No. 13-706

In the Supreme Court of the United States

FREDERICK COUNTY BOARD OF COMMISSIONERS, SHERIFF CHARLES JENKINS, AND DEPUTY SHERIFFS JEFFREY OPENSHAW AND KEVIN LYNCH,

Petitioners,

v.

ROXANA ORELLANA SANTOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether federal law preempts the brief detention of an alien by a local police officer, pursuant to a federal warrant, for the purpose of contacting Immigration and Customs Enforcement to determine if the alien should be taken into custody, when it is unknown whether the alien's violation of federal immigration law was criminal or civil.

2. Whether the Fourth Amendment prohibits a brief investigative stop of an alien when the law enforcement officer reasonably suspects that the alien has committed a violation of federal immigration law, regardless of whether it is civil or criminal in nature.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum")[1] is a nonprofit organization founded in 1981. From its inception,

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* lodged the parties' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

Eagle Forum has consistently: defended American sovereignty and promoted adherence to the U.S. Constitution; opposed unlawful behavior, including illegal entry into and residence in the United States; stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Roxana Orellana Santos brings suit against officers of Frederick County, Maryland (collectively, the "County") for their detaining her under a federal immigration warrant for immediate deportation.[2] The panel held that the warrant was civil – rather than criminal – and thus *per se* did not trigger the government interest needed to detain her under the Fourth Amendment. In addition, because the specific County officers who detained her were not operating under federal supervision pursuant to 8 U.S.C. §1357(g), the panel found the detention preempted by the panel's understanding of federal immigration

[2] On the day of her detention by the County, "[Ms.] Santos was the subject of an Immigrations and Customs Enforcement ('ICE') warrant for immediate deportation," and – after the County turned her over to ICE for questioning – ICE detained her for more than a month in jail. *Santos v. Frederick County Bd. of Comm'rs,* 884 F. Supp. 2d 420, 424-25 (D. Md. 2012). She "was not deported, and the record does not reveal her current immigration status." *Id.* at 425.

law under *Arizona v. U.S.,* 132 S.Ct. 2492 (2012). *Amicus* Eagle Forum respectfully submits that this expansive reading of *Arizona* overturns not only the recent decision in *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968 (2011), but also the unanimous decision in *DeCanas v. Bica,* 424 U.S. 351 (1976). This Court's review is needed to cabin the *Arizona* holding to its specific context, while affirming that state and local government retain their longstanding law-enforcement authority unless Congress has acted to exclude them.[3]

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever the two conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Two presumptions underlie preemption cases. First, courts presume that

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[3] *DeCanas* affirmed that states retain their traditional police powers, even when they act with regard to illegal aliens, except when Congress affirmatively prohibits their actions or the state action itself regulates immigration (*i.e.,* who enters the Nation and the terms for their remaining here). *Whiting* rejected preemption challenges to state-law licensing sanctions under 8 U.S.C. §1324a(h)(2) against those who employ illegal aliens and a state-law mandate that employers use the federal E-Verify program, notwithstanding that program's voluntary nature under federal law. *Arizona* relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and relied on conflict preemption to invalidate (1) state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably believed to be removable from the United States.

statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas,* 424 U.S. at 354, this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355. Standing alone, the mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* Instead, in the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe,* 457 U.S. 202, 225 (1982).

The Fourth Amendment prohibits unreasonable searches and seizures by the federal government, U.S. CONST. amend. IV, and the Fourteenth Amendment's Due Process Clause, *id.* amend. XIV, §1, cl. 3, incorporates those protections against state and local government to the same extent as the Fourth Amendment's protections against federal

searches and seizures. *Mapp v. Ohio,* 367 U.S. 643, 655 (1961); *Ker v. California,* 374 U.S. 23, 30 (1963). Although it applies primarily in the context of criminal law, the Fourth Amendment also applies to non-criminal contexts as well. *Camara v. Municipal Court of San Francisco,* 387 U.S. 523, 534 (1967) (administrative searches). In one of the relatively few contexts allowing arrest for non-criminal conduct, deportable aliens have been subject to arrest since 1798. *Abel v. U.S.,* 362 U.S. 217, 233 (1960) (*citing* Act of June 25, 1798, c. 58, §2, 1 Stat. 571), notwithstanding the Fourth Amendment.

Statutory Background

As the Fourth Circuit recognized, the federal Immigration and Naturalization Act ("INA") – as amended by the Immigration Reform & Control Act of 1986 ("IRCA") and the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRIRA") – expressly provides for state and local enforcement of various immigration-law provisions. Pet. App. at 20 (*citing* 8 U.S.C. §§1103(a)(10), 1252c(a), 1324(c)). The Fourth Circuit panel apparently based its preemptive reading on 8 U.S.C. §1357(g), which provides a program for state and local government's performing federal immigration functions under federal officials' supervision. *Id.* In expressly authorizing this form of cooperation with federal immigration authorities, however, Congress also included a "savings clause" so that state and local officers could "otherwise … cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U.S.C. §1357(g)(10)(B),

notwithstanding that they had not entered "an agreement under this subsection." *Id.* §1357(g)(10).

SUMMARY OF ARGUMENT

As signaled above, this case requires this Court to reconcile *Arizona* with *Whiting* and *DeCanas* to determine state and local government's latitude to act on immigration issues. *Amicus* Eagle Forum argues that federal law does not displace state authority unless Congress does so with clear and manifest intent, which is utterly lacking here, given not only §1357(g)'s savings clause but also the presumption against preemption (Section I), particularly in light of the absence here of any of the supporting legislative history that the *Arizona* majority found dispositive (Section II). Last, *amicus* Eagle Forum argues that the Fourth Amendment aspect of the Fourth Circuit panel's decision not only chills enforcement of immigration laws by *all levels* of government but also chills state and local enforcement in non-immigration civil contexts such as child-support warrants (Section III).

ARGUMENT

I. NEITHER THE INA NOR DORMANT FEDERAL POWER OVER IMMIGRATION PREEMPTS A COUNTY'S DETAINING ILLEGAL ALIENS UNDER A FEDERAL WARRANT

As a general rule under the federalist system of "dual sovereignty," "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990). In fields like immigration, however, where

Congress has "superior authority in this field," Congress can displace the states' dual sovereignty by "enact[ing] a complete scheme of regulation" such that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941). As indicated in the Constitutional Background, *supra,* federal statutes can preempt state and local actions either expressly or impliedly, with implied preemption consisting of either federal occupation of an entire field or a sufficient conflict between state and federal law. In addition, certain very rare forms of regulation would have the Constitution itself preempt state or local action. The following subsections establish that neither form of preemption applies here.

A. The Constitution Does Not Preempt the County's Actions

As long as the County's actions did not constitute the "regulation of immigration" in conflict with the plenary power of Congress to regulate immigration, U.S. CONST. art. I, §8, cl. 4; *DeCanas,* 424 U.S. at 354, the mere fact that the County took action that "in any way deal[t] with aliens" will not render its actions "*per se* pre-empted by this constitutional power." *DeCanas,* 424 U.S. at 355. To the contrary, with immigration law, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler,* 457 U.S. at 225. The County stayed well within those lines here.

To violate the *Constitution* as opposed to federal immigration law, state or local action must regulate immigration itself, which "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas,* 424 U.S. at 355. Here, the County simply detained Ms. Santos *under a federal warrant,* after confirming that the warrant was still active. Ms. Santos cannot rely on the unexercised constitutional *authority* of Congress – as distinct from particular congressional enactments like INA, IRCA, or IIRIRA – to find preemption under the Constitution.

B. Federal Law Does Not Preempt the County's Actions

Even in the immigration context, federal laws are not preemptive absent "persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *DeCanas,* 424 U.S. at 356. Whereas *Arizona* involved state enforcement priorities that *differed* from federal priorities, here the County assisted federal authorities pursuant to a federal request. "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *N.Y State Dept. of Social Services v. Dublino,* 413 U.S. 405, 421 (1973). To be sure, that identity of state and federal interests is by no means *required.* It is more than enough if state or local action "*closely* tracks [federal law] in all *material* respects." *Whiting,* 131

S.Ct. at 1981 (emphasis added). Here, the County did no more than detain Ms. Santos subject to a federal warrant, after confirming the warrant still was active. As explained in this action, no form of federal preemption applies.

1. The Presumption against Preemption Applies Here

The Fourth Circuit held that state or local law-enforcement officers required "*express direction or authorization* by federal statute or federal officials" to "detain or arrest an individual solely based on known or suspected civil violations of federal immigration law." App. 23 (emphasis added). By limiting state and local officers to express federal commands and permission, the Fourth Circuit panel created a presumption *of* preemption in place of the applicable presumption *against* preemption.

To be sure, Congress can write laws that create a presumption *of* preemption, as this Court has held with regard to the National Labor Relations Act ("NLRA"). NLRA cases rely on "a presumption of federal pre-emption" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54,* 468 U.S. 491, 502 (1984). Congress did not, however, write the INA to mirror the NLRB's preemption regime, or *DeCanas* and *Whiting* would have come out the opposite way. Under the circumstances, "absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council,*

Inc., 470 U.S. 116, 128 (1985). As such, Ms. Santos cannot invoke NLRB cases and NLRB-style preemption, which would "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* The Fourth Circuit panel plainly erred by setting too low a threshold for preemption.

Contrary to the Fourth Circuit's holding, all fields – particularly ones traditionally occupied by state and local government – at least initially benefit from a presumption *against* preemption. *Wyeth v. Levine,* 555 U.S. 555, 565 (2009). Under this presumption, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565. Even where Congress preempted *some* state action, the presumption against preemption still would apply to determine the *scope* of preemption. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996). Federal courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). Thus, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.; Santa Fe Elevator,* 331 U.S. at 230. "When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70,

77 (2008) (interior quotations omitted). The County's actions in cooperation with federal immigration authorities easily can be read to coexist with INA.

2. Immigration Law Does Not Conflict-Preempt Non-Federal Civil Detentions under Federal Warrants

Conflict preemption includes "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because the County's actions do not prevent or frustrate any federal objection, much less conflict with federal law, conflict preemption does not apply.

Significantly, this "prevent-or-frustrate" branch of the preemption analysis creates the real danger – from a separation-of-powers perspective – of the Judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137, 153 (1984). Conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Whiting,* 131 S.Ct. at 1985 (interior quotations omitted). *Amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative

history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (Thomas, J., concurring). This Court should reject any strained frustration of federal objectives here.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Moreover, detaining Ms. Santos under a federal warrant cannot frustrate congressional purpose in INA because the Supremacy Clause does not require *identical* standards. *Whiting,* 131 S.Ct. at 1981 (quoted *supra*). While *Arizona* reached a different result with respect to employee-based sanctions for illegal aliens, Ms. Santos cannot make the same claims here, where INA lacks both statutory text and legislative history comparable to the employment-related text and history that drove the *Arizona* decision.

Specifically, in distinguishing *Arizona* from *DeCanas,* the Court explained that "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona,* 132 S.Ct. at 2504 (rejecting employee-based criminal sanctions). Prior to IRCA's amendments, INA would have allowed both employee- and employer-based sanctions under *DeCanas.* According to *Arizona,* however, Congress considered and rejected employee-based sanctions in IRCA's amendments: "Proposals to make unauthorized work a criminal

offense were debated and discussed during the long process of drafting IRCA … [b]ut Congress rejected them." *Arizona,* 132 S.Ct. at 2504 (citing legislative history). The Court relied on "the text, structure, and history of IRCA" to conclude "that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Arizona,* 132 S.Ct. at 2505. Unlike the distinction between employer- and employee-based sanctions in *Arizona,* nothing in the legislative history here provides Ms. Santos or the Fourth Circuit a basis to argue that Congress considered and rejected unsupervised state and local detentions pursuant to federal warrants.

Because the presumption against preemption continues to apply, *Wyeth,* 555 U.S. at 565, this Court must presume that Congress did not intend IIRIRA to displace state and local authority *sub silentio. Santa Fe Elevator,* 331 U.S. at 230. To read *Arizona* to extend beyond employment would unmoor that decision from its authority, its reasoning, and even the text of that decision. *Arizona* did not change the analysis of preemption law generally, and it did not change how preemption law applies to immigration generally. In pertinent part, *Arizona* simply deemed IRCA to have intended to displace employee-based sanctions. As explained in Section II, *infra,* that plainly does not apply here, where §1357(g)(10)(B) expressly saves state and local authority.

The other *Arizona* conflict-preemption issue involved a state statute that authorized state officers to decide whether to detain aliens as removable –

without a federal determination of removability – which violated INA's entrusting the removal process to federal discretion. *Arizona,* 132 S.Ct. at 2506. While *Arizona* requires the Nation to speak "with one voice" – the federal voice – with respect to who is removable, *Arizona,* 132 S. Ct. at 2506-07, *Arizona* does not require the federal government to accomplish its commands with only its own arms. State and local government can lend their arms to advance the removal of those whom the federal government declares – here, through a warrant, no less[4] – to be removable.

3. Congress Has Not Field-Preempted Non-Federal Civil Detentions under Federal Warrants

Field preemption precludes state and local regulation of conduct in a field that Congress – acting within its proper authority – has carved out for exclusive federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 115 (1992). Relatively recently, this Court has recognized that statutes that have both express preemption and a savings clause nonetheless still can trigger conflict preemption. *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 352 (2001). As explained in this section, however, that same flexibility does not apply to finding field preemption in statutes with a

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[4] While it did not resolve the exact contours of permissible cooperation, *Arizona* included state or local officers' "provid[ing] operational support in executing a warrant" as permissible cooperation. *Id.* at 2507.

savings clause. And it especially does not apply to field preemption under §1357(g).

If Congress enacted Statute B to amend Statute A and included a savings clause in Statute B, it might theoretically have been possible that a court would have found field preemption under Statute A, even before Statute B's enactment. In that sense, Statute B's savings clause saved nothing. *See* BLACK'S LAW DICTIONARY 1344 (7th ed. 1999) (defining savings clauses as "statutory provision[s] exempting from coverage something that would otherwise be included"). In litigation under Statute B, the party opposing preemption would argue that the new savings clause suggests that Congress believed that Statute A did not already field preempt the issue, which is "entitled to great weight in statutory construction," *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-381 (1969), and which avoids the canon against reading a statutory provision as mere surplusage. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used"). The party opposing preemption also could cite the presumption against preemption as counseling for an interpretation that Congress did not intend to extinguish state and local authority. *Wyeth,* 555 U.S. at 565-66 & n.3. While the party opposing preemption appears to have the better argument under these hypothetical statutes, the County plainly has the better argument here.

The difference between the prior hypothetical and this present case is that, here, there is only one statute, and it has a savings clause. Consequently,

all the same authorities – *Red Lion, Reiter, Wyeth* – continue to apply. But so too does the canon that a statute's text "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp.,* 507 U.S. at 664. Congress said that nothing in section §1357(g) would preempt state and local government's operating under other, pre-enactment authority. 8 U.S.C. §1357(g)(10). That plainly means §1357(g)(3) cannot field preempt the County here.

II. IMMIGRATION LAW'S LEGISLATIVE HISTORY SUPPORTS THE COUNTY'S INTERPRETATION THAT FEDERAL LAW DOES NOT DISPLACE LOCAL AUTHORITY

This Court's review also is needed to ensure that lower courts do not extend *Arizona* beyond the very specific context in which it arose. In *Arizona,* 132 S.Ct. at 2504-05, this Court relied on the legislative history of INA's *employer-based* sanctions to hold that Congress intended to foreclose *employee-based* sanctions like the Arizona law challenged there. By contrast, the panel here cites nothing more than the statutory structure of §1357(g) to determine that Congress affirmatively intended to foreclose state and local action unless state and local government acted pursuant to the type of federal supervision contemplated in §1357(g).

Amicus Eagle Forum respectfully submits that this type of repeal by implication of pre-existing state and local authority requires *clear and manifest* congressional intent, whether viewed under preemption law, *Santa Fe Elevator,* 331 U.S. at 230, or as a repeal by implication. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662

(2007). When faced with a statute open to both a preemptive and non-preemptive reading, Congress would expect – *i.e.,* intend – a reviewing court to adopt the non-preemptive reading. *Altria Group,* 555 U.S. at 77; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). To complete the required analysis, *amicus* Eagle Forum reviews the statutory text and legislative history. Neither supports Ms. Santos, and especially not to the clear and manifest extent required for her to prevail.

First, the statute itself does not support Ms. Santos' and the panel's reading. Although §1357(g) provides for various types of agreements under which the federal government can work with state and local officers, 8 U.S.C. §1357(g), the specific provision on which the panel relied – namely, §1357(g)(3), *see* Pet. App. 19 – requires federal supervision only for when the state or local officer is "performing a function *under this subsection.*" 8 U.S.C. §1357(g)(3) (emphasis added). By its terms, that says nothing about state or local action not performed under §1357(g).

For state and local actions taken outside of §1357(g), Congress expressly saved state and local authority:

> *Nothing in this subsection shall be construed to require* an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State … otherwise to cooperate with the

> Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the [U.S.].

8 U.S.C. §1357(g)(10)(B) (emphasis added). Thus, the text does not reflect the panel's analysis that §1357(g)(10) authorizes state and local cooperation only under federal supervision through §1357(g)(3).

Second, unlike in *Arizona,* the legislative history does not support giving preemption a wider scope than the statutory text standing alone. The language of what became §1357(g)(10) was the same in both the House and Senate bills, *compare* H.R. 2202, 104th Cong., 2d Sess. §122 (Apr. 15, 1996) *with* S. 1664, 104th Cong., 2d Sess. §184 (Apr. 10, 1996), and the committee reports were silent on its impact. S. REP. NO. 104-249, at 20 (Apr. 10, 1996); H.R. CONF. REP. NO. 104-828, at 203 (Sept. 24, 1996).[5] Under the circumstances, Ms. Santos cannot rely on legislative history in the way that the *Arizona* plaintiffs could.

In summary, neither the statutory structure nor the legislative history supports reading §1357(g) to displace pre-existing state and local authority to detain illegal aliens under federal immigration

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[5] Although successfully reported out of conference, the IIRIRA bill – H.R. 2202 – was not enacted. Instead, IIRIRA was folded into an omnibus bill, reported without change, and enacted as part of the omnibus bill. H.R. CONF. REP. NO. 104-863, at 688 (Sept. 28, 1996); PUB. L. NO. 104-208, Div. C, §133, 110 Stat. 3009, 3009-563 to 3009-564 (1996). Courts routinely rely on legislative history from predecessor bills, *Begier v. I.R.S.,* 496 U.S. 53, 66 & n.6 (1990), and this Court has relied on IIRIRA's Conference Report. *INS v. St. Cyr,* 533 U.S. 289, 318 (2001). Thus, the legislative history of H.R. 2202 is the legislative history of IIRIRA.

warrants. This case thus is distinguishable from the treatment of employee-based sanctions in *Arizona,* and it certainly does not meet the stringent requirements for repeal by implication.

III. CRIMINAL CONDUCT IS NOT A PREREQUISITE TO CONSTITUTIONAL DETENTIONS UNDER EITHER FEDERAL IMMIGRATION LAW OR ANY OTHER ASPECT OF FEDERAL OR STATE LAW

This Court's review is required to eliminate the chill on law-enforcement activities by all levels of government in the Fourth Circuit and the confusion of government authority for law enforcement in other Circuits. Even if this Court were to uphold the Fourth Circuit, that result at least would clarify state and local authority in our federalist system.

A. The Panel Decision Undoes Centuries of Immigration Law

With our Constitution's having taken effect just over 225 years ago, few legal errors even have the opportunity to go against *centuries* of settled law. Immigration law has allowed detentions on civil warrants since 1798. *Abel,* 362 U.S. at 233. Further, absent federal law to the contrary, state officers' authority to make *arrests* under federal law is a question of state law, not federal law. *U.S. v. Di Re,* 332 U.S. 581, 589 (1948). These long-settled precedents establish two reasons why this Court's intervention is essential to resolve confusion in immigration law specifically.

First, for state and local enforcement, this Court should clarify whether there is indeed a federal law that limits the authority of state and local officers to

make arrests: "*in absence of an applicable federal statute* the law of the state where an arrest without warrant takes place determines its validity." *Di Re,* 332 U.S. at 589 (emphasis added). For the reasons explained in Sections I-II, *supra,* §1357(g) most emphatically is not such a law. And yet, state and local officers and the governments that they serve will face crippling liability under 42 U.S.C. §1983 if they act under the longstanding authority to make arrests pursuant to federal law. To avoid chilling these co-equal sovereigns' police power under our federalist system, this Court must grant review.

Second, the Fourth Amendment aspect of the panel decision is equally troubling for *federal* enforcement. The Fourth Amendment originally bound only the federal government, but was applied to the states by the Fourteenth Amendment. *Mapp,* 367 U.S. at 655. Because the Fourth Amendment thus applies equally to all levels of government, the panel's no-crime-afoot restrictions on Fourth Amendment detentions apply equally to federal authorities. If allowed to stand, the panel's decision would undo 200 years of immigration law.

B. The Panel's Decision Chills State and Local Law Enforcement in All Civil Contexts

As indicated in the prior subsection, prohibiting non-federal civil immigration detention spills over to prohibit *federal* civil immigration detentions as well, because the Fourth Amendment applies equally to all levels of government. Similarly, the Fourth Circuit's holding also chills civil detentions by state and local law enforcement in *non-immigration*

contexts, *see, e.g., State v. Stowell,* 286 Kan. 163, 167, 182 P.3d 1214 (Kan. 2008) (child-support warrants), because the same no-crime-afoot rationale applies to these other civil contexts. Pet. App. 23. In order to avoid chilling valid law-enforcement activity pursuant to civil warrants throughout the Fourth Circuit and confusing that activity nationwide and in the courts in other Circuits, this Court should settle this matter expeditiously. *See* S. Ct. Rule 10(c).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

January 13, 2014

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*