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 STATE SENATOR RUSSELL PEARCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented is whether the federal immigration laws displace Arizona's plenary police powers and impliedly preempt on their face the four provisions of the SB 1070 enjoined by the courts below.

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INTEREST OF THE *AMICUS CURIAE*[1]

State Senator Russell Pearce is the author of, and driving force behind, the Support Our Law Enforcement and Safe Neighborhoods Act, known as "SB 1070."

As the author of SB 1070, Senator Pearce submits this brief in support of Petitioners and offers his unique perspective on the meaning of the provisions of SB 1070. Because the Ninth Circuit upheld a facial challenge to SB 1070, there are no facts in the record to illuminate how the enjoined provisions might have been applied by Arizona law enforcement officials. Therefore, Senator Pearce is best positioned to speak as to how the enforcement of SB 1070 was envisioned.

During his years in the Arizona State Legislature,[2] Senator Pearce authored numerous historic legislative initiatives designed to protect the State of Arizona from the adverse effects of unlawfully present aliens and, most importantly, to uphold the rule of law. These include: Proposition 100, a State constitutional amendment to deny bond to any person unlawfully present in the United States who commits a serious crime in Arizona;

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his 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 lodged with the Clerk.

[2] Senator Pearce was a member of the Legislature for eleven years, including serving as Senate President.

Proposition 102, which states that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; Proposition 200, which requires individuals to produce proof of citizenship before they may register to vote; and the "Legal Arizona Workers Act," upheld by this Court last Term in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (prohibiting employers from hiring unauthorized workers and requiring use of federal E-Verify system to confirm employee eligibility). Senator Pearce's initiatives have served as models for similar legislation in numerous other States across the nation.

Even though only certain provisions of SB 1070 have thus far been implemented, they have been credited with a significant effect on the crime rate in Arizona.[3] According to the Phoenix Law Enforcement Association ("PLEA"), an association representing rank-and-file police officers in the City of Phoenix:

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[3] SB 1070 has been endorsed by, among others, the following law enforcement groups and officials: Arizona Police Ass'n (representing over 9,000 police officers); Maricopa County Sheriff Arpaio; Pinal County Sheriff Babeu; Mohave County Sheriff Sheahan; Yavapai County Sheriff Waugh; Cochise County Sheriff Dever; Gila County Sheriff Armer; Navajo County Sheriff Clark; Graham County Sheriff Allred; Greenlee County Sheriff Tucker; Arizona Fraternal Order of Police (FOP); Phoenix Law Enforcement Ass'n (2,600 members); Maricopa Deputy's Law Enforcement Ass'n (representing 800 officers); Maricopa County Detention Officers Ass'n; Glendale Police Officers Ass'n; Mesa Police Officers Ass'n; Chandler County Police Officers Ass'n; Border Patrol Officers Ass'n; Arizona Highway Patrol Ass'n.

> Since SB 1070, Phoenix has experienced a 30-year low crime rate. Six hundred police vacancies, budget cuts, and old policing strategies didn't bring about these falling crime rates. SB 1070 did. When hard-working rank-and-file Phoenix Police Officers were given access to the tool of SB 1070, the deterrence factor this legislation brought about was clearly instrumental in our unprecedented drop in crime. And all of this without a single civil rights, racial profiling, or biased policing complaint. To ignore the positive impact of SB 1070 in the City of Phoenix is to ignore the huge elephant in the middle of the room.

Statement of PLEA President Mark Spencer (Sept. 2011).

The employment-related provision of SB 1070 at issue here (Section 5) is a complement to the Legal Arizona Workers Act, upheld in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968. In Senator Pearce's view, this provision is an essential component to holding employers responsible for hiring unauthorized workers. These scofflaw employers, who put profits over patriotism by hiring unlawfully present aliens, should be denied the substantial benefit they receive by paying sub-standard wages and failing to comply with applicable laws relating to social security,

unemployment, Medicare, and occupational health and safety standards.

As author of SB 1070, Senator Pearce has a direct interest in this matter and unique perspective, and therefore, respectfully submits this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The provisions of SB 1070 put on hold by the courts below are not preempted by federal law, as they utilize Arizona's well-established police powers to address the effects of unlawfully present aliens. The provisions would significantly assist Arizona's effort to protect its citizens from the adverse effects of illegal immigration as they:

- Provide additional guidance to Arizona law enforcement officers as to how to interact with individuals who may not be lawfully present. Section 2(B).

- Invoke ordinary state police powers to create state criminal penalties for the failure to comply with federal law. Section 3.

- Utilize Arizona's broad authority to regulate employment under its police powers to protect its economy and lawfully resident labor force from the harmful effects resulting from the employment of unlawfully present aliens. Section 5(C).

- Re-emphasize Arizona law enforcement officers' pre-existing warrantless arrest authority by authorizing a warrantless arrest of an individual who has already been determined to have committed a public offense that makes him removable. Section 6.

Senator Pearce carefully crafted these provisions, relying on the State's plenary police power to further legitimate state goals. To reaffirm that Arizona retains the authority to enact such measures, this Court should reverse the decision below.

ARGUMENT

Contrary to the view of the United States, not every state action related to aliens is preempted by federal law. This nation has a system of dual sovereignty and only state laws that regulate immigration are preempted by federal law. Almost 40 years ago, this Court made it clear that the mere fact that aliens are the subject of a state statute does not render the statute a regulation of immigration. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Only the determination of who should or should not be admitted into the country, and the conditions under which that person may remain, constitutes the regulation of immigration. *Id.* Accordingly, Senator Pearce crafted SB 1070 in reliance on the principle that Arizona has authority to utilize its police powers in areas concerning immigration as long as it did not "regulate" immigration.

The provisions of SB 1070 at issue do not regulate immigration, as they do not impose new restrictions on the manner in which an alien enters or remains in the country. Instead, the provisions utilize Arizona's police powers and regulate unlawfully present aliens consistent with federal objectives. The provisions authorize and direct Arizona law enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under Arizona law for non-compliance with federal law. Hence, these provisions mirror federal objectives while furthering legitimate state goals.

I. Section 2(B) Provides Guidance to Law Enforcement Officers.

There is no dispute that state and local law enforcement officers have 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). Implicit in this power is 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. The United States has conceded the "existing discretion" of state and local law enforcement officers to verify a person's immigration status during the course of a lawful stop, detention, or arrest. *United States v. Arizona*, 703 F. Supp. 2d 980, 998 n.12 (D. Ariz. 2010); *see also Muehler v. Mena*, 544 U.S. 93, 100 (2005). Thus, even prior to the enactment of Section 2(B), Arizona law

enforcement officers had authority to inquire about a person's immigration status.

Facing severe adverse effects of illegal immigration (*see* Brief for Petitioners at pp. 1–8), Senator Pearce sought to provide Arizona law enforcement officers with additional guidance as to how to interact with individuals who may not be lawfully present. Cognizant of the existing authority of Arizona law enforcement officers, Senator Pearce undertook to define their available discretion consistent with federal law and create a unitary framework.

Pursuant to Section 2(B), Arizona law enforcement officers must make a reasonable attempt to determine a person's immigration status, if, during the course of a lawful stop, detention, or arrest, an officer develops reasonable suspicion that the person is an alien and is not lawfully present in the United States. A.R.S. § 11-1051(B). An officer need not make an inquiry if doing so is not practicable or may otherwise hinder or obstruct an investigation. *Id.*

As evident from the plain language of the provision, Senator Pearce carefully crafted Section 2(B) so that it did not authorize Arizona law enforcement officers to stop persons solely to inquire about their immigration status. Officers are not free to ask all persons whom they stop, detain, or arrest about their immigration status. For Section 2(B) to apply, there must be a lawful stop, detention, or arrest *and* there must be reasonable suspicion that a

person is an alien *and* is not lawfully present in the United States.

When a lawful stop, detention, or arrest has been effected *and* an Arizona law enforcement officer has reasonable suspicion that a person is an alien *and* is not lawfully present in the United States, the law enforcement officer still has considerable discretion about when and how to inquire about the person's immigration status. The law enforcement officer only needs to inquire about the person's immigration status if the officer believes it is "practicable" to do so and that it will not otherwise hinder or obstruct an investigation. Moreover, the officer need only make a "reasonable attempt" to determine the person's immigration status. A reasonable attempt may consist of nothing more than a simple question and an oral response.

In addition, Section 2(B) contains a presumption of legal presence if the suspected unlawfully present alien presents a valid Arizona driver license, or other similar, government-issued identification. If an Arizona law enforcement officer determines that further inquiry is necessary, the officer may find it appropriate to contact the federal government's Law Enforcement Support Center ("LESC") to inquire about the immigration status of a suspected unlawfully present alien. What is practicable and reasonable is left up to the law enforcement officer's discretion and obviously will depend on the unique circumstances of each particular stop, detention, or arrest.

To illustrate how Senator Pearce envisioned Section 2(B)'s enforcement, this Court can look to the factual circumstances of *Muehler v. Mena*, 544 U.S. 93 (2005). In *Mena*, the Court considered the questioning of a woman who had been detained by local, California law enforcement officers during the execution of a search warrant. *Id.* at 96. The officers asked the woman her "name, date of birth, place of birth, and immigration status." *Id.* The woman, who was a lawful permanent resident alien, later claimed in a section 1983 lawsuit that the officers violated her Fourth Amendment rights by questioning her about her immigration status without independent reasonable suspicion. *Id.* at 100-101. The Ninth Circuit agreed, but this Court reversed: "This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena about her immigration status . . . but the premise is faulty." *Mena*, 544 U.S. at 100-01. Under Section 2(B), Arizona law enforcement officers would not have been *required* to ask Mena about her immigration status because there was no reasonable suspicion to make such an inquiry, but the Court's holding in *Mena* shows that such an inquiry under these facts would not have exceeded the law enforcement officers' authority even prior to SB 1070's enactment.

Hence, under Section 2(B) Arizona law enforcement officers retain complete discretion to determine the scope of any inquiry or even to *decline* to conduct an inquiry if it is not practicable or will hinder or obstruct an investigation. Again, an

inquiry under Section 2(B) may be satisfied by a simple question and oral response. It also may be satisfied by the production of a valid Arizona driver license or other government identification.

Section 2(B) is well within the plenary police powers of the State, as it simply defines an officer's available discretion consistent with existing federal law.

II. Section 3 Utilizes Arizona's Police Powers to Create Penalties for Violating the Federal Registration Scheme.

Section 3 provides that a "person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." A.R.S. § 13-1509. Section 3 simply codifies federal law as it essentially makes it a state crime for unlawfully present aliens in Arizona to violate federal registration laws. *See United States v. Arizona*, 641 F.3d 339, 355 (9th Cir. 2011).

This provision exercises the State's plenary police power to penalize individuals who have failed to comply with federal alien registration laws. The provision in no way enacts a state-based registration scheme, such as the one this Court disallowed in *Hines v. Davidowitz*, 312 U.S. 52 (1941). It only creates state penalties for failing to comply with federal law, as is common practice in other areas

that are exclusively federal powers. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

Senator Pearce carefully crafted Section 3 so that, unlike the state registration scheme in *Hines*, Section 3 did not provide for any additional conditions under which a lawfully present alien may remain in the United States. In fact, the provision includes special safeguards for lawfully present aliens. To avoid running afoul of Section 3, a lawfully present alien simply has to do what he already is required to do – apply for registration with the federal government as provided for in 8 U.S.C. § 1306(a) and "at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him" as required by 8 § U.S.C. 1304(e). Even that minimal requirement has a caveat: Section 3 also states that it "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509. Therefore, if a lawfully present alien forgets his federal registration documentation at home, he is not required to obtain federal registration documentation, or otherwise has authorization from the federal government to remain in the United States, that lawfully present alien would not be in violation of Section 3. Hence, Section 3 creates no additional conditions upon which a lawfully present alien may remain in the country and is an entirely proper use of the State's police powers.

III. Section 5 Regulates Employment Under Arizona's Police Powers.

Section 5 provides that "it is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. A.R.S. § 13-2928(C).

Section 5 simply reinforces federal law. Under federal law, 8 U.S.C. § 1324a, it is unlawful to knowingly hire an illegal alien for employment. To assist employers in complying with this federal law, Senator Pearce carefully crafted Section 5 to ensure that only those who may lawfully work would apply for jobs.

Moreover, the provision embraces the well-established principle that "States possess broad authority under their police powers to regulate employment to protect workers within the state." *De Canas v. Bica*, 424 U.S. 315, 356 (1976). Section 5 therefore does no more than protect the jobs of those who may lawfully work from those who cannot lawfully work under federal law.

IV. Section 6 Defines Officers' Existing Warrantless Arrest Authority.

Section 6 amends an existing Arizona statute to specifically authorize a law enforcement officer to

arrest an individual without a warrant if the officer has probable cause to believe that "[t]he person to be arrested has committed any public offense that makes the person removable from the United States." A.R.S. § 13-3883(A)(5). Section 6 also mirrors federal objectives and furthers a legitimate state goal.

As noted above, it is undisputed that state and local law enforcement officers have authority to enforce criminal provisions of federal immigration laws. Therefore, Section 6 is crafted to do no more than make clear that Arizona law enforcement officers have the specific authority to make a warrantless arrest of individuals who have committed a felony under federal law.

Senator Pearce also recognized that Arizona law enforcement officers cannot make a determination about what type of offense might make a person removable or otherwise engage in an analysis of removability. Therefore, Section 6 only permits Arizona law enforcement officers the authority to arrest individuals who have willfully failed or refused to depart after having been ordered to be removed by a federal immigration judge.

Section 6 applies, for example, when an Arizona law enforcement officer runs an individual's name through the National Crime Information Center database and the response that the Arizona law enforcement officer receives from the federal government is that the individual is an "immigration absconder." In other words, the federal government

would have informed the Arizona law enforcement officer that the individual had previously been found to be removable and had been ordered removed, but had absconded on the removal orders. *Id.* Under federal law, that individual would have committed a felony. 8 U.S.C. § 1253(a) ("it is a felony for an individual 'against whom a final order of removal is outstanding' to 'willfully fail[] or refuse[] to depart.'"). Therefore, Section 6 simply makes clear that Arizona law enforcement officers have authority to arrest without a warrant individuals who have willfully failed or refused to depart after having been ordered to be removed by a federal immigration judge.

Finally, it is important to note that Ninth Circuit's interpretation of Section 6 is entirely erroneous and without any basis in the text. According to the Ninth Circuit, Section 6 "provides for the warrantless arrest of a person where there is probable cause to believe the person *committed a crime in another state* that would be a crime if it had been committed in Arizona and that would subject the person to removal from the United States." 641 F.3d at 361 (quoting *United States v. Arizona*, 703 F. Supp. 2d at 1005) (emphasis in original). The panel majority, like the district court, inserted the words "committed a crime in another state" into the statute. As explained above, Section 6 defines the already existing warrantless authority of officers to arrest persons who have committed felonies *under federal law*. The panel majority's tortured construction of the statute was not necessary or

correct, as those words simply do not appear in Section 6.

Section 6 defines the existing warrantless arrest of an Arizona law enforcement officer and is not preempted.

CONCLUSION

For the foregoing reasons, Senator Pearce respectfully requests that this Court reverse the Ninth Circuit's decision and hold that SB 1070 is not preempted by federal law.

Respectfully submitted,

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