No. 13-806

IN THE

Supreme Court of the United States

STATE OF ARIZONA, ET AL.,

Petitioners,

—v.—

VALLE DEL SOL, INC., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals commit legal error when it found that at least one plaintiff has standing to challenge Ariz. Rev. Stat. § 13-2929, where evidence in the record establishes that the statute directly harms several organizational plaintiffs and threatens an individual plaintiff with criminal prosecution?
2. Did the court of appeals commit legal error when it found § 13-2929 void for vagueness because a key phrase is incomprehensible, and declined to rewrite the statute?
3. Did the court of appeals commit legal error when it found in the alternative that § 13-2929, which creates a separate and independent Arizona criminal regime regulating and punishing the provision of assistance to unauthorized immigrants, is preempted by federal law?

CORPORATE DISCLOSURE STATEMENT

None of the respondents is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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INTRODUCTION

This petition involves a preliminary injunction entered against a criminal immigration law enacted by the State of Arizona that violates the Due Process and Supremacy Clauses of the Constitution. Petitioners ask this court to exercise its *certiorari* jurisdiction to address a broad array of questions, but do not assert that the courts of appeals disagree on these issues, or that the questions are nationally important as presented in this case. Instead, petitioners either argue that the decision below misapplies the Court's precedent, *see* Pet. 20–25, or simply ask the Court to revisit prior dispositive holdings, *see id.* 25–28.

This Court should not grant the writ. The decision below properly applied this Court's settled precedent to the facts of this case; petitioners' claims to the contrary largely boil down to simple disagreement with the result of the court of appeals' analysis, not the standards that it applied. There is also no need for the Court to take up the other questions proposed by the petitioners—particularly by granting the writ in this case, which is a poor vehicle for addressing them.

STATEMENT OF THE CASE

The interlocutory appeal at issue here was taken from an order that preliminarily enjoins Section 13-2929 of the Arizona Revised Statutes, which makes it a state crime to encourage unauthorized immigrants to enter Arizona, or to harbor or transport them within Arizona, while "in violation of a criminal offense." Section 13-2929 was enacted by Senate Bill 1070 ("SB 1070"), other

provisions of which were previously before this Court, *see Arizona v. United States*, 132 S. Ct. 2492 (2012) (upholding injunction sought by federal government against three other provisions of SB 1070, and reversing injunction as to a fourth provision).

Section 13-2929

In furtherance of SB 1070's effort to "establish an official state policy of 'attrition through enforcement,'" *Arizona*, 132 S. Ct. at 2497 (quoting SB 1070), Section 13-2929(A) provides:

> It is unlawful for a person who is in violation of a criminal offense to:
>
> 1. Transport or move or attempt to transport or move an alien in [Arizona], in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
>
> 2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
>
> 3. Encourage or induce an alien to come to or reside in this state if the person

> knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.

The statute exempts only "a child protective services worker acting in the worker's official capacity or a person who is acting in the capacity of a first responder, an ambulance attendant or an emergency medical technician and who is transporting or moving an alien in this state pursuant to [Arizona emergency services laws]" from its reach. A.R.S. § 13-2929(E). A conviction under § 13-2929 carries a minimum fine of $1,000 and up to six months' imprisonment, with higher fines and longer sentences if the violation involves "ten or more illegal aliens." A.R.S. §§ 13-2929(F), 13-702, 13-707.

Section 13-2929(A) resembles (but is not identical to) 8 U.S.C. § 1324(a)(1)(a), which prohibits transporting and harboring unauthorized immigrants, or encouraging or inducing them to come to or stay in the United States. "Section 1324 is . . . part of a larger federal scheme of criminal sanctions for those who facilitate the unlawful entry, residence, or movement of aliens within the United States." App. 34 (citing 8 U.S.C. §§ 1323, 1326, 1327, 1328). Federal law "outlines a detailed set of graduated punishments for violations, § 1324(a)(1)(B)(i)-(iv), (a)(2)(A)-(B), (a)(3)(A), (a)(4), (b), prescribes special evidentiary rules, § 1324(b)(3), (d), and mandates the creation of an educational program on the penalties for harboring aliens, § 1324(3)." *Id.* at 33–34. Arizona's § 13-2929 shares none of these features.

Federal law prescribes a specific role for state and local authorities with respect to this scheme: making arrests for violation of 8 U.S.C. § 1324 itself, under the supervision of federal prosecutors. 8 U.S.C. § 1324(c); *see Arizona*, 132 S. Ct at 2506 (listing § 1324(c) as one of the "limited circumstances" in which "[f]ederal law specifies . . . state officers may perform the functions of an immigration officer"). The federal framework does not authorize states to initiate immigrant harboring prosecutions themselves.

Procedural History

The plaintiffs in this case are individuals and organizations whose work and community activities lead them to regularly provide transportation and shelter to unauthorized immigrants. Among them are Luz Santiago, a pastor in Mesa, Arizona, whose congregation is in large part composed of unauthorized immigrants; Southside Presbyterian Church, a church that operates a homeless program and a "Samaritans" program that provide numerous services to those in need, including unauthorized immigrants; and Arizona South Asians for Safe Families, a community organization that provides support services to immigrant victims of domestic violence. *See* App. 10, 18; Pet. 13.

Plaintiffs commenced this action on May 17, 2010. On July 23, 2012, shortly after the issuance of this Court's decision in *Arizona*, plaintiffs moved for a preliminary injunction against § 13-2929 in the district court. Relying both on *Arizona* and on cases predating *Arizona*, including district court decisions preliminarily enjoining nearly identical laws in Alabama, Georgia, and South Carolina, respondents

argued that § 13-2929 is preempted by federal law. On September 5, 2012, the district court issued an order granting the preliminary injunction, finding that plaintiffs are likely to succeed in their preemption claim and that the other requirements for a preliminary injunction were satisfied.

Intervenor defendants Governor Jan Brewer and the State of Arizona appealed.[1] Although they did not question plaintiffs' standing in their opposition to the preliminary injunction motion in the district court, they raised standing along with other issues on appeal.

The court of appeals affirmed the preliminary injunction order on October 8, 2013. The panel held unanimously that multiple organizational plaintiffs and one individual plaintiff have standing to challenge § 13-2929 and that the district court did not abuse its discretion in finding the non-merits factors of the preliminary injunction analysis satisfied. The panel also held unanimously that the statute is unintelligible as written, and therefore is unconstitutionally vague in violation of the Due Process Clause.

"[G]uided by the Supreme Court's most recent discussion of preemption principles in *Arizona*, and the three out-of-circuit decisions finding nearly identical provisions in Alabama, Georgia, and South Carolina preempted by federal law," the court also found the statute both field and conflict preempted. App. 28 (citation omitted) (referencing *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012);

[1] The other defendants—county attorneys and sheriffs—did not appeal the preliminary injunction order.

Ga. Latino Alliance for Human Rights v. Gov. of Georgia, 691 F.3d 1250, 1258 (11th Cir. 2012) ("*GLAHR*"); and *United States v. South Carolina*, 720 F.3d 518, 523 (4th Cir. 2013)). Judge Carlos Bea dissented from the preemption portion of the court's ruling on the ground that he "believe[d] the court should not reach the preemption issue." App. 46. He did not express a view on the merits of that issue.

The defendants did not seek *en banc* review. This petition followed.

REASONS FOR DENYING THE WRIT

Petitioners do not assert that this case raises legal questions on which the circuit courts disagree. *No* circuit has upheld a state law criminalizing harboring of unauthorized immigrants, or dismissed a suit against such a law on standing grounds. Instead, the circuits that have considered challenges to laws like § 13-2929 have unanimously found them preempted. *See South Carolina*, 720 F.3d at 528–32; *GLAHR*, 691 F.3d at 1262–67; *see also Alabama*, 691 F.3d 1269, 1285–88, *cert denied*, ___ U.S. ___, 133 S. Ct. 2022 (2013); *cf. Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013) (rejecting challenge to *non-criminal* municipal ordinance prohibiting rental of dwellings to unauthorized immigrants), *petition for cert. filed*, No. 13-1043 (Feb. 26, 2014).

I. THE COURT OF APPEALS' STANDING RULING DOES NOT WARRANT REVIEW.

The court of appeals applied this Court's longstanding, firmly established precedent on both individual and organizational standing. Nevertheless, petitioners claim that this Court's

decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), rendered the court of appeals' straightforward application of preexisting precedent erroneous. Pet. 20. Petitioners also raise a number other of case-specific, fact-bound claims of error with respect to the standing analysis below. Pet. 21–23, 26–27. All of petitioners' claims of error are meritless, and none is supported by a decision of another court of appeals or this Court.

A. The Court of Appeals Correctly Applied Established Law When It Found that the Organizational Plaintiffs Have Standing.

The court of appeals applied the test for organizational standing set forth by this Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), which explained that an organization may sue on its own behalf when defendants "'perceptibly impair[]'" its purpose, frustrating the organization's mission and forcing a diversion of resources. App. 19 (quoting *Havens*, 455 U.S. at 379). Based on the record evidence, the unanimous court of appeals found that "[m]any of the organizational plaintiffs' core activities involve the transportation and/or provision of shelter to unauthorized aliens," and that the threat of enforcement posed by § 13-2929 forced plaintiffs to divert resources in response to the concerns raised by the organizations' constituents, staff, and members. App. 19. The court of appeals' straightforward application of *Havens* led to the conclusion that plaintiffs Southside Presbyterian Church, Border Action Network, and Arizona South Asians for Safe Families have direct standing to challenge § 13-2929 because "S.B. 1070, and § 13-

2929 in particular, has 'perceptibly impaired' their ability to carry out their missions." App. 19 (quoting *Havens*, 455 U.S. at 379). Petitioners disagree with the panel's application of the law to the facts in this case, but fail to identify any error—much less a conflict—that would merit this Court's review.

1. Petitioners first suggest that the court of appeals' reliance on *Havens* was inappropriate in light of *Clapper*. But nothing in *Clapper* contradicts the court of appeals' straightforward application of *Havens*, which *Clapper* did not overrule.

Unlike this case, *Clapper* involved plaintiffs challenging a law that *expressly disallowed* the government from targeting them. *Clapper*, 133 S.Ct. at 1148 (finding that the law in question "expressly provides that respondents . . . cannot be targeted"). Against that backdrop, this Court rejected plaintiffs' claims that they were suffering ongoing harms sufficient to give them standing, because any ongoing harms were "based on their fears of hypothetical future harm" that itself relied on a "highly attenuated chain of possibilities. . . ." *Clapper*, 133 S. Ct. at 1148, 1151; *see also id.* at 1150 n.5. This Court held that plaintiffs' "speculative chain of possibilities" could not suffice to show an impending injury. *Id.* at 1150.

The facts of *Clapper* could not be further afield from these plaintiffs' challenge to a state statute that *directly criminalizes* many of their core activities. Here, the plaintiffs are organizations such as Arizona South Asians for Safe Families, a group whose mission centers on providing support—including transportation to medical and legal appointments—to immigrant victims of domestic violence, and

Southside Presbyterian Church, whose mission involves providing shelter and transportation to the local population it serves—including persons without lawful presence. *See* App. 18; Pet. 13. Section 13-2929's narrow exception for child protective services workers and ambulance drivers underlines that the plaintiff organizations' activities fall within the statute's sweep, and the record shows that § 13-2929 directly impairs these organizations' missions and core activities. The plaintiff organizations' standing does not turn on speculation about future harm or an attenuated chain of possibilities. Thus, to the extent that *Clapper* is relevant at all, it is entirely harmonious with the unanimous decision below.

2. Petitioners claim that the decision below "is at odds with" the Fifth Circuit's organizational standing decision in *NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010). Pet. 26. But there is no conflict between the decision below and *NAACP*. In *NAACP*, the Fifth Circuit applied the same *Havens* test that the court of appeals did below, and determined that the plaintiff organization could not meet the requirements for standing because it could identify *no injury whatsoever* to its core mission or a single impaired activity, and instead identified only expenditures indistinguishable from its "routine lobbying activities" to support its standing. *NAACP*, 626 F.3d at 238–39. Here, by contrast, the record establishes that the organizational plaintiffs' "core activities involve the transportation and/or provision of shelter to unauthorized aliens" and demonstrates that the threat of enforcement posed by § 13-2929 forced plaintiffs to divert resources in response to the concerns raised by the organizations' constituents, staff, and members. *See* App. 18–19. That two courts

applying the same Supreme Court precedent to cases with widely differing facts arrived at different conclusions is unsurprising, much less suggestive of a circuit split.

3. Petitioners' contention that the Ninth Circuit somehow contravened the requirement that standing not be dispensed "in gross" is baseless. The decision below does not address any plaintiff's *general* standing to challenge S.B. 1070, but relies instead on evidence specific to the conduct Arizona seeks to penalize under § 13-2929 (namely provision of transportation and shelter). App. 19 (quoting *Havens*, 455 U.S. at 379).

4. Finally, Petitioners' theory that the organizations must identify specific "members, employees, or volunteers" who are deterred by the threat § 13-2929 poses to the organizations' core activities, Pet. 22 (citing *Summers v. Earth Island Institute,* 555 U.S. 488, 499 (2009)), fails to grasp the difference between an organization's standing in its own right—which is the issue here—and an organization's ability to assert claims on behalf of its members. It is the latter type of claim that gives rise to a requirement to identify members who have suffered harm. *See Summers*, 555 U.S. at 494, 497–99 (organizational plaintiffs were "assert[ing] the standing of their members"). This separate source of organizational standing is not even at issue in this case.

B. The Court of Appeals Correctly Applied Established Law When It Found that Individual Plaintiff Luz Santiago Has Standing.

It has long been the law that "Plaintiffs fac[ing] 'a credible threat of prosecution' . . . [have standing and] 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *see also Babbitt*, 442 U.S. at 302 ("when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first expose himself to actual arrest or prosecution" (punctuation omitted)). As described above, *Clapper*, which rejected the standing theory of plaintiffs who could not be targeted under the law they challenged, does not rewrite the well-established rules of standing for individuals threatened with prosecution.

Applying these well-established principles, the court of appeals found that Pastor Santiago, whose ministry includes provision of food, shelter, and transportation to a congregation that includes many individuals she reasonably believes to be unauthorized immigrants, has standing to challenge § 13-2929. She faces a clear threat of prosecution because "[h]er actions . . . fall within the plain language of [§ 13- 2929's] prohibitions on transporting [and] harboring . . . undocumented immigrants." App. 12 (alterations in original; citations and punctuation omitted). The panel's conclusion is entirely in line with courts that have addressed similar challenges. *See GLAHR*, 691 F.3d

at 1258 (finding standing to challenge similar state law based on similar facts).[2] Petitioners' claims of error are, again, case-specific, fact bound, and ultimately meritless.

1. Petitioners claim that the court of appeals' assessment of the evidence in the record misapplies this Court's requirement that standing be supported "with the manner and degree of evidence required at the successive stages of the litigation." Pet. 22 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)) (internal quotation marks omitted). Yet petitioners themselves acknowledge that "[r]espondents cited Santiago's deposition testimony that she provides food, transportation, and shelter to individuals in need" in support of the motion for a preliminary injunction. Pet. 12. Petitioners' disagreement with the lower courts' assessment of the facts is not a reason to grant the writ, and in any event the record evidence plainly supports the court of appeals' analysis.[3]

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[2] The district court found that Pastor Santiago has standing in three written opinions—two deciding separate motions to dismiss and one deciding a class certification motion. Petitioners have never submitted any evidence that would undermine Pastor Santiago's standing, either on those motions or on this one.

[3] To the extent that petitioners suggest that the court of appeals requires guidance as to the type of evidence that may be considered at the preliminary injunction stage, they overlook both the record evidence submitted by plaintiffs as well as clear circuit precedent. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1012–13 (9th Cir. 2011) (explaining the differences in evidence considered when weighing motions to dismiss and motions for preliminary injunction).

2. Petitioners attempt to bolster their argument by suggesting that Pastor Santiago and other individuals might not be subject to criminal prosecution because the statute requires a defendant to be a "person who is in violation of a criminal offense." Pet. 15–16. The interpretation of this idiosyncratic language does not present a certworthy question, and in any event, the court of appeals was correct to reject petitioners' attempt to insulate the statute from preenforcement review. As the panel held, even if that language requires a predicate criminal offense, the requirement is effectively meaningless. Petitioners have consistently admitted that a purported violation of 8 U.S.C. § 1324 would be a sufficient predicate offense, *see* App. 14, and have repeatedly argued that the federal and state statutes are largely coextensive in scope, *see, e.g.*, Pet. 7 n.2. Thus, in petitioners' view, the predicate offense requirement is automatically fulfilled, at least in the ordinary case. *See* App. 14–16; *see also GLAHR*, 691 F.3d at 1259 (noting that required predicate "finding of probable cause for *any violation of state or federal law*" did not undermine plaintiffs' standing to challenge similar Georgia law).

C. The Court Should Decline to Take Up The Other Standing Topics Proposed By Petitioners.

Petitioners suggest that the writ should be granted to address several other legal questions "that have not been, but should be, decided by this Court." Pet. 5. Other than labeling the questions "important," petitioners fail to demonstrate why any of these questions warrants this Court's attention at this time, especially in the absence of either a circuit

split or any conflict between the court of appeals' decision and settled precedent.

1. Petitioners observe that this Court has not "addressed the requirements for organizational standing" recently, or in a case in the same procedural posture as this one. Pet. 25. But, as explained above, the lack of a recent decision in this area has not resulted in conflicting decisions from the circuit courts or a misapplication of this Court's precedents in this case. Moreover, despite petitioners' insinuations to the contrary, this is not a case in which the plaintiff organizations have "manufacture[d] their own standing" based on mere "political opposition" to a challenged law, Pet. 26, but one where the plaintiff organizations' core missions and activities are *directly* impaired by the statute at issue, App. 19.

2. Petitioners request that the Court address "whether expenses an organization allegedly incurs to counteract the effects of a challenged law can constitute the type of irreparable harm necessary to warrant injunctive relief." Pet. 26. That issue is not even raised in this litigation. The court of appeals never suggested that "expenses an organization allegedly incurs to counteract the effects of a challenged law" are sufficient on their own to constitute irreparable injury. Pet. 26. Instead, the panel based its finding of irreparable harm on "ongoing harms to [plaintiffs'] organizational missions as a result of the statute." App. 45.

3. Petitioners ask this Court to institute an expiration date for evidentiary submissions by holding that courts should not consider declarations in the record filed at the outset of an action when

making a decision on standing or injunctive relief, at least where that later decision is made approximately two years after the initial submission. Pet. 27. That request does not make sense, and not a single case supports such a rule. As this Court has explained, "the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). And there is no basis to require plaintiffs seeking an injunction to continually produce new evidence demonstrating recent injuries, or to discard declarations once they reach a certain age. The harm prevented by the injunction is the same harm that was sufficient to confer standing in 2010: should the injunction be dissolved, the organizations will again face frustration of their missions and diversion of resources due to § 13-2929.

Moreover, even if there were some basis for creating an arbitrary cutoff for the consideration of earlier-filed declarations, that would not alter the result here. The evidence produced in discovery that documents the injuries of Pastor Santiago and Arizona South Asians for Safe Families was only months old at the time plaintiffs sought the injunction.

At bottom, petitioners' complaint is that they disagree with the court of appeals: petitioners believe that the record evidence does not establish standing and irreparable injury, while the court of appeals held otherwise. Petitioners' attempt to dress up this disagreement as a certworthy legal question fails.

II. THE COURT OF APPEALS' RULING ON THE NON-MERITS FACTORS DOES NOT MERIT REVIEW.

The panel applied the test set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), and concluded that the district court did not abuse its discretion in determining that the non-merits factors (irreparable injury, balance of the equities, and public interest) favored an injunction. Petitioners, again, do not claim that there is any disagreement in the circuit courts implicated by the panel's non-merits analysis. Petitioners nonetheless assert that the panel's decision misapplies this Court's precedents. It does not.

1. Petitioners claim, without explanation, that the court of appeals failed to require plaintiffs to make a "clear showing" of irreparable harm. Pet. 23 (quoting *Winter*, 555 U.S. at 21). But once again, petitioners' objection is to the panel's straightforward application of well-established law. The panel found that the district court did not abuse its discretion in finding a likelihood of irreparable harm, *see* App. 45; petitioners' request that this Court reassess the same evidence should not be granted, and would not produce a different result.

2. Petitioners' contention that the Ninth Circuit was insufficiently explicit about the lack of harm to Arizona when it reviewed the district court's balancing of hardships, Pet. 23, is no more compelling. As the panel recognized, the balance of equities strongly disfavors allowing states to continue violating federal law during the pendency of litigation, especially given the magnitude of the unredressable harm to plaintiffs threatened with

prosecution under an unconstitutional criminal law. App. 45. The court of appeals was not required to ritually recite the lack of comparable harm to Arizona when it applied this basic principle, which is entirely in line with the views of the other circuits. *See, e.g.*, *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) ("'[A] state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional.'" (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)); *Alabama*, 691 F.3d at 1301 ("Frustration of federal statutes and prerogatives are not in the public interest, and we discern no harm from the state's nonenforcement of invalid legislation."); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) ("Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm.").

III. THE COURT OF APPEALS' VAGUENESS RULING DOES NOT MERIT REVIEW.

The panel applied well-settled due process standards in unanimously concluding that A.R.S. § 13-2929 is unconstitutionally vague in violation of the Fourteenth Amendment. Petitioners do not dispute that the court of appeals applied the correct standards. *See* App. 21 ("'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.'" (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) (other citations omitted)); *id.* (holding that "a more demanding standard of scrutiny applies" to criminal sanctions) (internal citations and quotation marks omitted)); *see also Winters v. New York*, 333

U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanction for enforcement."). Nor do they claim that the court of appeals' application of these standards conflicts with that of any other circuit.

Petitioners also do not dispute the court of appeals' conclusion that the phrase "person in violation of a criminal offense" makes no grammatical sense, App. 21–25, or deny that "[t]he Arizona legislature knows how to write a statute requiring the commission of a predicate criminal offense and could have done so here," App. 26–27.

1. Petitioners instead assert that the statute has "only one possible meaning" and that the court of appeals refused to consider its arguments regarding the "common understanding" of the legislature's chosen phrase. Pet. 24. But the court of appeals clearly did consider these arguments. App. 25 & n.14. After consulting dictionaries, case law, and petitioners' submissions, the court of appeals simply disagreed with petitioners, finding that "there is no common understanding of the strange phrase," App. 25, and that "[a]s currently drafted, the statute is incomprehensible to a person of ordinary intelligence." App. 28; *see also United States v. Williams*, 553 U.S. 285, 304 (2008) (holding law is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited"). Again, petitioners' real argument is that the court of appeals utilized the appropriate legal standard, but misapplied the law to the unique facts of this case. Pet. 17–18.

2. Petitioners also argue that, even if the statute is unconstitutionally vague as written, the court of appeals' decision conflicts with *Zadvydas v. Davis*, 533 U.S. 678 (2001), because the court of appeals could have "avoid[ed] … constitutional invalidation" of § 13-2929 by assigning it a specific meaning proposed by the state. Pet. 24 (quoting *Zadvydas*, 533 U.S. at 689). But this case is dramatically different from *Zadvydas* or other cases where the courts have applied a reasonable narrowing construction to an intelligible statute. As the court of appeals explained, in this case petitioners "ask[] us not to adopt a narrowing construction, but rather to replace a nonsensical statutory element with a different element." App. 26. If petitioners want the statute rewritten, they should ask their own state legislature, rather than this Court, to do so. *See Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) (rejecting state's proposed construction of its law because "it is clearly not this Court's province to rewrite a state statute" and "leav[ing] to the Oklahoma Legislature" the task of fixing unconstitutional statute).

IV. THE COURT OF APPEALS' PREEMPTION RULING DOES NOT MERIT REVIEW.

The preemption analysis below agrees with and draws on the decisions of the Fourth and Eleventh Circuits holding preempted criminal immigrant harboring statutes in South Carolina, Alabama, and Georgia. Applying this Court's precedent in *Arizona* and earlier cases, the court of appeals, in line with its sister circuits, found that the federal "scheme governing the crimes associated with

the movement of unauthorized aliens in the United States, like the registration scheme addressed in *Arizona* (and *Hines* [*v. Davidowitz,* 312 U.S. 52, 72 (1941)]), provides 'a full set of standards' designed to work as a 'harmonious whole[,]'" in which Congress had "specifically considered the appropriate level of involvement for the states." App. 34–36; *see also Arizona,* 132 S. Ct at 2506 (discussing § 1324(c)'s provision of authority to state and local police to arrest for violations of § 1324). The panel majority found that, in addition to conflicting with federal law by "criminalizing conduct not covered by the federal harboring provision," § 13-2929 far exceeds the state's prescribed level of involvement in regulating harboring. App. 39–44.

Again, petitioners do not claim that there is a circuit conflict with respect to preemption, but instead make two narrow and easily disproven arguments for this Court's review.

1. Petitioners claim that the court of appeals' preemption analysis "conflicts with the well-established principle that 'a State may make violation of federal law a crime,' *Arizona*, 132 S. Ct. at 2502 . . . ." Pet. 25. This claim misconstrues both *Arizona* and the decision below, which properly applied *Arizona*.

As a fuller quote of that *Arizona* sentence makes clear, a state's ability to layer its own punishments atop those set out in federal law is limited by the Supremacy Clause: "*Even if* a State may make violation of federal law a crime *in some instances*, it *cannot* do so in a field (like the field of alien registration) that has been occupied by federal law." *Arizona*, 132 S. Ct. at 2502 (citations omitted;

emphases added). Nor is field preemption the only principle barring states from creating new punishments for violations of federal law. As this Court explained in *Arizona*, in addition to being field preempted, Section 3 of SB 1070 raised additional preemption problems because "[p]ermitting the State to impose its own penalties for the federal offenses here would *conflict* with the careful framework Congress adopted." *Id.* (emphasis added) (citing conflict preemption cases). *Arizona* underlines that conflict is "imminent" in these circumstances. *Id.* at 2503; *see also id.* at 2505 (invalidating another criminal provision of SB 1070 on conflict-preemption grounds).

Applying *Arizona*, the court of appeals correctly found that § 13-2929 directly undermines federal law by imposing criminal penalties on conduct that Congress elected not to punish, creating additional and different penalties not contemplated by federal law even in the spaces where Arizona's law overlaps with federal harboring law, and "divesting federal authorities of exclusive power to prosecute these crimes." App. 39–43. The Ninth Circuit joined every other court to examine similar state laws in finding that the Arizona provision is preempted for each of these reasons. *See South Carolina*, 720 F.3d at 528–32; *GLAHR*, 691 F.3d at 1262–67; *Alabama*, 691 F.3d at 1285–88.

2. Petitioners also ask that the Court grant the writ to "address whether Congress has occupied the field of criminal immigration enforcement." Pet. 27. But this case presents no occasion to answer such a broad-ranging question. Petitioners' description of the court of appeals' decision as "precluding any

State action that relates to immigration absent an invitation from Congress," Pet. 27–28, is simply mistaken.

The court of appeals thoroughly explained why it reached its conclusion about the comprehensiveness of the federal harboring scheme by following this Court's guidance in *Arizona*, not by applying the blanket rule that petitioners attribute to the decision below. Indeed, while petitioners assert that the court of appeals' ruling contradicts the Ninth Circuit's own, pre-*Arizona* decision in *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), the court of appeals' discussion of *Gonzales* actually refutes petitioners' mischaracterization of the decision below. The court of appeals carefully explained its previous holding in *Gonzales* and made clear that this decision does not preclude all state enforcement activity. App. 34 at n.16. The opinion below and *Gonzales* are consistent with each other and with this Court's *Arizona* decision.[4]

3. Petitioners' *amicus* argues that the field preemption analysis below is in conflict with the reasoning of the Eighth Circuit in *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *petition for cert. filed*, No. 13-1043 (Feb. 26, 2014). *Keller* rejected a field preemption challenge to a municipal ordinance establishing civil penalties for landlords who rent homes to purportedly unauthorized

[4] Of course, intra-circuit conflict is not ordinarily a basis for this Court's review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.") Thus, even if there were any tension between this case and *Gonzales* (which there is not), that would not warrant *certiorari*.

immigrants. 719 F.3d at 939–45; *but see Lozano v. City of Hazleton*, 724 F.3d 297, 313–23 (3d Cir. 2013), *cert. denied*, No. 13-531 (Mar. 3, 2014); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013) (en banc), *cert. denied*, No. 13-516, Mar. 3, 2014.[5] *Keller* and the decision below are not directly in conflict, as petitioners' decision not to make the same argument reflects. Unlike *Keller*, this case involves a criminal statute that directly criminalizes the harboring and transportation of unauthorized immigrants and purports to act in precisely the same field as the federal law.

Moreover, any tension between the field preemption holding below and *Keller* is not a reason to grant the writ in this case. Preemption is an alternative holding in this case and might never be reached by the Court at all. And, if the Court were to grant the writ and reached the preemption issue, even Petitioner's *amicus* does not suggest that the court of appeals' *conflict*-preemption analysis contradicts *Keller*. *Cf. Keller*, 719 F.3d at 943 (distinguishing Fremont ordinance from a law that "purport[s] to enforce the federal anti-harboring prohibition").

Finally, on the ground, there is neither confusion nor clamor meriting this Court's intervention. No new state harboring laws have been

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[5] Petitioner's *amicus* also argues that the field preemption analysis misapplies this Court's ruling in *De Canas v. Bica*, 424 U.S. 351, 356 (1976), because, in *amicus'* view, *De Canas* settled that the federal harboring statutes do not occupy any field at all. *See* Amicus Br. 8. However, even the Eighth Circuit did not adopt that view in *Keller*. *See* 719 F.3d at 943.

enacted since a brief wave of SB 1070 copycats subsided in 2011. All of the harboring laws passed as part of that wave have been blocked, and several states have agreed to permanent injunctions after losing in the circuit courts. *See South Carolina*, No. 2:11-cv-02779-RMG (D.S.C. Mar. 4, 2014) (Doc. No. 201); *GLAHR*, No. 1:11-cv-01804 (N.D. Ga. Mar. 20, 2013) (Doc. No. 143); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-cv-02484 (N.D. Ala. Nov. 25, 2013) (Doc. No. 180); *see Utah Coalition of La Raza, et al. v. Herbert*, No. 2:11-cv-00401 (D. Utah May 11, 2011) (Doc. No. 45).

Nothing suggests that legislatures, government officials, or courts need further guidance on this matter. Indeed, no municipality, state, or legislator has filed an amicus brief in support of *certiorari*. The only ongoing practical effect of the one outlier decision is that a single Nebraska municipality may attempt to enforce its civil housing regulations, subject to possible as-applied challenges. *See Keller*, 719 F.3d at 945 ("declin[ing] to speculate whether the rental provisions might" be preempted when actually applied).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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