No. 11-182

In The Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS 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 first 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 because they constitute an obstacle to the accomplishment and execution of the full purposes and objectives of Congress's federal immigration laws.

The second question presented is whether that part of conflict preemption providing that a state law is preempted if it constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress should be limited in its application or abandoned, due to concerns for principles of federalism and separation of powers.

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation incorporated under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include individuals who live and work in every State of the Nation. MSLF and its members believe strongly in the freedoms and liberties of individuals that are preserved by the constitutional structure of federalism and separation of powers.

If a court determines that State law is preempted by federal law because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, that decision implicates principles of federalism and separation of powers, and thereby, individual liberty. This court-created preemption theory ("obstacle preemption") encourages

[1] Pursuant to Supreme Court Rule 37.2(a), letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Petitioners have filed a "blanket" consent to the filing of amicus curiae briefs with this Court. Respondents have consented to filing this amicus curiae brief. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

courts to preempt State statutes that Congress did not intend to preempt, violating principles of federalism by depriving the States of the powers constitutionally reserved to them. It also encourages courts, in the absence of clear congressional intent, to substitute their own views of congressional purposes and objectives and, thereby, engage in judicial legislation, contrary to principles of separation of powers.

The Ninth Circuit panel majority altered the delicate balance of power between the States and the Federal Government and engaged in judicial legislation by substituting its own view of the purposes and objectives of Congress to preempt four provisions of S.B. 1070. MSLF respectfully submits that this Court should grant the Petition to determine whether the doctrine of "obstacle preemption" should be limited or abandoned.

STATEMENT OF THE CASE

The people of Arizona passed a statewide initiative entitled Support Our Law Enforcement and Safe Neighborhood Act to address "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." Petitioner's App. B at 117a. On April 23, 2010, Arizona Governor, Janice K. Brewer signed that Act into law as Arizona Senate Bill 1070, Ariz. Sess. Laws ch. 113. Arizona House Bill 2162, 2010 Ariz. Sess. Laws Ch. 211, made changes to S.B. 1070 and was signed by Governor

Brewer on April 30, 2010, (hereinafter all references to "S.B. 1070" include the amendments made by H.B. 2162).

The United States filed suit against the State of Arizona and Governor Brewer, seeking a declaration that all the provisions of S.B. 1070 were facially invalid because they were impliedly preempted by federal immigration laws under the doctrine of "obstacle preemption" and sought an injunction against their enforcement. *United States v. State of Arizona*, No. CV 10-1413-PHX-SRB (D. Ariz.) (Dkt. No. 1). The United States also sought a preliminary injunction against the enforcement of S.B. 1070, which the district court granted with respect to four provisions of S.B. 1070, utilizing "obstacle preemption" to do so. *United States v. State of Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

The State of Arizona and Governor Brewer appealed the preliminary injunction to the Ninth Circuit. A divided panel, Judge Bea strongly dissenting in part, affirmed the preliminary injunction. In so doing the majority ruled that § 2(b) of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1357(g); that § 3 of S.B. 1070 conflicted with and was preempted by 8 U.S.C. §§ 1304, 1306; that § 5(C) of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1324a and legislative history; and that § 6 of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1252c. *United States v. State of Arizona*, 641 F.3d 339, 348-54, 354-57, 357-60 and 360-65 (9th Cir. 2011). The Ninth Circuit utilized "obstacle preemption" to

hold that these four sections were preempted. *Id*. at 345. The Petition for a Writ of Certiorari followed.

REASON FOR GRANTING THE PETITION

This case involves infringement of the principles of federalism and separation of powers – issues of extraordinary, fundamental importance. The Ninth Circuit panel majority, faced with no clear congressional intent to preempt S.B. 1070, utilized the court-created doctrine of "obstacle preemption" to hold that four sections of S.B. 1070 were impliedly preempted by federal immigration laws. By doing so, the Ninth Circuit turned the principles of federalism and separation of powers upside down. This court should grant this petition not only for the reasons stated by Petitioners, but also to reexamine and limit or abandon "obstacle preemption," which itself is an affront to the principles of federalism and separation of powers.

I. FEDERALISM AND SEPARATION OF POWERS ARE ESSENTIAL TO PRESERVE INDIVIDUAL LIBERTIES.

The concept of federalism posits that the Federal Government is one of limited, enumerated powers, whereas the powers retained by the States are numerous and indefinite:

> The Constitution creates a Federal Government of enumerated powers. *See* Art. I § 8. As James Madison wrote: "The powers

> [delegated by the proposed] Constitution of the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed., 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

United States v. Lopez, 514 U.S. 549, 552 (1995). Thus, the "Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457 (1991). Under this federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

The Framers adopted this system of dual sovereignty to "reduce the risk of tyranny and abuse from either front" and because "[i]n the tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S. at 458-59; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties") (internal quotations omitted). Thus, this federal structure secures the individual liberties through a diffusion of power:

> The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

New York v. United States, 505 U.S. 144, 181 (1992) (internal quotations omitted).

Additionally, a "federalist structure of joint sovereigns preserves to the people numerous advantages," such as "a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and "increases opportunity for citizen involvement in democratic processes." *Gregory*, 501 U.S. at 458. Finally, as the Framers observed, the "compound republic of America" provides "a double security . . . to the rights of the people" because "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." *The Federalist* No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

The principle of separation of powers is necessary to preserve federalism and individual liberties: "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). That is, the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct

institutional responsibilities of the others, is essential to the liberty and security of the people." *Id*. (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("The Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers."); *see The Federalist* No. 51, at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961) (the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty.").

Thus, none of the branches may assume the role of any of the others because "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers," *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). This is so because "power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it." *The Federalist* No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961).

Therefore, the Judiciary may not legislate: "From its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Raines v. Byrd*, 511 U.S. 811, 819 (1997) (internal quotations omitted). Hence, separation of powers operates to "exclude[ ] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls

of Congress[.]" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Consequently, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be *the legislator*." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring) (quoting *The Federalist* No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961)) (emphasis in original).

II. THIS COURT SHOULD GRANT THE PETITION TO CONSIDER LIMITING OR ABANDONING "OBSTACLE PREEMPTION" BECAUSE IT VIOLATES FEDERALISM AND SEPARATION OF POWERS PRINCIPLES.

A. Federalism Demands That A Court Find A State Law Preempted Only With Great Circumspection And When Congressional Intent To Preempt Is Clear.

The Supremacy Clause is the basis for preemption, and provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Under current case law, "[p]reemption may either be express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992). This Court has recognized two types of implied conflict preemption, but only the second is involved here:

> Conflict preemption [is] . . . where state law stands as an obstacle to the accomplishment and execution of the full *purposes and objectives of Congress*.

Id. at 98 (internal citations omitted) (emphasis added).

By invalidating conflicting state laws, the preemption doctrine intrudes on the dual sovereignty of states and the federal government and impairs federalism. Therefore, a court must assume, absent explicit congressional expressions of intent to preempt, that Congress did not intend to preempt a state law:

> In *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.

Wyeth v. Levine, ___ U.S. ___, 129 S.Ct. 1187, 1195-96 (2009) (internal quotations omitted) (emphases added).

This "presumption against pre-emption is rooted in the concept of federalism." *Geier v. American Honda Motor Corp*., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). Moreover, this presumption places pre-emption authority in the hands of Congress, not the Judiciary:

> The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance . . . and its requirement that Congress *speak clearly* when exercising that power.

Id. (internal quotations omitted) (emphasis added).

B. S.B. 1070 Is Within The Police Powers Of The State Of Arizona And Addresses Traditional Matters Of State Concern.

One hundred years ago, Justice Holmes described the broad scope of the State's police power: "[T]he police power extends to all the great public needs [and] may be put forth in aid of what is . . . held by . . . preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). The "concept of the public welfare is broad and inclusive [and] . . . public safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power, . . . [y]et they merely illustrate the

scope of the power and do not delimit it." *Berman v. Parker*, 384 U.S. 26, 32-33 (1954).

The people of Arizona passed S.B. 1070 as a statewide initiative designed to address "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." *State of Arizona*, 703 F. Supp. 2d at 985. Thus, it was the "preponderant opinion" of Arizonians, as expressed by their votes, that S.B. 1070 was "greatly and immediately necessary to the public welfare," and, therefore, within Arizona's police powers. *Noble State Bank*, 219 U.S. at 111. It is undoubtedly within the police powers of a State to protect its residents from escalating crime and serious public safety violations. Indeed, this Court has previously held that, even in the immigration context, "States are [not] without any power to deter the influx of persons entering the United States against federal law and whose numbers might have a discernible impact on traditional state concerns." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982). Therefore, S.B. 1070 is within the police powers of the State of Arizona and addresses traditional matters of state concern.

C. "Obstacle Preemption," In The Absence Of Express Congressional Expression Of An Intent To Preempt, Violates Principles Of Federalism And Separation Of Powers.

As demonstrated below, "obstacle preemption" tends to avoid the central question of congressional

intent to preempt State law and tends instead to focus on the general purposes and objectives Congress intended the law to accomplish and whether State law interferes with these purposes in any way.

> As commentators across the political spectrum have pointed out, each House of Congress is a collective body, and its individual members each have their own purposes. Many statutes are the products of compromise; members of Congress who want to pursue one set of purposes agree on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective "purposes and objectives" may be naive, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 280-81 (2000); *Wyeth*, 129 S.Ct. at 1215 (Thomas, J., concurring in judgment) ("Federal legislation is often the result of compromise between legislators and groups marked with divergent interests[; thus,] a statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents.").

Even assuming that all members of Congress could agree on the "full purposes and objectives," there is still no reason to assume that they would want to

displace all State laws that may tend to make achieving those purposes more difficult. As this Court has acknowledged outside the context of preemption, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Pension Benefit Guar. Corp. v. LTV Corp*., 496 U.S. 633, 646-47 (1987).

Consequently, the mere fact that Congress enacts a statute to serve certain purposes does not necessarily imply that Congress wants to displace all State law that constitutes some obstacle to those purposes. "It follows that a general doctrine of 'obstacle preemption' will displace more state law than its rationale warrants . . . [and] will read federal statutes to imply preemption clauses that the enacting Congress might well have rejected." Nelson, *Preemption*, 86 Va. L. Rev. at 281. Indeed, referring to this process as "imaginative reconstruction," Professor Nelson explained that "[t]he Court is trying to reconstruct how the enacting Congress would have resolved questions about the statute's preemptive effect if it had considered them long enough to come to a collective agreement." *Id*. at 277. This approach clearly upsets the delicate balance between State and federal power, skewing it in favor of federal power.

"Obstacle preemption" not only tends to usurp State power and allocate it to the Federal Government, but it invites judges "to step in legislative shoes where Congress has not expressed a clear and

manifest intent." Robert S. Peck, *A Separation of Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1196 (2010). Accordingly, "because preemption depends so heavily on congressional intent, a freewheeling inquiry that ends up supplying missing legislative intent implicates separation of powers." *Id.* at 1197.

This process of "imaginative reconstruction" is less a matter of determining congressional intent to preempt and more a form of accidental preemption:

> Traditionally, courts determine congressional intent on the basis of a statute's text, structure, and purpose. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). The Court has said that, because of the presumption against preemption, it "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).
>
> Where that is not determinative, judges often rely upon history or a seemingly apt analogy in the face of legislative inscrutability. *See e.g. Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 249 n.17 (4th Cir. 1994); *Ga.-Pac. Corp. v. EPA*, 671 F.2d 1235, 1240 (9th Cir. 1982). Where it lacks sufficient legislative direction, the Court tends to rely on the most general assessment of congressional

> purpose and then extrapolate from there to give "application to congressional incompletion." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 240 (1959). The result then is less a reflection of congressional intentions and more a form of *accidental preemption, based solely on the sensibilities of the Justices*.

Id. at 1198-99 (emphasis added).

Accordingly, because "obstacle preemption" implicates both federalism and separation of powers, "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). Thus, the "preemptive scope of [a federal statute] is . . . *limited to the language of the statute*[.]" *Id*. (emphasis added). That is, "obstacle preemption" "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress's primary objectives, as conveyed with clarity in the federal legislation." *Id*. at 110.

For example, Justice Stevens observed with respect to "obstacle preemption":

> [T]he presumption [against preemption] serves as a limiting principle that prevents federal judges *from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict preemption* based on frustration of purposes –

> *i.e.*, that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Geier, 529 U.S. at 907-08 (Stevens, J., dissenting) (emphasis added). Indeed, Justice Stevens seemed to endorse rejecting "obstacle preemption":

> Recently, one commentator has argued that our doctrine of frustration-of-purposes . . . pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it.

Id. at 908 n.22 (citing Nelson, *Preemption*, 86 Va. L. Rev. at 231-32). Thus, "preemption analysis is, or *ought to be*, a matter of *precise statutory . . . construction* rather than an exercise in *free-form judicial policymaking*." *Id*. at 911 (emphasis added).

Furthermore, "obstacle preemption" "requires inquiry into matters *beyond the scope of proper judicial review*." *Wyeth*, 129 S.Ct. at 1216 (Thomas, J., concurring in judgment) (emphasis added). "Obstacle preemption" "facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law," which leads to "decisions giving improperly broad pre-emptive effect to *judicially manufactured policies rather than the statutory text* enacted by Congress[.]" *Id*. at 1217 (emphasis added). Therefore:

> This Court's entire body of "purposes and objectives" pre-emption jurisprudence is inherently flawed. The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.

Id. at 1216. That is, "obstacle preemption" leads to the unconstitutional invalidation of State laws and should be eliminated:

> Because such a sweeping approach to pre-emption leads to the *illegitimate – and thus, unconstitutional – invalidations of state laws,* I can no longer assent to a doctrine that pre-empts state laws merely because they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law[.]

Id. (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941) (emphasis added)).[2]

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[2] In fact, Justice Thomas argued that *Hines*, which was the first case to identify and apply "obstacle preemption," was fatally flawed and an example of the unconstitutional incursion into State power and the judicial assumption of legislative power. *Wyeth*, 129 S.Ct. at 1211-12 (Thomas, J., concurring in judgment). *Hines* did not confine itself to "considering merely the terms of the relevant federal law[,]" but instead "looked far beyond . . . statutory text and embarked on its own freeranging speculation about what the purposes of the federal law must have been." *Id.* at 1212. For example, Justice Thomas pointed out that, in *Hines*, the Court considered "public sentiment," "statements of particular Members of Congress," and the "nature

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Thus, "obstacle preemption" requires that courts, in the face of legislative inscrutability, engage in consideration of the purposes and objectives of Congress. Inevitably, the sensibilities, predilections, and predispositions of individual judges are substituted for a clear statement of legislative intent and unconstitutionally replace congressional preemption with judicial preemption, in violation of federalism principles. As one might expect, this also promotes splits in the circuit courts on the same question. *See* Petition at 24-30 (gathering cases). Indeed, even the panel decision here was sharply divided. *State of Arizona*, 641 F.3d at 370-91 (Bea, J., concurring in part and dissenting in part). Only if congressional intent to preempt state laws is clearly expressed may the courts preserve the principles of federalism and separation of powers. "Obstacle preemption," though, is antithetical to those principles.

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of the power exerted by Congress, the object sought to be attained, and the character of the obligation imposed by law." *Id*. Justice Thomas agreed with Justice Stone's dissent in *Hines* and observed that "obstacle preemption" "is driven by the Court's own conceptions of a policy which Congress had not expressed and which is not plainly to be inferred from the legislation which it had enacted." *Id*. (internal quotations omitted).

CONCLUSION

For the forgoing reasons, this Court should grant the Petition for a Writ of Certiorari – not only for those reasons expressed in the Petition – but also to reexamine the scope and applicability of "obstacle preemption," and, perhaps, to limit or abandon its application.

DATED this 12th day of September 2011.

Respectfully submitted,

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