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 the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioners

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

NOTE: *Amicus* American Unity Legal Defense Fund believes that the following Question is fairly encompassed within the Question Presented:

Whether the lower courts may find state laws preempted based on the Ninth Circuit's reversed interpretation in *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS,* 913 F.2d 1350 (9th Cir. 1990), *rev'd,* 502 U.S. 183 (1991), that immigration law enforcement must be "balanced," "tempered" and not "harsh."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chamber of Commerce v. Whiting* ("*Whiting*"), No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011), *City of Hazleton v. Lozano* ("*Hazleton*"), *cert. granted, vacated and remanded,* No. 10-772, 563 U.S. ___, 131 S.Ct. 2958 (2011), and *Horne v. Flores*, 557 U.S. 443, __ n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief). AULDF filed amicus briefs in the District Court and Ninth Circuit in this case.

AULDF agrees with Petitioners' reasons for reversing the decision below. AULDF writes separately to discuss the importance of this Court clarifying whether the lower courts can rely on a "balance" or "tempered enforcement" interpretation of congressional intent in the Immigration Reform and Control Act of 1986, even though this Court rejected that interpretation in *INS v. Nat'l Center for Immigrants' Rights*, 502 U.S. 183 (1991), and again twice last Term in *Whiting* and *Hazleton*.

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[1] All counsel of record consented to the filing of *amicus* briefs. Copies of the consents have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

"The objective of this Act[2] was to stop illegal aliens from working, period."
Nat'l Center for Immigrants' Rights, Inc. v. INS ("*NCIR*"), 913 F.2d 1350, 1375 (9th Cir. 1990) (Trott, J. dissenting), *rev'd,* 502 U.S. 183 (1991).

This case and other nearly identical cases[3] distill to a single challenge to this Court's precedents:

How much enforcement is "too much?"

Judge Bea, in partial dissent below, noted the centrality of this issue: "[I]t is the **enforcement** of immigration laws that this case is about, not whether a state can decree who can come into the country, what an alien may do while here, or how long an alien can stay in this country."[4] Petitioner's opening brief, except in passing, does not grapple directly with that central issue; nevertheless, the Court should do so.

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[2] The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA").

[3] *See, e.g.*, *United States v. Alabama*, 443 Fed.Appx. 411 (11th Cir. 2011); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F.Supp.2d 1317, 1335 (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 920-21 (N.D. Ind. 2011).

[4] *United States v. Arizona*, 641 F.3d 339, 369 (9th Cir. 2011), Joint Appendix ("J.A.") 62a-63a (Bea, J., concurring and dissenting) (Emphasis added). A similar analysis was offered by the District Court in *Whiting*: "[I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate." *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008).

The question is not always phrased this clearly. Respondent, for example, began this case by claiming: "If allowed to go into effect, S.B. 1070's mandatory enforcement scheme will conflict with and undermine the federal government's **careful balance** of immigration enforcement priorities and objectives." Complaint ¶ 4, J.A. 172a-173a (emphasis added). As shown in more detail below, this "balance" theory of limited immigration enforcement originated in the Ninth Circuit's decision in *NCIR*,[5] and this Court unanimously rejected it. 502 U.S. at 188, 196.

After this Court's 1991 unanimous rejection of the "balance" theory of limited immigration enforcement, no court raised the Ninth Circuit's "balance" interpretation until the *Hazleton* District Court in 2007. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 528 (M.D. Pa. 2007)("The two laws, however, strike a different balance between these interests. The laws, therefore, conflict."). The Third Circuit, on appeal in *Hazleton*, repeated the "balance" analysis, asserting that:

> it is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as 'foreign' from discrimination.

620 F.3d at 210-11. This Court granted review, vacated and remanded for reconsideration in light of *Whiting*. 131 S.Ct. 2958.

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[5] *NCIR*, 913 F.2d at 1367-68 ("The regulation disrupts the careful balance which Congress achieved in IRCA.").

And in *Whiting*, this "balance" interpretation was raised explicitly:

> In the Chamber's view, IRCA reflects Congress's careful balancing of several policy considerations—deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination. According to the Chamber, the harshness of Arizona's law "'exert[s] an extraneous pull on the scheme established by Congress'" that impermissibly upsets that balance.

Whiting, 131 S.Ct. at 1983. The United States also argued the "balance" theory in *Whiting*: "[T]he Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established." Brief for the United States as *Amicus Curiae*, in *Whiting*, No. 09-115, at 9.

This Court again rejected that limited enforcement "balance" argument: "The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban." *Whiting,* 131 S.Ct. at 1983.

Nevertheless, *NCIR*'s "balance" argument survives in the lower courts, and should be dealt with here. Indeed, the Ninth Circuit panel below asked, *sua sponte*, at oral argument about *NCIR*, and the parties (and *Amicus* AULDF) engaged in Rule 28(j) post-argument briefing on the effect of the 1990 Ninth Circuit panel decision and the 1991 reversal.[6] The Ninth Circuit panel ultimately chose to say that

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[6] Partly reprinted in AULDF's *amicus* brief in *Hazleton*, No. 10-772, at Appendix 1-A.

it was bound by its reversed 1990 panel opinion, and to distinguish the reversal as "on other grounds." *United States v. Arizona*, 641 F.3d at 357, J.A. 33a ("we are bound by our holding in [*NCIR*] regarding congressional intent"). That holding has now been echoed in other courts.[7]

The "balance" argument is a direct challenge to this Court's usual understanding of congressional intent in the immigration laws. Traditionally, this Court has recognized that Congress consistently adopted a policy of "forcefully" protecting American workers through enforcement.[8] These new cases posit that, Congress instead intended enforcement of the immigration laws to be "carefully balanced,"[9] "fair and humane"[10] and "tempered".[11]

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[7] *See, e.g.*, *United States v. Alabama*, __ F.Supp. 2d __, __, No. 2:11–CV–2746–SLB, 2011 WL 4469941, slip op. *23 (N.D. Ala, Sept. 28, 2011) ("This court agrees with the Ninth Circuit's holdings in *National Center for Immigrants' Rights* and its decision in *Arizona*."); *Buquer*, 797 F.Supp.2d at 920-21 ("direct contravention of 'the carefully calibrated scheme of immigration enforcement that Congress has adopted'", *quoting Arizona*, 641 F.3d at 362).

[8] *See, e.g., NCIR*, 502 U.S. at 194, and n. 8 (protecting American workers is an "established concern of immigration law"); *Reno v. Flores*, 507 U.S. 292, 334 (1993)(upholding detention of unaccompanied minor illegal immigrants); *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) (upholding state penalties for hiring illegal immigrants).

[9] *NCIR*, 913 F.2d at 1367-68.

[10] *NCIR*, 913 F.2d at 1369 (rejecting regulations denying illegal immigrants the right to work pending immigration proceedings).

[11] *Id*., 913 F.2d at 1366.

Put another way, should courts stop state law enforcement so that illegal immigrants do not "starve"[12] or "go homeless",[13] or did Congress intend that ""immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended"? H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.).

In addition, there is a new twist on these arguments: recent cases have extended the *NCIR* interpretation beyond Congressional intention, and asserted that "federal priorities" – meaning federal agency priorities – should govern immigration law preemption decisions.[14] And, as shown below, this question is critical in light of the recent collapse of immigration law enforcement in the interior of the country, since it appears that the federal agency's priorities are at odds with traditional Congressional intention to protect the most vulnerable American workers.

This fundamental question – how much enforcement is "too much" – thus appears in a variety

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[12] *United States v. Arizona,* 641 F.3d at 357, n. 17, J.A. 34a, *citing, NCIR*, 913 F.2d at 1368.

[13] *Lozano v. City of Hazleton*, 620 F.3d 170, 224 (3rd Cir. 2010), *vacated and remanded*, No. 10-772 (June 6, 2011).

[14] *See, e.g., Deal*, 793 F.Supp.2d at 1335-36 ("To the extent that federal officers and prosecutors have priorities that differ from those of local prosecutors, those priorities are part of the flexibility that 'is a critical component of the statutory and regulatory framework' under which the federal government pursues the difficult (and often competing) objectives, of 'protecting national security, protecting public safety, and securing the border.'"), *quoting Arizona*, 641 F.3d at 352, J.A. 22a.

of cases beyond the instant matter. It would seem that this Court's 1990 and 2011 decisions would be clear that Congress has decided that immigration law enforcement should be "forceful." Unfortunately, this Court's decisions do not seem to have been clear enough to either the United States[15] or to the lower courts. Nor has this Court apparently been clear enough about whether it is Congress or the enforcing agencies whose decisions control.

Thus, it would be helpful for the lower courts to clarify the survival and effect of the reversed Ninth Circuit decision in *NCIR* and its underlying theory that Congress intended to avoid "harsh" immigration enforcement in favor of "balance" and protections for illegal immigrants. As shown below, neither the *NCIR* opinion nor its "balance" interpretation should be used to preempt otherwise legitimate state law enforcement.

Even though this central question is not pressed sharply in Petitioner's opening brief, it is important that this Court clarify whether the lower courts should continue to use the "balance" or "tempered enforcement" theories to strike state laws. The purpose of this brief is to suggest that the

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[15]For example, the United States asserts in other cases that the vacated *Hazleton* opinion still controls preemption in these other areas. "Because *Whiting* did not address the preemptive effect of federal law on state or local ordinances addressing transportation, harboring, concealment, or housing, we do not believe the result should be any different on remand with respect to the housing ordinance." Motion for Preliminary Injunction in the District Court in *United States v. Alabama*, No. 2:11-cv-02746-SLB, (M.D.Ala., Aug. 1, 2011), at 33 n. 7. *But see*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950) (vacated case should not spawn any consequences).

"balance" or "tempered enforcement" argument does not reflect Congress's clear intention in enacting the immigration laws.

SUMMARY OF ARGUMENT

This case, and others like it, turns on the question of whether Congress intended vigorous or limited immigration law enforcement in the interior of the United States. Congress expressly intended "forceful" enforcement of the immigration laws as the principal method to protect American workers and preserve lawful immigration in the future. Neither the text nor the legislative history of the immigration laws provides any indication that Congress intended "balanced" or "tempered" immigration law enforcement in the manner the opinion below suggests and the reversed *NCIR* opinion requires. In 1986 and again in 1996, Congress enacted a variety of measures to protect American workers, including concurrent state law enforcement, state-level RICO liability for harboring illegal immigrants, and harsher penalties for violations, including, in some instances, the death penalty. In these "forceful" measures, Congress did not intend that immigration enforcement be limited, "tempered" or "balanced" to the exclusion of protection for American workers.

Nor do decisions of this Court provide any support for the "tempered" or "balanced" limited enforcement position. This Court has considered how "forceful" Congress intended immigration law enforcement to be and has rejected the "balance," "tempered" or "measured" enforcement position in each of the three cases that presented it. In 1991, the Court considered both the *NCIR* panel majority's

position that penalties on illegal immigrants themselves (in the form of no-work bond conditions pending immigration proceedings) were "harsh and inhumane" and Judge Stephen Trott's dissenting position that Congress intended to "stop illegal immigrants from working, period." The Court unanimously chose Judge Trott's more forceful interpretation of Congressional intentions. Just last Term, this Court was again presented with the "balanced" enforcement theory – twice – and expressly rejected it in *Whiting* and by reference in *Hazleton*.

Finally, this Court's decisions give no support to the assertion that administrative "priorities" can preempt otherwise legitimate state immigration law enforcement measures. Since 1997, immigration law enforcement in the interior of the United States has collapsed, with a 99% decline by 2005, and little rebound since then. This decline is self-imposed by the enforcing agency, which, since 2010, has issued four memoranda that, in President Obama's terms, "systematically" withdrew enforcement in the guise of resetting "priorities." The effect of this enforcement collapse falls most heavily on low-income and unemployed American workers, exactly the opposite of traditional Congressional intention.

There is no evidence that Congress intended this decline in interior immigration law enforcement. The evidence in both text and legislative history is otherwise. Nevertheless, the effect of the enforcing agency's decisions is to make ineffective immigration law enforcement the official policy of the Executive Branch, and here to offer that policy as the reason to preempt state laws.

The question of how much enforcement is "too much" is central to this case. Since there is no text, legislative history or precedent supporting the "balanced" or "tempered enforcement" interpretation of congressional intent, the court below should not have relied on that theory to strike even a portion of Arizona's S.B. 1070. In short, Congress was not as concerned about illegal immigrants "starving" as it was about low-income Americans doing the same. The lower courts were not entitled to reverse that choice, nor is the Executive Branch. A policy of ineffective enforcement, bolstered by an interpretation of Congressional intentions that prohibits "harsh" enforcement, is inconsistent with demonstrated Congressional intent and cannot sustain a preemption challenge.

The Court should clarify whether the lower courts should use the "tempered" or "balanced" enforcement theory to preempt state laws. A necessary first step in that clarification is to reverse the decision below.

ARGUMENT

I. In order to Protect American Workers and Preserve Lawful Immigration, Congress Intended Immigration Law Enforcement to Be "Forceful," Not "Balanced."

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). The Court must review "the full purposes and objectives of Congress[,]" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), to determine how much enforcement is too much. In

1986 and again in 1996, Congress made clear that it intended vigorous enforcement of the immigration laws. It did so not because of animus against immigrants or immigration; on the contrary, Congress expressly said that it intended to preserve a generous immigration system – through enforcement. This Court should reverse the decision below to protect both American workers and the generosity of the American immigration laws.

A. Immigration Law Traditionally Protects American Workers.

Traditionally, immigration law enforcement is intended to protect American workers. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 892-93 (1984) (a "primary purpose in restricting immigration is to preserve jobs for American workers"). As Justice Brennan previously explained:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

De Canas v. Bica, 424 U.S. at 356-57.

B. In 1986, Congress Sought Immigration Law Enforcement to Preserve A Generous Immigration System.

In 1986, Congress added new immigration law enforcement mechanisms. The Senate Judiciary Committee summarized the bill's "Purpose" in one

sentence: "The Committee bill is intended to increase control over illegal immigration." S. Rep. 99-132, at 1. The House Report noted that Congress's purpose was to provide a statutory scheme of penalties as a means "to curtail[ ] future illegal immigration[.]" H.R. Rep. No. 99-682(I), at 46.

In fact, Congress saw immigration law enforcement as the key to preserving immigration. "The **major purpose** of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are **actually implemented through adequate enforcement**." S. Rep. 99-132, at 3 (emphasis added).

The bill's chief Senate sponsor said: "Unless illegal immigration is brought under control, I and many others, fear an increasing public intolerance – a lack of compassion if you will – to all forms of immigration – legal and illegal. It is this unwanted and wretched result that this bill today attempts to avoid." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson). Sen. Simpson considered his approach in IRCA to be the "humane approach." *Id*. at 23718 (statement of Sen. Simpson) (without employer sanctions there "is no immigration reform, at least on the humane basis that Senator Kennedy and I have tried to do it"). Sen. Simpson's counterpart in the House, Rep. Romano Mazzoli, said that the new "employer sanctions" provisions in the 1986 IRCA had "universal application" to "bring some order and sense to our immigration policy by regaining control of our borders." 132 CONG. REC. 31633 (1986).

C. Congress Added Enforcement Powers, Not Just "Employer Sanctions."

Congress sought a "balance" in 1986, but it wasn't the "tempered" one the Ninth Circuit posed in *NCIR* and re-adopted below; instead, that congressional balance was more focused on enforcement and sanctions. Before 1986, the relevant federal crime, 8 U.S.C. § 1324,[16] prohibited smuggling, harboring or transporting illegal immigrants, *U.S. v. Evans,* 333 U.S. 483 (1948)(Congress intended to punish both bringing in and aiding the continued presence of illegal immigrants), but the "Texas Proviso" in that section said "harboring" did not include "the usual and normal practices incident to employment." *See De Canas v. Bica,* 424 U.S. at 360.

The § 1324 proviso survived until late in the consideration of IRCA. S. Rep. 99-132, at 76 (only amending the proviso to state that employment "by itself" was not harboring). In 1986, however, Congress finally deleted the proviso in its entirety, 8 U.S.C. § 1324(a), and also added new "employer sanctions" provisions. 8 U.S.C. § 1324a.

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[16] Section 1324 is not the more publicized "employer sanctions" of Section 1324a, but it is neither obscure nor abstract to those involved in immigration. "'We could all go in the van,' John suggests. 'But then I could be arrested for harboring.'" Stephanie McCrummen, "In Arizona, Stark Choices," *The Washington Post*, Oct. 10, 2010, A1; *see also, Williams v. Mohawk Industries*, 465 F.3d 1277, 1289 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007) ("Mohawk's argument ignores that Mohawk's conduct has grossly distorted those normal market forces by employing literally thousands of illegal, undocumented aliens at its manufacturing facilities in north Georgia ").

The deletion of the § 1324 proviso meant that employers could be penalized directly in ways other than through the "employer sanctions" scheme of 8 U.S.C. § 1324a. As the Eleventh Circuit noted:

> The legislative history demonstrates that Congress intended § 1324 [prohibiting harboring illegal immigrants] to cover employers such as the Appellees. Congress expressly noted the pervasive problem of illegal alien employment and its harmful effect on the American worker. Each time an employer hires an illegal alien, an American citizen loses an employment opportunity. Congress understood this problem and chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them.

U.S. v. Zheng, 306 F.3d 1080, 1087 (11th Cir. 2002); *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or shielding from detection."); *U.S. v. Kim,* 193 F.3d 567, 573 (2nd Cir., 1999) ("The fact that employers are also targeted by § 1324a provides no support for Kim's contention that he should have been prosecuted under § 1324a.").

Contrary to Respondent's "balance" theory, Congress did not intend a "delicately-balanced" 8 U.S.C. § 1324a to be the exclusive, administratively-enforced protection against hiring illegal immigrants. Even in 1986, Congress was looking for more.

D. In 1996, Congress Strengthened the Prohibitions Against Hiring and Harboring Illegal Immigrants With No Consideration for "Balance."

Congress was aware by 1995 that IRCA's "employer sanctions" were not stopping employers from hiring illegal immigrants. H.R. Rep. 104-469 (1995), at 129. In 1996, Congress increased workplace enforcement of immigration laws in ways having little to do with a "balance" of "competing goals." Even if Congress had intended equivalence in IRCA between immigration law enforcement and "competing goals," that was not true by 1996. In 1996, Congress reinforced federal enforcement resources by adding State and private enforcement authority, and by significantly increasing penalties for hiring illegal immigrants under § 1324.

In its first step, Congress revisited the question of Federal-State enforcement cooperation. In 1978, Attorney General Griffin Bell issued a directive which "established the policy of the Carter Administration that Federal-State cooperation in this area was not to be encouraged." S. Rep. 98-62, at 128 (Additional Views of Sen. Charles E. Grassley).

Sen. Grassley then promoted an amendment to "clarify a confused situation in which state and local law enforcement agencies were unsure as to their liability if they cooperated with Federal immigration officers." *Id*. His amendment passed the Senate subcommittee, but he withdrew it after assurances from Attorney General William French Smith and INS Commissioner Alan Nelson that they would reverse the Bell directive. *Id*. Smith issued a new directive on Federal-State cooperation on Feb. 10, 1983, which Grassley called a "very important step

which will greatly assist our immigration control efforts." *Id.*

Thus, in 1986 Congress saw no need to statutorily authorize Federal-State cooperation in immigration law enforcement. In 1996, however, seeking more enforcement capability, Congress formalized the "287g" program to expressly promote state-federal cooperation in immigration law enforcement. 8 U.S.C. § 1357(g).

Also in 1996, Congress took three separate steps to create a private right of action against, and increase penalties for, those who employ, smuggle or harbor illegal immigrants. First, Congress amended the list of RICO predicate crimes[17] to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

That change allows workers to bring RICO claims against employers who hire illegal immigrants. *Williams v. Mohawk Industries*, 411 F.3d at 1266. The addition of RICO liability exposes harborers of illegal immigrants to state-level RICO suits. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In *Mohawk Industries* on remand, for example, the 11th Circuit permitted the employer of illegal immigrants to be sued under Georgia's RICO statute. 465 F.3d at 1292-

[17]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96, entitled Racketeer Influenced and Corrupt Organizations ("RICO"), to Title 18 of the United State Code. 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

94. "The fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one." *Mohawk Indus.*, 465 F.3d at 1292.

Second, Congress expanded § 1324 to penalize directly (as opposed to being considered harboring) the hiring of more than ten illegal immigrants per year. 8 U.S.C. § 1324(a)(3)(A), Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996), Div. C, Title II, § 203(b)(4). Thus, at least by 1996, Congress did not intend "employer sanctions" under § 1324a to offer the sole sanction levied against employers of illegal immigrants. *U.S. v. Kim,* 193 F.3d at 573.

Third, Congress increased the penalties under § 1324 to include lengthy prison terms, and, in some cases, possibly the death penalty. 8 U.S.C. § 1324(a)(1)(B).

Together the new powers suggest that Congress intended particularly strenuous enforcement techniques and penalties, up to and including the death penalty, for those involved in harboring and employing illegal immigrants. In the context of the fundamental issue in this case, Congress wanted "forceful," not "tempered," immigration enforcement. *NCIR*, 502 U.S. at 194.

This Court should reverse the decision below so that the Ninth Circuit's revived "balance" theory does not short-circuit Congress's attempt to protect both American workers and the generosity of America's immigration laws.

II. This Court Has Uniformly Rejected the "Balance" Interpretation of Congressional Intent on Immigration Enforcement.

Even before the passage of IRCA, the issue of how much enforcement Congress intended was raised directly, and then and each time since, this Court has said that Congress intended forceful enforcement. As noted above, this Court has rejected the "balance" interpretation of congressional intent in three different cases: *Whiting*, *Hazleton*, and *NCIR*.

In 1986, prior to the passage of IRCA, the Ninth Circuit rejected a "no-work" bond condition for illegal immigrants released pending immigration proceedings because of the Immigration and Naturalization Act of 1952's purported "peripheral concern … with the employment of illegal aliens." *NCIR*, 791 F.2d 1351, 1356 (9th Cir. 1986). This Court vacated and remanded that decision for review in light of the then-newly-passed IRCA. *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 481 U.S. 1009 (1987).

On remand, the Ninth Circuit asked whether the Attorney General's regulations were founded on "considerations rationally related to the statute he is administering." 913 F.2d at 1360. It compared IRCA to the Internal Security Act of 1950. 913 F.2d at 1360-61. The Ninth Circuit then answered its own question in the negative: IRCA "states a **tempered enforcement policy** qualitatively different from the sweeping concerns with subversion of the Internal Security Act." 913 F.2d at 1366 (emphasis added).

The Ninth Circuit next said "While the INS argues that the authority to detain aliens is

consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the **careful balance** which Congress achieved in IRCA." 913 F.2d at 1367-68 (emphasis added). "The emphasis on the rights of aliens as well as citizens shows a concern for **fair and humane enforcement** of the immigration laws which is at odds with the … **harsh and inhumane measures**[18] at issue here." 913 F.2d at 1369 (emphasis added). It struck the regulation as not rationally-related to the purposes of the INA after IRCA. *Id*.

Ironically, the *NCIR* panel included Judge Stephen Trott, who had a different view from his service as Assistant Attorney General of the United States during the development of IRCA and Associate Attorney General during the three years after passage.[19] Judge Trott rejected the "balance" of purposes in IRCA. He summarized the congressional intent behind IRCA: "The objective of this Act was to stop illegal aliens from working, period." 913 F.2d at 1375.

> The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions [8 U.S.C. § 1324a] suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the **primary thrust**

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[18] The "harsh and inhumane measures" referred to by the Ninth Circuit were the "no-work" bond conditions on illegal immigrants awaiting immigration proceedings. 913 F.2d at 1369.

[19] www.fjc.gov/servlet/nGetInfo?jid=2416&cid=999.

> of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

Id. (emphasis added).

The United States, which apparently had different views than it asserts today, sought review of the Ninth Circuit's opinion, noting that "while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment." Appellate Petition, *INS v. Nat'l Center for Immigrants' Rights,* No. 90-1090, 1991 WL 11009301, at 8 n. 8 (emphasis in original).

This Court granted certiorari, limited to the question of whether the "no work" bond regulation was authorized by statute. 499 U.S. 496 (1991). In short, which doctrine would control: the panel majority's "careful balance" interpretation that the statute permits only "tempered enforcement" measures, not including limits on illegal immigrants' working, or Judge Trott's "stop illegal aliens from working, period" interpretation?

This Court unanimously rejected the panel majority's interpretation, reversed and remanded the case. 502 U.S. at 188, 196.

This Court first recounted the history of the case, rejecting the original *NCIR* panel's characterization by saying that the passage of IRCA had "cast serious doubt on the Court of Appeals'

conclusion that employment of undocumented aliens was only a 'peripheral concern' of the immigration laws." 502 U.S. at 187.

The Court likewise rejected the Ninth Circuit's analogy to the Internal Security Act of 1950. 502 U.S. at 193 ("too cramped"). Instead, the Court noted that the "stated and actual purpose of no-work bond conditions was 'to protect against the displacement of workers in the United States.' … We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers." 502 U.S. at 194.

In a footnote, the Court rejected the panel majority's belief that IRCA permits only a "tempered enforcement policy." The Court seemed to agree with Judge Trott that the purpose of IRCA "was to stop illegal aliens from working, period": "This policy of immigration was **forcefully** recognized most recently in the IRCA." 502 U.S. at 194, n. 8 (emphasis added). "The contested regulation is wholly consistent with this established concern of immigration law, and thus squarely within the scope of the Attorney General's statutory authority." 502 U.S. at 194.

Thus, this Court held that the United States' efforts to keep illegal immigrants from working during the pendency of their immigration proceedings, which the Ninth Circuit felt was "harsh and inhumane", 913 F.2d at 1369, was what Congress "forcefully" intended in IRCA. Accordingly, the Court reversed the Ninth Circuit's decision and remanded that case.

Of particular import in *NCIR* is that the burden of the no-work bond falls directly on the individual alien. The *NCIR* panel asserted that Congress could not possibly have wanted illegal

immigrants to "starve" while awaiting immigration proceedings. *NCIR*, 913 F.2d at 1368. This Court, reversing, apparently felt that Congress had contemplated that possibility, and felt that the overall purpose of protecting American workers and the generosity of America's immigration laws was sufficient justification to run that risk.

Nevertheless, faced with the question of whether sanctions could be applied directly to aliens themselves (as opposed to their employers), the court below said it was "bound" by *NCIR*, which it claimed stands for the proposition that sanctions on aliens, as opposed to employers, would not be consistent with congressional intent. *Arizona*, 641 F.3d at 358, J.A. 35a. The panel below found "it particularly relevant" that Congress heard testimony that an alien awaiting immigration proceedings should not "starve." 641 F.3d at 357, n. 17, J.A. 34a. That appears to be the very issue on which this Court reversed *NCIR*'s position against "no-work" bond conditions. The panel below, however, claimed "we do not believe that we can revisit our previous conclusion about Congress' intent simply because we are considering the effect of that intent on a different legal question," and cited *NCIR* reversal as "on other grounds." 641 F.3d at 357, J.A. 34a, 33a.[20] This seems clear error.

Nor are there other cases Respondent can rely on to support its "balance" theory. Just last Term, as noted above, this Court expressly rejected the "balance" theory in *Whiting* and vacated and

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[20] The Ninth Circuit's analysis was copied and expressly adopted by the District Court in Alabama to strike a similar section of Alabama's law. *United States v. Alabama*, 2011 WL 4469941, slip op. *23.

remanded *Hazleton*, which relied on the "balance" theory.

Judge Trott's dissent from the limited enforcement "balance" in *NCIR* echoes in *Whiting*. *Compare*, *NCIR*, 913 F.2d at 1375 ("The objective of [IRCA] was to stop illegal aliens from working, period.") *with Whiting,* 131 S.Ct. at 1983 ("The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban."). In contrast, nothing in *Whiting* supports the limited enforcement "balance" interpretation of Congressional intention offered below.

The Court should reverse the decision below because Congress would not consider the measures in Arizona's S.B. 1070 to be "too much" enforcement.

III. Plaintiffs' Preemption Theories Fail In Light of the Agency's Repeated Refusals to Enforce the Immigration Laws As Congress Intended

A. The "Tempered Enforcement" or "Balance" Theory Turns on Congressional Choices, Not on Administrative Enforcement Priorities.

Respondent has also claimed that the "balance" to be struck here is between choices made by the Executive agencies. As Judge Bea noted below: "It is Congress's intent we must value and apply, not the intent of the Executive Department, the Department of Justice, or the United States Immigration and Customs Enforcement." 641 F.3d at 369, J.A. 62a (Bea, J., concurring and dissenting).

President Obama first appeared to agree, at least in part, with Judge Bea's dissent, telling the Univision television network last month that: "the President doesn't have the authority to simply ignore Congress and say, 'We're not going to enforce the laws that you've passed.'"[21] The President then said, however, that "what we have the ability to do, and what we have systematically done, is to use our administrative authority to prioritize …" *Id.*

This distinction becomes much more pointed in light of the collapse in "interior enforcement" of the immigration laws since 1997. For a time after the 1986 enactment of IRCA, the federal enforcing agencies seemed to abide by the statutory priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law."[22] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration."[23]

By 1996, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by

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[21] Susan Crabtree, "Obama attacks GOP Hopefuls on Immigration," *The Washington Times*, January 27, 2012, A3.

[22] Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37.

[23] *Id*.

employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

In 1998, however, INS abandoned the "effective" strategy of "Operation Vanguard" *because* it was effective. "When the capability was realized, it was stopped." CRS, *Immigration Enforcement*, at 39; *see, also, id.*, at 61-62 (describing May 1998 INS "Immediate Action Directive for Worksite Enforcement Operations" ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id*. at 38, 62, not because Congress changed the law.

As a result, the reality[24] of worksite immigration enforcement has been substantially different from Congress's intention: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ."[25]

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[24] Indeed, it is difficult to know the reality of interior immigration law enforcement, since the enforcement agencies themselves are reluctant to reveal accurate information. The Transactional Records Access Clearinghouse at Syracuse University reports that "Case-by-case records provided by Immigration and Customs Enforcement (ICE) under the Freedom of Information Act (FOIA) show that many fewer individuals were apprehended, deported or detained by the agency than were claimed in its official statements." TRAC, "Agency's Immigration Enforcement Claims Not Supported By Own Data," January 4, 2012, http://trac.syr.edu/foia/ice/20120104/.

[25] U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration*

GAO's bland language masks the extent of the "decline." Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%.[26] The workplace enforcement figures have not rebounded since.[27]

One of the major reasons for the collapse in interior immigration law enforcement is that the enforcing agency has ordered itself not to enforce the law. Since June 2010, as President Obama noted last month,[28] ICE has issued four memoranda that

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Enforcement Weaknesses"), August 2005, GAO-05-813, at 30 (emphasis added).

[26] Sources: 1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5.

[27] Since FY 2005, there have been increases in worksite immigration law enforcement, but even the highest recent level (5,184 in FY2008) is still a "decline" of 70% from the FY1997 peak level. "Fact Sheet: Worksite Enforcement," April 30, 2009, www.ice.gov/news/library/factsheets/worksite.htm (latest available). *Amicus* AULDF filed a FOIA request for the workplace immigration law enforcement data for FY 2009 and 2010 (ICE FOIA Case Number 2010 FOIA5627, *reprinted* in AULDF's merits *amicus* brief in *Whiting*, No. 09-115 at App. 1.); the figures for FY 2009 and FY 2010 were both lower than FY 2008 (444 and 297 criminal arrests, respectively, and 1654 and 814 administrative arrests, respectively).

ICE nevertheless says on its "Fact vs. Fiction" page that: "For two years running, ICE has removed more aliens than it did under the prior Administration. Additionally, ICE removed 70 percent more convicted criminals than it did in 2008 under the prior Administration." www.ice.gov/news/fact-fiction.

[28] Crabtree, *supra*, note 19.

"systematically" retreat from vigorous enforcement in the guise of resetting "priorities."[29]

Under these memos, ICE enforcement policy is to release apprehended illegal immigrants unless they have serious criminal records or are national security risks. Immigration enforcement officials have cancelled the deportation of thousands of illegal immigrants.[30] The purpose, according to the U.S. Citizenship and Immigration Service: to "reduce the threat of removal for certain individuals present in the United States without authorization."[31]

> Bowing to pressure from immigrant rights activists, the Obama administration said Thursday that it will halt deportation

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[29] *See* generally, Janice Kephart, *Amnesty by any Means; Memos Trace Evolution of Obama Administration Policy*, Center for Immigration Studies, October 2011, available at www.cis.org/amnesty-by-any-means-memos. "Analysis of a series of leaked memos from within the Department of Homeland Security's highest ranks shows that the Obama administration has sought for the last year and a half to form a strategy to achieve amnesty for the illegal population without input from Congress."

[30] See Julia Preston, "Immigration Agency Ends Some Deportations," *The New York Times*, Aug. 27, 2010, A14, www.nytimes.com/2010/08/27/us/27immig.html?_r=1&scp=1&sq=Immigration%20Agency%20Ends&st=cse; See also, Susan Carroll, "Feds Moving to Dismiss Some Deportation Cases," *The Houston Chronicle*, August 24, 2010, www.chron.com/disp/story.mpl/special/immigration/7169978.html ("The Department of Homeland Security is systematically reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal immigrants who have no serious criminal records.")

[31] Kephart, *supra*, *quoting* June 10, 2010 memorandum from USCIS General Counsel's office to USCIS Director Alejandro Mayorkas.

> proceedings on a case-by-case basis against illegal immigrants who meet certain criteria, such as attending school, having family in the military or having primary responsible for other family members' care. … "The Obama administration should enforce immigration laws, not look for ways to ignore them," said [House Judiciary Committee Chairman] Rep. Lamar Smith, Texas Republican. "The Obama administration should not pick and choose which laws to enforce."[32]

The policy changes left "many of ICE's rank-and-file agents wondering who then is responsible for tracking down and detaining the millions of other illegal border-crossers and fugitive aliens now in the country".[33] "[S]ome agents were afraid to make any arrests."[34] The labor union representing ICE agents and employees voted a series of unanimous "no confidence" condemnations, charging ICE leadership with "abandon[ing] the agency's core mission of enforcing U.S. immigration laws and providing for public safety'".[35]

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[32] Stephen Dinan, "Obama to Deport Illegals by 'Priority'", *The Washington Times*, August 18, 2011, A1, www.washingtontimes.com/news/2011/aug/18/new-dhs-rules-cancel-deportations/.

[33] Jerry Seper, "Lack of resources curtails ICE tracking of illegals," *The Washington Times*, Aug. 8, 2010, P. A1, www.washingtontimes.com/news/2010/aug/8/lack-of-resources-curtails-ice-tracking-illegals.

[34] Julia Preston, "Agents' Union Stalls Training on Deportation Rules," *The New York Times*, January 7, 2012, A15.

[35] Jerry Seper, "Agents' Union Disavows Leaders of ICE," *The Washington Times*, Aug. 9, 2010, P. A1,

Thus, there is, in fact, little or no interior immigration law enforcement for the vast majority of millions of illegal immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. If other illegal immigrants are apprehended, they are to be released, not deported.

No matter what Congress intended as "federal priorities," the enforcement agency has decided that immigration enforcement in the interior of the United States is not its priority. This cannot be what Congress meant when it declared "immigration law enforcement is as high a priority as other aspects of Federal law enforcement". H.R. Rep. 104-725, at 383.

B. The Impact of the Immigration Enforcement Collapse Falls Most Heavily on American Low-Income Workers.

Illegal immigration is not a free and fair economic exchange; it always involves illegality and often involves coercion, as Congress noted in 1996, when it increased the penalties for harboring under § 1324. 141 CONG. REC. H1590 (Feb. 10, 1995) ("slave trade"). As Justice Brennan noted, it also imposes substantial costs on those least able to bear the burden. *De Canas v. Bica*, 424 U.S. at 356-57.

Given the lack of any realistic enforcement threat, employers apparently choose to preferentially hire illegal immigrants. "[N]atives account for 61 percent of the net growth in the number of people 18 to 64 in the United States, yet they earned only 9

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www.washingtontimes.com/news/2010/aug/9/agents-union-disavows-leaders-of-ice/.

percent of the net increase in jobs between March 2000 and March 2005."[36] "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent."[37]

This wage decrease is not equally shared. Professor Borjas noted that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers."[38]

The District Court in *Whiting* recognized this concern:

> People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among

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[36] Steve Camarota, *Dropping Out: Immigrant Entry and Native Exit From the Labor Market 2000-2005*, Center for Immigration Studies, 2006, www.cis.org/node/264.

[37] Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, at 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

[38] CBO Study, *supra*, 23-24; s*ee, also*, Steven Camarota, *From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007 to 2010*, Center for Immigration Studies, Aug. 27, 2010, www.cis.org/bad-to-worse.

> those competing social and economic interests. ...
>
> Those who suffer the most from unauthorized alien labor are those whom federal and Arizona law most explicitly protect. They are the competing lawful workers, many unskilled, low-wage, sometimes near or under the margin of poverty, who strain in individual competition and in a wage economy depressed by the great and expanding number of people who will work for less. (Facts Ex. 22I at 1.)

Ariz. Contractors Ass'n v. Napolitano, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, Dec. 21, 2007, 2007 WL 4570303, at *6.

There is some authority that the failure of federal enforcement alone can justify state action:

> And [*Pennsylvania v.*] *Nelson*[, 350 U.S. 497, 500 (1956)] stated that even in the face of the general immigration laws, States would have the right 'to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct.

De Canas v. Bica, 424 U.S. at 362-63.

But it may not be necessary to reach that point. Traditional conflict preemption doctrines negate Respondent's "balance" argument. Absent clear congressional ouster, States have the authority to act to prevent these "local problems." *De Canas v. Bica*, 424 U.S. at 356-57; *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). It is not enough just to have "strong

evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982).

As shown above, Congress has consistently attempted to increase enforcement to protect American workers. In 1986, in Judge Trott's view, "The objective of this Act [IRCA] was to stop illegal aliens from working, period." In 1996, Congress strengthened penalties for harboring and called for state cooperation in enforcement because "illegal aliens do not have the right to remain in the United States undetected and unapprehended". H.R. Rep. 104-725 (1996), at 383. In particular, Congress provided for concurrent state RICO law enforcement: "The fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one." *Mohawk Indus.*, 465 F.3d at 1292.

There is, on the other hand, no evidence at all that Congress intended low-income American workers to bear the brunt of the collapse of immigration law enforcement. *Sure-Tan, Inc. v. NLRB,* 467 U.S. at 892-93 (a "primary purpose in restricting immigration is to preserve jobs for American workers").

C. The Unauthorized Failure to Enforce Immigration Laws Should Not Be Considered a Federal "Priority" Sufficient to Oust Arizona's Legitimate Interests in Protecting Its People.

Nor does preemption analysis credit mere agency pronouncements. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979) (internal agency rules

without certain safeguards do not have the force of law). "[A]gency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Id., quoting NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 764 (1969).

ICE took none of the steps necessary to effectuate a legislative rule when it promulgated the Morton memoranda. Even if it had tried to issue a legislative rule, ICE does not have the authority to decide not to enforce the immigration laws. *See, Lousiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986) ("we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."). ICE simply decided on its own and without authorization to cease interior immigration law enforcement and deportations.

This Court should not credit an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965); *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008)("agency nonenforcement of a federal statute is not the same as a policy of approval.").

Only Congress should decide to cease enforcement. Because Congress has done no such thing, the agency is acting *ultra vires*. As Judge Bea pointed out in dissent:

> The majority's arguments … [are] consistent with only one premise: the complaining federal authorities do not want to enforce the immigration laws regarding the presence of illegal aliens, and do not want any help from the state of Arizona that would pressure federal officers to have to enforce those immigration laws. With respect, regardless what may be the intent of the Executive, I cannot accept this premise as accurately expressing the intent of Congress.

641 F.3d at 382 (Bea., J., concurring and dissenting).

In light of the collapse of interior immigration law enforcement, to adopt the agency's position is to do what the District Court in *Whiting* warned about: declare that "we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate." *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008). There is no evidence that "ineffective enforcement" was Congress's intent in 1986, in 1996, or today.

The Ninth Circuit's ruling that those "priorities" supersede State law is tantamount to saying that an agency's unauthorized decision not to enforce the law operates as a "clear and manifest purpose of Congress" sufficient to preempt State law. *De Canas,* 424 U.S. at 357. This will confuse the lower courts.

The question of how much enforcement is "too much" is central to this case. There is no support in the text or legislative history for a "tempered

enforcement" policy, and much evidence that Congress intended a vigorous and "forceful" immigration law enforcement effort to protect American workers and to protect generous immigration laws. Nor are there any decisions of this Court to support a "tempered enforcement" policy; instead there are three decisions, including two last Term, rejecting such an interpretation. It would appear difficult to justify the decision below, yet the "tempered" or "balanced" enforcement theory circulates in the lower courts.

Even though the Petitioners' opening brief does not sharply address this point, the Court should clarify that the lower courts may not use the "tempered" or "balanced" enforcement theory to preempt state laws. Congress is entitled to decide whether to permit illegal immigrants to "starve" or become "homeless;" the lower courts are not entitled to reverse that choice. Nor is the Executive Branch, either directly or in the guise of resetting priorities. In neither event is there a "clear and manifest" indication that Congress intended to preempt state laws like Arizona's.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the decision below.

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