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

BRIEF OF THE ARIZONA LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Arizona State Senate and the Arizona House of Representatives are the elected lawmaking authority of the State of Arizona (hereinafter the "Legislature"). Ariz. Const. art. 4 pt. 1 § 1. In the spring of 2010, the Legislature enacted Laws 2010, Chapter 113, Senate Bill 1070 (hereinafter S.B. 1070) during the Second Regular Session, Forty-Ninth Legislature. Shortly thereafter, the Legislature also enacted Laws 2010, Chapter 211, House Bill 2162 (hereinafter H.B. 2162), which made additional changes to the sections added by S.B. 1070.

The Legislature passed S.B. 1070 to address the real and significant economic costs and public-safety harms of illegal immigration on the citizens of the State of Arizona. Many of the tremendous challenges posed by illegal immigration, including but not limited to drug and human smuggling, violence, and substantial taxpayer expenses for incarceration of and social welfare benefits for illegal aliens, are detailed in the merits brief of the Petitioners, State of Arizona and Governor Janice K. Brewer. Br. for Pet. 1-8. With S.B. 1070, the Legislature sought to address these challenges through cooperation with the federal government on parallel enforcement of existing immigration laws. So far, Arizona's effort, pursuant to

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[1] The parties have filed blanket consent statements for the filing of briefs *amicus curiae*. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

its plenary police powers, to communicate and cooperate has been met by the federal executive branch with staunch resistance and litigation. The Legislature hopes that this case will be resolved as soon possible so that the enjoined provisions of S.B. 1070 can go into effect and Arizona can resume efforts to partner with the federal government on cooperative enforcement of existing immigration laws.

The Legislature submits this brief *amicus curiae* to specifically address issues of statutory interpretation with regard to S.B. 1070 that arose in the lower courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Together, S.B. 1070 and the subsequently enacted H.B. 2162, consist of 15 sections. This case involves sections 2, 3, 5, and 6—which the District Court either enjoined or enjoined in part. Rather than following the clear legal mandate set forth by this Court and presuming that S.B. 1070 is constitutional, both of the lower courts sidestepped precedent and tenuously built a bridge to preemption. This is a pre-enforcement, facial challenge. Arizona has not yet been able to implement the enjoined provisions of S.B. 1070. Under these circumstances, the federal courts should refrain from seeking out "conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990).

In the courts below, the parties vigorously disputed the proper interpretation of Section 2(B), which is codified at section 11-1051, Arizona Revised Statutes (hereinafter "Ariz. Rev. Stat."). The United States urged, and the lower courts adopted, a

compartmentalized interpretation of Section 2(B), whereby its sentences operate independently and conflict with one another. Specifically, the lower courts found that the second sentence of Section 2(B) requires that immigration status checks be conducted for all persons arrested by law enforcement in the State of Arizona. Arizona, on the other hand, interprets the second sentence to only require immigration status checks for those arrested persons for whom there is reasonable suspicion that they are unlawfully present in the United States. This interpretation is faithful to the intent of the provision and harmonizes the various sentences of Section 2(B) rather than placing them into conflict. Furthermore, this interpretation, is in keeping with clear, longstanding rules of statutory construction.

The Ninth Circuit also erred by asserting that Arizona's interpretation "creates irreconcilable confusion" for the third and fifth sentences of Section 2(B), which respectively mandate that immigration status be verified with the federal government, and provide for a presumption of lawful presence for persons presenting one of several common forms of identification. Clearly, however, there is no conflict. For persons with identification, the presumption applies and there is no requirement of status verification.

In addition, the decision of the panel majority is unique for its selective use of a portion of the intent clause of S.B. 1070. That approach lacks merit for two reasons. First, the intent clause itself must be read as a whole. The Ninth Circuit failed to produce any legal principle that would allow it to stress the relevance of a selected portion of the intent clause, while ignoring

the rest. Second, under this Court's preemption decisions, the general purpose of a statute cannot displace its actual effect. Disproportionately focusing on purpose language obscures the deeper and proper inquiry, whether actual conflict exists between the state enactment and federal law.

ARGUMENT

I. BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT FAILED TO APPLY NORMAL PRINCIPLES OF STATUTORY CONSTRUCTION

The Constitution's federalist structure does not favor the preemption of state laws. The enactments of the states are presumed to be constitutional. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-62 (2003). Moreover, in the case of "areas traditionally regulated by the states," the presumption runs against preemption. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). "The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption" of a state statute. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Courts will not seek out "conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (quotation omitted). The Ninth Circuit did not apply these accepted presumptions. Reviewing a preliminary injunction, the panel majority imagined the likelihood of conflict based in part upon its interpretation of Arizona law. That interpretation, however, directly clashes with Arizona's own interpretation of S.B. 1070—a logical and harmonious reading of the statute based upon well-established principles of statutory construction.

A. Arizona's Interpretation of Section 2(B)

Section 2(B) is made up of 5 sentences. It reads as follows:

> 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 § 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.

Ariz. Rev. Stat. § 11-1051(B). Arizona's interpretation[2] of these sentences is straightforward:

- Sentence one requires that for any "lawful stop, detention or arrest" by law enforcement where "reasonable suspicion exists that the person" is an unlawfully present alien "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person. . . ."
- Sentence two requires that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."

The word "arrest" is used in both sentences one and two, because it has the same meaning: an arrest where there is also reasonable suspicion of unlawful presence. Thus, if an officer has arrested a person—and has reasonable suspicion that the person

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[2] Br. for Pet. 40; App. 10a-11a.

is unlawfully present—a status determination must be done before the person is released.

- Sentence three requires that the immigration status shall be verified with the federal government pursuant to 8 U.S.C.A. § 1373(c).
- Sentence four mandates that in implementing Section 2 law enforcement comply with the United States and Arizona Constitutions.
- Sentence five mandates that a person "is presumed not to be an alien who is unlawfully present" if the person has one of several common forms of identification.

Accordingly, where the presumption of lawful presence applies there is no requirement for Arizona officers to determine the person's immigration status.[3]

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[3] Pursuant to Executive Order, all Arizona law enforcement officers must receive training in the implementation of S.B. 1070. Executive Order 2010-9, Vol. 16, Issue 21, Ariz. Admin. Reg. 856 (Apr. 23, 2010), http://www.azsos.gov/aar/2010/21/governor.pdf. As the materials for that training make clear, these provisions of Section 2(B) work together in the field and are not in conflict.

> In all lawful stops in which there is reasonable suspicion/probable cause of a civil traffic or criminal violation (includes drivers of vehicles stopped for traffic violations; does not include passengers unless they have committed a separate violation), the first step the officer should take is to ask for identification. If the person presents presumptive identification . . ., the issue of whether he or she may be unlawfully present in the United States is resolved and no further immigration inquiry is necessary in the absence of additional facts or an arrest requiring verification.

Arizona Police Office Standards and Training Board ("Ariz.

B. The Lower Courts Interpret Section 2(B) To Conflict With Itself And With Federal Law

Ignoring Arizona's interpretation and widely accepted principles of statutory construction, both the District Court and the Ninth Circuit read a conflict into Section 2(B). The lower courts read the second sentence as a stand alone provision. *See United States v. Arizona*, 703 F.Supp.2d 980, 994 (D. Ariz. 2010) ("the Court reads the second sentence of Section 2(B) independently from the first sentence.") *and United States v. Arizona*, 641 F.3d 339, 347 (9th Cir. 2011) ("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.'). By this reading, made without any factual or legal support, the second sentence requires immigration status checks for all arrestees in all circumstances—no exceptions.

The District Court noted that the second sentence is the same in both S.B. 1070 and the amendments in H.B. 2162. But the first sentence was modified by H.B. 2162. The Legislature changed the phrase "For any lawful contact" to "For any lawful stop, detention or arrest." This change, in the District Court's view, did not suggest that the Legislature "intended to alter the meaning of the second sentence in any way."

POST"), *Implementation of the 2010 Arizona Immigration Laws Statutory Provisions for Peace Officers* at 3 (June, 2010) (emphasis added) http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf.

United States v. Arizona, 703 F.Supp.2d at 994. Once the second sentence of Section 2(B) was cast as a stand-alone provision requiring universal status checks for all arrestees, the lower courts both went on to find that it burdens lawfully-present aliens and the resources of the federal government and is therefore likely preempted by federal law. *Id.* at 995; *United States v. Arizona*, 641 F.3d at 348-355.

In addition to agreeing with the District Court's interpretation, the Ninth Circuit also argued that Arizona's interpretation "creates irreconcilable confusion as to the meaning of the third and fifth sentences." 641 F.3d at 347. As Judge Bea noted in his partial dissent, the panel majority's preemption analysis turns on its construction of 8 U.S.C.A. § 1357(g) and is disconnected from its interpretation of the operation of S.B. 1070, Section 2(B). *Id*. at 382 (Bea, J. dissenting). As Arizona explains in its opening brief, the Ninth Circuit's interpretation of federal law is wrong and should be reversed. Br. for Pet. at 34-38. Furthermore, this Court should address the lower courts' construction of Section 2(B) because both courts have failed to follow the applicable standards of statutory construction; and because preemption analysis requires the federal courts to interpret both federal law and the challenged state enactment.

C. The Standards Neglected By The Lower Courts

The second sentence of Section 2(B) cannot be interpreted in isolation. Federal courts follow the interpretation of the courts of the state enacting the statute. *Winters v. New York*, 333 U.S. 507 (1948); *and see generally* Sutherland Statutory Construction § 37:4

(Interpretation of state statutes in the federal courts) (7th Ed.). Where federal courts address yet uninterrupted state statutes, they must apply the state's rules of statutory construction. *Federal Sav. and Loan Ins. Corp. v. Butler*, 904 F.2d 505, 510 (9th Cir. 1990) (applying California principles of statutory construction to interpret provision that had not yet been addressed by the California Supreme Court); *and see generally Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[T]he law to be applied in any case is the law of the state."). Initially, the District Court acknowledged this principle when it properly applied Arizona law to determine that the various provisions of S.B. 1070 are severable and must be considered separately. *Arizona*, 703 F.Supp. at 992 (citing five Arizona Supreme Court decisions on the severability of state statutes). The adherence to state law stopped, however, when the District Court turned to interpreting the substance of Section 2(B). Arizona vigorously contended how the provision would be interpreted and applied. Yet neither the District Court nor the Ninth Circuit repaired to the governing rules of statutory construction.

First, when interpreting a statute, courts make every effort to give effect to the intent of the Legislature. *Mejak v. Granville*, 136 P.3d 874, 876 (Ariz. 2006). "[T]he cornerstone [of statutory construction] is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *Janson on Behalf of Janson v. Christensen*, 808 P.2d 1222, 1223 (Ariz. 1991). Here the lower courts disregarded not only the plain meaning of Section 2(B) but the Legislature's express statement that the provision be

implemented "in a manner consistent with federal laws regulating immigration. . . ." Ariz. Rev. Stat. § 11-1051(L).

Second, the lower courts should have applied the presumption of constitutionality. "All statutes are presumed to be constitutional and any doubts will be resolved in favor of constitutionality. Moreover, the court has a duty to construe a statute so as to give it, if possible, a reasonable and constitutional meaning." *Ariz. Downs v. Ariz. Horsemen's Found.*, 637 P.2d 1053, 1057 (Ariz. 1981) (internal citations omitted); *see also Hall v. A.N.R. Freight Sys., Inc.*, 717 P.2d 434, 437 (Ariz. 1986) ("The burden of establishing that a statute is unconstitutional rests on the party challenging its validity."). The lower courts, by contrast, specifically rejected Arizona's reasonable interpretation which accords with constitutional requirements. This is wholly inconsistent with this Court's "elementary rule" that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

Third, the lower courts' compartmentalized approach to the second sentence of Section 2(B) is exactly the opposite of the interpretive method they were obligated to follow:

> If possible, a statute should be so construed as to render it a consistent and harmonious whole; if different portions seem to conflict, they should, if practicable, be harmonized, that construction being favored which will render every word operative rather than one which makes some words idle and nugatory. In other words, a statute must receive such construction

> as will make all its parts harmonize with each other, and render them consistent with its general scope and object.

Powers v. Isley, 183 P.2d 880, 884 (Ariz. 1947) (citation and quotation omitted; emphasis added). As this Court has recognized, "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (internal citations omitted).

Indeed, the lower courts' interpretation renders "idle" the word "arrest" in the first sentence. If, as the lower courts would have it, the second sentence requires an immigration status determination for every arrestee in the State of Arizona there is no need for the first sentence to require law enforcement to "determine the immigration status" for all persons arrested, when there is "reasonable suspicion" of the person being in the country illegally. Ariz. Rev. Stat. § 11-1051(B). Arizona's interpretation harmonizes both sentences, as well as the rest of Section 2(B). Sentence one indicates when an arrestee's immigration status should be checked: "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." *Id*. And sentence two indicates when the status check must be performed: "before the person is released." *Id*.

Beyond its misreading of the second sentence of Section 2(B), the Ninth Circuit asserted that Arizona's reading creates "irreconcilable confusion as to the meaning of the third and fifth sentences" of Section (2)(B):

> [O]ne 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 the facts. Arizona's reading would give law enforcement officers conflicting direction.

United States v. Arizona, 641 F.3d at 347. But the conflict exists only in the logic of the panel majority. Sentences three and five work in tandem: There is a presumption of lawful presence where a person presents one of several forms of identification. This is, in fact, the official practice of law enforcement in Arizona. Ariz. POST materials, *supra* at note 3.

As a final matter, the District Court compounded its interpretive error by failing to apply Arizona severability principles. Once the court lighted upon its universal status check for arrestees interpretation—and consequently found preemption—it was obligated to assess whether the second sentence of Section 2(B) could be severed. "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, 414 (Ariz. App. 1992). Moreover, whenever possible courts should give effect to severability clauses. *Selective Life Ins. Co. v. Equitable Life Assur. Soc. of U.S.*, 422 P.2d 710, 715 (Ariz. 1967). And in S.B. 1070 Arizona provided a specific severability directive:

> If 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.

Laws 2010, Ch. 113, § 12(A). The lower courts clearly made no attempt to avoid unnecessary conflict between state and federal law. On the contrary, the lower courts employed a broad and unreasonable interpretation of S.B. 1070 that locked it into an unnecessary collision course with federal law.

II. THE NINTH CIRCUIT IMPROPERLY FOCUSED ON A PORTION OF S.B. 1070'S INTENT SECTION AND USED IT TO DISPLACE THE STATUTE'S ACTUAL INTENT

The Arizona Legislature was not silent as to its purpose. Section 1 of S.B. 1070 reads:

> The legislature finds that there is 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

The decision of the Ninth Circuit unfairly characterizes this language and improperly relies upon a selected portion of it when interpreting the statute.

The panel majority ignored Arizona's primary purpose for "cooperative enforcement of federal immigration laws" and fixated upon the phrase "attrition through enforcement"—all at the expense of the rest of Section 1 and the other actual statutory provisions in the law.

This Court has consistently declined to use general purpose assertions as the controlling factor of preemption analysis. Whether it is Congress's intent, or the intent of the enacting state, this Court examines the entire law to assess its overall impact. "While we have frequently said that pre-emption analysis requires ascertaining congressional intent…we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). Moreover, in "assessing the impact of a state law on the federal scheme," this Court has "refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-6 (1992); *and see Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996) (Citing *Gade*—"[I]t is the effect of the state law that matters in determining preemption, not its intent or purpose.") (emphasis in original). This is a far cry from the Ninth Circuit's approach.

The panel majority portrays S.B. 1070 as permitting Arizona to direct its officers to enforce federal immigration law in "furtherance of the state's own immigration policy of attrition." *United States v. Arizona*, 641 F.3d 339, 351 (9th Cir. 2011). It is undisputed by the legislative record and plain language of S.B. 1070 that Arizona is respecting federal law and the federal policy set forth by

Congress. Arizona in no way created its own immigration policy. This is an oft-repeated but factually false mantra.[4]

Conflict preemption cases are particularly ill-suited to turn on purpose clauses.

> When courts rely on purpose clauses, rather than the concrete rules that the political branches have selected to achieve the stated ends, judges become effective lawmakers, bypassing the give-and-take of the legislative process. It is therefore no surprise that the Supreme Court does not think that declarations of purpose, however sweeping, preempt state or local laws.

City of Joliet, Ill. v. New W., L.P., 562 F.3d 830, 836-37 (7th Cir. 2009). Judge Easterbrook's observation comes in the context of assessing a federal statute, yet the logic holds here because implied preemption requires actual conflict. Conflict cannot be assessed on mere general statements of purpose, especially when there are multiple purposes set forth. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."). At most, the selective use of the intent language found in Section 1 of S.B. 1070 constitutes a prediction of conflict—the enjoined provisions of S.B. 1070 never

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[4] In addition to reading the "cooperative enforcement" language out of the intent section, the panel majority disregarded S.B. 1070's clear directives that it "shall be implemented in a manner consistent with federal laws regulating immigration. . . ." Ariz. Rev. Stat. § 11-1051(B), (L); *and* Laws 2010, Ch. 113, § 12(C).

went into effect. As this Court recently reiterated, "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (quoting *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). That principle should be vindicated here, where Arizona law purposefully and carefully tracking federal immigration law, has been badly misread and given a tortured interpretation by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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