No. 11-182

In the Supreme Court of the United States

THE STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA IN HER OFFICIAL CAPACITY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND __ OTHER STATES IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

In the absence of a clear, Congressional statement in the statutory language, does a federal statute impliedly preempt a state's sovereign police power and thus preclude the state from adopting laws aimed at improving enforcement of the federal scheme.

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INTEREST OF *AMICI CURIAE*[1]

One of the chief characteristics of the American model of government is its federal system, in which the states serve two unique and indispensable roles. First, the states operate as a separate sovereign, distinct from the United States. Second, the states operate cooperatively with the United States in areas in which Congress invites the states to play a concurrent role. This case implicates both of these roles, and the *amici* states have a manifest interest in ensuring that their sovereignty is accorded proper respect.

The police powers of a state include the authority to arrest for federal crimes, a prerogative derived from the state's own sovereign authority. Consistent with the principle of dual sovereignty, the states may exercise this power to direct the police to arrest persons who violate federal immigration laws. This arrest authority should not be easily set aside, and the Ninth Circuit's decision to do so here is a misreading of 8 U.S.C. § 1252c.

Arizona has by statute mandated that its law enforcement officials participate in assisting the federal Government in enforcing immigration law to the full extent Congress prescribed. It is a puzzling view of federal preemption, to say the least, which would nullify a state law seeking to achieve the ends that federal law itself dictates.

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[1] Consistent with Supreme Court Rule 37.2, the State of Michigan provided notice to counsel more than 10 days in advance of the filing of its plan to file this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit interpreted federal immigration laws as preempting traditional state authority in three important areas: enforcing federal law, regulating employment matters, and communicating with federal officials regarding immigration status. This Court should reject each interpretation.

First, the Ninth Circuit's decision created a split in the circuits regarding the inherent power of the sovereign states to enforce federal law. Specifically, the Ninth Circuit held that a state can only conduct a warrantless arrest for a violation of federal immigration law under 8 U.S.C. § 1252c. But the Tenth Circuit rejected the very same position in *United States* v. *Vasquez-Alverez*, 176 F.3d 1294 (10th Cir. 1999). The Tenth Circuit noted that states have preexisting authority to make arrests based on violations of federal law. Because Congress under § 1252c did not expressly preempt that authority, the statute augments state power, not restricts it. This conclusion is consistent with the Department of Justice's own reading of the statute, as demonstrated by a 2002 memorandum by the Office of Legal Counsel.

Second, the Ninth Circuit erroneously interpreted the Immigration Reform and Control Act of 1986 as preempting states' traditional role of regulating employees. It is true that Congress limited state authority somewhat by forbidding states from imposing civil or criminal sanctions on the *employers* of unlawful aliens. 8 U.S.C. § 1324a(h)(2). But Congress was silent on whether states were also barred from their traditional role of regulating employees, and that

silence cannot be construed as an express or implied preemption. This Court's recent decision in *Chamber of Commerce of the United States* v. *Whiting*, __ U.S. __; 131 S. Ct. 1968 (2011), made the same point interpreting the very same federal statute.

Third, even when states decline to enter into a cooperative-enforcement agreement under 8 U.S.C. § 1357(g), *any* state is authorized to communicate with the Attorney General to ascertain the immigration status of an individual under 8 U.S.C. § 1357(g)(10)(A), and the Attorney General *must* respond to such an inquiry under 8 U.S.C. § 1373(c). The Ninth Circuit upset this cooperative scheme by re-writing § 1357(g). Under the Ninth Circuit's view, a state that wishes to engage in "routine" or "systematic" communication with federal immigration authorities must first enter into a § 1357(g) agreement. But Congress has stated just the opposite: no state need enter into an agreement to either communicate with the Attorney General or cooperate in the enforcement of federal immigration law.

In sum, Congressional intent is furthered, not thwarted, when state law enforcement officers verify, and communicate to the federal government, their reasonable suspicion that an individual is in the country illegally. Likewise, federal law is fostered, not denigrated, when law enforcement officials arrest an individual and refer him to the federal government when they have probable cause that the individual has committed a removable offense. A contrary conclusion stands the whole notion of federal preemption on its head: a state enforcing Congressional directives *too* well is an obstacle to Congressional intent.

ARGUMENT

Legal scholars have recognized that states ordinarily occupy two roles within our federalist system. The primary role is based on the system of "dual sovereignty" established by our constitution. *Printz* v. *United States*, 521 U.S. 898, 918 (1997). While states surrendered some powers to the federal government, they retained "a residuary and inviolable sovereignty." *Printz*, 521 U.S. at 919, quoting The Federalist No. 39, at 245. Perhaps the best recognized facet of this "residuary" are the states' police powers. This Court has recognized that the states act with their greatest authority when legislating to protect "the lives, limbs, health, comfort, and quiet of all persons." *Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006). Thus, in the preemption context, this Court assumes that a state's historic police powers are not superseded by a federal act unless *clearly* indicated by Congress. *PLIVA, Inc.* v. *Mensing*, __ U.S. __; 131 S.Ct. 2567, 2586 (2011).

The states also act in our system in a cooperative fashion to administer and implement federal programs. Under this "cooperative federalism," Congress invites the states to participate in a coordinated federal program. The states can choose to regulate based on federal standards, or to have their own laws preempted by federal regulation. E.g., Sarah C. Rispin, Comment, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. Chi. L. Rev. 1639 (2003). This "cooperative" approach applies to a broad variety of legal areas, including Medicaid, occupational safety and health, utilities, and child welfare, among other things. *Id.* 1642–43.

Perhaps the most well-known area of "cooperative federalism" is the enforcement of environmental regulations. For instance, under the Clean Water Act, state water pollution control agencies are primarily responsible for the statute's implementation. See 33 U.S.C. § 1251(b). Forty-six states operate permitting programs for the discharge of pollutants into state waters through the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342(b). Under that program, states must regulate at least to the extent set forth by Congress under the Clean Water Act. But states are allowed to apply more stringent limitations on discharges in their NPDES permits than are set by the federal government. 33 U.S.C. § 1370.

The Clean Water Act also requires that the federal government condition any federal license or permit that may result in discharges to the waters of a state on compliance with that state's water-quality standards. 33 U.S.C. § 1341(2); see *Laker Carriers Assoc.* v. *EPA*, 2011 U.S. App. LEXIS 14996 (D.C. Cir. 2011). Accord also, e.g., 42 U.S.C. §§ 6926, 6929 (the Solid Waste Disposal Act authorizes state hazardous waste programs meeting minimum federal requirements, in lieu of the Federal program, and expressly authorizes states to impose *more* stringent requirements than federal law); 42 U.S.C. § 7410 (the Clean Air Act establishes a program of cooperative federalism under which states enact their own regulatory programs that must satisfy minimum federal standards regarding air quality). As explained below, enforcement of federal immigration law is another area in which Congress has invited state participation.

I. The Immigration and Nationalization Act does not expressly or impliedly preempt the states' sovereign authority to enforce federal law or regulate employment.

Under the Immigration and Nationalization Act, Congress left intact states' inherent authority to make arrests for violations of federal law. Moreover, Congress has not totally preempted the traditional state authority over employment matters.

In *De Canas* v. *Bica*, 424 U.S. 351 (1976), this Court recognized the states' traditional authority to regulate employment matters, including the employment of unlawful aliens, under the police power. Congress preempted that authority, in part, by barring states from punishing the employers of unlawful aliens. But because the statute was silent as to *employees*, states retained their traditional police-power authority over employees.

A. The states enjoy inherent authority to enforce federal law.

The source of a state's authority to arrest flows from the state's status as a sovereign government possessing all residual powers not abridged or superseded by the Constitution. See *Sturges* v. *Crowninshield*, 17 U.S. 122, 193 (1819). One of those residual powers is the police power—i.e., the state's authority to "protect the lives, health, morals, comfort, and general welfare of the people." *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). A state is free to exercise its police powers, unless it either violates the Constitution or the action to be taken has been preempted by federal law.

This Court has recognized that state law is the reservoir of power authorizing a state law-enforcement officer to make a warrantless arrest for a violation of federal law. *United States* v. *Di Re*, 332 U.S. 581, 591 (1948). Likewise, the Seventh Circuit has explained that "[state] officers have implicit authority to make federal arrests." *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983). The Tenth Circuit found specifically that this inherent authority applies equally to the investigation and arrest of violations of federal immigration law. *United States* v. *Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001).

Several additional courts have similarly held that a state has the inherent authority to make an arrest for a violation of federal immigration laws. In *United States* v. *Salinas-Calderon*, the Tenth Circuit held that a police officer could inquire into a person's immigration status where he had "reasonable suspicion" that a person had violated federal immigration law. 728 F.2d 1298 (10th Cir. 1984). In *Salinas-Calderon*, a Kansas state trooper pulled over a driver of Mexican descent based on his suspicion the driver was intoxicated. During the stop, the trooper discovered that neither the driver nor the six adult males in the bed of his pickup truck could speak English. The Tenth Circuit held that the trooper had "general investigatory authority to inquire into possible immigration violations," and that his questions to the driver's wife about the defendant's green card was reasonable under *Terry* v. *Ohio*. *Salinas-Calderon*, 728 F.2d at 1301 n. 3 (citing *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968)). When the trooper ascertained that the defendant was from Mexico and did not have identification papers or a green card, he

had probable cause to make a warrantless arrest for violation of the immigration laws. *Id.* at 1301.

In stark conflict here, the Ninth Circuit concluded that 8 U.S.C. § 1252c preempts a state's inherent authority to arrest for a violation of federal immigration law. Under § 1252c, state law enforcement officers are authorized to arrest and detain an individual who is (1) in the United States illegally; and (2) has previously been convicted of a felony and was deported or voluntarily left the United States, "but only after" confirmation from Immigrations and Customs Enforcement (ICE) of the immigration status of that individual. According to the majority, any state law that authorizes an arrest beyond what is permitted under § 1252c is preempted.

As the majority below acknowledged, its decision created a split in the circuits regarding § 1252c's impact on states' inherent authority to make arrests for federal-law violations. The Tenth Circuit has said that in § 1252c, Congress did not "limit or displace the *preexisting* general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws." *United States* v. *Vasquez-Alverez*, 176 F.3d 1294, 1298, 1299 (10th Cir. 1999) (emphasis added). Instead § 1252c created an additional reservoir of power from which a state could draw arrest authority. *Id.* A 2002 memorandum by the Department of Justice's Office of Legal Counsel reaches the exact same conclusion: states have "inherent power" to make arrests for violations of federal law, and 8 U.S.C. § 1252c does not

preempt state authority to arrest for federal violations.[2]

The Ninth Circuit has limited the states' authority to exercise their police powers, despite the fact that Congress has not expressly created such a limitation. Moreover, the split between the Ninth and Tenth Circuits creates uncertainty and will lead to the uneven application of state power throughout the nation. This Court should grant certiorari and determine whether and to what extent the states retain the authority to make warrantless arrests—consistent with state law—for violations of federal immigration law.

B. The states also have inherent authority to regulate employment.

This Court has long recognized that states have "broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas* v. *Bica*, 424 U.S. 351, 356, 359 (1976). Under this authority, states are "largely free" to implement laws to restrict the employment of unlawful aliens within their borders. *De Canas*, 424 U.S. at 356.

Under the Immigration Reform and Control Act of 1986 ("IRCA"), Congress limited traditional state authority over employment matters somewhat by forbidding states from imposing civil or criminal

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[2] *See* Dep't of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (April 3, 2002) available at http://www.aclu.org/FilesPDFs/ACF27DA.pdf (accessed on September 7, 2011).

sanctions on the *employers* of unlawful aliens. 8 U.S.C. § 1324a(h)(2). But Congress was silent on whether states were also barred from their traditional role of regulating employees. The Ninth Circuit below interpreted Congress's silence on the issue of employee sanctions as an implied preemption. Specifically, the Ninth Circuit noted that Congress had considered several proposals to adopt criminal sanctions against the employee, but ultimately rejected them. *National Center for Immigrants' Rights, Inc.* v. *I.N.S.*, 913 F.2d 1350, 1367–68 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). The Ninth Circuit reasoned that the decision to allow sanctions against employers, rather than employees, represented a "careful balance" stuck by Congress between enforcing immigration laws and respecting the rights of unlawful alien workers. *Id.* at 1368–69. The Ninth Circuit concluded that allowing state sanctions of employees would upset that "balance" and, therefore, section 5(C) was preempted.

But the Ninth Circuit's decision is no longer tenable in light of this Court's recent decision in *Chamber of Commerce of the United States* v. *Whiting*, __ U.S. __; 131 S.Ct. 1968 (2011). At issue in *Whiting* was whether § 1324a(h)(2) preempted an Arizona statute suspending or revoking the licenses of businesses that knowingly employed unlawful aliens. This Court noted that while the IRCA preempts states from imposing "civil or criminal sanctions" on employers, it allows states to impose sanctions through licensing laws. *Id.* at 1977. While Arizona's definition of a "license" was broad, this Court found that it was consistent both with the plain meaning of the term and with the definition of a "license" as set forth in the Administrative Procedure Act. *Id.* at 1978 (citing 5

U.S.C. § 551(8)). This Court concluded that the IRCA "expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others." *Id.* at 1981. Because Arizona's licensing scheme did not fall within the statute's preemptive scope, Arizona retained its authority to regulate. *Id.*

The Court should grant certiorari and apply *Whiting* to the Ninth Circuit's decision. Congressional objectives in controlling illegal-alien entry and presence, as well as removing those have committed certain crimes, are not impeded by the states identifying those very individuals and providing pertinent information to the federal government. There is nothing in the federal statutory scheme that would suggest an express or conflict preemption of the states' traditional role in regulating employment. And in the absence of such preemption, it must be assumed that state sovereign power authorizes such local regulation.

II. The Immigration and Nationalization Act does not expressly or impliedly preempt the states' sovereign authority to communicate with federal officials to determine the immigration status of a person in state custody.

Congress has explicitly invited states to participate in the concurrent enforcement of federal immigration law in two ways. First, a state can participate as a full partner with the federal government by entering into an agreement under 8 U.S.C. § 1357(g). Second, a state can perform in a more limited capacity by either "communicating" with the federal government to

ascertain the immigration status of a person in its custody, or by "cooperating" with the detection and removal of an unlawful alien within the state. But the Ninth Circuit has re-written the federal statute to require a § 1357(g) agreement for "routine" or "systematic" communication with the federal government. In other words, the Ninth Circuit has replaced the scheme of cooperative enforcement envisioned by Congress with an "all-or-none" approach of its own design.

Sections (1)-(8) of § 1357(g) set forth the conditions under which the Attorney General of the United States may enter into an agreement with a state or political subdivision of a state to perform the function of an immigration officer. Under a § 1357(g) agreement, local police officers function as immigration officers acting under the color of federal law. Such officers are permitted to utilize federal facilities—consistent with the terms of the agreement and under the direction of the federal government.

Section (9) makes clear that such agreements are voluntary in nature. But a state's choice not to enter into such an agreement does not remove that state from the cooperative immigration-enforcement scheme. Rather, § 1357(g)(10) provides for state cooperation even when there is *no* formal agreement:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer of 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 cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

The Ninth Circuit panel majority re-wrote § 1357(g) so that a state cannot act in immigration enforcement without a formal agreement unless (1) "called upon" to do so by the Attorney General, or (2) the action is necessary and not "systematic and routine." The majority based its re-write on the presence of the word "removal" in subsection (g)(10)(B). Since a state lacks the authority to "remove" a person from the United States, the majority reasoned that a state acting under subsection (g)(10)(B) must be under the same restrictions as a state acting under the direction of the Attorney General in a § 1357(g) agreement.

As a result, the majority concluded that subsection (g)(10)(B) only applies when the state cooperates with the Attorney General on an "incidental and as needed basis." An agreement under § 1357(g) is required for "*systemic* and *routine* cooperation." The panel majority applied the same reasoning to communications with federal official under subsection (g)(10)(A). Because § 2(B) of S.B. 1070 mandates verification of a person's immigration status, the Court held that the law went beyond the "incidental" communication authorized by subsection (g)(10)(A) and was preempted.

There are two fundamental problems with that result. First, the statute indicates that no state is required to enter into such an agreement. 8 U.S.C. § 1357(g)(9). Congress recognized that even non-agreeing states could still provide valuable assistance in the cooperative enforcement of federal immigration law. The most basic way for a state to participate is to communicate with the INS regarding the immigration status of persons within the state. And to communicate that information, a state law-enforcement officer must have the authority to inquire as to an individual's immigration status. That is precisely what Congress has done by mandating that ICE respond to any inquiry from a state regarding an individual's immigration status. The Ninth Circuit's decision does not advance but defeats this Congressional scheme. According to the Ninth Circuit, states that decline to participate in a § 1357(g) agreement are limited to passively or incidentally learning about a violation of federal law and then passing that information along.

Second, the Ninth Circuit's view restricts state sovereignty in an area where Congress did not clearly indicate its intent to do so. Congress presumably desires that its immigration policies be enforced. Yet the Ninth Circuit refuses to allow Arizona to do just that.

A state's unfettered ability to communicate with the Immigration and Customs Enforcement Agency ("ICE") regarding an individual's immigration status is also consistent with the rest of the Immigration and Nationalization Act ("INA"). Under 8 U.S.C. § 1373(c), the INS "*shall* respond" to any state agency's inquiry seeking to verify a person's immigration status. That

is, under the plain language of the statute, any state may contact ICE to ascertain the immigration status of an individual, 8 U.S.C. § 1357(b)(10)(A), and ICE must respond to that request.

Yet, the essence of the majority opinion is that a state must participate in a § 1357(g) agreement if it "routinely" communicates with the INS regarding an individual's immigration status. There is no statutory foundation for this requirement. Indeed, as the dissent notes, the key phrases of the majority opinion—"calls upon," "necessity," "routine," or "systematic"—do not appear *anywhere* in the INA, let alone the portion of that Act the majority is examining.

Rather, the majority appears to have arrived at this language based on its reading of subsection (g)(10)(B). Under that provision any state—including one not participating in a § 1357(g) agreement—may "cooperate with the Attorney General in the . . . removal of aliens not present in the United States." The majority seized on the word "removal," noting that only the federal government may remove a foreign national. But the majority misses the point. Subsection (g)(10)(B) does not authorize a state to act on its own to remove a foreign national. Rather, the state is authorized to "cooperate" with the Attorney General, who most assuredly does have the authority to remove someone from the United States. The fact that a state does not have the independent authority to remove a person is of no moment. Rather, the language of the statute indicates that any state is authorized to work together with the Attorney General in the removal of a foreign national. The majority's redrafting of the statute cannot survive textual scrutiny.

The Ninth Circuit's decision has much broader implications than simply defining the scope of state authority to enforce federal immigration law. Under the Ninth Circuit's reasoning, Congress can strip the states of their sovereignty simply by failing to "authorize" that sovereignty when enacting a federal statute. This Court has never articulated such a view, which would dramatically rewrite the history of the federal-state relationship in this country. Accordingly, the *amici* states respectfully request that the Court grant certiorari.

CONCLUSION

The Court should grant the petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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