No. 13-806

In The
Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA,

Petitioners,

v.

VALLE DEL SOL, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, Immigration Reform Law Institute ("IRLI"), assists in the representation of cities, states, municipalities and government officials against claims of preemption regarding immigration related actions. IRLI is co-counsel in two cases cited in the Petition which will be affected by a decision in this case. *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013). IRLI seeks to protect the interests of its clients in these other cases. This Court should grant the State of Arizona's Petition for Certiorari to correct what is becoming a confusing and conflicting application of this Court's previous precedents.

[1] Counsel of record for both parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Both parties have consented to the filing of an *Amicus Curiae* brief by *Amicus* Immigration Reform Law Institute. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. IRLI does not have a parent corporation, and no publicly held company owns 10% or more of IRLI's stock.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO REMEDY THE LACK OF CONSENSUS AS TO WHEN AND HOW TO APPLY FIELD PREEMPTION TO STATE AND LOCAL LAWS INTENDED TO DETER ILLEGAL IMMIGRATION.

Since this Court's decision in *Arizona v. United States*, 132 S.Ct. 2492 (2012), the opinions of lower courts have shown an increasing and irreconcilable conflict with regards to field preemption of state and local laws that mirror the federal immigration harboring statute. The decision of the Ninth Circuit below found the Arizona anti-harboring statute, A.R.S. § 13-2929, to be preempted by federal occupation of the field of enforcement of criminal immigration laws involving the movement of unauthorized aliens. App. 34.

That finding has only added to the confusion in the courts below. It widens an already existing circuit split on field preemption among the circuits. It also presents this Court with the opportunity to address three fundamental questions over which courts below are in strong disagreement: What are the required elements for finding that a state or local immigration-related law is unconstitutional on the basis of field preemption? What "field" of law, if any, is occupied by the federal anti-harboring statute in the context of immigration? What are the specific elements of the federal crime of harboring, the statute whose intended scope must be the "ultimate touchstone" for a finding of any variety of federal preemption?

The petition for certiorari of the State of Arizona and Governor Janice K. Brewer, Intervenor-Defendant-Appellants below, is the third petition now pending before this Court which in some way addresses whether the federal felony of harboring certain aliens, 8 U.S.C. § 1324(a)(1)(A)(iii), when read in context within the body of federal immigration law, constitutes a regulatory framework "so pervasive . . . that Congress left no room for the States to supplement it," or represents a "federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 132 S.Ct. at 2501. *See City of Farmers Branch, Texas v. Villas at Parkside Partners, et al.*, No 13-516 (petition filed on Oct. 21, 2013); *Lozano v. City of Hazleton*, No. 13-531 (petition filed on Oct. 24, 2013).

"When Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). However, this Court has justifiably been loath to find field preemption in the absence of unmistakable Congressional intent. "Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

A. The Decision Below Conflicts with this Court's Decision in *De Canas* and Other Circuits.

Certiorari is appropriate in this case because the Ninth Circuit opinion is in conflict with this Court's decision in *De Canas* and exacerbates an already existing conflict among the Circuits.

In *De Canas v. Bica*, this Court unanimously held that the harboring statute did not field preempt a California state law which prohibited the employment of illegal aliens. 424 U.S. at 365. Therefore, under this Court's prior precedents, the Ninth Circuit's field preemption holding is foreclosed.

Nevertheless, the Ninth Circuit held that a state law which mirrors the federal harboring statute is field preempted. App. 38. The Ninth Circuit did not attempt to reconcile its holding with *De Canas*.

The Ninth Circuit is not alone in ignoring this Court's *De Canas* decision. The Third, Fourth, and Eleventh Circuits all have likewise found field preemption. App. 36-38.

In contrast, the Eighth Circuit, presented with similar issues, relied on *De Canas* to find that local laws which prohibited harboring were not field preempted. In *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), the Eighth Circuit forcefully rejected the argument that a local ordinance which prohibited the knowing harboring of illegal aliens was field preempted because "We find nothing in an anti-harboring

prohibition contained in one sub-part of one section of 8 U.S.C. § 1324 that establishes a 'framework of regulation so pervasive . . . that Congress left no room for the States to supplement it. . . .'". *Id.* at 943 (*quoting De Canas*, 424 U.S. at 357).

In *Villas at Parkside v. Farmers Branch*, 726 F.3d 524 (5th Cir. 2013), the Fifth Circuit *en banc* was split on the issue of field preemption. While the majority opinion did not reach the issue of harboring, *id.* at 524 n.4, the author of that opinion specially concurred explaining, "In my view, the Supreme Court's unanimous decision authored by Justice Brennan in *De Canas* . . . forecloses [Plaintiffs' field preemption] argument." *Id.* at 549 (Higginson, J. *concurring*) (*quoting De Canas*, 424 U.S. at 357). In addition, both dissents in the case explained that *De Canas* precluded field preemption. "[T]he Supreme Court unequivocally held in *De Canas* that the federal harboring laws do not give rise to field preemption. . . . The Supreme Court squarely held that the federal harboring laws did not give rise to field preemption and therefore that the California law was not preempted, even though it was contrary to federal law." *Farmers Branch*, 726 F.3d 555-556 (Owens, J., *concurring and dissenting*). Moreover, the plurality finding of field preemption "conflicted with the Supreme Court's incontrovertible explanation of the 'field' of removal proceedings. 'A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States.'" (JJ. Jones, Walker, joined by Jolly, Smith,

and Clement, *dissenting*) ("Jones *dissent*") *Id.* at 569-570, *citing Arizona*, 132 S.Ct. at 2506. Two concurring opinions used some field preemption principles in finding the ordinance preempted. *See id.* at 569-570 (Jones *dissent*) (discussing the Dennis and Reavley concurrences).

The Ninth Circuit's decision also conflicts with the Eighth Circuit's decision on "conflict preemption." The court below found the statute to be conflict preempted, App. 39-44, while the Eighth Circuit has rejected similar conflict preemption arguments. *Keller*, 719 F.3d at 943-945.

Additionally, the Ninth Circuit's conflict preemption holdings conflict with this Court's *Whiting* decision in two ways. First, the Court found the Arizona statute conflict preempted because it did not expressly include a safe harbor found in the federal statute. App. 43. That holding ignores *Whiting* which held that a state law does not have to expressly insert the same federal safe harbors into state laws. *Chamber of Commence v. Whiting*, 131 S.Ct. 1968, 1984 (2011). It also ignores that the Arizona law at issue in this case requires that the statute be construed consistently with federal law. S.B. 1070 § 12(B), (C).

Second, the court below found "conflict" preemption because the Arizona law criminalizes the encouraging or inducing of an alien to come to or reside in Arizona as opposed to the United States as a whole, which the federal statute does. App. 44. According to the lower court, this non-identical language meant

that *Whiting* compels a finding of conflict preemption under its explanation that Arizona in its employer sanctions law "went the extra mile in ensuring that this law closely tracks IRCA's provisions in all material respects." *Whiting*, 131 S.Ct. at 1981. Indeed, the Court below omitted the words "went the extra mile" in its analysis. App. 44. If the Ninth Circuit's analysis were correct, that a state and federal statute must be identical in wording to avoid conflict preemption, then *Whiting* would have invalidated the Arizona employer sanctions law because it required businesses to use E-Verify, whereas the federal law made its use voluntary. *Whiting*, 131 S.Ct. at 1985. This Court rejected that argument.

Certiorari should be granted to address these conflicts among the Circuits and ensure uniformity with this Court's decisions.

B. The Circuit Courts are Confused as to How Field Preemption is to be Applied.

Under the Supremacy Clause, the federal government in the immigration context does not grant legislative power to states, but instead restricts power the states would otherwise exercise in its absence. *De Canas*, 424 U.S. at 356.

This Court has addressed preemption challenges to state laws seeking to deter illegal aliens four times since 1976. In every case, this Court has declined to accept broad sweeping field preemption challenges. Instead, this Court has routinely narrowed the scope

of the field in its review. *De Canas,* 424 U.S. 351; *Plyler v. Doe*, 457 U.S. 202 (1982); *Chamber of Commerce v. Whiting,* 131 S.Ct. 1968 (2011); *Arizona v. United States,* 132 S.Ct. 2492 (2012); *see also Farmers Branch*, 726 F.3d at 570 (Jones, *dissent*) ("Taken together, *De Canas*, *Whiting*, and *Arizona* demonstrate how narrow the scope of field preemption is regarding local legislation that concerns illegal aliens.").

In *De Canas*, this Court rejected the position taken by the Ninth Circuit in this case – that the federal harboring statute field preempts state regulation. 424 U.S. at 360, n.9. Additionally, this Court rejected the broader argument that denying employment to illegal aliens in California was the same as attempting to "remove" them, despite the practical consequence that lack of employment opportunities would be an insuperable barrier to continued presence. 424 U.S. at 356-363.

In *Plyler v. Doe*, this Court rejected the argument that exclusive federal control of U.S. borders pursuant to the foreign affairs powers of the executive branch preempted states from exercising state police 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," 457 U.S. 228, n.23.

In *Whiting*, an express and conflict preemption case, this Court identified certain principles for reviewing implied conflict preemption claims. *Whiting*, 131 S.Ct. at 1985. These principles should apply to

any implied preemption case – especially implied field preemption. Field preemption requires a finding that Congress intended to preclude all state action in whole areas of law. Given that field preemption requires a complete withdrawal of state authority by Congress, a "high threshold" would have to be met to find field preemption. *Id.* Any analysis should not justify a "freewheeling judicial inquiry" by the courts, otherwise, a real risk exists that a court, rather than Congress, is preempting state action. *Id.*

Finally, in *Arizona v. United States*, this Court recognized that Section 3 of S.B. 1070 was field preempted, but only by a carefully circumscribed "field" of alien registration. 132 S.Ct. at 2501-2510; *Farmers Branch*, 726 F.3d at 567 (Jones, *dissent*) ("[I]n *Arizona*, the Court narrowly defined the field of 'alien registration.' ").

The court below ignored this Court's record of reluctant and limited application of field preemption to state activity to deter illegal immigration. The Arizona statute at issue in this case is in harmony with the field preemption principles articulated above. A.R.S. § 13-2929 does not determine who may or may not enter the country or set conditions under which a legal entrant may remain. It is intended to deter the influx of illegal aliens through the exercise of state police power consistent with *Plyler*.[2] It is

[2] App. 4, *citing* S.B. 1070 § 1 ("The provisions of this act are intended to work together to discourage and deter the unlawful

(Continued on following page)

not a state alien registration scheme and requires Arizona enforcement officials to rely on federal determinations of immigration or citizenship status pursuant to 8 U.S.C. § 1373(c) consistent with *Arizona* and *Whiting*.[3] The Ninth Circuit even recognized (1) that the conduct criminalized is "nearly identical" to that of the federal anti-harboring law but narrower in scope and (2) that Congress has expressly invited states and localities onto the field of enforcing the federal harboring statute, which should be consistent with *Whiting*. App. 32-33, 36. Moreover, controlling circuit precedent had recognized for thirty years that Arizona police officers may enforce federal criminal laws, including the federal anti-smuggling statute, 8 U.S.C. § 1324. *See Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("The general rule is that local police are not precluded from enforcing federal statutes."). Under *De Canas*, that circuit precedent should have precluded any finding that "no other conclusion"

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entry and presence of aliens and economic activity by persons unlawfully present in the United States.").

[3] The Ninth Circuit panel also mistakenly stated Arizona state courts are not "bound by federal interpretations of federal law when interpreting their own state harboring provisions." App. 16-17. In fact, S.B. 1070 expressly binds state court to follow federal law whenever construing A.R.S. § 13-2929. *See* S.B. 1070 § 12(B) ("The terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.); and 12(C) ("This act shall be implemented in a manner consistent with federal laws regulating immigration. . . .").

is permitted but to find field preemption. 424 U.S. at 356.

Rather than uphold a presumptively valid exercise of state police power consistent with this Court's principles, the Ninth Circuit relied on a new but mistaken claim of express jurisdictional preemption, which the district court below had evoked as part of its field preemption finding. The Ninth Circuit held that a Title 8 jurisdictional statute, 8 U.S.C. § 1329, bars states from creating and prosecuting their own laws because those laws mirror federal crimes enacted under the Immigration and Nationality Act. App. 34 n.16, 36.[4] The lower courts' jurisdictional preemption theory does not follow this Court's opinions.

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[4] It has been settled law since 1847 that a state and the federal government can criminalize similar conduct using state laws that mirror their federal counterparts without violating the constitution. *See Fox v. Ohio*, 46 U.S. 410 (1847); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both."); *Bartkus v. Illinois*, 359 U.S. 121, 132-33 (1959) (collecting cases). As Justice Holmes once wrote, "Of course an act may be criminal under the laws of both jurisdictions. . . . The general proposition is too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927) (*citing Lanza*, 260 U.S. at 382). This Court has long maintained that a State may make a violation of federal law a violation of state law "even when the interest protected is a distinctively federal interest." *Halter v. Nebraska*, 205 U.S. 34 (1907); *Gilbert v. Minnesota*, 254 U.S. 325 (1920). In *Arizona*, this Court recognized that principle in the context of immigration law. 132 S.Ct. at 2503 ("[A] State may make violation of federal law a crime.").

First, this Court has already held that "IIRIRA [made] clear that [8 U.S.C. § 1329] applies *only to actions brought by the United States*." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 n.4 (1999) (emphasis added); *see also Sulit v. Schiltgen*, 213 F.3d 449, 453 n.2 (9th Cir. 2000); *In re Jose C.*, 198 P.3d 1087, 1097 (Cal. 2009) (holding that 8 U.S.C. § 1329 does not preclude state jurisdiction).[5] Therefore, 8 U.S.C. § 1329 imposes no preemptive "field" effect on state prosecution of alien harboring crimes.

Second, the panel majority in *Valle del Sol v. Whiting,* 732 F.3d 1006 (9th Cir. 2013), adopted an inverted preemption doctrine created by the Eleventh Circuit in a 2012 opinion – that preemption exists unless Congress expressly permits a state to act: "In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that role of the states is limited to

[5] The Ninth Circuit ignored that this Court validated the prosecution of another Title 8 provision, 8 U.S.C. § 1324a, in Arizona state courts, even though that statute is also silent regarding the authority of state prosecutors or civil tribunals. *Whiting*, 131 S.Ct. 1968. The Ninth Circuit majority also misunderstood the basis of the widespread exercise of jurisdiction to prosecute § 1324 anti-harboring crimes under state RICO provisions mirroring federal criminal law. *See, e.g.,* Mich. Comp. Laws § 750.159g(jj); N.C. Stat. § 75D-3(2). The Ninth Circuit confused concurrent state prosecution of federal alien harboring predicate crimes under the federal RICO statute, 18 U.S.C. § 1961(1)(F), with state criminal or civil prosecution of alien harboring, as defined by state RICO statutes that reference 8 U.S.C. § 1324(a)(1)(A)(iii) as an applicable predicate offense.

arrest for violations of federal law." App. 36-37, *citing Georgia Latino Alliance for Human Rights v. Gov. of Georgia* ("*GLAHR*"), 691 F.3d 1250, 1264 (11th Cir. 2012); *see also United States v. Alabama*, 691 F.3d 1269, 1986 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 2022 (2013) (same).

The court below got the analysis backward. The Supremacy Clause requires a clear and unmistakable statement of congressional intent to displace state sovereignty: "[T]he historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008); *De Canas*, 424 U.S. at 356 ("Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.").

This Court recently reiterated that

> [i]mplied 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" . . . Our precedents "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act."

Whiting, 131 S.Ct. at 1985 (citations omitted). The Ninth Circuit's analysis ignores this high standard and instead empowers a federal judge to prohibit a state from enacting legislation based on congressional *silence*. Under this theory, if Congress has not expressly stated that a State may act, then no State may act.

If the "high threshold" required by *Whiting*, 131 S.Ct. at 1985, to find implied preemption truly exists, unmistakable intent to preempt cannot be found merely "in the absence of a savings clause." App. 36-37 (*citing GLAHR*, 691 F.3d at 1264). The Ninth Circuit's deviation from long-standing principles of federalism compels this Court's review to ensure that its preemption doctrine is uniformly applied.

C. The Ninth and other Circuit Courts Cannot Agree on What "Field Of Law," If Any, Displaces State and Local Anti-Harboring Laws.

In addition to the field preemption conflicts as well as the inconsistent application of field preemption principles, the circuits below cannot even agree on what "field" to assess when reviewing whether field preemption has occurred.

While the Third, Fourth, Eleventh and now Ninth Circuits have all found that state or local anti-harboring enactments are field-preempted in some way, they cannot agree on which field has been occupied by Congressional action, leaving the doctrine

incoherent at the national level. *Compare*: App. 34 (9th Cir. 2013) (preempted by federal occupation of the field of "crimes associated with the movement of unauthorized aliens"); *Lozano v. City of Hazleton,* 724 F.3d 297 (3d Cir. 2013) (local law intruded into field of harboring); *United States v. South Carolina*, 720 F.3d 518, 531 (4th Cir. 2013) (state law intruded into field of the "entry, movement, and residence of aliens within the United States"); *GLAHR,* 691 F.3d at 1265 (federal supremacy "in the realm of immigration" and the "field of international relations" has field-preempted H.B. 87 § 7, O.G.C.A. §§ 16-21-200 through 202).

A review of *Valle del Sol* and the second decision of the Eleventh Circuit analyzing a state law mirroring the federal anti-harboring statute demonstrate the problems courts are having in following *Arizona*. In its decision below, the panel had to "distinguish" a Ninth Circuit opinion that had been the law of the Circuit for thirty years. App. 34, n.19 (*distinguishing Gonzales*, 722 F.2d 468). In *Gonzales*, the Ninth Circuit expressly held that, "It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement." *Id.* at 475. Indeed, multiple state courts within the Ninth Circuit had cited this ruling in specifically rejecting harboring field preemption arguments. *See In re Jose C.*, 198 P.3d 1087 (Cal. 2009); *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008). Nevertheless, the panel below held that Congress had now occupied the field of criminal immigration law enforcement, justifying its departure from *Gonzales* by pointing to 8 U.S.C.

§ 1324(c), a subsection that expressly authorizes the arrest of persons who harbor unlawfully present aliens by state and local police, but is silent on the authority of state prosecutors. App. 34 n.16, 36.[6] It also cites to other criminal violations of the code in support of its conclusion. App. 34. However, *Gonzales* considered and *rejected* an almost identical argument. *Gonzales*, 722 F.2d at 475 (rejecting the argument that § 1324(c) limits enforcement authority of §§ 1325 and 1326).

The Eleventh Circuit, following its earlier *GLAHR* opinion, held preempted an Alabama state statute very similar to A.R.S. § 13-2929.[7] However, the Eleventh Circuit's opinion is confusing because it mixes concepts of field and conflict preemption to arrive at its conclusion. The Eleventh Circuit claimed that it was holding the state statute "conflict preempted," yet all of its analysis focused on this Court's field preemption concepts. *Alabama*, 691 F.3d at 1285-1287 (Finding that Congress provided a "full set of standards" to govern the unlawful transport and movement of aliens, that the breadth of federal

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[6] The panel's reasoning for distinguishing *Gonzales* on this point is unclear. The current language of § 1324(c) was in the harboring statute when the *Gonzales* opinion was decided and has been a part of the harboring statute since enactment of the INA in 1952. *See* INA § 274(c), Act of June 27, 1952, 66 Stat. 228.

[7] The Alabama statute was also similar to Georgia's statute which mirrored the federal harboring law, Georgia H.B. 87, § 7, which the Eleventh Circuit had previously held preempted.

legislation created an "overwhelming dominant federal interest," and citing the "intent of Congress to confer discretion on the Executive Branch in matters concerning immigration."). *Id.* at 1285-1287. The Eleventh Circuit was unable to agree on any defined "field" within which the state legislation was preemptively barred.

This Court's holdings on constitutionally-proscribed regulation of immigration are clear, well-defined, and still rely on *De Canas*. Significantly, the District Court of Arizona below dismissed the claim that A.R.S. § 13-2929 was a preempted "regulation of immigration." App. 57. The dismissal was not appealed to the Ninth Circuit.

Similarly, express Congressional preemption of state and local enforcement actions has played a limited role in immigration preemption because it is not only quite rare, but in general protects state and local action when undertaken within Congressionally-specified procedural limits.[8] Clearly, Congress knows

[8] *Amicus* IRLI is aware of only three immigration law provisions which expressly preempt state or local action. The first is the employer sanctions law which this Court addressed in *Chamber of Commerce v. Whiting*. States may not impose state criminal or civil sanctions, on employers of unauthorized aliens, other than through licensing or similar laws. 8 U.S.C. § 1324a(h)(2). The second provision expressly preempts states and localities from granting public benefits to illegal aliens, except through express state legislation. 8 U.S.C. § 1621(b), (d). The third provision preempts any state or local statute or policy that "prohibits or in any way restricts" the maintaining or

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how to express intent to preempt under immigration law.

It is primarily in the conflicts among the appellate courts as to whether a "field" of immigration-related federal law exists, wherein Congress has "unmistakably" intended to occupy the field, that immigration preemption doctrine has become incoherent and dysfunctional. This Court's recent finding of Congressional preemption of the field of "alien registration" has not improved matters in practice.[9]

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exchanging of "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(b).

Conversely, no statute establishes that the authority of the Department of Homeland Security to detain criminal aliens supersedes or deprioritizes its core immigration control mission to inspect, register, and monitor the status and location of the entire population of aliens in the United States. To the contrary, when creating the Department of Homeland Security, Congress mandated that enforcement of immigration law against unlawfully present aliens was to be a joint responsibility, not an exclusive power, shared with the Departments of Justice, Defense, intelligence agencies, and federal, state and local law enforcement agencies nationwide. *See* 6 U.S.C. § 255(b) (requiring DHS to consult with state and local law enforcement agencies "to determine how to most efficiently conduct enforcement operations").

[9] Under *Hines v. Davidowitz*, Justice Douglas had found a Pennsylvania alien registration statute to be in implied *conflict* with the 1940 version of the Alien Registration Act. 312 U.S. 52, 74 (1941). Seventy years later in *Arizona*, the Court found that the current version of the law occupies the field of alien registration, seeming to imply in dicta that state statutes that implicate the conduct of foreign relations are field preempted. 132 S.Ct. at 2502. However, as the conduct of foreign affairs is largely an

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Congressional intent is the "ultimate touchstone" in preemption inquiries. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Yet the courts below cannot agree on when or if Congress has field preempted state and local harboring laws. This incoherence among the circuits can only be harmonized by the Supreme Court. The federal and state judiciaries as well as many thousands of state and local legislators and agency officials will greatly benefit from clarity regarding this fundamental aspect of federalism. The pending petition for certiorari represents a highly appropriate vehicle for the urgently needed harmonization of constitutional and congressional preemption doctrine at the national level.

D. The Circuit Courts are Deadlocked Over the Elements and Scope of the Touchstone Crime of Harboring Under 8 U.S.C. § 1324.

In addition to the problems previously addressed, the Ninth Circuit's implied preemption holding is incoherent in its depiction of the judicial construction of the touchstone federal statute, 8 U.S.C. § 1324, as both unified and comprehensive.

As a key holding in support of its conclusion that A.R.S. § 13-2929 was field-preempted by "a full set of

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exercise of executive branch discretion, it fits very poorly under the rubric of Congressionally-enacted field preemption, as defined by *De Canas*.

standards designed to work as a harmonious whole," the Ninth Circuit below held that § 1324 "demonstrates Congress' intentional calibration of the appropriate breadth of the law," App. 35, and "now presents a single comprehensive 'definition' of the federal crime of alien smuggling." *Id.*

However, in its extended discussion of standing of plaintiff Luz Santiago, App. 10-17, the *Valle del Sol* majority disregarded its own rhetoric about a "single comprehensive definition" and highlighted the conflicts within the Ninth Circuit and with other circuits as to the scope and construction of the federal harboring statute. App. 13-14. In a lengthy footnote to its standing analysis, the court discussed cases from the Second, Seventh, and Ninth Circuits that adopted conflicting constructions of the required elements of the federal crime of harboring. App. 16, n.9. The footnote stated that "the federal interpretation adopted [by the Seventh Circuit] was not "entirely stable." *Id*.

The lack of stability in the federal interpretation of 8 U.S.C. § 1324 noted by the Ninth Circuit reflects but understates the much more serious multi-element, multi-circuit split over the federal definition of felony alien harboring. Despite the Ninth Circuit's rhetorical characterization of the legislative development of § 1324 as "an intentional calibration of the appropriate breadth of the law," App. 35, the United States Supreme Court has never definitively construed the modern harboring statute, which has

resulted in the current proliferation of conflicting constructions by the lower courts.

In 1948, this Court reviewed a predecessor harboring statute and determined that Congress had not created any penalties for harboring in that statute, but did not decide the "question" of the "reach of the statute" because it was not before the Court. *United States v. Evans*, 333 U.S. 483, 489 (1948). However, in *dicta*, this Court hypothesized that "an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining." *Id.* at 489.

Congress amended the harboring statute in 1952 to add the penalties that this Court found lacking. *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1972) (*citing* H.R. Rep. No. 1377, 82d Cong., 2d Sess.) In amending the harboring statute, "members of Congress appear[ed] to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act. . . ." *Id.* However, this Court has never defined the term "harboring" under 8 U.S.C. § 1324(a)(1)(A)(iii). *Evans*, 333 U.S. at 489.

In the absence of Supreme Court guidance over the past 62 years, multiple conflicting interpretations of 8 U.S.C. § 1324(a)(1)(A)(iii) have emerged. Circuits have acknowledged this circuit split. *See Lopez*, 521 F.2d at 440 (rejecting the Sixth Circuit's outdated "clandestine sheltering" test for harboring).

The Ninth Circuit has relied on the "plain meaning" of the statute, holding that harboring means simply "to afford shelter to," with no showing of clandestine sheltering being necessary. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (rejecting the Sixth Circuit's harboring requirement that aliens be hidden from detection and holding that harboring only means "to afford shelter to"); *United States v. Aguilar*, 883 F.2d 662, 689 (9th Cir. 1989).

Similarly, the Eighth Circuit holds "that a showing of concealment is unnecessary, and that conduct which merely 'substantially facilitates an alien's remaining in the country illegally' is sufficient to constitute harboring." *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008).[10]

In stark contrast, the Third Circuit requires two additional non-statutory elements to show harboring: "conduct 'tending to substantially facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting the alien's unlawful presence*.'" *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis in original). The Sixth Circuit also requires some kind of element of preventing detection. However, that holding is 82

[10] The Seventh Circuit relies solely on the three elements that are found in 8 U.S.C. § 1324(a)(1)(A)(iii). *United States v. Ye*, 588 F.3d 411, 416 (7th Cir. 2009); *cf. United States v. Costello*, 666 F.3d 1040 (7th Cir. 2013).

years old. *See Susnajar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928).[11]

Until the recent change of direction in the *Farmers Branch* preemption litigation, now pending before this Court, both the Fifth and Eighth Circuits agreed that harboring only required a showing that the "conduct tends to substantially facilitate an alien's remaining in the United States illegally," with no requirement of preventing detection. *United States v. Martinez-Medina*, 2009 U.S. App. LEXIS 890, *3 (5th Cir. 2009); *United States v. Tipton*, 518 F.3d 591 (8th Cir. 2008). In fact, the Fifth Circuit had expressly rejected any "concealment" requirement. *United States v. Herrera*, 584 F.2d 1137, 1144 (5th Cir. 1978) (To prove harboring, the government must show that the "conduct tend[ed] substantially to facilitate an alien's 'remaining in the United States illegally' " but "[s]uch conduct need not be clandestine.") (internal citations omitted).

Nonetheless, the *Farmers Branch* plurality cited to the extensive splits among the circuits, while ignoring its prior Circuit precedent. 726 F.3d at 536. In the process, the Fifth Circuit grafted the Third and Sixth Circuit's judicially-created element of "evading federal detection" onto that Circuit's established prior

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[11] Both the Second and Ninth Circuits rejected the *Susnajar* "clandestine sheltering" test because *Susnajar* was interpreting a pre-1952 harboring statute, and it predated the Supreme Court's 1948 *Evans* decision. *Lopez*, 521 F.2d at 440 n.3; *Acosta de Evans*, 531 F.2d at 430.

construction of the harboring statute. *Id.* at 530-531, n.9. Based on that novel definition, the Fifth Circuit found that the Farmers Branch ordinance "interferes with the careful balance struck by Congress with respect to the harboring of non-citizens." *Id.* at 531.

As congressional intent reflected in the plain language of the statute is the "ultimate touchstone" of implied preemption analysis, *Wyeth v. Levine*, 555 U.S. at 565, it is essential for a finding of field preemption that there be a "single comprehensive definition," *see* App. 13-14, of the dominant touchstone federal statute. However, the Ninth Circuit's claim that an established comprehensive definition of the federal harboring statute supports its preemption analysis is discredited by the discussion of circuit court conflicts over construction of § 1324 in the majority's standing section, *see* App. 16-17.

The conflicts as to the scope of § 1324 within the Ninth Circuit's opinion below underline why a definitive construction of the harboring statute by the Supreme Court is a prerequisite for harmonization of implied preemption doctrine. If § 1324 is a broad statute that does not require intent to evade federal immigration authorities, then it is not in conflict with state statutes that sanction harboring from other authorities. If on the other hand it is a narrow statute that only applies to evading detection from ICE or Border Patrol agents, but one where Congress has expressly authorized state and local police to freely arrest violators pursuant to § 1324(c), and state prosecutors to enforce against those who harbor "for

commercial gain" under federal and state RICO statutes, then it is difficult to maintain that Congress has unmistakably occupied the field to the exclusion of state authorities.

Until this Court grants certiorari to examine the breadth of the harboring statute, the existence of a multi-element, multi-circuit split over the scope of 8 U.S.C. § 1324 will subvert all attempts by lower courts to bring a coherent field preemption analysis to the nationally momentous trend of state or local anti-harboring laws like A.R.S. § 13-2929.

CONCLUSION

The opinion of the Ninth Circuit reflects incoherence among the federal Circuit courts on three fundamental points of preemption analysis in immigration law: The field of law, if any occupied by federal statutes; the interpretation of the prior holdings in *De Canas*, *Plyler*, *Whiting* and *Arizona*; and construction of the touchstone federal statute, 8 U.S.C. § 1324. Only Supreme Court review can bring harmony

to this major area of law. *Amicus* respectfully requests this Court to Grant the Petition for Writ of Certiorari.

Respectfully submitted,

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