No. 11-182

IN THE
Supreme Court of the United States

State of Arizona, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICI CURIAE* STATE LEGISLATORS FOR LEGAL IMMIGRATION AND INDIVIDUAL STATE LEGISLATORS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

State Legislators for Legal Immigration is a nationwide coalition of state legislators ("the *Amici*") who seek to promote cooperation among the federal, state, and local governments in eliminating incentives (including public benefits, welfare, education and employment opportunities) that encourage aliens to enter and remain in the United States unlawfully. Founded by Pennsylvania State Representative Daryl D. Metcalfe, the coalition also is committed to respecting the principles of federalism and state sovereignty that underlie our system of government.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

[2] The following 29 Legislators from 20 states join in this *amici curiae* brief: Sen. Scott Beason (Alabama), Rep. John Kavanagh (Arizona), Rep. Jon Hubbard (Arkansas), Sen. Ted Harvey (Colorado), Sen. Jack Murphy (Georgia), Rep. Eric Koch (Indiana), Sen. Mike Delph (Indiana), Del. Don Dwyer (Maryland), Del. Nic Kipke (Maryland), Del. Pat McDonough (Maryland), Rep. Dave Agema (Michigan), Rep. Becky Currie (Mississippi), Rep. David Howard (Montana), Rep. Wendy Warburton (Montana), Sen. Charlie Janssen (Nebraska), Rep. Jordan Ulery (New Hampshire), Rep. Larry Rappaport (New Hampshire), Assm. Gary R. Chiusano (New Jersey), Assw. Alison Littell McHose (New Jersey), Sen. Steve Oroho (New Jersey), Rep. George Cleveland (North Carolina), Rep. Courtney Combs (Ohio), Rep. Randy Terrill (Oklahoma), Rep. Sally Kern (Oklahoma), Rep. Daryl Metcalfe (Pennsylvania), Sen. Marc

In May 2011, at the United States-Mexico border in El Paso, Texas, President Barack Obama stated:

> We define ourselves as a nation of immigrants – a nation that welcomes those willing to embrace America's ideals and America's precepts. That's why millions of people, ancestors to most of us, braved hardship and great risk to come here – so they could be free to work and worship and start a business and live their lives in peace and prosperity. The Asian immigrants who made their way to California's Angel Island. The German and Scandinavians who settled across the Midwest. The waves of Irish, and Italian, and Polish, and Russian, and Jewish immigrants who leaned against the railing to catch their first glimpse of the Statue of Liberty.

News Transcript, *Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas*, The White House (May 10, 2011). President Obama concluded his remarks stating, "This flow of immigrants has helped make this country stronger and more prosperous." *Id*. *Amici* wholeheartedly agree with the President.

Each city, county, and state represented by *Amici* has a rich history of immigrants who have made a positive impact on their communities. *Amici* do not oppose lawful immigration or naturalization. Nor do

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Cote (Rhode Island), Rep. Matt Shea (Washington), Del. Walter Duke (West Virginia), Del. John Overington (West Virginia).

they challenge the primacy of the federal government's authority to regulate aliens' entry into the United States and the conditions under which lawfully present aliens may remain in the United States and become naturalized citizens. However, the issues of lawful immigration and naturalization are not before the Court. The issue before the Court is whether Arizona may authorize and direct its state and local law enforcement officers to communicate and cooperate with federal officials regarding the enforcement of federal immigration law and create disincentives for unlawfully present aliens who do not comply with federal law to enter or remain in Arizona.

The neighborhoods, cities, counties, and states that *Amici* represent are being adversely affected by the influx of large populations of unlawfully present aliens. *Amici* were elected to represent and protect the interests of the people – the citizens and lawfully present aliens – of their states. Pursuant to their longstanding and well established police power, states have the authority to enact legislation that protects their citizens and lawfully present aliens within their jurisdiction. *Amici* submit this brief to support Arizona's efforts to use its police power to protect its citizens and the lawfully present aliens of Arizona.

SUMMARY OF THE ARGUMENT

The issue before the Court is whether states may use their police power to authorize and direct state and local law enforcement officers to communicate and cooperate with federal officials regarding the enforcement of federal immigration laws and create disincentives for unlawfully present aliens who do

not comply with federal law to enter or remain within their respective borders. The Constitution establishes a system of dual sovereignty between the states and the federal government. The founders created a federal system of government in order to protect the individual liberties of the people. Under this system, the authority of the federal government is limited to those powers specifically enumerated in the Constitution. The states, on the other hand, enjoy broad, plenary power to regulate activities within their borders and to protect the health, safety, morals, and general welfare of the people of their states.

At the time of the drafting of the Constitution, there was no uniformity of rules regarding the entry or naturalization of aliens. An alien could gain rights and privileges in one state but not in others. Therefore, the founders placed immigration and naturalization within the purview of the federal government. Under this framework, the federal government, not the individual states, regulates which aliens are allowed to enter the United States and the conditions under which lawfully present aliens may remain in the United States and become naturalized citizens.

Yet, even under our federalist system, the states retain their right to regulate within their borders. S.B. 1070 does not regulate immigration or naturalization. It does not control who may enter the United States or the conditions under which lawfully present aliens may remain in the United States or become naturalized citizens. Nor does it purport to define any alien's legal status or deport unlawfully present aliens from the United States. It merely

authorizes and directs Arizona's state and local law enforcement officers to communicate and cooperate with federal officials regarding the enforcement of federal immigration law and creates disincentives for unlawfully present aliens who do not comply with federal law to enter or remain in Arizona. Therefore, this Court should reverse the Ninth Circuit's decision and hold that S.B. 1070 is not preempted by federal law.

ARGUMENT

I. The Federalist Structure Was Created for the Protection of Individuals.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It is also axiomatic that under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (*citing Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Hence, while the states have surrendered certain powers to the federal government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST No. 39 (J. Madison)). This Court has described this constitutional scheme of dual sovereigns as follows:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . Without the States in union, there could be no such political body as the

> United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory, 501 U.S. at 457 (citing *Texas v. White*, 74 U.S. 700 (1869), *quoting Lane County v. Oregon*, 74 U.S. 71 (1869)). This concept of dual sovereignty is embodied by the Constitution's conferral upon Congress of not all government powers, but only discrete, enumerated powers. *Printz*, 521 U.S. at 919 (citing Art. I, § 8 and Amend. X). As James Madison described:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, pp. 292-93 (C. Rossiter ed. 1961).

As noted above, often overlooked is the fundamental purpose of the federal structure of joint sovereigns.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 505 U.S. 144, 181 (1992); *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (The "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."); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (The Federal System exists "not as a matter of doctrinaire localism but as a promoter of democracy.").

> The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control.

Alden v. Maine, 527 U.S. 706, 759 (1999).

In sum, our system of federalism:

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Bond v. United States, 564 U.S. ___, 2011 U.S. LEXIS 4558, *19 (June 16, 2011). Whereas the federal government has only the authority enumerated to it in the Constitution, the states maintain broad, plenary power to regulate activities that take place within their borders and affect the lives, health, safety, morals, and general welfare of persons within their borders.

II. Immigration and Naturalization Laws Have Always Focused on the Regulation of Lawful Entry and Lawful Presence of Aliens.

Prior to the drafting and signing of the Constitution, James Madison wrote, "The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions." THE FEDERALIST No. 42, pp. 266-74 (C. Rossiter ed. 1961). Madison explained that under the articles of the Confederation:

> In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater im-

> portance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other.

Id. In other words, an alien could become a citizen of one state and have all the rights associated with it and would not have such rights in other states. Madison elaborated:

> By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them?

Id. For a country to succeed as a whole, the founders recognized that, with respect to naturalization, uniformity among the states was a necessity. Therefore, through the Constitution, the people of the United States authorized Congress to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. "The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the

Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States." THE FEDERALIST No. 45.

From 1790 to 1870, Congress used this authority to permit only "free white persons" to become citizens. *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 412 (1948). However, starting in 1870, Congress "extended eligibility of aliens to citizenship" to others. *Id.* In 1952, Congress enacted the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq*. Generally, the INA collected and codified many existing provisions and reorganized the structure of the naturalization and immigration law. More specifically, the INA was enacted to clarify "the terms and conditions of admission to the country and the subsequent treatment of aliens ***lawfully*** in the country." *De Canas v. Bica*, 424 U.S. 351, 359 (1976) (emphasis added); *see also Chamber of Commerce v. Whiting*, __ U.S. __; 131 S. Ct. 1968, 1973 (2011) (The INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set the 'terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'") (*quoting De Canas*, 424 U.S. at 353)).

Indeed, the principal purpose of immigration and naturalization laws has always been to provide "a broad and comprehensive plan describing the terms and conditions upon which aliens may enter the country, how they may acquire citizenship, and the manner in which they may be deported." *Hines v. Davidowitz*, 312 U.S. 52, 69 (1941). Immigration and naturalization came hand in hand. Thus, the

regulation of aliens focused on the legal entry and lawful presence of aliens, with the ultimate objective being that such persons would become naturalized citizens. *Takahashi*, 334 U.S. at 419 ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, the regulation of their conduct before naturalization, and the terms and conditions of their naturalization.").

Short of deportation, the INA was never intended to usurp the power of the states to regulate unlawfully present aliens within their borders. Rather, its intention was to create a uniform scheme to regulate the legal entry and lawful presence of immigrants to the United States so that they might become citizens.

III. Arizona May Regulate the Activities of Unlawfully Present Aliens Pursuant to Its Police Power.

Although the federal government has the power to regulate immigration, the mere fact that "aliens are the subject of a state statute does not render it a regulation of immigration" and exclusively within the federal government's purview. *De Canas,* 424 U.S. at 352-53. Succinctly put, the regulation of immigration is nothing more than "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 (emphasis added); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("The authority to 'control immigration' is the power to 'admit or exclude aliens.'").

As Judge Bea noted in his dissent, this case is not about "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 the country." *United States v. Arizona*, 641 F.3d 339, 369 (9th Cir. 2011). The issue is whether Arizona may enact laws concerning unlawfully present aliens "to promote the health, safety, morals, and welfare of those within its jurisdiction." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

It is undisputed that a state may employ its police power to regulate activity within its jurisdiction. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (States have unequivocal authority when legislating to protect "the lives, limbs, health, comfort, and quiet of all persons."); *see also, Garmon*, 359 U.S. at 244 (States have the power to act with respect to conduct that touches upon "interests so deeply rooted in local feeling and responsibility."); *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) ("[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."); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (A state has the authority to "protect the lives, health, morals, comfort, and general welfare of the people."). In addition, it is well established that a State's police power is not superseded by a federal act unless clearly indicated by Congress. *PLIVA, Inc. v. Mensing*, __ U.S. __; 131 S.Ct. 2567, 2586 (2011).

Recognizing that the federal government has exclusive authority to regulate the activities of lawfully present aliens in the United States (*De Canas*, 424

U.S. at 355), Arizona enacted S.B. 1070 to authorize and direct its state and local law enforcement officers to communicate and cooperate with federal officials and to create disincentives for unlawfully present aliens who do not comply with federal law to enter or remain in Arizona. S.B. 1070 does not regulate lawfully present aliens; it regulates Arizona's own state and local law enforcement officers and unlawfully present aliens who do not comply with federal law, but enter or remain in Arizona.

This distinction is not one without a difference. In fact, this Court recognized the distinction in *Plyler v. Doe*, 456 U.S. 202 (1982). In *Plyer*, the Court held, "Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are 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." *Id.* at 229. Similarly, the Court recognized that federal immigration and naturalization laws prevent states from regulating the activity of lawfully present aliens. However, with respect to those aliens who are not lawfully present, the Court stated, "[A] State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct." *Id*. at 219.

Similarly, last Term, this Court reaffirmed states' power to regulate the employment of aliens who lack authorization to work in the United States. *See generally Whiting*, 131 S. Ct. 1968. In addition, courts have long recognized that nothing in federal law precludes a state or locality from enforcing the criminal provisions of immigration law. *Gonzalez v.*

Peoria, 722 F.2d 468, 476 (1983). No court has ever ruled that a state cannot enact legislation that regulates the activities of immigrants who have made the conscious decision to enter the United States unlawfully and maintain their unlawful presence in a particular state.

The Arizona State Legislature enacted S.B. 1070 in an effort to reduce the "escalating drug and human trafficking crimes[] and serious public safety concerns" that the state was experiencing due to "rampant illegal immigration." *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010). S.B. 1070 authorizes and directs Arizona law enforcement officers to communicate and cooperate with federal officials regarding the enforcement of federal immigration law. Specifically, the state instructed its law enforcement officers to exercise their undisputed authority to enforce the criminal provisions of federal immigration laws. *See, e.g., United States v. Villa-Velasquez*, 282 F.3d 553, 555-56 (8th Cir. 2002). For example, the state of Arizona found it of great import that its state and local law enforcement officers understood that they already had the authority to investigate possible violations of the criminal provisions of federal immigration laws, including the authority to inquire about a person's immigration status.

In addition, S.B. 1070 also creates disincentives for unlawfully present aliens who do not comply with federal law to enter or remain in Arizona. Specifically, it uses the state's well-established police power to penalize unlawfully present aliens within its jurisdiction who fail to comply with federal alien registration laws. It is undisputed that such exercise of a

state's police power is common practice in other areas that are exclusively federal powers. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

Moreover, as reaffirmed just last Term, states have the irrefutable authority to regulate the employment of aliens who lack authorization to work in the United States. *See generally Whiting*, 131 S. Ct. 1968. S.B. 1070 compliments the legislation upheld in *Whiting* by creating another disincentive for unlawfully present aliens to enter or remain in Arizona. By making it a misdemeanor for an unlawfully present alien to seek work in Arizona, the state has done no more than seek to protect its "fiscal interests and lawfully resident labor force from the deleterious effects on its economy" due to "rampant illegal immigration. *De Canas*, 424 U.S. at 357.

When drafting S.B. 1070, the Arizona State Legislature was cognizant of the federal immigration laws Therefore, it was careful to craft legislation that incorporates federal standards and defers to federal determinations. Arizona has not infringed on the federal government's exclusive authority to regulate immigration and naturalization. It does not impose restrictions on the manner in which aliens enter the United States. Nor does it impose any conditions under which lawfully present aliens may remain in the country. Rather, Arizona has exercised its undisputed police power "to promote the health, safety, morals, and welfare of" the People of Arizona in a manner that is consistent with and respects federal law and principles of federalism. *Truax*, 239 U.S. at 41.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that this Court reverse the Ninth Circuit's decision and hold that S.B. 1070 is not preempted by federal law.

Respectfully submitted,

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