does not advance its argument against preemption. Sharing a goal with the United States does not permit Arizona to "pull[ ] levers of influence that the federal Act does not reach." *Crosby*, 530 U.S. at 376. By pulling the lever of criminalizing work—which Congress specifically chose not to pull in the INA—Section 5(C) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. It is therefore likely that federal law preempts Section 5(C).

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 5(C).

[20] In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 5(C) would not be preempted, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

V. *Section 6*

S.B. 1070 Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States."[19] Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010).

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[19]Arizona law defines "public offense" as "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state an which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state." Ariz. Rev. Stat. Ann. § 13-105(26) (2009).

[21] We first address the meaning of this Section. S.B. 1070 Section 6 added only subsection 5 to Ariz. Rev. Stat. Ann. § 13-3883(A), which authorizes warrantless arrests. Section 13-3883(A) already allowed for warrantless arrests for felonies, misdemeanors, petty offenses, and certain traffic related criminal violations. Therefore, to comply with Arizona case law that "[e]ach word, phrase, clause, and sentence . . . must be given meaning so that no part will be void, inert, *redundant*, or trivial," *Williams v. Thude*, 934 P.2d 1349, 1351 (Ariz. 1997) (internal quotations omitted), we conclude, as the district court did, that Section 6 "provides for the warrantless arrest of a person where there is probable cause to believe the person *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States." 703 F. Supp. 2d at 1005 (emphasis in original). Section 6 also allows for warrantless arrests when there is probable cause to believe that an individual committed a removable offense in Arizona, served his or her time for the criminal conduct, and was released; and when there is probable cause to believe that an individual was arrested for a removable offense but was not prosecuted.

Thus, the question we must decide is whether federal law likely preempts Arizona from allowing its officers to effect warrantless arrests based on probable cause of removability. Because arresting immigrants for civil immigration violations is not a

"field which the States have traditionally occupied," we do not start with a presumption against preemption of Section 6. *Wyeth*, 129 S. Ct. at 1194.

[22] We first turn to whether Section 6 is consistent with Congressional intent. As authorized by 8 U.S.C. § 1252c, state and local officers may, "to the extent permitted by relevant State . . . law," arrest and detain an individual who:

> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, *but only after* the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual.

8 U.S.C. § 1252c (emphasis added). Nothing in this provision permits warrantless arrests, and the authority is conditioned on compliance with a mandatory obligation to confirm an individual's status with the federal government prior to arrest. Moreover, this provision only confers state or local arrest authority where the immigrant has been convicted of a felony. Section 6, by contrast, permits warrantless arrests if there is probable cause that a person has "committed any public offense that makes the person removable." Misdemeanors, not just felonies, can result in removablility. *See generally Fernandez-*

Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc). Thus, Section 6 authorizes state and local officers to effectuate more intrusive arrests than Congress has permitted in Section 1252c.[20] Moreover, none of the circumstances in which Congress has permitted federal DHS officers to arrest immigrants without a warrant are as broad as Section 6. Absent a federal officer actually viewing an immigration violation, warrantless arrests under 8 U.S.C. § 1357(a) require a likelihood that the immigrant will escape before a warrant can be obtained. 8 U.S.C. §§ 1357(a)(2), (a)(4), (a)(5). Section 6 contains no such requirement and we are not aware of any INA provision indicating that Congress intended state and local law enforcement officers to enjoy greater authority to effectuate a warrantless arrest than federal immigration officials.

Thus, Section 6 significantly expands the circumstances in which Congress has allowed state and local

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[20]Arizona argues that we should "construe[ ] section 6 so as to require officers to confirm with federal authorities that an alien has committed a public offense that makes the alien removable before making a warrantless arrest under section 6." Even if we interpreted Section 6 as Arizona suggests, the provision would still permit more intrusive state arrests than Congress has sanctioned, because it permits arrests on the basis of misdemeanor removability, which Congress has not provided for in 8 U.S.C. § 1252c. Further, even if a law enforcement officer confirmed with the federal government that an individual had been convicted of murder—a felony that would clearly result in removability, *see* 8 U.S.C. § 1227(a)(2)(A)(iii)—Section 6 would still expand the scope of § 1252c by permitting warrantless arrests.

officers to arrest immigrants. Federal law does not allow these officers to conduct warrantless arrests based on probable cause of *civil* removability, but Section 6 does. Therefore, Section 6 interferes with the carefully calibrated scheme of immigration enforcement that Congress has adopted, and it appears to be preempted. Arizona suggests, however, that it has the inherent authority to enforce federal *civil* removability without federal authorization, and therefore that the United States will not prevail on the merits. We do not agree. Contrary to the State's view, we simply are not persuaded that Arizona has the authority to unilaterally transform state and local law enforcement officers into a state-controlled DHS force to carry out its declared policy of attrition.

[23] We have previously suggested that states do not have the inherent authority to enforce the civil provisions of federal immigration law. In *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), *overruled on other grounds by Hodgers- Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), we held that "federal law does not preclude local enforcement of the *criminal* provisions of the [INA]." (Emphasis added). There, we "assume[d] that the *civil* provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." *Id.* at 474-75 (emphasis added). We are not aware of any binding authority holding that states possess the inherent authority to enforce

the civil provisions of federal immigration law—we now hold that states do not have such inherent authority.[21]

The Sixth Circuit has come to the same conclusion. *United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008).[22] In *Urrieta*, the court explained that "[i]n its

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[21]The dissent argues that "the Supreme Court explicitly recognized—in one of our California cases—that state police officers have authority to question a suspect regarding his or her immigration status." Dissent at 4887 (citing *Muehler v. Mena*, 544 U.S. 93, 101 (2005)). The dissent mischaracterizes the issue in *Mena* and the facts of the case in order to make it appear relevant to the case before us now. The Court explained that "[a]s the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status." *Id.* at 101. In summarizing the facts of the case, the Court explained that, "[a]ware that the West Side Locos gang was composed primarily of illegal immigrants, the officers had notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During their detention in the garage, an officer asked for each detainee's name, date of birth, place of birth, and immigration status. The INS officer later asked the detainees for their immigration documentation." *Id.* at 96. Thus, contrary to the dissent's contention, *Mena* did not recognize that state officers can enforce federal civil immigration law with no federal supervision or involvement.

[22] The dissent's characterization of our discussion of *Urrieta* is inaccurate. *See* Dissent at 4884-85. We do not "rely" on *Urrieta* to conclude that states do not have the inherent authority to enforce the civil provisions of federal immigration law. We cite

response to Urrieta's motion to suppress evidence, the government originally argued that Urrieta's extended detention was justified on the grounds that

> . . . [county] Deputy Young had reason to suspect that Urrieta was an undocumented immigrant. The government withdrew th[is] argument, however, after conceding that [it] misstated the law."

Id. at 574. The Sixth Circuit cited 8 U.S.C. § 1357(g), which it summarized as "stating that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence)

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this case in laying out the existing legal landscape on this issue.

In addition, the dissent states that we "ignore clear Supreme Court precedent" in concluding states do not possess this inherent authority. Dissent at 4886. The dissent cites three Supreme Court cases dealing with state officers enforcing federal *criminal* laws. These cases are inapposite, as Section 6 concerns state enforcement of federal *civil* immigration laws. Although the dissent conflates federal criminal and civil immigration laws in this matter, this court has long recognized the distinction. *See Martinez- Medina v. Holder*, ___ F.3d ___, 2011 WL 855791 *6 (9th Cir. 2011) ("Nor is there any other federal criminal statute making unlawful presence in the United States, alone, a federal crime, although an alien's willful failure to register his presence in the United States when required to do so is a crime . . . and other criminal statutes may be applicable in a particular circumstance. Therefore, Gonzales's observation that 'an alien who is illegally present in the United States . . . [commits] only a civil violation,' and its holding that an alien's 'admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry,' always were, and remain, the law of the circuit, binding on law enforcement officers.") (quoting *Gonzales*, 722 F.2d at 476-77 (9th Cir. 1983).

unless specifically authorized to do so by the Attorney General under special conditions." *Id.* Therefore, the court required that "[t]o justify Urrieta's extended detention [ ] the government must point to specific facts demonstrating that Deputy Young had a reasonable suspicion that Urrieta was engaged in some nonimmigration-related illegal activity." *Id.*

We recognize that our view conflicts with the Tenth Circuit's. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). In *Vasquez-Alvarez*, the Tenth Circuit affirmed the denial of a motion to suppress where the defendant's "arrest was based solely on the fact that Vasquez was an illegal alien." *Id.* at 1295. The arrest did not comply with the requirements of 8 U.S.C. § 1252c, and the defendant argued that the evidence found as a result of that arrest should be suppressed. The Tenth Circuit disagreed, holding that § 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal laws, including immigration laws." *Id.* at 1295. The Tenth Circuit based its conclusion on "§ 1252c's legislative history and [ ] subsequent Congressional enactments providing additional nonexclusive sources of authority for state and local officers to enforce federal immigration laws." *Id.* at 1299. The legislative history to which the court refers consists of the comments of § 1252c's sponsor, Representative Doolittle. As the court recounts, Doolittle stated:

With such a threat to our public safety posed by criminal aliens, one would think that we would give law enforcement all the tools it needs to remove these criminals from our streets, but unfortunately just the opposite is true. In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining *criminal aliens* whom they encountered through their routine duties

. . .

My amendment would also permit State and local law enforcement officials to assist the INS by granting them the authority in their normal course of duty to arrest and detain criminal aliens until the INS can properly take them into Federal custody.

. . .

My amendment is supported by our local law enforcement because they know that fighting illegal immigration can no longer be left solely to Federal agencies. Let us untie the hands of those we ask to protect us and include my amendment in H.R. 2703 today.

Id. at 1298 (citing 142 Cong. Rec. 4619 (1996) (comments of Rep. Doolittle)). Interpreting these comments, the Tenth Circuit stated: "As discussed at length above, § 1252c's legislative history demonstrates that the purpose of the provision was to eliminate perceived federal limitations . . . There is simply no indication whatsoever in the legislative history to § 1252c that Congress intended to displace preexisting state or local authority to arrest individuals violating federal immigration laws." *Id.* at 1299-1300.[23]

The Tenth Circuit's interpretation of this legislative history is not persuasive. Section 1252c was intended to grant authority to state officers to aid in federal immigration enforcement because Congress thought state officers lacked that authority. The Tenth Circuit's conclusion is nonsensical: we perceive no reason why Congress would display an intent "to displace preexisting . . . authority" when its purpose in passing the law was to grant authority it believed was otherwise lacking. *Id.*at 1300.

Vasquez-Alvarez also cited "subsequent Congressional enactments providing additional nonexclusive

[23]The dissent alleges that we have improperly focused on a single Representative's comment in assessing the meaning of § 1252c. Dissent at 4889-90. The dissent argues that we ought to follow the Tenth Circuit's example in *Vasquez-Alvarez* and hold that § 1252c has no preemptive effect on a state's inherent ability to enforce the civil provisions of federal immigration law. Dissent at 4889-91. We note that the Tenth Circuit went to great lengths assessing and relying on the very legislative history that he dissent now chastises us for evaluating.

sources of authority for state and local officers to enforce federal immigration laws" in support of its conclusion that § 1252c does not prevent state officers from making civil immigration-based arrests pursuant to state law. *Id.* at 1299. The court noted that "in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Id.* at 1300 (citing § 1357(g)). The court interpreted § 1357(g)(10) to mean that "formal agreement [pursuant to § 1357(g) (1)-(9)] is not necessary for state and local officers 'to cooperate with the Attorney General in identification, apprehension, detention, or removal of aliens.' " *Id.* at 1300 (quoting 8 U.S.C. § 1357(g)(10)(B)). To reason that the enactment of § 1357(g) means that Congress did not intend to limit state and local officers' alleged inherent authority to make civil immigration arrests in § 1252c, requires a broad reading of § 1357(g)(10); we explain above in II.B. the reasons why we reject such a broad reading of this provision.

Subsection (g)(10) neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision. If such authority existed, all of 8 U.S.C. § 1357(g)—and § 1252c for that matter—would be superfluous, and we do not believe that Congress spends its time passing unnecessary laws.[24]

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[24] The U.S. Department of Justice's Office of Legal Counsel ("OLC") issued a memorandum in 2002—at which time OLC was headed by then Assistant Attorney General Jay S. Bybee,

[24] In sum, we are not persuaded that Arizona has the inherent authority to enforce the *civil* provisions of federal immigration law. Therefore, Arizona must be federally authorized to conduct such enforcement. Congress has created a comprehensive and carefully

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now a United States Circuit Judge, as Arizona emphasizes—concluding that (1) the authority to arrest for violation of federal law inheres in the states, subject only to preemption by federal law; (2) a 1996 OLC memo incorrectly concluded that state police lack the authority to arrest immigrants on the basis of civil deportability; and (3) 8 U.S.C. § 1252c does not preempt state arrest authority. To conclude that § 1252c does not preempt inherent state arrest authority, the OLC memo relies entirely on the Tenth Circuit's decision in *Vasquez-Alvarez*—the logic of which we have already rejected.

The dissent quotes from the 2002 OLC memo in claiming that § 1252c is not made superfluous by interpreting it to have no preemptive effect. Dissent at 4893. We are neither persuaded, nor bound by the arguments in this memo. It is an axiomatic separation of powers principle that legal opinions of Executive lawyers are not binding on federal courts. The OLC memo itself demonstrates why this is: the OLC's conclusion about the issue in the 2002 memo was different in 1996 under the direction of President Clinton, and was different in 1989, under the direction of President George H.W. Bush.

The dissent also claims that "Congress has authority to enact legislation which is designed merely to clarify, without affecting the distribution of power." Dissent at 4893. The dissent cites language from the Reaffirmation—Reference to One Nation Under God in the Pledge of Allegiance, stating, "An Act to reaffirm the reference to one Nation under God." Pub. L. No. 107-293 (2002). The dissent's argument is unavailing, as § 1252c contains no reference to anything remotely related to a "reaffirmation" of a state's alleged inherent authority to enforce the civil provisions of federal immigration law.

calibrated scheme—and has authorized the Executive to promulgate extensive regulations —for adjudicating and enforcing civil removability. S.B. 1070 Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the civil provisions of federal immigration law. Section 6 interferes with the federal government's prerogative to make removability determinations and set priorities with regard to the enforcement of civil immigration laws. Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress.

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 6.

[25] In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 6 would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

VI. *Equitable Factors*

Once a party moving for a preliminary injunction has demonstrated that it is likely to succeed on the merits, courts must consider whether the party will suffer irreparable harm absent injunctive relief, and

whether the balance of the equities and the public interest favor granting an injunction. *Winter v. Natural Res. Def. Council Inc.*, 129 S. Ct. 365, 374 (2008).

We have "stated that an alleged constitutional infringement will often alone constitute irreparable harm." *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (internal quotation marks omitted). We have found that "it is *clear that it would not be equitable or in the public's interest to allow the state* . . . to violate the requirements of federal law, especially when there are no adequate remedies available . . . . In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (emphasis added); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059-60 (9th Cir. 2009) (recognizing that the balance of equities and the public interest weighed in favor of granting a preliminary injunction against a likely-preempted local ordinance).

[26] Accordingly, we find that as to the S.B. 1070 Sections on which the United States is likely to prevail, the district court did not abuse its discretion in finding that the United States demonstrated that it faced irreparable harm and that granting the preliminary injunction properly balanced the equities and was in the public interest.

Conclusion

For the foregoing reasons, we AFFIRM the preliminary injunction enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6.

AFFIRMED; REMANDED.

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court. I write separately to emphasize the intent of the statute and its incompatibility with federal foreign policy.

Consideration of the constitutionality of the statute begins with Section 1 of the law, which in entirety, reads as follows:

Sec. 1. Intent

> The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic

> activity by persons unlawfully present in the United States.

This section of the act constitutes an authoritative statement of the legislative purpose. The purpose is "attrition," a noun which is unmodified but which can only refer to the attrition of the population of immigrants unlawfully in the state. The purpose is to be accomplished by "enforcement," also unmodified but in context referring to enforcement of law by the agencies of Arizona. The provisions of the act are "intended to work together." Working together, the sections of the statute are meant "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

It would be difficult to set out more explicitly the policy of a state in regard to aliens unlawfully present not only in the state but in the United States. The presence of these persons is to be discouraged and deterred. Their number is to be diminished. Without qualification, Arizona establishes its policy on immigration.

As Section 1 requires, each section of the statute must be read with its stated purpose in mind. Section 2 might, in isolation from Section 1, be read as requiring information only. Such a reading would ignore the intent established in Section 1, to secure attrition through enforcement. As the United States observes, Arizona already had the capability of obtaining information on immigrants by consulting the federal database maintained by the federal

government. Section 2 of the statute provides for more — for the detention of immigrants to achieve the purpose of the statute. Section 2 is not intended as a means of acquiring information. It is intended to work with the other provisions of the act to achieve enforcement.

As the opinion of the court makes clear, Sections 3, 5 and 6 are unconstitutional. Section 2 is equally unconstitutional in its function as their support.

Section 1's profession of "cooperative" enforcement of federal immigration laws does not alter Arizona's enactment of its own immigration policy distinct from the immigration policy and the broader foreign policy of the United States.

Federal foreign policy is a pleonasm. What foreign policy can a federal nation have except a national policy? That fifty individual states or one individual state should have a foreign policy is absurdity too gross to be entertained. In matters affecting the intercourse of the federal nation with other nations, the federal nation must speak with one voice.

That immigration policy is a subset of foreign policy follows from its subject: the admission, regulation and control of foreigners within the United States. By its subject, immigration policy determines the domestication of aliens as American citizens. It affects the nation's interactions with foreign populations and foreign nations. It affects the travel of foreigners here and the trade conducted by foreigners here. It equally and reciprocally bears on the travel and trade of Americans abroad. As the decla-

rations of several countries or governmental bodies demonstrate in this case, what is done to foreigners here has a bearing on how Americans will be regarded and treated abroad.

That the movement of the people of one nation into the boundaries of another nation is a matter of national security is scarcely a doubtful or debatable matter. Almost everyone is familiar with how the movement of the Angles and the Saxons into Roman Britain transformed that country. The situation of the United States is less precarious. Nonetheless, an estimated 10.8 million foreigners have illegally taken up residence in our country. U.S. Dept. of Homeland Sec., Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010 at 2. True, at the maximum, their number is less than 4% of our population. They are not about to outnumber our citizens. Still, in individual towns and areas those illegally present can be a substantial presence. In the state of Arizona, their estimated number is 470,000, or seven percent of the population of the state. Id. at 4.

The local impact appears to call for local response. Yet ineluctably the issue is national. The people of other nations are entering our nation and settling within its borders contrary to our nation's stated requirements. We must deal with people of other nations and so must deal with other nations. The problems are local but our whole nation is affected. Reasonably, the nation has made enforcement of criminal sanctions against aliens criminally present

in the United States the top priority of the federal government. United States Sentencing Commission, Overview of Federal Criminal Cases Fiscal Year 2009 at 1.

Against this background, the following propositions are clear:

The foreign policy of the United States preempts the field entered by Arizona. Foreign policy is not and cannot be determined by the several states. Foreign policy is determined by the nation as the nation interacts with other nations. Whatever in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field.

Federal foreign policy is determined by Congress when Congress exercises the power to declare war conferred upon it by Article I, Section 8 of the Constitution. Foreign policy is also determined by the Senate when it exercises the power to ratify a treaty, the power conferred upon it by Article II, Section 2. Congress also determines foreign policy when it lays excise taxes upon foreign imports under Article I, Section 8. Congress further determines foreign policy when it authorizes sanctions against a nation, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

The foreign policy of the nation consists in more than a declaration of war, the making of a treaty, the imposition of a tax, and the imposition of sanctions. The foreign policy of the nation is also established by acts of executive power — among others, executive

agreements with foreign nations; the appointment of ambassadors to foreign nations; the exchange of information with foreign governments; the encouragement of trade with foreign countries; and the facilitation of the travel abroad of Americans and of travel within the United States by foreigners. In these several ways a federal foreign policy is forged that is as palpable and durable as that expressed by a particular act of legislation or by the ratification of a particular treaty.

Less than eight years ago the Supreme Court reviewed and reaffirmed the position of the Executive Branch in forming foreign policy preemptive of legislation by a state. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Strong humanitarian considerations supported California's legislation to provide a remedy against insurance companies that had profited from the Nazi treatment of Jewish victims of the Holocaust. Recognizing that "the iron fist" of California might be more effective than the gentler approach taken by the Executive Branch, the Supreme Court assembled cases showing the President's "unique responsibility" for the conduct of foreign policy. Id. at 415. Noting that no express text in the Constitution conferred this authority, the Court quoted both Hamilton and Madison in The Federalist on the structure of the nation being designed. Structure was stronger than text. The Supreme Court demonstrated that strength in an unbroken line of decisions acknowledging presidential leadership in foreign affairs. Id. at 413-415.

Presidential power to preempt states from acting in matters of foreign policy is beyond question.

To take one example from our relations to our nearest neighbor to the South, it is an expression of federal foreign policy that the State Department issues passports by whose use approximately twenty million American citizens enter Mexico annually, while the State Department annually issues approximately one million visas which enable citizens of Mexico to enter this country. U.S. Dep't of Commerce, Int'l Trade Admin., 2009 United States Resident Travel Abroad 3 (2010); U.S. Dep't of State, Report of the Visa Office 2010 at Table XVII (2011).

The foreign policy of the United States is further established by trade agreements made between this country and Mexico manifesting the desire to permit the importation of a variety of goods from Mexico and the desire to export goods from the United States into Mexico.

An objective assessment of the foreign policy of the United States toward Mexico would pronounce that policy to be one of cordiality, friendship and cooperation. The tangible expression of this policy is the export of $14.8 billion in goods in January 2011 and the importation of $19.7 billion in goods from Mexico in the same month. News Release, U.S. Census Bureau, U.S. Bureau of Economic Analysis, U.S. Int'l Trade in Goods and Services 16 (March 10, 2011).

Understandably, the United States finds such a policy preemptive of a single state's uninvited effort to enter the field of immigration law.

The Arizona statute before us has become a symbol. For those sympathetic to immigrants to the United States, it is a challenge and a chilling foretaste of what other states might attempt. For those burdened by unlawful immigration, it suggests how a state could tackle that problem. It is not our function, however, to evaluate the statute as a symbol. We are asked to assess the constitutionality of five sections on their face integrated by the intent stated in Section 1. If we read Section 1 of the statute, the statute states the purpose of providing a solution to illegal immigration into the United States. So read, the statute is a singular entry into the foreign policy of the United States by a single state. The district court properly enjoined implementation of the four sections of the statute.

BEA, Circuit Judge, concurring in part and dissenting in part:

I quite agree with the majority that "[t]he purpose of Congress is the ultimate touchstone" in determining whether Arizona's S.B. 1070 is preempted under the Supremacy Clause. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Thus, this court is tasked with determining whether Congress intended to fence off the states from any involvement in the enforcement of federal immigration law. 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. Moreover, it is the enforce-

ment 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.

By its very enactment of statutes, Congress has provided important roles for state and local officials to play in the enforcement of federal immigration law. First, the states are free, even without an explicit agreement with the federal government, "to communicate with the Attorney General regarding the immigration status of any individual." 8 U.S.C. § 1357(g)(10)(A). Second, to emphasize the importance of a state's involvement in determining the immigration status of an individual, Congress has commanded that federal authorities "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual." Id. § 1373(c) (emphasis added). Third, putting to one side communications from and responses to a state regarding an individual's immigration status, no agreement with the federal government is necessary for states "otherwise [than through communications regarding an individual's immigration status] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." Id. § 1357(g)(10)(B). Finally, Congress has even provided that state officers are authorized to arrest and detain certain illegal aliens. Id. § 1252c. Recognizing the important role of states in enforcing immigration law, the record shows that the federal government

has welcomed efforts by New Jersey[1] and Rhode Island,[2] efforts which Arizona attempts to mirror with S.B. 1070. The record is bereft of any evidence that New Jersey's or Rhode Island's efforts have in any way interfered with federal immigration enforcement. To the contrary, the federal government embraced such programs and increased the number of removal officers to handle the increased workload.

Nonetheless, the United States has here challenged Arizona S.B. 1070 before it went into effect and, thus, made a facial challenge to the legislation. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully,

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[1]In August 2007, the attorney general of New Jersey issued a directive which stated:

> When a local, county, or State law enforcement officer makes an arrest for any indictable crime, or for driving while intoxicated, the arresting officer or a designated officer, as part of the booking process, shall inquire about the arrestee's citizenship, nationality and immigration status. If the officer has reason to believe that the person may not be lawfully present in the United States, the officer shall notify [ICE] during the arrest booking process. Anne Milgram, Attorney General Law Enforcement Directive No. 2007-3.

[2]Rhode Island Executive Order 08-01, "Illegal Immigration Control Order," issued March 27, 2008, states at paragraph 6:

> It is urged that all law enforcement officials, including state and local law enforcement agencies take steps to support the enforcement of federal immigration laws by investigating and determining the immigration status of all non-citizens taken into custody, incarcerated, or under investigation for any crime and notifying federal authorities of all illegal immigrants discovered as a result of such investigations.

since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). As the Supreme Court stated:

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. . . . Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50 (2008). Further:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be

> applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Id. at 450-51 (internal quotation marks and citations omitted).[3]

Our task, then, is—or *should* be—to examine the Arizona legislation and relevant federal statutes to determine whether, under the United States' facial challenge, S.B. 1070 has applications that do not conflict with Congress's intent. I respectfully dissent from the majority opinion as to Sections 2(B) (entitled "Cooperation and assistance in enforcement of immigration laws; indemnification") and 6 (entitled "Arrest b officer without warrant"), finding their reasoning as to Congress' intent without support in the relevant statutes and case law. As to Sections 3 and 5(C), I concur in the result and the majority of the reasoning, although I dissent to the portion of

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[3]"While some Members of the [Supreme] Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.' " *Wash. State Grange*, 552 U.S. at 449 (quoting *Wash. v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (Stevens, J., concurring in judgments)). The high facial challenge standard was reaffirmed just last term. *See United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

the majority's reasoning which allows complaining foreign countries to preempt a state law. I address S.B. 1070's section in numerical order, as the majority did.

I. Section 2(B)

I dissent from the majority's determination that Section 2(B) of Arizona S.B. 1070[4] is preempted by

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[4] Section 2(B) of S.B. 1070 provides in relevant part:

> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the
> enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c) . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforce- ment officer or agency any of the following:
>
> 1. A valid Arizona driver license.
>
> 2. A valid Arizona nonoperating identification license.
>
> 3. A valid tribal enrollment card or other form of tribal identification.

federal law and therefore is unconstitutional on its face. As I see it, Congress has clearly expressed its intention that state officials *should* assist federal officials in checking the immigration status of aliens, *see* 8 U.S.C. § 1373(c), and in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U.S.C. § 1357(g)(10)(B). The majority comes to a different conclusion by minimizing the importance of § 1373(c) and by interpreting § 1357(g)(10) precisely to invert its plain meaning "*Nothing* in this subsection shall be construed to require an agreement . . . to communicate with the Attorney General regarding the immigration status of any individual" (emphasis added) to become "*Everything* in this subsection shall be construed to require an agreement."[5] Fur-

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> 4. If the entity requires proof of legal presence in theUnited States before issuance, any valid United States federal, state or local government issued identification.

Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

[5] The majority has apparently mastered its Lewis Carroll:

> "I don't know what you mean by 'glory,' " Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knockdown argument for you!' "
>
> But 'glory' doesn't mean 'a nice knockdown argument,' " Alice
> objected.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words
> mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master
> —that's all."

Lewis Carroll, *Through the Looking Glass and What Alice Found There*, *in* THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers) (2000).

I am disappointed the majority does not take Lewis Carroll's humorous example of word traducing seriously to explain how the majority's use of "nothing" in 8 U.S.C. § 1357(g)(10) could be made to mean "everything."

> 'Twas the saying of an ancient sage that humour was the only test of gravity, and gravity of humour. For a subject which would not bear raillery was suspicious; and a jest which would not bear a serious examination was certainly false wit.

Anthony Cooper, Earl of Shaftesbury, *Essay on the Freedom of Wit and Humour*, sec. 5 (1709).

However, it is not accurate to imply that recourse to the estimable Humpty-Dumpty is to slip the bounds of judicial argument. A quick Westlaw search shows six mentions in Supreme Court opinions of Humpty Dumpty's views as to how the meanings of words can be changed, and another dozen in this court—including one case in which the author of the majority here concurred. *See Scribner v. Worldcom, Inc.*, 249 F.3d 902 (9th Cir. 2001).

ther, the majority mischaracterizes the limited scope of Section 2(B), misinterprets the Supreme Court's cases on foreign relations preemption to allow any complaining foreign country to preempt a state law, and holds that the prospect of all 50 states assisting the federal government in identifying illegal aliens is—to Congress—an unwanted burden. I discuss each one of these errors in turn below.

The district court found that Section 2(B) resulted in an unconstitutional invasion of the province of federal immigration law for a variety of reasons. But there seems little point to examine and rebut the district court's findings, because the majority opinion does not adopt any of them.[6] Rather, the majority

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[6]It is curious the majority opinion spends as much time as it does interpreting the language of Section 2(B) to be a mandate of immigration status checks of every arrestee, regardless whether there is reasonable suspicion he is an illegal alien—contrary to Arizona's interpretation of its own statute. Maj. Op. at 4816-18. That interpretation was *used* by the district court to conclude state actions would result in invasion of the federal province of immigration enforcement, by over-burdening federal immigration status checking resources. The majority adopts the district court's statutory analysis of Section 2(B)—violating a slew of canons of statutory construction along the way—but fails to arrive at the district court's findings, findings thought necessary by the district court to conclude Section 2(B) was preempted. The district court incorrectly analyzed the Arizona statute to make its incorrect point that immigration inquiries will overburden federal resources. But at least it made a point. The majority trudges the same analytical trail, but goes nowhere. It rather gives the impression that a portion of the majority opinion has been left at the printer.

opinion rests its case solely on its inverted reading of § 1357(g), which prescribes the process by which Congress intended state officers to play a role in the enforcement of federal immigration laws.

A. 8 U.S.C. § 1373(c)

As noted above, Congress has clearly stated its intention to have state and local agents assist in the enforcement of federal immigration law, at least as to the identification of illegal aliens, in two federal code sections. First is 8 U.S.C. § 1373(c), which reads:

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

Of course, it is awkward indeed to argue that immigration status inquiries by state officials *can* "overburden" federal officials when 8 U.S.C. § 1373(c) reads so plainly ("The Immigration and Naturalization Service *shall* respond . . . ." (emphasis added)). Had Congress wanted to give federal immigration officers *discretion* as to whether to answer such inquiries, it could have used "may" rather than "shall," as it does in 8 U.S.C. § 1357(g)(1) regarding federal officials' discretion to enter into written agreements with the states regarding enforcement of immigration laws.

8 U.S.C. § 1373(c). The title of § 1373(c) is "Obligation to respond to inquiries." Thus, § 1373(c) *requires* that United States Immigration and Customs Enforcement ("ICE")[7] respond to an inquiry by *any* federal, state, or local agency seeking the immigration status of any person. The Report of the Senate Judiciary Committee accompanying the Senate Bill explained that the "acquisition, maintenance, and *exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. No. 104-249, at 19-20 (1996) (emphasis added).

Section 1373(c) does not limit the number of inquiries that state officials can make, limit the circumstances under which a state official may inquire, nor allow federal officials to limit their responses to the state officials.[8] Indeed, as established by the declara-

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[7]The statute has not been amended to reflect that the Immigration and Naturalization Service ceased to exist in 2003. ICE, an agency within the Department of Homeland Security, now performs the immigration-related functions.

[8]Another example of federal authorization for state inquiries into an alien's immigration status is 8 U.S.C. § 1644, part of the 1996 Welfare Reform Act. This section states "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644. The House Conference Report accompanying the Welfare Reform Act

tion of the United States' own Unit Chief for the Law Enforcement Support Center ("LESC"), the LESC was established "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." Section 1373(c) demonstrates Congress's clear intent for state police officials to communicate with federal immigration officials in the first step of immigration enforcement—identification of illegal aliens.

The majority misstates my interpretation of § 1373(c)'s scope. Neither I, nor Arizona, claim § 1373(c) allows Arizona to pursue its "own immigration policy." Maj. Op. at 4823. Instead, § 1373(c) demonstrates Congress's intent for Arizona to help enforce *Congress's* immigration policy, but in a way with which the Executive cannot interfere. Congress has *required* that the federal government respond to state and local inquires into a person's immigration status, 8 U.S.C.§ 1373(c), which allows states to

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explained: "The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. . . . The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2649, 2771. The title and placement of the statute seems to have more to do with helping states administer benefits than to achieve removals of illegal aliens. But the statute does reflect Congress's repeatedly stated intention to provide for the free flow of immigration status information between the states and the federal immigration establishment.

"cooperate with the Attorney General in the identification, apprehension, detention, or removal of [illegal] aliens," *id.* § 1357(g)(10)(B).

B. 8 U.S.C. § 1357(g)

The second federal code section which states Congress's to have state authorities assist in identifying illegal aliens is 8 U.S.C. § 1357(g), entitled "Performance of immigration officer functions by State officers and employees." Subsections (g)(1)-(9) provide the precise conditions under which the Attorney General may "deputize" state police officers (creating, in the vernacular of the immigration field, "287(g) officers") for immigration enforcement pursuant to an explicit written agreement. For example, § 1357(g)(1) defines the scope of any such agreement, § 1357(g)(3) provides that the Attorney General shall direct and supervise the deputized officers, § 1357(g)(6) prohibits the Attorney General from deputizing state officers if a federal employee would be displaced, and § 1357(g)(7)-(8) describe the state officers' liability and immunity. Section 1357(g)(9) clarifies that no state or locality shall be required to enter into such an agreement with the Attorney General. Finally, § 1357(g)(10) explains what happens if *no* such agreement is entered into: it recognizes the validity of certain conduct by state and local officers, and explicitly excepts such conduct from a requirement there be a written agreement between the state and federal authorities:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> >
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

The majority's error is to read § 1357(g)(1)-(9), which provides the precise conditions under which the Attorney General *may* enter into written agreements to "deputize" officers, as the *exclusive* authority which Congress intended state officials to have in the field of immigration enforcement. That reading is made somewhat awkward in view of § 1357(g)(10), which explicitly carves out certain immigration activities by state and local officials as *not* requiring a written agreement. But, the majority opinion reasons that since state officials cannot themselves *remove* illegal aliens, the natural reading of §

1357(g)(10) is that state officials cannot *act at all* in immigration enforcement matters, absent an explicit written agreement, unless:

> 1. They are "called upon" by the Attorney General; OR
>
> 2. There is a "necessity"; AND
> 3. Such cooperation is "incidental," rather than "systematic and routine."

Maj. Op. at 4820-21. I concede the majority's insertion of the quoted terms into § 1357(g)(10) is quite original, which perhaps explains why no legal basis is cited for any of it. Neither does the majority opinion give us any clue from statute, regulations, or case authority as to the genesis of the key conditioning phrases "calls upon," "necessity," "routine," or "systematic," which—in their opinion—*would* legitimate agreement-less state intervention. Needless to say, anyone who actually reads § 1357(g)(10) will observe that none of the quoted words appear in *that* statute, nor indeed in any part of the Immigration and Naturalization Act ("INA").[9] 8 U.S.C. § 1101 et

[9]We strive to read Congress's enactments in a reasonable manner. *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Is the majority's reading of § 1357(g)(10) reasonable? Imagine, for a moment, its implementation. Morning dawns at the Pima County (Tucson) Sheriff's Office. The watch commander assembles the deputies: "Officers, in your patrols and arrests today, please remember the Ninth Circuit has told us that if you encounter aliens you suspect are illegally present in this country, you may check

seq. Alas, the majority opinion does not point uswhere to look.[10]

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their immigration status with federal immigration officers, and cooperate with federal agents in their identification, apprehension, detention and removal, but only (1) if called upon by the federal authorities to assist, or (2) absent such request, where necessary, but (3) then only on an incidental basis, and (4) not in a routine or systematic basis." Officer Smith responds: "Commander, does that mean that, unless asked by the federal officers, we cannot determine immigration status of suspected illegal aliens from federal immigration officers or cooperate to help in their removal in each case in which we have reasonable suspicion, but, on the other hand, that we can do so when necessary, but then only once in a while? When will it be 'necessary'? Second, for every ten suspicious persons we run across, in how many cases are we allowed to request immigration checks and cooperate with the federal authorities without our immigration checks becoming 'systematic' and 'routine,' rather than merely 'incidental'?"

Rather than explain the content of the conditions which it invents— "called upon," "necessity," "systematic," and "routine"—the majority turns up its nose at a scenario made all-tooprobable by its vague limitations; limitations themselves bereft of structure for lack of citation of authority. As in the case of its refusal to refute its traducing of statutory language (see footnote 5, *supra*). the majority declaims the impropriety of my criticisms, rather than discuss why they are wrong. But that does not shed any light on the question likely to be asked by the Sheriff's Deputy: "When *can* I detain a suspect to check his immigration status?"

[10] The majority contends its interpretation of § 1357(g)(10) is supported by 8 U.S.C. § 1103(a)(10). Section 1103(a)(10) empowers the Attorney General, in the event of a mass influx of aliens, to authorize state and local officers "to perform or exercise *any* of the powers, privileges, or duties" of a federal immigration officer. 8 U.S.C. § 1103(a)(10) (emphasis added). That the Attorney General may designate state officers to

To determine Congress's intent, we must attempt to read and interpret Congress's statutes on similar topics together. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law." (internal quotations omitted)). In light of this, I submit that a more natural reading of § 1357(g)(10), together with § 1373(c), leads to a conclusion that Congress's intent was to provide an important role for state officers in the enforcement of immigration laws, especially as to the *identification* of illegal aliens.

Unless the state officers are subject to a written agreement described in § 1357(g)(1)-(9), which would otherwise control their actions, the state officers are independently authorized by Congressional statute "to communicate with the Attorney General regarding the immigration status of any individual." 8 U.S.C. § 1357(g)(10)(A). Moreover, state officers are authorized "to cooperate with the Attorney General

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exercise the *full* scope of federal immigration authority in such emergency situations— *alone* and not in cooperation with federal immigration officials— does not affect or limit state officers' otherwise inherent authority under *non-emergency* circumstances "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of [illegal] aliens," 8 U.S.C. § 1357(g)(10)(B), especially by seeking immigration status information which federal authorities are obligated to provide, 8 U.S.C. § 1373(c). Nothing in the text of § 1357(g)(10), nor of § 1373(c), requires a prior "mass influx of aliens" to allow state officers to act. No case authority is cited for this peculiar instance of statutory interpretation.

in the *identification*, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id.* § 1357(g)(10)(B) (emphasis added).[11] Of course, the majority is correct that state officers cannot themselves *remove* illegal aliens from the United States. The majority would read that inability as evidence of congressional intent that state officers cannot act at all with respect to other aspects of immigration enforcement that lead to removal, save on the orders of federal officers pursuant to the provisions of written agreements as set forth in 1357(g)(1)-(9). Maj. Op. at 4820. Were that so, § 1357(g)(10) would be redundant and a dead letter, save for the vague and uncertain powers which the majority limits by its newly-crafted terms "calls upon," "necessity," "systematic" and "routine." We must interpret statutes in a manner to give each part of the statute meaning, if at all reasonable. *See, e.g.*, *U.S. v. Lopez*, 514 U.S. 549, 589 (1995) ("An interpretation of [the Commerce Clause] that makes the rest of [Article I,] § 8 superfluous simply cannot be correct."); *see also Williams v. Thude*, 188 P.2d 1349, 1351 (Ariz. 1997) ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, *redundant*, or trivi-

[11]It is ironic that while construing Section 2(B) so as to make the second sentence thereof an independent mandate to run immigration checks on all arrestees, the majority does not apply the same canon to make § 1357(g)(10) independent, especially since § 1357(g)(10) begins with the classic language of a stand-alone, independent provision: "Nothing in this subsection shall be construed to require an agreement . . . ."

al." (internal quotation marks omitted, alteration and emphasis in original)).

Further, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Section 1357(g)(10) need not be interpreted at all—its plain language states that "Nothing in this subsection [8 U.S.C. § 1357(g)] shall be construed to require an agreement under this subsection in order for any officer . . . to communicate with the Attorney General regarding the immigration status of any individual." There is no need to place restrictions on this meaning, through terms such as "calls upon," "necessity," "systematic," and "routine," because the statute's meaning is clear and includes no such limitations.

I agree with the majority that "we must determine how the many provisions of [the] vastly complex [INA] function together." Maj. Op. at 4823. However, the majority opinion's interpretation of § 1357(g)(10), which requires the Attorney General to "call upon" state officers in the absence of "necessity" for state officers to have any immigration authority, makes § 1373(c) a dead letter. Congress would have little need to obligate federal authorities to respond to state immigration status requests if it is those very

same federal officials who must call upon state officers to identify illegal aliens. Further, there is no authority for the majority's assertion that § 1357(g) establishes the "boundaries" within which state cooperation pursuant to § 1373(c) must occur. Maj. Op. at 4822-23. Indeed, "communicat[ions] with the Attorney General regarding the immigration status of any individual" were explicitly excluded from § 1357(g)'s requirement of an agreement with the Attorney General. 8 U.S.C. § 1357(g)(10)(A). Congress intended the free flow of immigration status information to continue despite the passage of § 1357(g), and so provided in subsection (g)(10). The majority's interpretation turns § 1357(g)(10) and § 1373(c) into: "Don't call us, we'll call you," when what Congress enacted was "When the state and local officers ask, give them the information."

The majority's attempt to straight-jacket local and state inquiries as to immigration status to what "terms" the "federal government" dictates reveals the fundamental divide in our views. The majority finds the intent of "the government" decisive; I look to Congress's intent—as required by Supreme Court preemption law.

Further, to "cooperate" means, I submit, "to act or operate jointly, with another or others, to the same end; to work or labor with mutual efforts to promote the same object." *Webster's New Twentieth Century Dictionary of the English Language Unabridged* (Jean L. McKechnie ed., 1979). It does not mean that each person cooperating need be capable of doing all

portions of the common task by himself. We often speak of a prosecution's "cooperating witness," but it doesn't occur to anyone that the witness himself cannot be "cooperating" unless he is able to prosecute and convict the defendant himself. Hence, the inability of a state police officer to "remove" an alien from the United States does not imply the officer is unable to cooperate with the federal authorities to achieve the alien's removal.

The provision of authority whereby the Attorney General may "deputize" state police officers allows the Attorney General to define the scope and duration of the state officers' authority, as well as "direct[ ] and supervis[e]" the state officers in performing immigration functions. 8 U.S.C. § 1357(g)(1)-(9). However, this is merely *one of two forms* of state participation in federal immigration enforcement provided for by Congress in § 1357(g). Congress provided for *another* form of state participation, for which no agreement is required—states are free "to communicate with the Attorney General regarding the immigration status of any individual," *id.* § 1357(g)(10)(A), and are also free "otherwise [than by communication] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *id.* § 1357(g)(10)(B).

This conclusion is confirmed by a close comparison of the language in each part of § 1357(g). As to the authority of the Attorney General to enter explicit

written agreements, these agreements are limited to deputizing state officers to perform immigration-related functions "in relation to the investigation, apprehension, or detention of aliens in the United States." *Id.* § 1357(g)(1). Notably absent from this list of functions is the "identification" of illegal aliens. However, Congress recognized state officers' authority even in the absence of a written agreement with federal authorities both "to communicate with the Attorney General regarding the immigration status of any individual" and "to cooperate with the Attorney General in the *identification* . . . of aliens not lawfully present in the United States." *Id.* § 1357(g)(10) (emphasis added). "We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). The exclusion of illegal alien identification from the restraints of explicit written agreements under § 1357(g)(1)-(9), and the inclusion of this identification function in the state's unrestrained rights under § 1357(g)(10), leads to the conclusion that Congress intended that state officers be free to inquire of the federal officers into the immigration status of any person, without any direction or supervision of such federal officers—and the federal officers "*shall* respond" to any such inquiry. 8 U.S.C. § 1373(c) (emphasis added).

Another limitation of authority inferred by the majority from § 1357(g)(10) seems to be that state authorities cannot order their officers to enforce

immigration laws in every case where they have reasonable suspicion to believe the laws are being violated. The argument seems to be that while "incidental" investigation—motivated solely by the individual officer's discretion—might be permissible and not an invasion of federal immigration turf, any systematic and mandatory order to identify illegal aliens would be an incursion into a preempted area. *See* Maj. Op. at 4020-21; *see also* Oral Argument at 46:15-46:35 ("[T]he mandatory application [of Section 2(B)] is impermissible, because it takes away the discretion of the local law enforcement officer to decide whether to pursue a particular line of inquiry rather than mandated."). This reading of the statute is as original, and therefore, problematic as is utilizing the words "calls upon," "necessity," "systematic," and "routine" to circumscribe an otherwise clear statute. First, by what authority can the federal government tell a state government what orders it is to give state police officers as to the intensity with which they should investigate breaches of federal immigration law? Other than pursuant to the provisions of written agreements, 8 U.S.C. § 1357(g)(1)-(9), I see no statutory basis for allowing the federal government to limit the effort the state can command of its officers. Rather, Congress intended the Attorney General to cooperate with state officers, 8 U.S.C. § 1357(g), and commanded him to answer their requests for immigration status checks, 8 U.S.C. § 1373(c). Second, how practical is it for a watch commander to instruct his deputies that it is up to their whims as to when they can enforce federal immigration law?

C. Section 2(B)'s limited scope

Next, the majority seems to believe that when a state officer (1) initiates the identification of an illegal alien by checking the alien's immigration status with federal officials pursuant to § 1373(c), and (2) has the alien identified to him by federal authorities, the state officer has somehow *usurped* the federal role of immigration enforcement. Maj. Op. at 4821-22. Section 2(B)'s scope, however, is not so expansive. Section 2(B) does not purport to authorize Arizona officers to remove illegal aliens from the United States—Section 2(B) merely requires Arizona officers to inquire into the immigration status of suspected illegal aliens during an otherwise lawful encounter. *See* Section 2(B). Section 2(B) does not govern any other action taken by Arizona officers once they discover an alien is illegally present in the United States. Further, Section 2(B) does not require that ICE accept custody or initiate removal of the illegal alien from the United States. Federal authorities are merely obligated to respond to the immigration status inquiry pursuant to § 1373(c). Once this occurs, federal authorities are free to refuse additional cooperation offered by the state officers, and frankly to state their lack of interest in removing the illegal alien. The federal authorities can stop the illegal alien removal process at any point after responding to the state immigration status request.[12]

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[12]Of course, were the federal authorities to do just that—turn away the cooperation of state officials—they might be subject to

Although it is true that Section 2(B) requires Arizona officers detain an arrestee suspected of being an illegal alien before releasing the alien, this does little to broaden Section 2(B)'s scope. First, because this is a facial challenge, we must assume that Arizona police officers will comply with federal law and the Constitution in executing Section 2(B). Second, Arizona has built a safeguard into Section 2 which requires that Section 2(B)'s immigration status checking mechanisms be executed in a manner consistent with federal law. *See* Section 2(L) ("This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."). Finally, it would be absurd to assume that Congress would permit states to check a person's immigration status, *see* 8 U.S.C. § 1373(c), but would not allow the state to hold the suspected illegal alien until a response were received.

The majority also finds that state officers reporting illegal aliens to federal officers, Arizona would interfere with ICE's "priorities and strategies." Maj. Op. at 4824. It is only by speaking in such impor-

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criticism for not enforcing federal immigration law by failing to remove identified illegal aliens. Worse, since police departments tend to keep pesky records of communications, the exact amount of refusals of state assistance, and the future consequences of failing to remove illegal aliens, might make it into the Press, with perhaps embarrassing or impolitic results. These considerations, of course, should not affect the preemption analysis.

tant-sounding abstractions "priorities and strategies"—that such an argument can be made palatable to the unquestioning. How can simply informing federal authorities of the presence of an illegal alien, which represents the full extent of Section 2(B)'s limited scope of state-federal interaction, possibly interfere with federal priorities and strategies—unless such priorities and strategies are to avoid learning of the presence of illegal aliens? What would we say to a fire station which told its community not to report fires because such information would interfere with the fire station's "priorities and strategies" for detecting and extinguishing fires?

The internal policies of ICE do not and cannot change this result. The power to preempt lies with Congress, not with the Executive; as such, an agency such as ICE can preempt state law only when such power has been delegated to it by Congress. *See North Dakota v. United States*, 495 U.S. 423, 442 (1990) ("It is Congress—not the [Department of Defense]— that has the power to pre-empt otherwise valid state laws . . . ."). Otherwise, evolving changes in federal "priorities and strategies" from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action. Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy. Although Congress *did* grant some discretion to the Attorney General in entering into agreements pursuant to § 1357(g), Congress explicitly withheld any discretion as to immigration status

inquiries by "obligat[ing]" the federal government to respond to state and local inquiries pursuant to § 1373(c) and by excepting communication regarding immigration status from the scope of the explicit written agreements created pursuant to § 1357(g)(10). Congress's statutes provide for calls and order the calls be returned.

D. Supreme Court preemption cases

The Supreme Court's decisions in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), and *Buckman Co. v. Plaintiff's Legal Committee*, 531 U.S. 341 (2001), are in accord with the view that Section 2(B) is not preempted by federal law. As the majority points out, in each of those cases, the Supreme Court concluded that Congress intended to provide the Executive with flexibility when it enacted federal law, and that state law encroached on that flexibility. That is not the situation we face here. The majority errs by reading the flexibility Congress provided to the Attorney General in entering agreements pursuant to § 1357(g) as providing universal flexibility as to all immigration matters. Congress did just the opposite. As discussed above, Congress explicitly withheld administrative discretion and flexibility as to responses to state officers' immigration status inquiries in both § 1373(c) and § 1357(g)(10). Federal authorities have no discretion whether they may respond to immigration status inquiries from state officials. 8 U.S.C. § 1373(c). State officials need not enter into a written agreement to communicate with the Attorney General regarding the immigration

status of any individual. 8 U.S.C. § 1357(g)(10). Section 2(B) does not encroach on federal flexibility because Congress did not intend federal authorities to have any flexibility in providing states with properly requested immigration status information.

Neither does the Supreme Court's preemption jurisprudence in the field of foreign relations change the conclusion that Section 2(B) is not preempted. In *Crosby*, Massachusetts passed a law which restricted state entities from buying goods or services from those doing business with Burma. 530 U.S. at 366-68. Three months later, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. *Id.* at 368. The Court found that the Massachusetts law conflicted with several identified Congressional objectives. "First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma." *Id.* at 374. Second, "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range." *Id.* At 377. "Finally, . . . the President's intended authority to speak for the United States among the world's nations in developing a 'comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.' " *Id.* at 380. Thus, the Court concluded:

> Because the state Act's provisions conflict with Congress's specific delegation to the

> President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

Id. at 388.

In *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), President Clinton entered into an agreement with the German Chancellor in which Germany agreed to establish a foundation to compensate victims of German National Socialist companies. *Id.* at 405. In exchange, the U.S. government agreed to discourage Holocaust-era claims in American courts and encourage state and local governments to respect the foundation as the exclusive mechanism for resolving these claims. *Id.* at 405-06. Meanwhile, California passed legislation which required insurance companies doing business in the state to disclose the details of insurance policies issued to people in Europe between 1920 and 1945. *Id.* at 409. The Court explained 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 the state law." *Id.* At 420. The Court held California's law was preempted: "[T]he evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.' " *Id.* at 427

(quoting *Crosby*, 530 U.S. at 386). That is, California's law conflicted with *specific* foreign relations objectives of the Executive, as "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." *Id.* at 421.

Thus, as *Crosby* and *Garamendi* demonstrate, it is not simply *any effect* on foreign relations generally which leads to preemption, as the majority asserts. *See* Maj. Op. at 4825-28. Instead, a state law is preempted because it conflicts with federal law only when the state law's effect on foreign relations conflicts with federally *established* foreign relations goals. In *Crosby*, the state law conflicted with the degree of trade Congress decided to allow with Burma, and the discretion explicitly given to the Executive to make trade decisions. In *Garamendi*, the state law imposed an investigatory and litigation burden inconsistent with the rules the Executive Agreement had created. Here, however, there is *no established* foreign relations policy goal with which Section 2(B) may be claimed to conflict. The majority contends that Section 2(B) "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." Maj. Op. at 4828.

First, the majority fails to identify a federal foreign relation policy which establishes the United States must avoid "spillover effects," if that term is meant to describe displeasure by foreign countries with the

United States' immigration policies. The majority would have us believe that Congress has provided the Executive with the power to veto any state law which happens to have some effect on foreign relations, as if Congress had not weighed that possible effect in enacting laws permitting state intervention in the immigration field. To the contrary, here Congress *has* established—through its enactment of statutes such as 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644—a policy which encourages the free flow of immigration status information between federal and local governments. Arizona's law embraces and furthers this federal policy; any negative effect on foreign relations caused by the free flow of immigration status information between Arizona and federal officials is due not to Arizona's law, but to the laws of Congress. Second, the Executive's desire to appease foreign governments' complaints cannot override Congressionally-mandated provisions—as to the free flow of immigration status information between states and federal authorities—on grounds of a claimed effect on foreign relations any more than could such a foreign relations claim override Congressional statues for (1) who qualifies to acquire residency in the United States, 8 U.S.C. § 1154, or (2) who to become a United States citizen, 8 U.S.C. § 1421 et seq.

Finally, the majority errs in finding that the threat of all 50 states layering their own immigration rules on top of federal law weighs in favor of preemption. In *Buckman*, the Supreme Court stated: "As a prac-

tical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants *burdens not contemplated by Congress in enacting the FDCA and the MDA*." 531 U.S. at 350 (emphasis added). I fail to see how Congress could have failed to contemplate that states would make use of the very statutory framework that Congress itself enacted. Congress created the Law Enforcement Support Center "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." Congress also obligated ICE to respond to all immigration status inquiries from state and local authorities. 8 U.S.C. § 1373(c). In light of this, all 50 states enacting laws for inquiring into the immigration status of suspected illegal aliens is *desired* by Congress, and weighs against preemption.

Conclusion

As demonstrated above, Congress envisioned, intended, and encouraged inter-governmental cooperation between state and federal agencies, at least as to information regarding person's immigration status, for the proper and efficient enforcement of federal immigration law. While § 1357(g)(1)-(9) grants the Attorney General discretion to enter into written agreements deputizing and supervising state officers, § 1357(g)(10) explicitly recognizes an alternative to that regime, so as to encourage and facilitate the free flow of immigration status information provided for in § 1373(c). The majority's arguments

regarding how any of the state officers' actions spelled out in Section 2(B) could interfere with federal immigration enforcement is 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.

II. Sections 3 and 5(C)

I concur with the majority that Section 3, which penalizes an alien's failure to carry documentation as required by federal immigration statutes, impermissibly infringes on the federal government's uniform, integrated, and comprehensive system of registration which leaves no room for its enforcement by the state. I also concur with the majority that Section 5(C), which penalizes an illegal alien for working or seeking work, conflicts with Congress's intent to focus on employer penalties, an intent determined by this court in *National Center for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). As a three-judge panel, we may not re-examine the conclusions reached in *National Center*. *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc); *see also Newdow v. Lefevre*, 598 F.3d 638, 644

(9th Cir. 2010) (holding that Establishment Clause challenge to the placement of "In God We Trust" on coins and currency was foreclosed by *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970)).

However, for the reasons discussed above as to Section 2, I disagree with the majority's foreign-relations rationale. The majority fails to identify a foreign relations policy, established by Congress, with which Sections 3 and 5 conflict; a foreign nation may not cause a state law to be preempted simply by complaining about the law's effects on foreign relations generally. We do not grant other nations' foreign ministries a "heckler's veto."

III. Section 6

The majority's analysis of S.B. 1070 Section 6[13] will come as a surprise to all parties involved in this case. It ignores the contentions in the filings before the district court, the district court's rationale, the briefs filed in this court, and what was said by the well-prepared counsel, questioned at our oral argument. Indeed, it is an argument and conclusion volunteered by the majority, but carefully avoided by the United States— probably because it conflicts with the present policy of the Department of Jus-

[13]S.B. 1070 Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . .[t]he person to be arrested has committed any public offense that makes the person removable from the United States." Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010).

tice's Office of Legal Counsel. First, let us examine what I thought the parties put before us for decision.

The *only* contention made by the United States in this litigation with respect to Section 6 is that, due to the complexity inherent in determining whether a specific crime makes an alien removable, Arizona police officers will ineluctably burden legal aliens through erroneous warrantless arrests. Not a very strong contention at that, since counsel for the United States all but conceded this argument's flaw as to this facial challenge at oral argument by admitting that Arizona police officers could very easily determine that some crimes, such as murder, would make an alien removable. Thus, the analysis of this section should have been simple—Section 6 was facially constitutional because a "set of circumstances" existed under which no "complexity" existed: an Arizona police officer comes across an alien convicted of murder; he is removable; he can be lawfully arrested. *See Salerno*, 481 U.S. at 745. So, Section 6 was not preempted. End of story.

Instead, the majority misrepresents Arizona's attempt to assist the federal government as "unilaterally transform[ing] state and local law enforcement officers into a state-controlled DHS force to carry out its declared policy of attrition." Maj. Op. at 4842. Section 6 is not, and could not, be so broad. Instead, Section 6 merely authorizes Arizona police officers to make warrantless arrests when they cooperate in

the enforcement of federal immigration law—as invited to do by Congress. *See* 8 U.S.C. § 1357(g)(10).

For its newly-minted-but-not-argued position, the majority relies extensively on 8 U.S.C. § 1252c—a code section not cited in support by the United States[14]—misinterpreting its meaning and putting this circuit in direct conflict with the Tenth Circuit. The majority also ignores clear Supreme Court precedent and concludes that 8 U.S.C. § 1357(a)'s limitations as to *federal* warrantless arrest power implies a limitation on state officers. As I discuss below, the majority erred in concluding that state police officers have no authority to enforce the civil provisions of federal immigration law.

As noted by the majority opinion, Section 6 applies to three different scenarios: (1) when there is probable cause to believe a person committed a removable offense in a state other than Arizona; (2) when there is probable cause to believe that an individual committed a removable offense in Arizona, served his or her time for the crime, and was released; and (3) when there is probable cause to believe an individual committed a removable offense, but was not prosecuted. The question before us is whether warrantless arrests by state police officers in these three scenarios conflict with Congress's intent.

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[14]Indeed, the total treatment of § 1252c in the briefs consists of a one sentence citation in Arizona's brief arguing *against* Section 6's preemption, and the United States' citation, without argument, in a string cite in its statement of facts.

A. Inherent authority of state officers to enforce federal immigration law

As an initial matter, it is notable that the United States never once asserted, either at oral argument or in its briefs, that Arizona officers are without the power to enforce the civil provisions of immigration law. Indeed, counsel for the United States at oral argument actually *confirmed* state officers' authority to arrest aliens on the basis of civil removability. *See* Oral Argument at 58:40-59:40 (stating that Section 6 would be constitutional if it required Arizona officers to contact ICE regarding whether a crime renders an alien removable).[15] The United States' argument

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[15] Actual text from oral argument:

> DEPUTY SOLICITOR GENERAL KNEEDLER: No, I think
> [Section 6] continues to present the problems that the [District]
> Court identified because there's no requirement in Section 6 that the state or local officer contact ICE in order to find whether an offense is removable. The individual with, the officer would have to make a judgment as to whether the public offense in the other state was also a public offense in Arizona, and then determine whether it would in turn lead to a removal—
>
> JUDGE NOONAN: But the response is like Judge Paez suggested earlier, second-degree murder is the crime.
>
> DEPUTY SOLICITOR GENERAL KNEEDLER: *Well, in some, in that situation, it would probably, you*

against Section 6's constitutionality was limited to the "burden" that would be imposed on *wrongfully* arrested legal aliens due to the complexity of determining whether a certain crime makes an alien eligible for removal. Indeed, as the 2002 Department of Justice's Office of Legal Counsel Opinion ("2002 OLC Opinion") concludes, "the authority to arrest for violation of federal law inheres in the state, subject only to preemption by federal law." *See also Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928) ("[I]t would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow.").[16]

> *know, it would probably be possible to make that determination.*
>
> JUDGE NOONAN: Then why, so it doesn't, you have a *Salerno* problem with respect to Section 6?
>
> DEPUTY SOLICITOR GENERAL KNEEDLER: Well, I don't think so because there's no requirement to check with ICE, first
> of all, and the INA, that's that responsibility for making removability determinations in the Federal Government. *There may be some situations in which something could be done otherwise.*

(emphases added).

[16]The United States likely did not adopt the majority's § 1252c argument because the Department of Justice is required to comply with Opinions from the Office of Legal Counsel. Congressional Research Service, Authority of State and Local Police to Enforce Federal Immigration Law, Sept. 17, 2010, *available at* http://www.ilw.com/immigrationdaily/news/2010,1104-crs.pdf ("[Office of Legal Counsel] opinions are generally viewed as providing binding interpretive guidance for

The majority rejects the existence of this inherent state authority by citing one case from this court in which we "assumed" states lacked such authority. In *Gonzales v. City of Peoria*, this court held state police officers could enforce criminal provisions of the INA. 722 F.2d 468, 475 (9th Cir. 1983), *rev'd on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). During its analysis, this court stated in dicta:

> We *assume* that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration. *However, this case does not concern that broad scheme*, but only a narrow and distinct element of it—the regulation of criminal immigration activity by aliens.

Id. at 474-75 (emphasis added). The majority erred in simply accepting *Gonzales*'s assumption, in dicta, without performing any additional inquiry into whether it was indeed correct.[17]

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executive agencies and reflecting the legal position of the executive branch . . . .").

[17]*Gonzales*' dicta is not binding on this panel. In *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc), this court stated:

> Where it is clear that a statement is made casually and without analysis, where the statement is uttered

The majority also missteps in relying on an abbr viated analysis in *United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008). There, Urrieta moved to suppress items found in his car during an extended search by local police. *Id.* 572-73. Urrieta had been detained by a local police officer following the issuance of a traffic citation. *Id.* at 571-72. During the detention related to the traffic violation, the police officer attempted to determine whether Urrieta was an illegal alien. *Id.* The court concluded that suspicion of Urrieta's illegal presence was insufficient to extend Urrieta's detention. *Id.* At 574. In doing so, the court characterized 8 U.S.C. § 1357(g) as "stating that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions that are not applicable in the present case." *Id.*

> in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.

Id. at 915. Here, the *Gonzales* panel's statement regarding the civil provisions was "made casually and without analysis"; indeed, the panel even admitted they "assume[d]" the conclusion. It takes no analysis to assume. Further, the statement on INA's civil provisions was "merely a prelude to another legal issue." Immediately after making the statement, the panel noted that the "case d[id] not concern" the civil provisions. Therefore, this panel is not bound by the *Gonzales* court's assumption, in dicta, regarding the INA's civil provisions.

This conclusion, however, completely ignored the existence and effect of § 1357(g)(10). As discussed fully throughout this dissent, subsection (g)(10) envisions state cooperation in the enforcement of federal immigration law outside the context of a specific agreement with the Attorney General by "identification, apprehension, detention, or removal" in cooperation with federal immigration authorities. Further, § 1357(g)(10) makes no distinction between criminal and civil provisions—indeed, it refers to "aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). The Sixth Circuit's truncated conclusion may be based on the fact that the government withdrew the argument that Urrieta's extended detention was justified on suspicion that he was an "undocumented immigrant" as "misstat[ing] the law." *Id.* Thus, the majority should not have relied on the Sixth Circuit's language in concluding that state officers lack inherent authority to enforce the civil provisions of immigration law any more than it should have relied on the language in *Gonzales*, and for the same reason: the issue whether a state officer had inherent authority to arrest a person for violation of a federal civil violation was simply not before either court.

Moreover, the majority ignores clear Supreme Court precedent in concluding that state officers cannot make warrantless arrests because federal immigration officers cannot make warrantless arrests under the same circumstances pursuant to 8 U.S.C. § 1357(a). Maj. Op. at 4842. In *United States v. Di Re*, 332 U.S. 581 (1948), state officers arrested

Di Re for knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers Act of 1942, a federal law. *Id.* at 582. Di Re challenged the search incident to the arrest. *Id.* The Supreme Court upheld the arrest, stating "that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589; *accord Miller v. United States*, 357 U.S. 301, 305 (1958) (holding that when state peace officers arrest a person for violation of federal narcotics law, "the lawfulness of the arrest without warrant is to be determined by reference to state law"); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948) (holding that when state peace officers arrest a person for violation of federal narcotics law, "[s]tate law determines the validity of arrests without warrant"). Thus, the authority of states to authorize warrantless arrests for violations of federal law is well established.[18]

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[18]Although it is true that the federal laws in these cases were criminal, rather than civil, the Supreme Court was careful to couch its holdings in terms of "federal laws" generally, without reference to whether such laws were criminal in nature. This court's holding in *Gonzales* that illegal presence, alone, is not a crime—recently reaffirmed by this court in *Martinez- Medina v. Holder*, ___ F.3d ___, 2011 WL 855791, at *6 (9th Cir. 2011) — is inapposite. As discussed above, the question whether state and local officers could enforce civil immigration laws was not before the court in *Gonzales*, and therefore its "distinction" between criminal and civil immigration laws is inexistent. *See* Maj. Op. at 4843-44 n.22.

The conclusion that state police officers have the inherent authority to enforce the civil provisions of federal immigration law is supported by *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003). There, a police officer questioned a woman about her immigration status. *Id.* at 1262. This court stated that "it [was] doubtful that the police officer had any authority to question Mena regarding her citizenship." *Id.* At 1165 n.15. The Supreme Court overruled this court and stated:

> As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, *or immigration status*.

Muehler v. Mena, 544 U.S. 93, 101 (2005) (emphasis added). Thus, the Supreme Court explicitly recognized—in one of our California cases—that state police officers have authority to question a suspect regarding his or her immigration status, directly contradicting the majority's conclusion that state officers possess no inherent authority to enforce the civil provisions of immigration law.[19]

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[19]The majority contends "*Mena* did not recognize that state officers can enforce federal civil immigration law with no federal supervision or involvement." Maj. Op. at 4843 n.21. It is true that an INS officer was present when the state and local officers questioned Mena regarding her immigration status. However, the actions of the INS officer were not before the

B. Non-preemption of states' inherent enforcement Authority

Next, the majority errs in finding that 8 U.S.C. § 1252c preempts this inherent state arrest authority. Despite § 1252c's lack of *any* language which indicates an intent to *limit* state powers, the majority holds that § 1252c represents the *full extent* of the arrest power Congress intended—a contention the Tenth Circuit previously rejected. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999); *see also United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001). 8 U.S.C. § 1252c provides, in relevant part:

> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

Court; it was the conduct of the state and local officers which the Court scrutinized. *See Mena*, 544 U.S. at 100-01. Moreover, the Supreme Court did not state that the presence of an INS officer was *required* for the state and local officers to question Mena regarding her immigration status. Indeed, the Court in *Mena* did not even mention the presence of the INS officer in the portion of the opinion recognizing the state and local officers' questioning was permissible. *See id.* So, the officer conduct the Court approved was the state and local officer conduct. For aught that appears, the federal officer was a bystander, not one who "called upon" the state officers for help. *See supra* pages 4865-69.

> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,
>
> but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

8 U.S.C. § 1252c(a). The majority concludes that because Section 6 would allow warrantless arrests in a broader set of circumstances than described in § 1252c, it therefore conflicts with Congress's intent.

The Tenth Circuit persuasively rejected this contention over a decade ago. In *United States v. Vasquez-Alvarez*, "Vasquez claimed that 8 U.S.C. § 1252c limit[ed] the authority of state and local police officers, allowing such an officer to arrest an illegal alien only when the INS has confirmed, before the arrest, that the alien has previously been convicted of a felony and has, since that conviction, been

deported or left the United States." 176 F.3d at 1295.[20]

Unable to cite any text in § 1252c which would expressly or impliedly state an intention that § 1252c was meant to be the *only* authority for state police to arrest an alien for his unlawful presence in this country, nor any canon of statutory interpretation that would come to its aid—and ignoring a later statute's recognition of the authority to detain (1357(g)(10)) —the majority appeals to legislative history. As noted by the majority, the only legislative history as to § 1252c is the floor debate that accompanied Representative Doolittle's introduction of § 1252c. The Tenth Circuit analyzed the plain language of § 1252c as well as this legislative history, and rejected Vasquez's claim:

> This legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers. Accordingly, neither the text of the statute nor its legislative history support Vasquez's claim that § 1252c expressly preempts state law.

Id. at 1299.

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[20]Again, Vasquez claimed that in *his* case. The United States has made *no* such claim here. *See supra* footnote 14.

The majority takes a single Representative's comment—that states lacked the authority to arrest illegal aliens and that § 1252c was needed to authorize such arrests—to conclude that Congress *as a whole* intended § 1252c to represent the limit of state arrest authority. Like the Tenth Circuit, however, I cannot conclude that Congress intended § 1252c to represent the outer bounds of state officers' authority to arrest illegal aliens based solely on the comments of one Representative. As stated by the Tenth Circuit:

> Representative Doolittle did not identify which "current Federal law" prohibited "State and local law enforcement officials from arresting and detaining criminal aliens." Neither the United States nor Vasquez has identified any such preexisting law. Furthermore, this court has not been able to identify any pre-§ 1252c limitations on the powers of state and local officers to enforce federal law.

Id. at 1299 n.4; *see also United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1990) (Kozinski, J., dissenting) ("[Legislative] history . . . is seldom, if ever, even seen by most of the legislators at the time they cast their votes.").[21] Further supporting this

[21] The majority contends it is hypocritical that I criticize the majority's reliance on a single representative's comments while supporting the Tenth Circuit's approach in *Vasquez-Alvarez*—which also relied on this representative's comments. To the

conclusion is the text of § 1252c, which does not provide even the slightest indication that Congress intended to preempt otherwise inherent state arrest powers. The Tenth Circuit went on to note that Congress subsequently "passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Vasquez- Alvarez*, 176 F.3d at 1300. Notably, Congress passed 8 U.S.C. § 1357(g), discussed at length above, just five months later.[22]

The Tenth Circuit found this code section "evince[d] a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Id.* The majority states that the Tenth Circuit erred in "*interpret[ing]* § 1357(g)(10) to mean that [a] 'formal agreement [pursuant to § 1357(g)(1)-(9)] is not necessary for state and local officers "to cooperate with the Attor-

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extent the Tenth Circuit relied affirmatively on Rep. Doolittle's comments, I agree with the majority that' such reliance was misguided. Nonetheless, the Tenth Circuit also noted what the legislative history *failed* to demonstrate: an intent to displace preexisting state arrest authority. *See Vasquez-Alvarez*, 176 F.3d at 1299 & n.4. Conflict preemption requires a determination that Congress's intent conflicts with the state law in question. This requires, first, determining Congress's intent. Was it Congress's intent not to remove aliens illegally present in this country? The inability to discern an incompatible intent is fatal to the United States' preemption claim.

[22]8 U.S.C. § 1644 was passed four months after § 1252c, and one month before § 1357(g). Section 1373(c) was passed at the same time as § 1357(g).

ney General in identification, apprehension, detention, or removal of aliens." ' " Maj. Op. at 4847 (emphasis added). It is no wonder that the Tenth Circuit so "interpreted" § 1357(g)(10), when that is what the statute *explicitly* says:

> *Nothing in this subsection [1357(g)] shall be construed to require an agreement* under this subsection in order for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10)(B) (emphasis added). I cannot join the majority in criticizing the Tenth Circuit for merely reading the statute's words.[23]

The majority contends that § 1357(g)(10) "neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision." Maj. Op. at 4847. What, then, does § 1357(g)(10) do? We must read 1357(g)(10) in context of § 1357(g) as a whole. Section 1357(g) created, for the first time, the authority

[23]But I *can* criticize the majority for initiating a needless circuit split between our court and the Tenth Circuit, contrary to our own declared preference to avoid such circuit splits. *See, e.g.*, *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002) ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits." (quoting *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987))).

of the Attorney General to enter into agreements with states and localities to deputize their officers as 287(g) immigration officers. Subsections (g)(1)-(9) set out the specifics of the explicit written agreements—state officers are paid by the state, trained by the federal government, supervised by the Attorney General, and should be treated as federal employees for purposes of liability and immunity. However, § 1357(g)(10) states clearly that this new method of state involvement—287(g) deputized officers—is not the *only* way state officers may cooperate in the enforcement of federal immigration law. Subsection (g)(10) preserves the preexisting authority of state officers to participate in enforcing immigration law, without the requirement of any formal, written agreement as envisioned by § 1357(g)(1)-(9).

Absent subsection (g)(10), one might argue that the authority created by § 1357(g)(1)-(9) to deputize state officers represents the *full* extent of state officer immigration enforcement.[24] Instead, (g)(10) makes clear that state officers' authority "otherwise to cooperate" in enforcing federal immigration law remained intact after the creation of the new "deputy track" of enforcement. This reading does not make § 1357(g) superfluous, as the majority contends. *See* Maj. Op. at 4847. Indeed, this interpretation makes each part of § 1357(g) necessary—subsections (g)(1)-(9) are necessary to authorize the Attorney General to deputize 287(g) officers, and subsection (g)(10) is

[24] Indeed, this is what the majority does even *with* the presence of § 1357(g)(10).

necessary to preserve state officers' preexisting communication and arrest authority. The majority cannot explain how state officers may "otherwise cooperate" pursuant to § 1357(g)(10)—in such concrete areas as the "identification, apprehension, detention, [and] removal" of suspects— if they possess no inherent authority to enforce civil immigration law. The reason for this inconsistency is the majority's antecedent error—finding state officers lack such inherent authority.

Neither does this interpretation render § 1252c superfluous, as the majority contends. *See* Maj. Op. at 4847. Section 1252c's "notwithstanding" language acts as a safeguard against other provisions of *federal* law, preventing any other provision from being construed to preempt state arrest authority to arrest certain illegal aliens. As stated by the 2002 OLC Opinion:

> If, for example, a court were otherwise inclined (per the Ninth Circuit's dicta in *Gonzales*[*v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)]) to misconstrue the provisions of the INA as preempting state authority to arrest for civil deportability, section 1252c would operate to ensure that state police at least retained the authority to make such arrests of aliens who had previously been convicted of a felony and had been deported or had left the United States after such conviction.

2002 OLC Opinion at 11. Moreover, Congress has authority to enact legislation which is designed merely to clarify, without affecting the distribution of power. *See, e.g.*, Reaffirmation—Reference to One Nation Under God in the Pledge of Allegiance, Pub L. No. 107-293 (2002) ("An Act To *reaffirm* the reference to one Nation under God in the Pledge of Allegiance." (emphasis added)). Thus, § 1252c does not become "superfluous" merely because it does not enlarge or shrink the arrest power provided to state police officers.[25]

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[25]The majority criticizes my use of the 2002 OLC Opinion. Maj. Op. at 4847 n.24. I agree with the majority's assertion that the OLC Opinion does not bind this court. I quote it, however, not for its authority, but to rebut the majority's contention that § 1252c is superfluous.

The majority is correct that the legislative history accompanying § 1252c does not contain reaffirming language like that found in Reaffirmation—Reference to One Nation Under God in the Pledge of Allegiance, Pub L. No. 107-293 (2002). Indeed, § 1252c's legislative history contains nothing more than the floor debate discussed previously. Again, the point of this citation is simply to demonstrate the various, nonsuperfluous motivations for Congressional action which do not explicitly alter the status quo.

Conclusion

In conclusion, Section 6 is not preempted and is constitutional. The United States all but conceded the only argument it made in this court and the court below. On the merits of the majority's *sua sponte* suggestion that state officers can act in the immigration enforcement field pursuant only to 8 U.S.C. § 1252c, familiar principles of dual sovereignty, as recognized by the Supreme Court, provide states with the inherent authority to enforce federal immigration law. In passing 8 U.S.C. § 1252c, a statement by the bill's sponsor of what *he* thought was the preexisting state of the law is insufficient to establish that Congress as a whole intended to displace this preexisting authority vested in the states. Finally, 8 U.S.C. § 1357(g)(10), enacted *after* § 1252c, explicitly recognizes an authority reserved to the states to enforce federal immigration law *outside* the confines of a written agreement with the Attorney General. Section 6 does not conflict with the intent of Congress, and thus is not conflict preempted.

IV. Conclusion

The majority misreads the meaning of the relevant federal statutes to ignore what is plain in the statutes—Congress intended state and local police officers to participate in the enforcement of federal immigration law. Sections 2 and 6 do not conflict with this intent, and thus are constitutional.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

July 28, 2010

United States of America
Plaintiff,

v.

State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity

Defendants.

No. CV 10-1413-PHX-SRB

At issue is the Motion for Preliminary Injunction filed by Plaintiff the United States ("Pl.'s Mot.") (Doc. 27).

I. SUMMARY

Against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, the Arizona Legislature enacted a set of statutes and statutory amendments in the form of Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," 2010 Arizona Session Laws, Chapter 113, which Governor Janice K. Brewer signed into law on April 23, 2010. Seven days later, the Governor signed into law a set of amendments to Senate Bill 1070 under House Bill 2162, 2010 Arizona Session Laws, Chapter 211.[1] Among other things, S.B. 1070 requires officers to check a person's immigration status under certain circumstances (Section 2) and authorizes officers to make a warrantless arrest of a person where there is probable cause to believe that the person committed a public offense that makes the person removable from the United States (Section 6). S.B. 1070 also creates or amends crimes for the failure of an alien to apply for or carry registration papers (Section 3), the smuggling of human beings (Section 4), the performance of work

[1] In this Order, unless otherwise specified, the Court refers to S.B. 1070 and H.B. 2162 collectively as "S.B. 1070," describing the April 23, 2010, enactment as modified by the April 30, 2010, amendments.

by unauthorized aliens, and the transport or harboring of unlawfully present aliens (Section 5).

On July 6, 2010, the United States filed a Complaint with this Court challenging the constitutionality of S.B. 1070, and it also filed a Motion requesting that the Court issue a preliminary injunction to enjoin Arizona from enforcing S.B. 1070 until the Court can make a final determination as to its constitutionality. The United States argues principally that the power to regulate immigration is vested exclusively in the federal government, and that the provisions of S.B. 1070 are therefore preempted by federal law.

The Court notes that S.B. 1070 is not a freestanding statute; rather, it is an enactment of the Arizona Legislature that adds some new sections to the Arizona Revised Statutes ("A.R.S.") and amends some preexisting sections. S.B. 1070 also contains a severability clause, providing that,

> [i]f a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

S.B. 1070 § 12(A). Therefore, the Court cannot and will not enjoin S.B. 1070 in its entirety, as certain

parties to lawsuits challenging the enactment have requested. The Court is obligated to consider S.B. 1070 on a section by section and provision by provision basis.

Other than seeking a preliminary injunction as to "S.B. 1070," the United States has not made any argument to preliminarily enjoin and the Court therefore does *not* enjoin the following provisions of S.B. 1070:

> Section 1 of S.B. 1070
> no A.R.S. citation: providing the intent of the legislation
>
> Portions of Section 2 of S.B. 1070
> A.R.S. § 11-1051(A): prohibiting Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws
>
> A.R.S. § 11-1051(C)-(F): requiring that state officials work with federal officials with regard to unlawfully present aliens
>
> A.R.S. § 11-1051(G)-(L): allowing legal residents to sue any state official, agency, or political subdivision for adopting a policy of restricting enforcement of federal immigration laws to less than the full extent permitted by federal law

Section 4 of S.B. 1070[2]
A.R.S. § 13-2319: amending the crime of human smuggling

Portion of Section 5 of S.B. 1070
A.R.S. § 13-2928(A)-(B): creating a crime for stopping a motor vehicle to pick up
day laborers and for day laborers to get in a motor vehicle if it impedes the normal movement of traffic

Section 7 of S.B. 1070
A.R.S. § 23-212: amending the crime of knowing employment of unauthorized aliens

Section 8 of S.B. 1070
A.R.S. § 23-212.01: amending the crime of intentional employment of unauthorized aliens

Section 9 of S.B. 1070
A.R.S. § 23-214: amending the requirements for checking employment eligibility

Section 11 of S.B. 1070
A.R.S. § 41-1724: creating the gang and immigration intelligence team enforcement mission fund

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[2] Although the United States' Complaint challenges Section 4 of S.B. 1070, counsel for the United States stated at oral argument that the federal government is not seeking to enjoin A.R.S. § 13-2319 at this time. (Hr'g Tr. 5:10-20, July 22, 2010 ("Hr'g Tr.").)

Sections 12 & 13 of S.B. 1070
no A.R.S. citation: administering S.B. 1070

Applying the proper legal standards based upon well-established precedent, the Court finds that the United States is not likely to succeed on the merits in showing that the following provisions of S.B. 1070 are preempted by federal law, and the Court therefore does *not* enjoin the enforcement of the following provisions of S.B. 1070:

Portion of Section 5 of S.B. 1070
A.R.S. § 13-2929: creating a separate crime for a person in violation of a criminal offense to transport or harbor an unlawfully present alien or encourage or induce an unlawfully present alien to come to or live in Arizona

Section 10 of S.B. 1070
A.R.S. § 28-3511: amending the provisions for the removal or impoundment of a vehicle to permit impoundment of vehicles used in the transporting or harboring of unlawfully present aliens

Applying the proper legal standards based upon well-established precedent, the Court finds that the United States *is* likely to succeed on the merits in showing that the following Sections of S.B. 1070 are preempted by federal law:

Portion of Section 2 of S.B. 1070

A.R.S. § 11-1051(B): requiring that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person

Section 3 of S.B. 1070
A.R.S. § 13-1509: creating a crime for the failure to apply for or carry alien registration papers

Portion of Section 5 of S.B. 1070
A.R.S. § 13-2928(C): creating a crime for an unauthorized alien to solicit, apply for, or perform work

Section 6 of S.B. 1070
A.R.S. § 13-3883(A)(5): authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States

The Court also finds that the United States is likely to suffer irreparable harm if the Court does not preliminarily enjoin enforcement of these Sections of S.B. 1070 and that the balance of equities tips in the United States' favor considering the public interest. The Court therefore issues a preliminary injunction

enjoining the enforcement of the portion of Section 2 creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 13-1509, the portion of Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

II. BACKGROUND

A. Overview of Federal Immigration Law

Congress has created and refined a complex and detailed statutory framework regulating immigration. The federal immigration scheme is largely enacted through the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, which empowers various federal agencies (including the Department of Justice ("DOJ"), Department of Homeland Security ("DHS"), and Department of State ("DOS")) to administer and enforce the immigration laws. *See, e.g.*, *id.* §§ 1103-1104. Among its many provisions, the INA sets forth the conditions under which a foreign national may be admitted to and remain in the United States. *Id.* §§ 1181-1182, 1184. The INA also contains an alien registration system intended to monitor the entry and movement of aliens in the United States. *Id.* §§ 1201(b), 1301-1306. Various actions may subject an alien to being placed in removal proceedings, such as entering the United States without inspection, presenting fraudulent documents at a port of entry, violating the conditions of admission, or engaging in certain other proscribed conduct. *Id.* §§ 1225, 1227, 1228, 1229, 1229c, 1231. Violations of immigration laws may also subject an alien to civil and criminal sanctions. *E.g.*, *id.* §§ 1325, 1306, 1324c. Unlawful presence in the United

States is not a federal crime, although it may make the alien removable. *See id.* §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)-(C).[3]

Federal alien smuggling laws make it a crime to knowingly bring an unauthorized alien into the country, as well as to harbor such a person or to facilitate unlawful immigration. *Id.* § 1324. Congress also created sanctions to be implemented against employers who knowingly employ aliens who are not authorized to work when it passed the Immigration Reform and Control Act ("IRCA") in 1986. *Id.* § 1324a(a)(1)-(2). Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation under IRCA. *Id.* § 1324c. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which, among other things, created various employmenteligibility verification programs. *See Chicanos Por La Causa, Inc. v. Napolitano (Chicanos Por La Causa II)*, 558 F.3d 856, 861 (9th Cir. 2009).

Federal immigration law also envisions certain areas of cooperation in immigration enforcement among the federal government and state and local governments. *See* 8 U.S.C. § 1357(g)(1)-(9) (permitting DHS to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities); *id.* § 1373 (establishing parameters for

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[3] Unlawful presence is an element of the federal crime of reentry after deportation, 8 U.S.C. § 1326, and unlawful entry into the United States is also a federal crime, 8 U.S.C. § 1325.

information-sharing between state and local officials and federal immigration officials); *id.* § 1252c (authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported). DHS has also established the Law Enforcement Support Center ("LESC"), which is administered by Immigration and Customs Enforcement ("ICE") and serves as a national enforcement information center, answering queries from state and local officials regarding immigration status. (Pl.'s Mot., Ex. 3, Decl. of David Palmatier, Unit Chief for LESC ("Palmatier Decl.") ¶¶ 3-6.)

B. Overview of S.B. 1070

1. Section 1

Section 1 of S.B. 1070 states that "the intent of [S.B. 1070] is to make attrition through enforcement the public policy of all state and local government agencies in Arizona" and that "[t]he provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Section 1 also states that "there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona."

2. Section 2

Section 2 of S.B. 1070 adds A.R.S. § 11-1051. Section 2 contains twelve separate subsections. Subsection 2(A) prohibits Arizona officials, agencies and political subdivisions from limiting or restricting the enforcement of federal immigration laws. A.R.S.

§ 11- 1051(A). Subsection 2(B) requires officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States *Id.* § 11-1051(B). Subsection 2(B) also requires that all persons who are arrested have their immigration status verified prior to release. *Id.* Subsections 2(B) and 2(E) provide the process for verifying immigration status and list documents that create a presumption of lawful presence. *Id.* § 11-1051(B), (E). Mandatory stops for the purpose of immigration status verification are not required or authorized by Subsection 2(B). Subsection 2(C) requires notification of ICE or Customs and Border Protection whenever an unlawfully present alien is discharged or assessed a monetary obligation. *Id.* § 11-1051(C). Subsections 2(D) and (F) permit law enforcement to securely transport unlawfully present aliens and send, receive, and exchange information related to immigration status. *Id.* § 11-1051(D), (F).

In addition, Subsection 2(H) permits legal residents of Arizona to bring actions in state court "to challenge any official or agency of [Arizona] that adopts or implements a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law." *Id.* § 11-1051(H). Subsections 2(I) and (J) address the civil penalties arising from such civil suits, and Subsection 2(K) provides that law enforcement officers are indemnified against reasonable costs and expenses incurred by the officer in

connection with any suit initiated under this Section unless the officer is found to have acted in bad faith. *Id.* § 11-1051(I)-(K).

3. Section 3

Section 3 of S.B. 1070 adds A.R.S. § 13-1509, which provides that "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of [8 U.S.C. §§] 1304(e) or 1306(a)," federal statutes that require aliens to carry documentation of registration and penalize the willful failure to register. A.R.S. § 13-1509(A). Violation of Section 3 is a class 1 misdemeanor and results in a maximum fine of $100 and a maximum of 20 days in jail for a first violation and up to 30 days in jail for any subsequent violation. *Id.* § 13-1509(H). Section 3 limits a violator's eligibility for a suspended sentence, probation, pardon, and commutation of a sentence and requires violators to pay jail costs. *Id*
§ 13-1509(D), (E). In the enforcement of Section 3, immigration status may be determined by a law enforcement officer authorized by the federal government or pursuant to 8 U.S.C. § 1373(c). *Id.* § 13 1509(B). Pursuant to Subsection 3(C), law enforcement officers are not permitted to consider race, color, or national origin in the enforcement of Section 3. *Id.* § 13- 1509(C). Finally, Section 3 does not apply to "a person who maintains authorization from the federal government to remain in the United States." *Id.* § 13-1509(F).

4. Section 4

In Section 4 of S.B. 1070, the Arizona Legislature revised A.R.S. § 13-2319 by adding a provision that

permits officers enforcing Arizona's human smuggling statute to stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe that the person is in violation of any civil traffic law. *Id.* § 13-2319(E). Section 4 does not make any other changes or additions to Arizona's human smuggling statute, A.R.S. § 13-2319.

5. Section 5

Section 5 of S.B. 1070 adds two provisions to the Arizona Criminal Code, A.R.S. §§ 13-2928 and 13-2929. A.R.S. § 13-2928(A) provides that it is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway and is impeding traffic to attempt to hire a person for work at another location. *Id.* § 13-2928(A). Similarly, A.R.S. § 13-2928(B) provides that it is unlawful for a person to enter a motor vehicle in order to be hired if the vehicle is stopped on a street, roadway, or highway and is impeding traffic. *Id.* § 13-2928(B). Finally, A.R.S. § 13-2928(C) provides that it is unlawful "for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." *Id.* § 13-2928(C). Violation of A.R.S. § 13-2928 is a class 1 misdemeanor. *Id.* § 13-2928(F).

Section 5 of S.B. 1070 also creates A.R.S. § 13-2929, which provides that it is unlawful for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, har-

bor, or shield or attempt to conceal, harbor, or shield an alien from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona. *Id.* § 13-2929(A)(1)-(3). In order to violate A.R.S. § 13-2929(A), a person must also know or recklessly disregard the fact that the alien is unlawfully present in the United States. *Id.* Violation of A.R.S. § 13-2929 is a class 1 misdemeanor. *Id.* § 13 2929(F).

6. Section 6

Section 6 of S.B. 1070 amends A.R.S. § 13-3883 to permit an officer to arrest a person without a warrant if the officer has probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable from the United States." *Id.* § 13-3883(A)(5).

7. Sections 7-13

Sections 7, 8, and 9 amend Arizona's law imposing sanctions on employers who hire unlawfully present aliens. *See* A.R.S. §§ 23-212, 23-212.01, 23-214. Section 10 amends A.R.S. § 28-3511 to allow for the immobilization or impoundment of vehicles used in the transporting and concealing of unlawfully present aliens where the driver of the vehicle knew or recklessly disregarded the fact that the alien was unlawfully present. Section 11 creates the "gang and immigration intelligence team enforcement mission fund" for civil penalties paid pursuant to Subsection 2(I). Finally, Section 12 provides for the severance of any unconstitutional provisions, and Section 13 provides a short title for the enactment.

C. Procedural Posture

The United States filed its Complaint challenging the constitutionality of S.B. 1070 on July 6, 2010,

naming as Defendants the State of Arizona and Governor Brewer in her official capacity (collectively, "Arizona"). On the same day, it also filed a Motion requesting that the Court preliminarily enjoin Arizona from enforcing S.B. 1070 until the Court can make a final determination as to its constitutionality. (Doc. 6, Pl.'s Lodged Proposed Mot. for Prelim. Inj.) The United States argues principally that the power to regulate immigration is vested exclusively with the federal government, and the provisions of S.B. 1070 are therefore preempted by federal law. The Court held a Hearing on Plaintiff's Motion on July 22, 2010 ("the Hearing"). S.B. 1070 has an effective date of July 29, 2010. The Court now considers the United States' Motion for Preliminary Injunction.

III. LEGAL STANDARDS AND ANALYSIS

A. General Legal Standards

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (citations omitted).

The United States primarily asserts that the statutory provisions contained in S.B. 1070 are preempted by federal law. The Supremacy Clause of the United States Constitution makes federal law "the supreme law of the land." U.S. Const. art. VI, cl. 2. The Supreme Court has consistently ruled that

the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers.[4] While holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the Supreme Court concluded that not every state enactment "which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." *De Canas v. Bica*, 424 U.S. 351, 354-355 (1976).

Federal preemption can be either express or implied. *Chicanos Por La Causa v. Napolitano (Chicanos Por La Causa I)*, 544 F.3d 976, 982 (9th Cir. 2008), *cert. granted*, 78 U.S.L.W. 3065, 78 U.S.L.W. 3754, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115). There are two types of implied preemption: field preemption and conflict preemption. *Id.* Field preemption occurs "where 'the depth and breadth of a congressional scheme . . . occupies the legislative field.'" *Id.* (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). Conflict preemption describes a situation in which "compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes

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[4] A variety of enumerated powers implicate the federal government's long-recognized immigration power, including the Commerce Clause, the Naturalization Clause, and the Migration and Importation Clause. *See* U.S. Const. art. I, § 8, cl. 3-4; art. I, § 9, cl. 1; *see also Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

and objectives of Congress." *Id.* (internal quotations and citations omitted). An actual, as opposed to hypothetical or potential, conflict must exist for conflict preemption to apply. *Id.*

B. Likelihood of Success on the Merits

The United States must first demonstrate a likelihood of success on the merits. *Winter*, 129 S. Ct. at 374. The United States challenges S.B. 1070 on its face, before it takes effect on July 29, 2010. (Pl.'s Mot. at 7.) "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Supreme Court later observed, in considering a facial challenge, "[S]ome Members of the Court have criticized the *Salerno* formulation, [but] all agree that a facial challenge must fail where a statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)). In deciding a facial challenge, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

1. Preemption of Overall Statutory Scheme

As discussed above, S.B. 1070 contains several provisions adding to and amending Arizona law. While the United States has requested that the Court enjoin S.B. 1070 in its entirety, it specifically

challenges only select provisions of S.B. 1070. (*See* Pl.'s Mot. at 12 n.8 (noting that "the instant motion does not seek to enjoin" Sections 7-9 of S.B. 1070 and that Sections 11-13 "are administrative provisions which are not the subject of this dispute").) The United States also argues that the overall statutory scheme of S.B. 1070 is preempted because it attempts to set immigration policy at the state level and interferes and conflicts with federal immigration law, foreign relations, and foreign policy. (*Id.* at 12-25.) Section 1 of S.B. 1070 declares a unified, statewide public policy, providing:

> The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in
> Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

S.B. 1070 § 1. The United States urges the Court to enjoin S.B. 1070 as an integrated statutory enactment with interlocking provisions. (Pl.'s Mot. at 12 25.) The United States asserts that Section 1 animates and "infuses" the operative sections of the law. (Hr'g Tr. 13:4-14:5.)

"[W]hen the constitutionality of a state statute is challenged, principles of state law guide the severability analysis and [courts] should strike down only those provisions which are inseparable from the invalid provisions." *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008) (citing *Tucson*

Woman's Clinic v. Eden, 379 F.3d 531, 556-57 (9th Cir. 2004)). "A court should not declare an entire statute unconstitutional if the constitutional portions can be severed from those which are unconstitutional." *State v. Ramsey*, 831 P.2d 408, 413 (Ariz. Ct. App. 1992) (citing *State v. Prentiss*, 786 P.2d 932, 937 (Ariz. 1989)).

Under Arizona law,

> it is well settled . . . that where the valid parts of a statute are effective and enforceable standing alone and independent of those portions declared unconstitutional, the court will not disturb the valid law if the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act.

Selective Life Ins. Co. v. Equitable Life Assurance Soc'y of the U.S., 422 P.2d 710, 715 (Ariz. 1967) (citing *McCune v. City of Phx.*, 317 P.2d 537, 542 (Ariz. 1957)). In determining whether potentially unconstitutional provisions of S.B. 1070 may be severed from the remainder of the enactment, the primary concern is legislative intent. *See id.* at 715-16 (citing *City of Mesa v. Killingsworth*, 394 P.2d 410, 413 (Ariz. 1964)). Where a statute contains a severability provision, Arizona courts generally attempt to give effect to the severability clause. *Id.* at 715.

Section 12(A) of S.B. 1070 provides for the severability of S.B. 1070's provisions, stating that if any provision of the Act "is held invalid, the invalidity

does not affect other provisions . . . that can be given effect without the invalid provision." Arizona's Legislature intended the provisions of S.B. 1070 to be severable in order to preserve the constitutional provisions of the Act. As a result, where the provisions of S.B. 1070 are "effective and enforceable standing alone and independent" of any unconstitutional provisions and the valid portions are not so "intimately connected" to any invalid provision as to raise the presumption that the Arizona Legislature would not have enacted the valid provisions without the invalid provisions, S.B. 1070's provisions are severable. *See Selective Life Ins.*, 422 P.2d at 715.

While Section 1 of S.B. 1070 provides a statement of the Act's intent and purpose, it does not create a single and unified statutory scheme incapable of careful provision by provision analysis. The Court cannot enjoin a purpose; the Arizona Legislature is free to express its viewpoint and intention as it wishes, and Section 1 has no operative function. However, this is not to say that Section 1 is irrelevant. The expression of the Legislature's intent provides context and backdrop for the functional enactments of S.B. 1070, and the Court considers it in this capacity as it analyzes the other provisions of the law.

S.B. 1070 will not be enjoined in its entirety. The Court will not ignore the obligation to preserve the constitutional provisions of a state legislative enactment or S.B. 1070's severability clause. The Court thus evaluates the constitutionality of the individual provisions of S.B. 1070 challenged by the United States.

2. Section 2(B): A.R.S. § 11-1051(B)

> Section 2(B) of S.B. 1070 provides as follows:
>
> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or . . . law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town of this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released.

A.R.S. § 11-1051(B). Section 2(B) also states that if an officer is presented with one of the following forms of identification, the officer is to presume that the person is not an unauthorized alien: (1) a valid Arizona driver license or identification license; (2) a valid tribal enrollment card or other form of tribal identification; or (3) a valid United States federal, state, or local form of identification, provided that the issuing entity requires proof of citizenship before issuance. *Id.* The United States argues that this section is preempted because it will result in the harassment of lawfully present aliens and will burden federal resources and impede federal enforcement and policy priorities. (Pl.'s Mot. at 25-32.)

a. Mandatory Immigration Status Determination Upon Arrest

The Court first addresses the second sentence of Section 2(B): "Any person who is arrested shall have the person's immigration status determined before the person is released." Arizona advances that the proper interpretation of this sentence is "that *only* where a reasonable suspicion exists that a person arrested is an alien and is unlawfully present in the United States *must* the person's immigration status be determined before the person is released." (Defs.' Resp. to Pl.'s Mot. ("Defs.' Resp.") at 10.)[5] Arizona goes on to state, "[T]he Arizona Legislature could not have intended to compel Arizona's law enforcement officers to determine and verify the immigration status of *every single person* arrested – even for United States citizens and when there is absolutely no reason to believe the person is unlawfully present in the country." (*Id.*)

The Court cannot interpret this provision as Arizona suggests. Before the passage of H.B. 2162, the first sentence of Section 2(B) of the original S.B. 1070 began, "For any lawful contact" rather than "For any lawful stop, detention or arrest." (*Compare* original S.B. 1070 § 2(B) *with* H.B. 2162 § 3(B).) The second sentence was identical in the original version and as modified by H.B. 2162. It is not a logical interpretation of the Arizona Legislature's intent to state that it originally intended the first two sentences of Section 2(B) to be read as dependent on one

[5] Arizona acknowledges that this sentence of Section 2(B) "might well have been more artfully worded." (*Id.*)

another. As initially written, the first sentence of Section 2(B) did not contain the word "arrest," such that the second sentence could be read as modifying or explicating the first sentence. In S.B. 1070 as originally enacted, the first two sentences of Section 2(B) are clearly independent of one another. Therefore, it does not follow logically that by changing "any lawful contact" to "any lawful stop, detention or arrest" in the first sentence, the Arizona Legislature intended to alter the meaning of the second sentence in any way. If that had been the Legislature's intent, it could easily have modified the second sentence accordingly.

As a result of this conclusion, the Court reads the second sentence of Section 2(B) independently from the first sentence. The Court also concludes that the list of forms of identification that could provide a presumption that a person is not an unlawfully present alien applies only to the first sentence of Section 2(B) because the second sentence makes no mention of unlawful presence: the second sentence states plainly that "[a]ny person who is arrested" must have his or her immigration status determined before release. A presumption against unlawful presence would not dispose of the requirement that immigration status be checked because a legal permanent resident might have a valid Arizona driver's license, but an inquiry would still need to be made to satisfy the requirement that the person's "immigration status" be determined prior to release.

The United States asserts that mandatory determination of immigration status for all arrestees "conflicts with federal law because it necessarily

imposes substantial burdens on lawful immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country – rules designed to ensure 'our traditional policy of not treating aliens as a thing apart.'" (Pl.'s Mot. at 26 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)).) Finding a state law related to alien registration to be preempted, the Supreme Court in *Hines* observed that Congress "manifested a purpose to [regulate immigration] in such a way as to protect the personal liberties of law-abiding aliens through one uniform national . . . system[] and to leave them free from the possibility of inquisitorial practices and police surveillance." 312 U.S. at 74.

Requiring Arizona law enforcement officials and agencies to determine the immigration status of every person who is arrested burdens lawfully-present aliens because their liberty will be restricted while their status is checked. Given the large number of people who are technically "arrested" but never booked into jail or perhaps even transported to a law enforcement facility, detention time for this category of arrestee will certainly be extended during an immigration status verification. (*See Escobar, et al. v. City of Tucson, et al.*, No. CV 10-249-TUC-SRB, Doc. 9, City of Tucson's Answer & Cross-cl., 38 (stating that during fiscal year 2009, Tucson used the cite-and-release procedure provided by A.R.S. § 13-3903 to "arrest" and immediately release 36,821 people).) Under Section 2(B) of S.B. 1070, all arrestees will be required to prove their immigration status to the satisfaction of state authorities, thus

increasing the intrusion of police presence into the lives of legally-present aliens (and even United States citizens), who will necessarily be swept up by this requirement.[6]

The United States argues that the influx of requests for immigration status determination directed to the federal government or federally-qualified officials would "impermissibly shift the allocation of federal resources away from federal priorities." (Pl.'s Mot. at 30.) State laws have been found to be preempted where they imposed a burden on a federal agency's resources that impeded the agency's function. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001) (finding a state law preempted in part because it would create an incentive for individuals to "submit a deluge of information that the [federal agency] neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application"); *cf. Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006) (expressing concern in preemption analysis for preliminary injunction purposes that burden on DOJ and DHS as a result of immigration status checks could "impede the functions of those federal agencies").

Pursuant to 8 U.S.C. § 1373(c), DHS is required to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain

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[6] The Court is also cognizant of the potentially serious Fourth Amendment problems with the inevitable increase in length of detention while immigration status is determined, as raised by the plaintiffs in *Friendly House, et al. v. Whiting, et al.*, No. CV 10-1061-PHX-SRB.

the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information." DHS has, in its discretion, set up LESC, which is administered by ICE and "serves as a national enforcement operations center that promptly provides immigration status and identity information to local, state, and federal law enforcement agencies regarding aliens suspected of, arrested for, or convicted of criminal activity." (Pl.'s Mot. at 6-7 (citing Palmatier Decl. ¶¶ 3-6).) Mr. Palmatier states in his Declaration that LESC resources are currently dedicated in part to national security objectives such as requests for immigration status determination from the United States Secret Service, the FBI, and employment-related requests at "national security related locations that could be vulnerable to sabotage, attack, or exploitation." (Palmatier Decl. ¶ 4.) Thus, an increase in the number of requests for determinations of immigration status, such as is likely to result from the mandatory requirement that Arizona law enforcement officials and agencies check the immigration status of any person who is arrested, will divert resources from the federal government's other responsibilities and priorities.

For these reasons, the United States has demonstrated that it is likely to succeed on its claim that the mandatory immigration verification upon arrest requirement contained in Section 2(B) of S.B. 1070 is preempted by federal law. This requirement, as stated above, is likely to burden legally-present aliens, in contravention of the Supreme Court's directive in *Hines* that aliens not be subject to "the

possibility of inquisitorial practices and police surveillance." 312 U.S. at 74. Further, the number of requests that will emanate from Arizona as a result of determining the status of every arrestee is likely to impermissibly burden federal resources and redirect federal agencies away from the priorities they have established.[7]

b. Immigration Status Determination During Lawful Stops, Detentions, or Arrests

Next, the Court turns to the first sentence of Section 2(B):

> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or . . . law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town of this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.

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[7] The problems associated with burdening federal resources are even more acute when considered in light of other state laws similar to this provision. (*See* Pl.'s Mot. at 31-32 (citing to a newspaper article stating that at least 18 other states are considering parallel legislation).); *see also North Dakota v. United States*, 495 U.S. 423, 458-59 (1990) (Brennan, J., concurring in plurality opinion in part and dissenting in part) (collecting cases where burden of state regulation on federal government was amplified by aggregate potential of multiple states following suit).

A.R.S. § 11-1051(B). The United States makes essentially the same arguments about this requirement. First, the United States advances that it imposes a burden on lawfully-present aliens not permitted by *Hines*, where the Supreme Court sought to protect the personal liberties of lawfully-present aliens to leave them free from the possibility of intrusive police practices that might affect international relations and generate disloyalty. (Pl.'s Mot. at 26 (citing *Hines*, 312 U.S. at 74).) Second, the United States argues that this requirement impermissibly burdens and redirects federal resources away from federally-established priorities. (*Id.*) The United States' arguments regarding burdening of federal resources are identical to those outlined above and will not be restated. However, the United States makes several arguments with respect to the burden on lawfully-present aliens that are specific to or slightly different in the context of the first sentence of Section 2(B).

First, the United States argues that this provision "necessarily places lawfully present aliens (and even U.S. citizens) in continual jeopardy of having to demonstrate their lawful status to non-federal officials." (*Id.* at 26.) The United States further asserts that there are numerous categories of lawfully-present aliens "who will not have readily available documentation to demonstrate that fact," including foreign visitors from Visa Waiver Program countries,[8] individuals who have applied for asylum but

[8] The Visa Waiver Program permits visitors from certain countries to enter the United States without a visa, so long as

not yet received an adjudication, people with temporary protected status, U and T non-immigrant visa applicants, or people who have self-petitioned for relief under the Violence Against Women Act. (*Id.* at 26-27.) Also, the United States points out that Uni ed States citizens are not required to carry identification, and some citizens might not have easy access to a form of identification that would satisfy the requirement of Section 2(B).[9]

The United States contends that the impact on lawfully-present aliens of the requirement that law enforcement officials, where practicable, check the immigration status of a person lawfully stopped, detained, or arrested where there is reasonable suspicion that the person is an alien and is unlawfully present will be exacerbated by several factors. (*Id.* at 28- 29.) First, the United States suggests that the impact on lawfully-present aliens is enhanced because this requirement applies to stops for even very minor, non-criminal violations of state law, including jaywalking, failing to have a dog on a leash, or riding a bicycle on the sidewalk. (*Id.* at 28.) Also, the United States argues that the impact will be increased because other provisions in S.B. 1070 put pressure

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various requirements are met. *See, e.g.*, 8 U.S.C. § 1187; 8 C.F.R. §§ 217.1-217.7.

[9] Also, upon a check with LESC or a federally-authorized state official, the status of a United States citizen might not be easily confirmable as many people born in the United States likely do not have an entry in a DHS database.

on law enforcement agencies and officials to enforce the immigration laws vigorously.[10] (*Id.* at 29.)

Hines cautions against imposing burdens on lawfully-present aliens such as those described above. *See* 312 U.S. at 73-74. Legal residents will certainly be swept up by this requirement, particularly when the impacts of the provisions pressuring law enforcement agencies to enforce immigration laws are considered. *See* A.R.S. § 11-1051(A), (H). Certain categories of people with transitional status and foreign visitors from countries that are part of the Visa Waiver Program will not have readily available documentation of their authorization to remain in the United States, thus potentially subjecting them to arrest or detention, in addition to the burden of "the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74. In *Hines*, the Supreme Court emphasized the important federal responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy. *Id.* at 62-66; *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("We recognize . . . the Nation's need to 'speak with one voice' in immigration matters."). The United States asserts, and the Court agrees, that "the federal government has long rejected a system by which aliens' papers are routinely de-

[10] These provisions include Sections 2(A) and 2(H), which, respectively, prohibit agencies from restricting the enforcement of immigration laws and create a private right of action for legal residents to sue agencies if they believe the laws are not being enforced aggressively enough.

manded and checked." (Pl.'s Mot. at 26.)[11] The Court finds that this requirement imposes an unacceptable burden on lawfully-present aliens.

With respect to the United States' arguments regarding the burden on and impediment of federal resources as they relate to the first sentence of Section 2(B), the Court's conclusions mirror those stated above regarding the second sentence of Section 2(B). Federal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status determination that will flow from Arizona if law enforcement officials are required to verify immigration status whenever, during the course of a lawful stop, detention, or arrest, the law enforcement official has reasonable suspicion of unlawful presence in the United States.[12] In combination with the impermissible burden this provision will place on lawfully-present aliens, the burden on federal resources and priorities also leads to an inference of preemption. Therefore, for the purposes of preliminary injunction analysis, the Court concludes that the United States has demonstrated a likelihood of success on its challenge to the first sentence of

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[11] The Court notes, but does not analyze here, the arguments raised by the plaintiffs in *Friendly House*, No. CV 10-1061-PHX-SRB, regarding racial profiling.

[12] Many law enforcement officials already have the *discretion* to verify immigration status if they have reasonable suspicion, in the absence of S.B. 1070; Section 2 of S.B. 1070 removes that discretion by making immigration status determinations mandatory where practicable. (*See* Pl.'s Mot. at 26; Defs.' Resp. at 20.)

Section 2(B). Section 2(B) in its entirety is likely preempted by federal law.

3. Section 3: A.R.S. § 13-1509

Section 3 states that "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)." A.R.S. § 13-1509(A).[13] The penalties for violation of Section 3, a class 1 misdemeanor, are a maximum fine of $100 and a maximum of 20 days in jail for a first violation and up to 30 days in jail for any subsequent violation. A.R.S. § 13-1509(H). Section 3 also limits violators' eligibility for suspension of sentence, probation, pardon, and commutation of a sentence and requires violators to pay jail costs. A.R.S. § 13-1509(D), (E). Section 3 does not apply to "a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509(F). Essentially, Section 3 makes it a state crime to violate federal registration laws and provides for state prosecutions and penalties for violations of the federal registration law. The United States argues that Section 3 is preempted because it interferes with comprehensive federal alien registration law, seeks to criminalize unlawful presence, and will result in the harassment

[13] 8 U.S.C. § 1306(a) makes it a misdemeanor, subject to a maximum fine of $1000 and a maximum of six months imprisonment, to willfully fail or refuse to apply for registration when such application is required. Similarly, 8 U.S.C. § 1304(e) requires an alien to carry a certificate of alien registration or alien registration receipt and makes a failure to comply with these requirements a misdemeanor subject to a maximum fine of $100 and imprisonment for up to 30 days.

of aliens. (Pl.'s Mot. at 34-39.) Arizona asserts that Section 3 neither conflicts with federal law nor regulates in a federally occupied field. (Defs.' Resp. at 21-22.)

"[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law." *Hines*, 312 U.S. at 68. In *Hines*, the Supreme Court found that,

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

312 U.S. at 66-67. *Hines* also stated that a state statute is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67. The Supreme Court determined in *Hines* that the purpose of the Federal Alien Registration Act was to "make a harmonious whole" and that the Alien Registration Act "provided a standard for alien registration in a single integrated and all-embracing system." *Id.* at 72, 74. As a result, the *Hines* court held that the state registration scheme at issue could not be enforced. *Id.* at 74.

The current federal alien registration requirements create an integrated and comprehensive system of registration. *See id.* (finding that the Alien Registration Act, the precursor to the current alien registration scheme, created a "single integrated and all-embracing system" of registration); 8 U.S.C. §§ 1201, 1301-06 (providing federal registration requirements and penalties). While the Supreme Court rejected the possibility that the INA is so comprehensive that it leaves no room for state action that impacts aliens, *De Canas*, 424 U.S. at 358, the Supreme Court has also evaluated the impact of the comprehensive federal alien registration scheme and determined that the complete scheme of registration precludes states from conflicting with or complementing the federal law. *Hines*, 312 U.S. at 66-67.

Section 3 attempts to supplement or complement the uniform, national registration scheme by making it a state crime to violate the federal alien registration requirements, which a state may not do "inconsistently with the purpose of Congress." *Hines*, 312 U.S. at 66-67; *see also* A.R.S. § 13-1509(A). While Section 3 does not create additional registration requirements, the statute does aim to create state penalties and lead to state prosecutions for violation of the federal law. Although the alien registration requirements remain uniform, Section 3 alters the penalties established by Congress under the federal registration scheme. Section 3 stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt by Arizona to regulate alien registration. *See Hines*, 312 U.S. at 67. As a result, the Court finds that the United

States is likely to succeed on its claim that Section 3 is preempted by federal law.[14]

4. Section 4: Amendment to A.R.S. § 13-2319

Section 4 of S.B. 1070 amends Arizona's human smuggling statute, A.R.S. § 13-2319. Section 4 adds, "Notwithstanding any other law, in the enforcement of this section a peace officer may lawfully stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law." A.R.S. § 13-2319(E). The United States requests an injunction prohibiting the enforcement of Section 4 but does not seek an injunction as to A.R.S. § 13-2319. (Pl.'s Compl. at 24 (requesting a preliminary and permanent injunction prohibiting the enforcement of Sections 1-6 of S.B. 1070).)[15] However, the arguments asserted by the United States in support of enjoining Section 4 pertain entirely to separate provisions of A.R.S. § 13-2319 and do not challenge the change embodied in Section 4. (Pl.'s Mot. at 39 42.)

Section 4 makes a minor change to Arizona's preexisting human smuggling statute, which is not specifically challenged by the United States. Nothing about the section standing alone warrants an injunction. As a result, the Court finds that the United

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[14] Subsections (B)-(H) pertain to the implementation and enforcement of Section 3. No provisions of Section 3 retain any effect absent Section 3's operative provision.

[15] At the July 22, 2010, Hearing on the United States' Motion for a Preliminary Injunction, the United States confirmed that it does not seek to enjoin A.R.S. § 13-2319. (Hr'g Tr. 5:10-20.)

States is not likely to succeed on a claim that Section 4 of S.B. 1070 is preempted by federal law.

5. Section 5: A.R.S. § 13-2928(C)[16]

Section 5 of S.B. 1070 creates A.R.S. § 13-2928(C), which provides that "it is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." This violation is a class 1 misdemeanor. A.R.S. § 13- 2928(F). The United States asserts that this provision "is preempted by Congress's comprehensive scheme, set forth in [IRCA] for regulating the employment of aliens." (Pl.'s Mot. at 42.) The United States argues that "IRCA reflects Congress's deliberate choice *not* to criminally penalize unlawfully present aliens for performing work, much less for attempting to perform it." (*Id.*) Arizona responds that "Congress could have, but chose not to, expressly preempt state and local laws that impose civil or criminal sanctions upon employees." (Defs.' Resp. at 25.) Arizona contends that, in an area of traditional state sovereignty such as employment, "[p]reemption cannot be lightly inferred." (*Id.*)

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[16] Two provisions of Section 5 prohibit the act of hiring and being hired by the occupant of a motor vehicle. A.R.S. § 13-2928(A), (B). The Court finds that the June 9, 2010, decision of the Ninth Circuit Court of Appeals in a case contesting a virtually identical local ordinance in Redondo Beach, California forecloses a challenge to A.R.S. §§ 13-2928 (A) and (B) on First Amendment grounds. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1184-93 (9th Cir. 2010).

"States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356. Interpreting *De Canas* and considering a state law sanctioning employers who hire unauthorized workers, the Ninth Circuit Court of Appeals held that, "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of nonpreemption appli[ed]." *Chicanos Por La Causa I*, 544 F.3d at 984; *accord Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (observing that "[i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (internal quotations and citation omitted)).

A.R.S. § 13-2928(C), as amended, regulates the employment of unauthorized aliens in Arizona, and, thus, a presumption against preemption applies in the context of this provision. However, while deliberate federal inaction does not always imply preemption, "[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn, not from federal inaction alone but from inaction joined with action." *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). The Supreme Court explained in *Puerto Rico Department of Consumer Affairs* that with some

"extant action" by Congress, there can arise "an inference of pre-emption in an unregulated segment of an otherwise regulated field." *Id.* at 504; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (concluding that neither an express pre-emption provision nor a saving clause "bar[s] the ordinary working of conflict preemption principles").

IRCA provides penalties for employers who knowingly hire or continue to employ an alien without work authorization. 8 U.S.C. § 1324a(a)(1)-(2), (e)(4). IRCA also prohibits employers from recruiting or referring for a fee unauthorized workers. *Id.* § 1324a(a)(1). IRCA makes it unlawful to use contractors or subcontractors to hire unauthorized alien workers. *Id.* § 1324a(a)(4). Under IRCA, employers are required to comply with an "employment verification system" set up by the statute. *Id.* § 1324a(b).[17] IRCA also instituted a compliance scheme and a series of escalating sanctions for violations, entailing increasing monetary fines for each subsequent violation and the possibility of injunctive sanctions. *Id.* § 1324a(e)(4); 8 C.F.R. § 274a.10 (outlining civil and criminal penalties for violations of 8 U.S.C. § 1324a(a)(1)(A) or (a)(2)).

While it is readily apparent that Congress's central focus in IRCA was employer sanctions, there are also targeted sanctions directed at employees. *See* 8 U.S.C. § 1324c (making it a civil violation to make or

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[17] IIRIRA created three pilot programs for employee verification; of those three, only the program commonly known as E-Verify is still in existence. *See Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 752 (10th Cir. 2010).

use a false document or to use a document belonging to another person, in the context of unlawful employment of an unauthorized alien). As the Ninth Circuit Court of Appeals observed, "While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990) (examining IRCA's legislative history), *rev'd on other grounds*, 502 U.S. 183 (1991). The court in *National Center for Immigrants' Rights* found that the determination to reduce or deter employment of unauthorized workers by sanctioning employers, rather than employees, was "a congressional policy choice clearly elaborated in IRCA." *Id.* at 1370.

IRCA also requires that an individual seeking employment "attest, under penalty of perjury . . . that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized . . . to be hired, recruited, or referred for such employment." 8 U.S.C. § 1324a(b)(2). This attestation is to be made on a form "designated or established by the Attorney General," and IRCA states that the form "and any information contained in or appended to such form[] may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18" of the federal criminal code. *Id.* § 1324a(b)(5). The provisions of Title 18 referenced in § 1324a(b)(5) of Title 8 make it a federal crime to, in any matter within the jurisdiction of the federal government:

> 18 U.S.C. § 1001(a): (1) falsify, conceal, or cover up any material fact;
> (2) knowingly make or use a materially false, fictitious, or fraudulent statement; or (3) make or use any false writing or document.
>
> 18 U.S.C. § 1028(a): knowingly make, use, or transfer a false or stolen identification document or identification document belonging to another person or any implement or feature for use in creating a false identification document.
>
> 18 U.S.C. § 1546: (a) forge or falsify an immigration document; or (b) use a false identification document, a document not properly issued to the user, or a false attestation.
>
> 18 U.S.C. § 1621: commit perjury by knowingly making a false statement after taking an oath to tell the truth during a proceeding or on any document signed under penalty of perjury.

Accordingly, the attestation forms described in 8 U.S.C. § 1324a(b)(2) may only be used for these limited purposes.

The provision limiting the use of attestation forms and the civil penalties outlined for document fraud in Title 8 and the robust sanctions for employers who hire, continue to employ, or refer unauthorized workers convince the Court that Congress has comprehensively regulated in the field of employ-

ment of unauthorized aliens. These "extant actions," in combination with an absence of regulation for the particular violation of working without authorization, lead to the conclusion that Congress intended not to penalize this action, other than the specific sanctions outlined above. *See P.R. Dep't of Consumer Affairs*, 485 U.S. at 503-04. Thus, the Court finds that Plaintiff is likely to succeed on its claim that Arizona's new crime for working without authorization, set forth in Section 5(C) of S.B. 1070, conflicts with a comprehensive federal scheme and is preempted.

6. Section 5: A.R.S. § 13-2929

Section 5 of S.B. 1070 also creates A.R.S. § 13-2929, which makes it illegal for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield an alien from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona. A.R.S. § 13-2929(A)(1)-(3). In order to violate A.R.S. § 13-2929(A), a person must also know or recklessly disregard the fact that the alien is unlawfully present in the United States. *Id.* The United States asserts that this provision is preempted as an impermissible regulation of immigration and that the provision violates the dormant Commerce Clause. (Pl.'s Mot. at 44-46.)[18]

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[18] The United States also asserts in a footnote that A.R.S. § 13-2929 directly conflicts with 8 U.S.C. § 1324(a)(1)(C), a section of the federal alien smuggling statute, which provides an excep-

a. Regulation of Immigration

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas*, 424 U.S. at 354. The regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* The United States argues that "to the extent Section 5 is not a restriction on interstate movement, it is necessarily a restriction on unlawful entry into the United States." (Pl.'s Mot. at 45.)

A.R.S. § 13-2929 does not attempt to regulate who should or should not be admitted into the United

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tion for certain religious groups for contact with volunteer ministers and missionaries. (*Id.* at 46 n.40.) While the federal statute includes a narrow exception for religious organizations engaged in certain conduct not specifically exempted under A.R.S. § 13-2929, the new Arizona statute is narrower than its federal counterpart because it requires that the person already be in violation of a criminal offense. In light of the intentional narrowing of the Arizona enactment, the Court would have to imagine a set of remote circumstances in order to find a potential conflict between the federal and the state law. In addition, Arizona asserts that A.R.S. § 13-2929 targets criminals who engage unlawfully present aliens to be involved in a criminal enterprise. On a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. In deciding a facial challenge, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50 (quoting *Raines*, 362 U.S. at 22). A.R.S. § 13-2929 is narrower than the federal law, and the Court will not speculate about hypothetical cases in order to find a conflict between the two.

States, and it does not regulate the conditions under which legal entrants may remain in the United States. *See De Canas*, 424 U.S. at 355. Therefore, the Court concludes that the United States is not likely to succeed on its claim that A.R.S. § 13-2929 is an impermissible regulation of immigration.

b. The Dormant Commerce Clause

The Commerce Clause provides Congress with the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 1, 3. The Supreme Court has interpreted the Commerce Clause "to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). This doctrine is often referred to as the "dormant Commerce Clause." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). "The dormant Commerce Clause is implicated if state laws regulate an activity that 'has a substantial effect' on interstate commerce such that Congress could regulate the activity.'" *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (quoting *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 993 (9th Cir. 2002)).

If a state statute implicates the dormant Commerce Clause, the Court must then determine "whether [the statute] discriminates on its face against interstate commerce." *United Haulers*, 550 U.S. at 338. "In this context, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and

burdens the latter." *Id.* (internal quotation and citation omitted). Nondiscriminatory statutes directed at legitimate local concerns do not violate the dormant Commerce Clause "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 346 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The United States argues that A.R.S. § 13-2929 "offends the [d]ormant Commerce Clause by restricting the interstate movement of aliens." (Pl.'s Mot. At 45.) A.R.S. § 13-2929 does not restrict or limit which aliens can enter Arizona. While the regulation of immigration does have an impact on interstate commerce, the United States has not provided a satisfactory explanation of how A.R.S. § 13-2929, which creates parallel state statutory provisions for conduct already prohibited by federal law, has a substantial effect on interstate commerce.[19]

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[19] The United States argues that the dormant Commerce Clause "forbids certain state regulations attempting to discourage or otherwise restrict the movement of people between states." (Pl.'s Mot. at 45 (citing *Edwards v. California*, 314 U.S. 160, 172-73 (1941)).) However, the United States fails to cite any authority supporting the proposition that unlawfully present aliens must be permitted to travel from state to state. In *Edwards*, the Supreme Court struck down a California statute prohibiting the transportation of indigent people into California. *Edwards*, 314 U.S. at 173. Unlike the California statute at issue in *Edwards*, A.R.S. § 13-2929 prohibits the transportation of people who are unlawfully present in the United States. Moreover, A.R.S. § 13-2929 does not attempt to prohibit entry into Arizona, but rather criminalizes specific conduct already prohibited by federal law.

Even assuming that A.R.S. § 13-2929 implicates the Commerce Clause, the statutory provision does not discriminate between in-state and out-of-state economic interests. *See United Haulers*, 550 U.S. at 338. A.R.S. § 13-2929 governs conduct occurring in Arizona and does not differentiate between in-state and out-of-state economic interests or burden out-of state interests in a way that benefits in-state interests. Further, Arizona's nondiscriminatory statute is directed at legitimate local concerns related to public safety. Therefore, A.R.S. § 13- 2929 does not violate the dormant Commerce Clause "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 346 (quoting *Pike*, 397 U.S. at 142). Here, any incidental burden on interstate commerce is minimal in comparison with the putative local benefits. The Court finds that the United States is not likely to succeed on its claim that Section 5's addition of A.R.S. § 13-2929 violates the dormant Commerce Clause or is an impermissible attempt to regulate immigration.[20]

7. Section 6: Amendment to A.R.S. § 13-3883(A)

In Section 6 of S.B. 1070, the Arizona Legislature revised A.R.S. § 13-3883 to provide that an officer may arrest a person without a warrant if the officer

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[20] The United States asserts that Section 10 of S.B. 1070 "is preempted insofar as it is based on the state law violations identified in Sections 4 and 5, which are preempted for the reasons discussed herein." (Pl.'s Mot. at 12 n.8.) As discussed above, the Court finds that Sections 4 and 5 are not likely to be preempted by federal law. Therefore, the United States is also not likely to succeed on its claim that Section 10 is preempted.

has probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable from the United States." A.R.S. § 13-3883(A)(5). In Arizona, a "public offense" is

> conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.

A.R.S. § 13-105(26). Because A.R.S. § 13-3883 already provides for the warrantless arrest of a person who commits a felony, misdemeanor, petty offense, or one of certain criminal violations in connection with a traffic accident, the effect of Section 6 on warrantless arrest authority is not entirely clear. Indeed, the Arizona officer training materials state that the revision to A.R.S. § 13-3883 "does not appear to change Arizona law." *Implementation of the 2010 Ariz. Immigration Laws - Statutory Provisions for Peace Officers* 11 (June 2010), http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf. Both the United States, in its Motion, and Arizona, at the Hearing, suggested that the revision provides for the warrantless arrest of a person where there is probable cause to believe the person *committed a crime in another state* that would be considered a crime if it had been

committed in Arizona and that would subject the person to removal from the United States. (Pl's Mot. at 32-33; Hr'g Tr. 46-48.) What is clear is that the statutory revision targets only aliens–legal and illegal–because only aliens are removable. *See Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001) (citing 8 U.S.C. § 1227).

In its brief, Arizona originally asserted that the new provision in A.R.S. § 13-3883 was "based upon a memorandum the DOJ's Office of Legal Counsel prepared in which it concluded that federal law does not 'preclude[] state police from arresting aliens on the basis of civil deportability.'" (Defs.' Resp. at 14 (quoting *id.*, Ex. 4, Mem. from Jay S. Bybee, Assistant Att'y Gen., Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations, at 13).) Although neither party asserted it at the Hearing, the Arizona Legislature's intent may have been to provide for the warrantless arrest of an alien who was *previously convicted of a crime in Arizona but never referred to DHS for potential removal proceedings*. This alternate interpretation of the revision to A.R.S. § 13-3883 would be in keeping with a goal of conferring on state officers the authority to arrest aliens on the basis of civil deportability.

Under the interpretation suggested by both parties that the revision to A.R.S. § 13-3883 is directed at the arrest of aliens who committed a crime in another state, the statute first requires an officer to determine whether an alien's out-of-state crime would have been a crime if it had been committed in Arizona, a determination that requires knowledge of out-

of-state statutes and their relationship with Arizona's statutes. *See State v. Roque*, 141 P.3d 368, 391 (Ariz. 2006) (concluding that the California and Arizona robbery statutes are not coterminous and, under certain facts, a person may be convicted of attempted robbery in California but not Arizona). Under any interpretation of the revision to A.R.S. § 13-3883, it requires an officer to determine whether an alien's public offense makes the alien removable from the United States, a task of considerable complexity that falls under the exclusive authority of the federal government. Justice Alito has commented that

> providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes such as *crime involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task.

Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (some citations omitted).

Within the complicated scheme of determining removability, some federal officials are, under certain circumstances, authorized to change the immigration consequences of the commission of a public offense and cancel or suspend the removal of an alien. *See, e.g.*, 8 U.S.C. §§ 1229b(a), 1253(a)(3). Ultimately, immigration court judges and federal appeals court judges determine whether an alien's offense makes an alien removable. *See id.* § 1182(a)(2) (describing crimes that qualify as grounds for inadmissibility); *id.* § 1227(a)(2) (describing crimes that qualify as grounds for deportation).

In its Motion, the United States provided evidence that Arizona police officers have no familiarity with assessing whether a public offense would make an alien removable from the United States. (Pl.'s Mot., Ex. 8, Decl. of Tony Estrada, Sheriff of Santa Cruz Cnty. ¶¶ 8-9; Ex. 9, Decl. of Roberto Villaseñor, Chief of Police, Tucson Police Dep't ¶ 6.) In its Response, Arizona asserted that, under the new A.R.S. § 11-1051, Arizona officers can contact DHS to determine the immigration status of aliens. (Defs.' Resp. at 19.) But the revision to A.R.S. § 13-3883 does not state that an officer must contact DHS to assess removability; the revision simply extends the authority for an officer to make a warrantless arrest.[21]

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[21] Even if an officer does contact LESC for the immigration status of an alien, it is not clear that LESC will have any information regarding whether a particular public offense that an alien may have committed will make the alien removable from the United States. "Congress established the LESC to provide alien status determination support to federal, state,

Considering the substantial complexity in determining whether a particular public offense makes an alien removable from the United States and the fact that this determination is ultimately made by federal judges, there is a substantial likelihood that officers will wrongfully arrest legal resident aliens under the new A.R.S. § 13-3883(A)(5). By enforcing this statute, Arizona would impose a "distinct, unusual and extraordinary" burden on legal resident aliens that only the federal government has the authority to impose. *Hines*, 312 U.S. at 65-66. The Court thus finds that the United States is likely to succeed on the merits in showing that A.R.S. § 13-3883(A)(5), created by Section 6 of S.B. 1070, is preempted by federal law.

C. Likelihood of Irreparable Harm

The Supreme Court has repeatedly recognized the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). Thus the United States also has the burden to establish that, absent a preliminary injunction, there is a likelihood–not just

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and local law enforcement on a 24-hour-a-day, seven-days-a-week basis. The enabling legislation is codified in 8 U.S.C. §§ 1226(d)(1)(A) & 1252 Note." (Palmatier Decl. ¶ 5.) The statute only directs LESC to determine the immigration status of an arrested individual. 8 U.S.C. § 1226(d)(1)(A). For its part, Arizona did not provide any evidence that LESC would be able to advise an officer whether a particular public offense makes an alien removable.

a possibility–that it will suffer irreparable harm. *Winter*, 129 S. Ct. at 374-75.

The Ninth Circuit Court of Appeals has stated "'that an alleged constitutional infringement will often alone constitute irreparable harm.'" *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Assoc. Gen. Contractors of Cal., Inc. v. Coal. For Econ. Equal.*, 950 F.2d 1401, 1412 (9th Cir. 1991)). Indeed, if an individual or entity faces the imminent threat of enforcement of a preempted state law and the resulting injury may not be remedied by monetary damages, the individual or entity is likely to suffer irreparable harm. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (stating that a federal court may properly enjoin "state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution'" (quoting *Ex parte Young*, 209 U.S. 123, 156 (1908)); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 366-67 (1989) (suggesting that irreparable injury is an inherent result of the enforcement of a state law that is preempted on its face); *Edmondson,* 594 F.3d at 771 (concluding that plaintiff is likely to suffer irreparable injury if enforcement of state law that is likely preempted by IRCA and IIRIRA is not enjoined); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 878 (N.D. Tex. 2008) (concluding that there is a likelihood of irreparable injury if enforcement of a city ordinance that is preempted by the INA is not enjoined).

If enforcement of the portions of S.B. 1070 for which the Court finds a likelihood of preemption is not enjoined, the United States is likely to suffer irreparable harm. This is so because the federal government's ability to enforce its policies and achieve its objectives will be undermined by the state's enforcement of statutes that interfere with federal law, even if the Court were to conclude that the state statutes have substantially the same goals as federal law. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 & n.14 (2000). For this injury, the United States will have no remedy at law. The Court thus finds a likelihood of irreparable harm to the interests of the United States that warrants preliminary injunctive relief. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 427 (2003) (enjoining permanently the enforcement of a state statute that is preempted by federal law because it interferes with the federal government's ability to enforce its policies); *Crosby*, 530 U.S. at 372, 379-80 (same).

D. The Balance of Equities and the Public Interest

The United States also has the burden to show that the balance of equities tips in its favor and that a preliminary injunction is in the public interest. *Winter*, 129 S. Ct. at 374. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 376 (citing *Munaf v. Green*, 128 S. Ct. 2207, 2218-19 (2008)). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,'" paying particu-

lar attention to the public consequences. *Id.* at 376-77 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

The Ninth Circuit Court of Appeals has concluded that allowing a state to enforce a state law in violation of the Supremacy Clause is neither equitable nor in the public interest. *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1059-60 (9th Cir. 2009). If Arizona were to enforce the portions of S.B. 1070 for which the Court has found a likelihood of preemption, such enforcement would likely burden legal resident aliens and interfere with federal policy. A preliminary injunction would allow the federal government to continue to pursue federal priorities, which is inherently in the public interest, until a final judgment is reached in this case. *See Am. Trucking*, 559 F.3d at 1059-60.

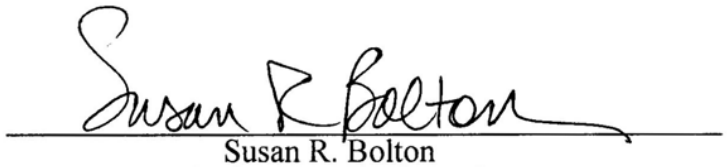
The Court by no means disregards Arizona's interests in controlling illegal immigration and addressing the concurrent problems with crime including the trafficking of humans, drugs, guns, and money. Even though Arizona's interests may be consistent with those of the federal government, it is not in the public interest for Arizona to enforce preempted laws. *See Edmondson*, 594 F.3d at 771. The Court therefore finds that preserving the status quo through a preliminary injunction is less harmful than allowing state laws that are likely preempted by federal law to be enforced. *See Cal. Pharmacists*, 563 F.3d at 852-53; *Am. Trucking*, 559 F.3d at 1059-60.

IT IS THEREFORE ORDERED granting in part and denying in part the United States' Motion for Preliminary Injunction (Doc. 27).

IT IS FURTHER ORDERED denying the United States' Motion for Preliminary Injunction as to the following Sections of Senate Bill 1070 (as amended by House Bill 2162): Section 1, Section 2(A) and (C)-(L), Section 4, the portion of Section 5 creating A.R.S. § 13- 2929, the portion of Section 5 creating A.R.S. § 13-2928(A) and (B), and Sections 7-13.

IT IS FURTHER ORDERED preliminarily enjoining the State of Arizona and Governor Brewer from enforcing the following Sections of Senate Bill 1070 (as amended by House Bill 2162): Section 2(B) creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 13-1509, the portion of Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

DATED this 28th day of July, 2010.



Susan R. Bolton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

July 6, 2010

The United States of America
Plaintiff,

v.

The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity

Defendants.

Case 2:10-cv-01413-SRB

COMPLAINT

Plaintiff, the United States of America, by its undersigned attorneys, brings this civil action for declaratory and injunctive relief, and alleges as follows:

INTRODUCTION

1. In this action, the United States seeks to declare invalid and preliminarily and permanently enjoin the enforcement of S.B. 1070, as amended and enacted by the State of Arizona, because S.B. 1070 is preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution.

2. In our constitutional system, the federal government has preeminent authority to regulate immigration matters. This authority derives from the United States Constitution and numerous acts of Congress. The nation's immigration laws reflect a careful and considered balance of national law enforcement, foreign relations, and humanitarian interests. Congress has assigned to the United States Department of Homeland Security, Department of Justice, and Department of State, along with other federal agencies, the task of enforcing and administering these immigration-related laws. In administering these laws, the federal agencies balance the complex – and often competing – objectives that animate federal immigration law and policy. Although states may exercise their police power in a manner that has an incidental or indirect effect on aliens, a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with the federal immigration laws. The Constitution and the federal immigration laws do not permit the development of a patchwork of

state and local immigration policies throughout the country.

3. Despite the preeminent federal authority and responsibility over immigration, the State of Arizona recently enacted S.B. 1070, a sweeping set of provisions that are designed to "work together to discourage and deter the unlawful entry and presence of aliens" by making "attrition through enforcement the public policy of all state and local government agencies in Arizona." *See* S.B. 1070 (as amended by H.B. 2162). S.B. 1070's provisions, working in concert and separately, seek to deter and punish unlawful entry and presence by requiring, whenever practicable, the determination of immigration status during any lawful stop by the police where there is "reasonable suspicion" that an individual is unlawfully present, and by establishing new state criminal sanctions against unlawfully present aliens. The mandate to enforce S.B. 1070 to the fullest extent possible is reinforced by a provision allowing for any legal resident of Arizona to collect money damages by showing that "any official or agency . . . [has] adopt[ed] or implement[ed] a policy" that "limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law."

4. S.B. 1070 pursues only one goal – "attrition" – and ignores the many other objectives that Congress has established for the federal immigration system. And even in pursuing attrition, S.B. 1070 disrupts federal enforcement priorities and resources that focus on aliens who pose a threat to national security or public safety. If allowed to go into effect, S.B.

1070's mandatory enforcement scheme will conflict with and undermine the federal government's careful balance of immigration enforcement priorities and objectives. For example, it will impose significant and counterproductive burdens on the federal agencies charged with enforcing the national immigration scheme, diverting resources and attention from the dangerous aliens who the federal government targets as its top enforcement priority. It will cause the detention and harassment of authorized visitors, immigrants, and citizens who do not have or carry identification documents specified by the statute, or who otherwise will be swept into the ambit of S.B. 1070's "attrition through enforcement" approach. It will conflict with longstanding federal law governing the registration, smuggling, and employment of aliens. It will altogether ignore humanitarian concerns, such as the protections available under federal law for an alien who has a well-founded fear of persecution or who has been the victim of a natural disaster. And it will interfere with vital foreign policy and national security interests by disrupting the United States' relationship with Mexico and other countries.

5. The United States understands the State of Arizona's legitimate concerns about illegal immigration, and has undertaken significant efforts to secure our nation's borders. The federal government, moreover, welcomes cooperative efforts by states and localities to aid in the enforcement of the nation's immigration laws. But the United States Constitution forbids Arizona from supplanting the federal government's immigration regime with its own state-

specific immigration policy – a policy that, in purpose and effect, interferes with the numerous interests the federal government must balance when enforcing and administering the immigration laws and disrupts the balance actually established by the federal government. Accordingly, S.B. 1070 is invalid under the Supremacy Clause of the United States Constitution and must be struck down.

JURISDICTION AND VENUE

6. This action arises under the Constitution of the United States, Article VI, Clause 2 and Article I, Section 8, and the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345, and the United States seeks remedies under 28 U.S.C. §§ 1651, 2201, and 2202.

7. Venue lies in the District of Arizona pursuant to 28 U.S.C. § 1391(b). Defendants are the Governor of Arizona, who resides in Arizona, and the State of Arizona. A substantial part of the events or omissions giving rise to this claim occurred in Arizona.

PARTIES

8. The United States of America is the plaintiff in this action, suing on its own behalf, as well as on behalf of the United States Department of Homeland Security ("DHS"), the Department of Justice ("DOJ"), and the Department of State.

9. DHS is an executive department of the United States. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002). DHS is responsible for the administration and enforcement of laws relating

to immigration, as well as the investigation of immigration crimes and protection of the United States border against the illegal entry of aliens. *See* 8 U.S.C. § 1103. DHS is also responsible for providing citizenship and immigration services through U.S. Citizenship and Immigration Services.

10. DOJ is an executive department of the United States. *See* Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870). The Attorney General, as the head of DOJ, shares certain immigration-related responsibilities with the Secretary of Homeland Security, and he may, among his various immigration functions, order aliens removed from the United States and order the cancellation of removal. *See, e.g.*, 8 U.S.C. §§ 1103, 1158, 1182, 1227, 1229a, 1229b.

11. The Department of State is an executive department of the United States. *See* State Department Basic Authorities Act of 1956, Pub. L. No. 84-885, as amended; 22 U.S.C. § 2651 *et seq*. The Department of State is partially responsible for administering aspects of the federal immigration laws, including but not limited to the administration of visas.

12. Defendant, the State of Arizona, is a state of the United States that entered the Union as the 48th State in 1912.

13. Defendant, Janice K. Brewer, is the Governor of Arizona, and is being sued in her official capacity.

STATEMENT OF THE CLAIM
Federal Authority and Law Governing Immigration and Status of Aliens

14. The Supremacy Clause of the Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

15. The Constitution affords the federal government the power to "establish an uniform Rule of Naturalization," U.S. Const., art. I § 8, cl. 4, and to "regulate Commerce with foreign Nations," U.S. Const., art. I § 8, cl. 3. Further, the federal government has broad authority to establish the terms and conditions for entry and continued presence in the United States, and to regulate the status of aliens within the boundaries of the United States.

16. The Constitution affords the President of the United States the authority to "take Care that the Laws be faithfully executed." U.S. Const., art. II § 3. Further, the President has broad authority over foreign affairs. Immigration law, policy, and enforcement priorities are affected by and have impacts on U.S. foreign policy, and are themselves the subject of diplomatic arrangements.

17. Congress has exercised its authority to make laws governing immigration and the status of aliens within the United States by enacting the various provisions of the INA and other laws regulating immigration. Through the INA, Congress set forth the framework by which the federal government

determines which aliens may be eligible to enter and reside in the United States, which aliens may be removed from the United States, the consequences for unlawful presence, the penalties on persons who violate the procedures established for entry, conditions of residence, and employment of aliens, as well as the process by which certain aliens may ultimately become naturalized citizens of the United States. *See* 8 U.S.C. § 1101, *et seq*. The INA also vests the executive branch with considerable discretion in enforcing the provisions of the federal immigration laws, generally allowing federal agencies to ultimately decide whether particular immigration remedies are appropriate in individual cases.

18. In exercising its significant enforcement discretion, the federal government prioritizes for arrest, detention, prosecution, and removal those aliens who pose a danger to national security or a risk to public safety. Consistent with these enforcement priorities, the federal government principally targets aliens engaged in or suspected of terrorism or espionage; aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; certain gang members; aliens subject to outstanding criminal warrants; and fugitive aliens, especially those with criminal records.

19. In crafting federal immigration law and policy, Congress has necessarily taken into account multiple and often competing national interests. Assuring effective enforcement of the provisions against illegal migration and unlawful presence is a highly important interest, but it is not the singular goal of the federal immigration laws. The laws also take

into account other uniquely national interests, including facilitating trade and commerce; welcoming those foreign nationals who visit or immigrate lawfully and ensuring their fair and equitable treatment wherever they may reside; responding to humanitarian concerns at the global and individual levels; and otherwise ensuring that the treatment of aliens present in our nation does not harm our foreign relations with the countries from which they come or jeopardize the treatment of U.S. citizens abroad. Because immigration control and management is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program," *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal citations omitted), Congress vested substantial discretion in the President and the administering federal agencies to adjust the balance of these multiple interests as appropriate – both globally and in individual cases.

20. Congress has tasked DHS and DOJ with overseeing significant portions of the United States' immigration interests, and has provided each with specific powers to promote the various goals of the federal immigration scheme and to enforce the federal immigration authority under the INA. *See* 8 U.S.C. § 1103. The Department of State is also empowered by the INA to administer aspects of the federal immigration laws, including visa programs. *See, e.g.*, 8 U.S.C. § 1104. DHS may generally order an alien immediately removed where the alien either fails to present the appropriate documentation or commits fraud at the time of the alien's inspection.

DHS may also place an alien into removal proceedings, and may ultimately remove an alien who entered the United States unlawfully or violated the conditions of his admission. *See* 8 U.S.C. §§ 1182, 1225, 1227, 1228(b), 1229, 1229a, 1231. DOJ may order an alien removed for many reasons, including if the alien has stayed in the United States longer than permitted or has engaged in certain unlawful conduct. *See* 8 U.S.C. §§ 1227, 1229a. In addition to removal, the statute authorizes DHS and DOJ to employ civil and criminal sanctions against an alien for immigration violations, such as unlawful entry, failing to appropriately register with the federal government, and document fraud. *See, e.g.,* 8 U.S.C. §§ 1325, 1306, 1324c. However, in the exercise of discretion, the administering agencies may decide not to apply a specific sanction and may, among other steps, permit the alien to depart the country voluntarily at his or her own expense and may even decide not to pursue removal of the alien if deferred federal enforcement will help pursue some other goal of the immigration system. *See* 8 U.S.C. § 1229c.

21. Under federal law, both DHS and DOJ may, for humanitarian or other reasons, decline to exercise certain immigration sanctions or grant an otherwise unlawfully present or removable alien an immigration benefit – and potentially adjust that alien's immigration status – if the alien meets certain conditions. *See, e.g.*, 8 U.S.C. § 1158 (providing asylum eligibility for aliens who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, if removed); 8 U.S.C. § 1254a

(providing temporary protected status for otherwise eligible nationals of a foreign state that the Secretary of Homeland Security has specially designated as undergoing ongoing armed conflict, a natural disaster, or another extraordinary circumstance); 8 U.S.C. § 1227(a)(1)(E)(iii) (providing discretion to waive ground of deportability "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest" for aliens who are otherwise deportable for encouraging unlawful entry of an immediate family member); 8 U.S.C. § 1229b (granting the Attorney General discretion to cancel removal for certain aliens). DHS also has the authority to permit aliens, including those who would be inadmissible, to temporarily enter the United States for "urgent humanitarian reasons" or "significant public benefit." 8 U.S.C. § 1182(d)(5). DHS may also refrain from enforcement actions, in appropriate circumstances, against persons unlawfully present in the United States. *See* 8 C.F.R. § 274a.12(c)(14) (discussing deferred action).

22. In light of these statutory provisions, DHS and DOJ exercise discretion with respect to, among other things, whether to allow an unlawfully present alien to voluntarily depart, whether to place an alien into removal proceedings, whether to exact criminal sanctions on an alien who has committed an immigration violation, whether to allow an unlawfully present alien to remain in the country without physical detention, and whether to grant an alien humanitarian or some other form of relief. Decisions to forego removal or criminal penalties result not only from resource constraints, but also from affir-

mative policy considerations – including humanitarian and foreign policy interests – established by Congress and balanced by the executive branch.

23. Congress, which holds exclusive authority for establishing alien status categories and setting the conditions of aliens' entry and continued presence, has affirmatively decided that unlawful presence – standing alone – should not subject an alien to criminal penalties and incarceration although unlawful presence may subject the alien to the civil remedy of removal. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)&(C). However, unlawful presence becomes an element of a criminal offense when an alien is found in the United States after having been previously removed or after voluntarily departing from the United States while a removal order was pending. *See* 8 U.S.C. § 1326. Further, unlawful entry into the United States is a criminal offense, *see* 8 U.S.C. § 1325. Congress specifically authorized federal immigration officers to patrol the United States border, as well as search vehicles and lands near the border, to prevent aliens from unlawfully entering the United States, and it empowered these officers to arrest an alien who is seen attempting unlawful entry at the border or who the officer has reason to believe has unlawfully entered the county and is likely to escape before a warrant can be obtained. *See* 8 U.S.C. § 1357.

24. Congress has created a comprehensive alien registration system for monitoring the entry and movement of aliens within the United States. *See* 8 U.S.C. §§ 1201, 1301- 1306; *see also* 8 C.F.R. Part 264 (regulations regarding "Registration and Fin-

gerprinting of Aliens in the United States"). Under this federal alien registration system, aliens seeking to enter the United States, either permanently or temporarily (other than diplomatic and official visitors), must be registered by the Department of State at the time of visa application. *See* 8 U.S.C. §§ 1201(b), 1301, 1302. Any alien who is 14 or over, who has not otherwise been registered and fingerprinted under the INA, and who remains in the United States for 30 days or longer, must apply to be registered and fingerprinted by DHS. *See* 8 U.S.C. § 1302(a). The INA provides that any alien who is required to apply for registration and willfully fails to do so may be fined and imprisoned not more than six months. *See* 8 U.S.C. § 1306(a); 18 U.S.C. § 3571. Aliens are required to report their change of address to DHS within ten days of such change. *See* 8 U.S.C. § 1305.

25. As part of this federal alien registration system, Congress further specified the content of the registration forms, *see* 8 U.S.C. § 1303, what special circumstances may require deviation, *id.*, and the confidential nature of registration information, *see* 8 U.S.C. § 1304. Aliens who are 18 years and older are required to carry in their possession their certificate of alien registration or alien registration receipt card. *See* 8 U.S.C. § 1304(e). The INA provides that any alien who fails to comply with this requirement may be fined and imprisoned not more than 30 days. *See id.*; 18 U.S.C. § 3571.

26. However, there are several circumstances in which an alien would not be provided with evidence of registration notwithstanding the federal govern-

ment's knowledge of the alien's presence. Federal law provides a variety of humanitarian options for aliens – including unlawfully present aliens – who have been victimized or fear persecution or violence, including but not limited to asylum, special visas for victims of trafficking, and special visas for victims of violent crime. In order to qualify for such programs an alien needs to apply and satisfy the criteria that the program at issue requires. During the pendency of the application process, an alien may not have evidence of registration even though the federal government is aware of the alien's presence, has decided against removing the alien, and certainly has no interest in prosecuting the alien for a crime. These humanitarian programs demonstrate that one aspect of federal immigration policy is to assist and welcome such victims in the United States, notwithstanding possible temporary unlawful presence. It would therefore violate federal policy to prosecute or detain these types of aliens on the basis of their immigration status – which is often known to the federal government and, for affirmative policy reasons, not used as the basis for a removal proceeding or criminal prosecution.

27. Congress has further exercised its authority over the entry and movement of aliens by criminalizing the smuggling of unlawful aliens into the country, as well as the facilitation of unlawful immigration within the nation's borders. *See* 8 U.S.C. § 1324. Specifically, federal law prohibits the knowing attempt to bring an alien into the United States "at a place other than a designated port of entry or place other than as designated by the [Secretary of Ho-

meland Security]," 8 U.S.C. § 1324(a)(1)(A)(i), and imposes criminal penalties on a person who, "knowing or in reckless disregard" of the fact that an alien has unlawfully entered or remained in the United States, attempts to "transport or move" the alien within the United States "in furtherance of such violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii). These criminal sanctions are directed at the smuggler and are not meant to serve as a criminal sanction for the unlawfully present alien or for incidental transportation. Congress chose not to penalize an unlawfully present alien's mere movement within the country or across state lines unless other factors are present, nor do the federal immigration laws penalize the provision of transportation services in such situations.

28. Federal law also imposes criminal penalties on a person who, "conceals, harbors, or shields from detection," an alien in "knowing or in reckless disregard" of the fact that the alien has unlawfully entered or remained in the United States. 8 U.S.C. § 1324(a)(1)(A)(iii). Similarly, it is unlawful to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that" such entry or residence will be in violation of the law. 8 U.S.C. § 1324(a)(1)(A)(iv). Federal law does not, as a general matter, restrict the movement of aliens – whether lawfully or unlawfully present – between different states. Federal law additionally exempts from certain of these prohibitions religious organizations which "encourage, invite, call, allow, or enable" an alien to volunteer as a minister or missionary, and

which provide the alien with basic living expenses. 8 U.S.C. § 1324(a)(1)(C).

29. Congress has further exercised its authority over immigration and the status of aliens by prohibiting the hiring of aliens not authorized to work in the United States. 8 U.S.C. § 1324a(a)(1). Specifically, federal law makes it unlawful "to hire, or to recruit or refer for a fee" an alien, knowing that the alien is not authorized to work in the United States. *Id.* Federal law also makes it "unlawful for a person or other entity, after hiring an alien for employment," to "continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). In addition, Congress established civil penalties for immigration-related document fraud, such as the presentation of fraudulent documents to demonstrate work eligibility. 8 U.S.C. § 1324c. In enacting penalties on employers of unlawful aliens, as well as on unlawful aliens who engage in document fraud, Congress chose not to impose criminal penalties on aliens for solely seeking or obtaining employment in the United States without authorization and in fact decided that criminal sanctions for seeking or obtaining employment would run counter to the purposes of the immigration system. Although unlawfully present aliens may be subject to removal, no criminal penalty attaches simply because an alien has solicited or performed work without proper authorization.

30. DHS is primarily charged with administering and enforcing the INA and other laws relating to immigration, which it accomplishes mainly through

its components, U.S. Immigration and Customs Enforcement ("ICE"), U.S. Customs and Border Protection ("CBP"), and U.S. Citizenship and Immigration Services ("USCIS"). *See* 8 U.S.C. § 1103. DHS also receives state and local cooperation in its enforcement efforts. *See* 8 U.S.C. § 1357(g). In addition, Congress prescribed by statute a number of ways in which states may assist the federal government in its enforcement of the immigration laws. *See, e.g.*, 8 U.S.C. § 1103(a)(10) (authorizing DHS to empower state or local law enforcement with immigration enforcement authority when an "actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response"); 8 U.S.C. § 1357(g)(1)–(9) (authorizing DHS to enter into agreements to provide appropriately trained and supervised state and local officers with the authority to perform functions related to the investigation, apprehension, and detention of aliens); 8 U.S.C. § 1373(a)-(b) (preempting state and local laws that prohibit information-sharing between local law enforcement and federal immigration authorities and proscribing such a prohibition); 8 U.S.C. § 1252c (authorizing state and local law enforcement to arrest aliens who are unlawfully present in the United States and were previously removed after being convicted of a felony in the United States).

31. Through a variety of programs, DHS works cooperatively with states and localities to accomplish its mission to enforce the federal immigration laws. Among these efforts is the Law Enforcement Agency Response program ("LEAR"), an Arizona-specific

program that is operational 24 hours a day, 7 days a week, for responding to calls from state and local law enforcement officers seeking assistance from ICE regarding suspected unlawfully present aliens. ICE also administers the Law Enforcement Support Center ("LESC"), also operational 24 hours a day, 7 days a week, which serves as a national enforcement operations center and – among other responsibilities – promptly provides immigration status and identity information to local, state, and federal law enforcement agencies regarding aliens suspected of, arrested for, or convicted of criminal activity. Further, ICE and CBP officers respond to requests from state and local law enforcement officers on a variety of immigration matters, including assisting with translation, determining alienage, and evaluating immigration documentation.

32. But the opportunity that federal law provides for participation by state and local officials does not mean that states can enact their own immigration policies to rival the national immigration policy; the formulation of immigration policy and balancing of immigration enforcement priorities is a matter reserved for the federal government. Such regulations do not fall within the state's traditional police powers and remain the exclusive province of the federal government.

Arizona's S.B. 1070

33. On April 23, 2010, Governor Brewer signed into law S.B. 1070, which contains several provisions designed to "work together to discourage and deter the unlawful entry and presence of aliens" in Arizo-

na by making "attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070 includes a provision that requires, in the context of a lawful stop, detention, or arrest, the verification of an individual's immigration status when practicable where there is "reasonable suspicion" that the individual is unlawfully present in the United States (Section 2). This mandatory provision is reinforced through the creation of a private right of action, which allows any legal resident of Arizona to collect money damages if he can show that "any official or agency . . . [has] adopt[ed] or implent[ed] a policy" that "limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law" (Section 2). S.B. 1070 also creates or amends several state law criminal provisions, which impose criminal penalties for an alien's failure to federally register or carry his federal registration documents (Section 3), for the so-called smuggling, transporting, or harboring of an unlawfully present alien (Sections 4 and 5), for encouraging an unlawfully present alien to move to Arizona (Section 5), and for an unauthorized alien's attempt to seek work (Section 5). Further, S.B. 1070 provides law enforcement officers with authority to make warrantless arrests of any person whom they have probable cause to believe has committed a public offense that would make the person "removable," regardless of where the offense was committed (Section 6).

34. On the same day that she signed S.B. 1070 into law, Governor Brewer issued an executive order requiring law enforcement training to "provide clear

guidance to law enforcement officials regarding what constitutes reasonable suspicion," and to "make clear that an individual's race, color or national origin alone cannot be grounds for reasonable suspicion to believe any law has been violated." Arizona State Executive Order 2010-09 (Apr. 23, 2010).

35. One week after S.B. 1070 was signed into law, the Arizona Legislature passed, and Governor Brewer signed, H.B. 2162, which amended S.B. 1070. H.B. 2162 made modifications to S.B. 1070 for the purpose of responding to those who "expressed fears that the original law would somehow allow or lead to racial profiling." Statement by Governor Jan Brewer (Apr. 30, 2010), *available at* http://azgovernor.gov/dms/upload/PR_043010_StatementGovBrewer.pdf.

36. S.B. 1070 (as amended) attempts to second guess federal policies and re-order federal priorities in the area of immigration enforcement and to directly regulate immigration and the conditions of an alien's entry and presence in the United States despite the fact that those subjects are federal domains and do not involve any legitimate state interest. Arizona's adoption of a maximal "attrition through enforcement" policy disrupts the national enforcement regime set forth in the INA and reflected in federal immigration enforcement policy and practice, including the federal government's prioritization of enforcement against dangerous aliens. S.B. 1070 also interferes with U.S. foreign affairs priorities and rejects any concern for humanitarian interests or broader security objectives, and will thus harm a range of U.S. interests. Thus, because S.B.

1070 attempts to set state-specific immigration policy, it legislates in an area constitutionally reserved to the federal government, conflicts with the federal immigration laws and federal immigration policy, conflicts with foreign policy, and impedes the accomplishment and execution of the full purposes and objectives of Congress, and is therefore preempted.

37. S.B. 1070 implements Arizona's stated immigration policy through a novel and comprehensive immigration regime that, among other things, creates a series of state immigration crimes (Sections 3-5) relating to the presence, employment, and transportation of aliens, expands the opportunities for Arizona police to push aliens toward incarceration for those crimes by enforcing a mandatory immigration status verification system (Section 2), and allows for arrests based on crimes with no nexus to Arizona (Section 6). By pursuing attrition and ignoring every other objective embodied in the federal immigration system (including the federal government's prioritization of the removal of dangerous aliens), S.B. 1070 conflicts with and otherwise stands as an obstacle to Congress's demand that federal immigration policy accommodate the competing interests of immigration control, national security and public safety, humanitarian concerns, and foreign relations – a balance implemented through the policies of the President and various executive officers with the discretion to enforce the federal immigration laws. *See* 8 U.S.C. § 1101, *et seq.* Enforcement of S.B. 1070 would also effectively create state crimes and sanctions for unlawful

presence despite Congress's considered judgment to not criminalize such status. S.B. 1070 would thus interfere with federal policy and prerogatives in the enforcement of the U.S. immigration laws.

38. Because S.B. 1070, in both its singularly stated purpose and necessary operation, conflicts with the federal government's balance of competing objectives in the enforcement of the federal immigration laws, its passage already has had foreign policy implications for U.S. diplomatic relations with other countries, including Mexico and many others. S.B. 1070 has also had foreign policy implications concerning specific national interests regarding national security, drug enforcement, tourism, trade, and a variety of other issues. *See, e.g.*,Travel Alert, Secretaría de Relaciones Exteriores, Mexico, Apr. 27, 2010, *available at* http://www.sre.gob.mx/csocial/contenido/comunicados/2010/abr/ /cp_121eng.html; Mexican President Calderon's Address to Joint Meeting of Congress, May 20, 2010, *available at* http://www.c-spanvideo.org/program/293616-2. S.B. 1070 has subjected the United States to direct criticism by other countries and international organizations and has resulted in a breakdown in certain planned bilateral and multilateral arrangements on issues such as border security and disaster management. S.B. 1070 has in these ways undermined several aspects of U.S. foreign policy related to immigration issues and other national concerns that are unrelated to immigration.

39. Numerous other states are contemplating passing legislation similar to S.B. 1070. The development of various conflicting state immigration

enforcement policies would result in further and significant damage to (1) U.S. foreign relations, (2) the United States' ability to fairly and consistently enforce the federal immigration laws and provide immigration related humanitarian relief, and (3) the United States' ability to exercise the discretion vested in the executive branch under the INA, and would result in the non-uniform treatment of aliens across the United States.

Section 2 of S.B. 1070

40. Section 2 of S.B. 1070 (adding Ariz. Rev. Stat. 11-1051) mandates that for any lawful "stop, detention or arrest made by a law enforcement official" (or agency) in the enforcement of any state or local law, including civil ordinances, where reasonable suspicion exists that an individual is an alien and is "unlawfully present" in the United States, the officer must make a reasonable attempt to determine the individual's immigration status when practicable, and to verify it with the federal government pursuant to 8 U.S.C. § 1373(c) or through a federally qualified law enforcement officer. Section 2 also requires that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."

41. Section 2 provides that any legal resident of Arizona may bring a civil action in an Arizona court to challenge any official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." Whereas Arizona police (like federal officers and police in

other states) formerly had the discretion to decide whether to verify immigration status during the course of a lawful stop, the combination of the verification requirement and the threat of private lawsuits now removes such discretion and mandates verification. This provision also mandates the enforcement of the remaining provisions of S.B. 1070.

42. The mandatory nature of Section 2, in tandem with S.B. 1070's new or amended state immigration crimes, directs officers to seek maximum scrutiny of a person's immigration status, and mandates the imposition of state criminal penalties for what is effectively unlawful presence, even in circumstances where the federal government has decided not to impose such penalties because of federal enforcement priorities or humanitarian, foreign policy, or other federal interests.

43. In addition, the mandatory nature of this alien inspection scheme will necessarily result in countless inspections and detentions of individuals who are lawfully present in the United States. Verification is mandated for all cases where an Arizona police officer has a "reasonable suspicion" that a person in a lawful stop is unlawfully present and it is practicable to do so. But a "reasonable suspicion" is not definitive proof, and will often result in the verification requirement being applied – wholly unnecessarily – to lawfully present aliens and United States citizens. Further, because the federal authorities may not be able to immediately verify lawful presence – and may rarely have information related to stopped U.S. citizens – Section 2 will result in the prolonged detention of lawfully present

aliens and United States citizens. Section 2 of S.B. 1070 will therefore impose burdens on lawful immigrants and U.S. citizens alike who are stopped, questioned, or detained and cannot readily prove their immigration or citizenship status, including those individuals who may not have an accepted form of identification because, for example, they are legal minors without a driver's license. Arizona's alien inspection scheme therefore will subject lawful aliens to the "possibility of inquisitorial practices and police surveillance," *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) – a form of treatment which Congress has plainly guarded against in crafting a balanced, federally-directed immigration enforcement scheme.

44. Mandatory state alien inspection schemes and attendant federal verification requirements will impermissibly impair and burden the federal resources and activities of DHS. S.B. 1070's mandate for verification of alien status will necessarily result in a dramatic increase in the number of verification requests being issued to DHS, and will thereby place a tremendous burden on DHS resources, necessitating a reallocation of DHS resources away from its policy priorities. As such, the federal government will be required to divert resources from its own, carefully considered enforcement priorities – dangerous aliens who pose a threat to national security and public safety – to address the work that Arizona will now create for it. Such interference with federal priorities, driven by state imposed burdens on federal resources, constitutes a violation of the Supremacy Clause.

45. Section 2 conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress, and its enforcement would further conflict with the enforcement prerogatives and priorities of the federal government. Moreover, Section 2 does not promote any legitimate state interest.

Section 3 of S.B. 1070

46. Section 3 of S.B. 1070 (adding Ariz. Rev. Stat. 13-1509) makes it a new state criminal offense for an alien in Arizona to violate 8 U.S.C. § 1304(e), which requires every alien to "at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him," or 8 U.S.C. § 1306(a), which penalizes the willful failure to apply for registration when required. Section 3 of S.B. 1070 provides a state penalty of up to $100 and up to twenty days imprisonment for a first offense and thirty days imprisonment for any subsequent violation.

47. Section 3 of S.B. 1070 is preempted by the comprehensive federal alien registration scheme – including 8 U.S.C. §§ 1201, 1301-1306, and 8 C.F.R. Part 264 – which provides a "standard for alien registration in a single integrated and all-embracing system." *Hines*, 312 U.S. at 73. Section 3 of S.B. 1070 conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress in creating a uniform and singular federal alien registration scheme.

48. Section 3 – the enforcement of which S.B. 1070 effectively mandates through operation of Section 2's alien inspection and verification regime – demands

the arrest and prosecution of all aliens who do not have certain enumerated registration documents. But several classes of aliens who are eligible for humanitarian relief are simply not provided with registration documents while their status is being adjudicated by the federal government, notwithstanding the federal government's knowledge that these aliens are present in the United States. S.B. 1070 thus seeks to criminalize aliens whose presence is known and accepted by the federal government (at least during the pendency of their status review) and thereby conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress in providing certain forms of humanitarian relief.

49. Additionally, Section 3 of S.B. 1070 is a key part of Arizona's new immigration policy as it is tantamount to a regulation of immigration, in that it seeks to control the conditions of an alien's entry and presence in the United States without serving any traditional state police interest. Accordingly, Section 3 of S.B. 1070 is preempted by the federal government's recognized exclusive authority over the regulation of immigration.

Section 4 of S.B. 1070/Ariz. Rev. Stat. 13-2319

50. Section 4 of S.B. 1070 amended Ariz. Rev. Stat. 13-2319 (collectively, "Arizona's alien smuggling prohibition"). Arizona's alien smuggling prohibition makes it a felony for "a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." Ariz. Rev. Stat. 13-2319. The statute defines "smuggling of human beings" as

the "transportation, procurement of transportation or use of property . . . by a person or an entity that knows or has reason to know that the person or persons transported . . . are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law." *Id.* § 13-2319(E).

51. Arizona's alien smuggling prohibition is preempted by federal law, including 8 U.S.C. § 1324. There are several key differences between the federal and Arizona alien smuggling provisions that demonstrate that Arizona's alien smuggling prohibition actually regulates conditions of unlawful presence and not smuggling at all. First, Arizona's alien smuggling law, unlike the federal criminal provisions, is not limited to transportation that is provided "in furtherance" of unlawful immigration, but instead prohibits the knowing provision of any commercial transportation services to an alien unlawfully present in the United States. Ariz. Rev. Stat. 13-2319(A). Second, unlike federal law, Arizona's alien smuggling law not only criminalizes the conduct of the transportation provider but has been used, in conjunction with Arizona's conspiracy statute, to prosecute the unlawfully present alien. Third, Arizona's smuggling provision is not targeted at smuggling across the United States' international borders. As a result of these differences, taken both separately and in tandem, Arizona's smuggling prohibition regulates the conditions of an alien's entry and continued presence in the United States, by essentially banning an unlawfully present alien

from using commercial transportation. Although a state is free, in certain instances, to regulate conduct that is not regulated by the federal government, the differences between Section 4 and federal anti-smuggling law convert Arizona's alien smuggling prohibitions into a preempted regulation of immigration. Additionally, Arizona's smuggling prohibition will result in special, impermissible burdens for lawfully present aliens, who will predictably be impeded from using commercial transportation services due to the strictures of Section 4. Arizona's smuggling prohibition thus conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress in creating a comprehensive system of penalties for aliens who are unlawfully present in the United States.

Section 5 of S.B. 1070

52. Section 5 of S.B. 1070 adds two new provisions to Arizona's revised code: Ariz. Rev. Stat. 13-2928 and Ariz. Rev. Stat. 13-2929.

53. Ariz. Rev. Stat. 13-2928 makes it a new state crime for any person who is "unauthorized" and "unlawfully present" in the United States to solicit, apply for, or perform work. S.B. 1070, Section 5(C)-(E).

54. Arizona's new prohibition on unauthorized aliens seeking or performing work is preempted by the comprehensive federal scheme of sanctions related to the employment of unauthorized aliens – including 8 U.S.C. §§ 1324a–1324c. The text, structure, history, and purpose of this scheme reflect an affirmative decision by Congress to regulate the

employment of unlawful aliens by imposing sanctions on the employer without imposing sanctions on the unlawful alien employee. Arizona's criminal sanction on unauthorized aliens stands as an obstacle to the full purposes and objectives of Congress's considered approach to regulating employment practices concerning unauthorized aliens, and it conflicts with Congress's decision not to criminalize such conduct for humanitarian and other reasons. Enforcement of this new state crime additionally interferes with the comprehensive system of civil consequences for aliens unlawfully present in the United States by attaching criminal sanctions on the conditions of unlawful presence, despite an affirmative choice by Congress not to criminalize unlawful presence.

55. Ariz. Rev. Stat. 13-2929 makes it a new state crime for a person committing any criminal offense to (1) "transport . . . an alien . . . , in furtherance of the illegal presence of the alien in the United States, . . . if the person knows or recklessly disregards" that the alien is here illegally; (2) "conceal, harbor or shield . . . an alien from detection . . . if the person knows or recklessly disregards the fact that the alien" is unlawfully present; or (3) "encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such . . . entering or residing in this state is or will be in violation of law." This provision exempts child protective service workers, first responders, and emergency medical technicians. S.B. 1070 § 5. This provision contains no further exceptions, including for organizations exempted by federal law

from criminal liability, such as religious organizations which "encourage, invite, call, allow, or enable" an alien to volunteer as a minister or missionary. *See* 8 U.S.C. § 1324(a)(C).

56. Arizona's new state law prohibition of certain transporting, concealing, and encouraging of unlawfully present aliens is preempted by federal law, including 8 U.S.C. § 1324(a)(1)(C). This new provision is an attempt to regulate unlawful entry into the United States (through the Arizona border). The regulation of unlawful entry is an area from which states are definitively barred by the U.S. Constitution. Additionally, because the purpose of this law is to deter and prevent the movement of certain aliens into Arizona, the law restricts interstate commerce. Enforcement and operation of this state law provision would therefore conflict and interfere with the federal government's management of interstate commerce, and would thereby violate Article I, Section 8 of the United States Constitution.

Section 6 of S.B. 1070

57. Section 6 of S.B. 1070 amends a preexisting Arizona criminal statute (Ariz. Rev. Stat. 13-3883) governing the circumstances under which law enforcement officers can make a warrantless arrest. Section 6 allows the arrest of anyone whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States," and does not require coordination with DHS to confirm removability. The warrantless arrest authority provided by Section 6 applies to persons who have committed an offense in

another state when an Arizona law enforcement official believes that offense makes the person removable. *See* Ariz. Rev. Stat. 13-3883.

58. Arizona law previously allowed for the warrantless arrest of anyone who was suspected of having committed a misdemeanor or felony in Arizona. Although Section 6 authorizes warrantless arrests based on crimes committed out of state, it does so only if the officer believes the crime makes the individual removable. Thus, Section 6 is not intended to serve any new law enforcement interest. Rather, the purpose of Section 6, especially when read in light of S.B. 1070's overall purpose, is plain: Section 6 provides additional means to arrest aliens in the state on the basis of immigration status.

59. Section 6 makes no exception for aliens whose removability has already been resolved by federal authorities, despite the fact that only the federal government can actually issue removal decisions. Section 6 will therefore necessarily result in the arrest of aliens based on out-of-state crimes, even if the criminal and immigration consequences of the out of- state crime have already been definitively resolved. For that reason, as with Section 2, Section 6 of S.B. 1070 interferes with the federal government's enforcement prerogatives and will necessarily impose burdens on lawful aliens in a manner that conflicts with the purposes and practices of the federal immigration laws. Additionally, Section 6 will result in the arrest of aliens whose out-of-state crimes would not give rise to removal proceedings at all.

60. By reason of the foregoing, defendants' actions have caused and will continue to cause substantial and irreparable harm to the United States for which plaintiff has no adequate remedy except by this action.

FIRST CAUSE OF ACTION – VIOLATION OF THE SUPREMACY CLAUSE

61. Plaintiff incorporates paragraphs 1 through 60 of the Complaint as if fully stated herein.

62. Sections 1-6 of S.B. 1070, taken in whole and in part, represent an impermissible effort by Arizona to establish its own immigration policy and to directly regulate the immigration status of aliens. In particular, Sections 1-6 conflict with federal law and foreign policy, disregard federal policies, interfere with federal enforcement priorities in areas committed to the discretion of plaintiff United States, and otherwise impede the accomplishment and execution of the full purposes and objectives of federal law and foreign policy.

63. Sections 1-6 of S.B. 1070 violate the Supremacy Clause, and are invalid.

SECOND CAUSE OF ACTION – PREEMPTION UNDER FEDERAL LAW

64. Plaintiff incorporates paragraphs 1 through 63 of the Complaint as if fully stated herein. 65. Sections 1-6 of S.B. 1070 are preempted by federal law, including 8 U.S.C. § 1101, *et seq.*, and by U.S. foreign policy.

THIRD CAUSE OF ACTION – VIOLATION OF THE COMMERCE CLAUSE

66. Plaintiff incorporates paragraphs 1 through 65 of the Complaint as if fully stated herein.

67. Section 5 of S.B. 1070 (adding Ariz. Rev. Stat. 13-2929) restricts the interstate movement of aliens in a manner that is prohibited by Article One, Section Eight of the Constitution.

68. Section 5 of S.B. 1070 (adding Ariz. Rev. Stat. 13-2929) violates the Commerce Clause, and is therefore invalid.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests the following relief:

1. A declaratory judgment stating that Sections 1-6 of S.B. 1070 are invalid, null, and void;

2. A preliminary and a permanent injunction against the State of Arizona, and its officers, agents, and employees, prohibiting the enforcement of Sections 1-6 of S.B. 1070;

3. That this Court award the United States its costs in this action; and

4. That this Court award any other relief it deems just and proper.

DATED: July 6, 2010

Tony West
Assistant Attorney General
Dennis K. Burke
United States Attorney
Arthur R. Goldberg
Assistant Director, Federal Programs Branch

/s/ *Varu Chilakamarri*
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APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

June 30, 2011

Mr. Paul D. Clement
Bancroft PLLC
1919 M Street N.W., Suite 470
Washington, DC 20036

Re: Arizona, et al. v. United States,

Application No. 10A1277

Dear Mr. Clement:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on June 30, 2011 extended the time to and including August 10, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
by /s/ JEFFREY ATKINS
Jeffrey Atkins
Supervisor-Case Analyst

APPENDIX E

8 U.S.C.A. § 1252c

§ 1252c. Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens

(a) In general

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the

National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

8 U.S.C.A. § 1304

§ 1304. Forms for registration and fingerprinting

(a) Preparation; contents

The Attorney General and the Secretary of State jointly are authorized and directed to prepare forms for the registration of aliens under section 1301 of this title, and the Attorney General is authorized and directed to prepare forms for the registration and fingerprinting of aliens under section 1302 of this title. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed.

(b) Confidential nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only (1) pursuant to section 1357(f)(2) of this title, and (2) to such persons

or agencies as may be designated by the Attorney General.

(c) Information under oath

Every person required to apply for the registration of himself or another under this subchapter shall submit under oath the information required for such registration. Any person authorized under regulations issued by the Attorney General to register aliens under this subchapter shall be authorized to administer oaths for such purpose.

(d) Certificate of alien registration or alien receipt card

Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

(e) Personal possession of registration or receipt card; penalties

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed

$100 or be imprisoned not more than thirty days, or both.

(f) Alien's social security account number
Notwithstanding any other provision of law, the Attorney General is authorized to require any alien to provide the alien's social security account number for purposes of inclusion in any record of the alien maintained by the Attorney General or the Service.

8 U.S.C.A. § 1306

§ 1306. Penalties

(a) Willful failure to register
Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

(b) Failure to notify change of address
Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemea-

nor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and removed in the manner provided by part IV of this subchapter, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(c) Fraudulent statements

Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter.

(d) Counterfeiting

Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card or any colorable imitation thereof, except when and as authorized

under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both.

8 U.S.C.A. § 1324a

§ 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity--

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was re-

ferred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if--

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual,

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining--

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably ap-

pears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's--

(i) United States passport;1

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document--

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's--

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's--

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authoriza-

tion or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending--

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual--

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if--

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b)

of this section provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) of this section is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) of this section as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether--

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of Title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least--

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D), before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change.

The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would--

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C.A. § 301 et seq.], including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C.A. § 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C.A. § 301 et seq.].

(4) Demonstration projects

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b) of this section. No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures--

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of this section,

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) of this section as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) of this section under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection--

(A) Immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) Administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) Immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the

person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection--

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity--

(i) to comply with the requirements of subsection (b) of this section (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another

subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1) of this section, the order under this subsection may provide for the remedy described in subsection (g)(2) of this section.

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision

and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2)

of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e) of this section, to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at

that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C.A. § 1373

§ 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries
The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C.A. § 1357(g)

§ 1357. Powers of immigration officers and employees

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections

2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

APPENDIX F

Arizona Rev. Stat. § 11-1051(B)

11-1051. Cooperation and assistance in enforcement of immigration laws; indemnification

B. For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.

2. A valid Arizona nonoperating identification license.

3. A valid tribal enrollment card or other form of tribal identification.

4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

Arizona Rev. Stat. § 13-1509

§ **13-1509**. Willful failure to complete or carry an alien registration document; exception; authenticated records; classification

A. In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).

B. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

C. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

D. A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or the person is eligible for release pursuant to § 41-1604.07.

E. In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs.
F. This section does not apply to a person who maintains authorization from the federal government to remain in the United States.
G. Any record that relates to the immigration status of a person is admissible in any court without fur-

ther foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.

H. A violation of this section is a class 1 misdemeanor, except that the maximum fine is one hundred dollars and for a first violation of this section the court shall not sentence the person to more than twenty days in jail and for a second or subsequent violation the court shall not sentence the person to more than thirty days in jail.

Arizona Rev. Stat. § 13-2928

§ **13-2928**. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location

if the motor vehicle blocks or impedes the normal movement of traffic.

C. It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.

D. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

E. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code § 1373(c).

F. A violation of this section is a class 1 misdemeanor.

G. For the purposes of this section:

1. "Solicit" means verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.

2. "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3).

Arizona Rev. Stat. § 13-3883

§ **13-3883**. Arrest by officer without warrant

A. A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in the officer's presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of

title 28,[1] and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under § 13-3903.
5. The person to be arrested has committed any public offense that makes the person removable from the United States.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.