No. 14-825

In The
Supreme Court of the United States

COUNTY OF MARICOPA;
JOSEPH M. ARPAIO, Maricopa County Sheriff;
WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioners,

v.

ANGEL LOPEZ-VALENZUELA;
ISAAC CASTRO-ARMENTA,

Respondents.

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

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

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar, DC Bar pending; under direct supervision of DC Bar member)

Attorney for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS*[1]

Amicus, Immigration Reform Law Institute ("IRLI"), assists in the representation of cities, states, municipalities and government officials in immigration related actions. *Amicus* IRLI also supports states' ability to take limited actions to confront real problems they face from illegal immigration. IRLI has filed multiple *amicus curiae* briefs addressing the authority of state and local governments in immigration related matters. *See Arizona v. Valle del Sol*, No. 13-806, *cert. denied*, 134 S. Ct. 1876 (2014); *Arizona v. United States*, 132 S. Ct. 2492 (2012), *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). IRLI has also petitioned this Court for cities on similar matters. *See*, *e.g.*, *City of Hazleton v. Lozano*, 10-772, *cert. granted, judgment vacated, case remanded*, 131 S. Ct. 2958 (2011); *Frederick County Bd. of Comm'rs v. Santos*, No. 13-706, *cert. denied*, 134 S. Ct. 1541 (2014).

While *amicus* agrees with all points raised in the Petition for Certiorari, this *amicus curiae* brief is focused on the Ninth Circuit's en banc substantive

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

due process holding that is inconsistent with this Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003).

REASONS FOR GRANTING THE WRIT

I. THE EN BANC PANEL'S OPINION CONFLICTS WITH *DEMORE V. KIM*

In *Demore v. Kim*, 538 U.S. 510 (2003), this Court upheld a challenge to the mandatory detention of certain criminal aliens during removal proceedings pursuant to 8 U.S.C. § 1226(c). Petitioners correctly recognize that the substantive due process portion of the Ninth Circuit's en banc panel's opinion conflicts with *Demore* because it invalidates Proposition 100 following reasoning that *Demore* considered and rejected. Pet. 11. However, the en banc opinion is inconsistent with *Demore* in two additional ways.

The en banc panel identified three considerations on which it claimed this Court focused in upholding the pretrial denial of bail authorized by the Bail Reform Act. Pet. App. 19a (*citing United States v. Salerno*, 481 U.S. 739, 750 (1987)). Those considerations were that the denial of bail in *Salerno* (1) addressed "a particularly acute problem," (2) "operate[d] only [as to] individuals who ha[d] been arrested for a specific category of extremely serious offenses, where Congress had specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest," and (3) "the Act

required a full-blown adversary hearing at which the government was required to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* (internal quotation marks omitted). In applying these considerations to invalidate Arizona Proposition 100, the en banc panel misconstrued *Demore*'s holding and analysis. *See* Pet. App. 20a-34a.[2]

A. The En Banc Panel's Holding that Arizona is not Addressing an "Acute Problem" is Inconsistent with the Reasoning in *Demore.*

The en banc panel "[did] not question that Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial." Pet. App. 18a. However, the en banc panel found that there was "no evidence that the Proposition 100 laws were adopted to address [this] particularly acute problem" because, unlike in *Salerno* and *Demore*, "the record contain[ed] no findings, studies, statistics or other evidence (whether or not part of the legislative record) showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly

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[2] This *amicus* brief only addresses considerations "one" and "two" from the en banc panel's opinion. Consideration number "three," individualized hearings involving flight risk, has been adequately addressed by Petitioners.

greater flight risk than lawful residents." *Id.* To come to its conclusion, the en banc panel ignores evidence considered by this Court in *Demore* and ignores other record evidence or wrongly deems it not "credible."

In *Demore*, this Court primarily cited three pieces of evidence to support Congress's decision to deny bail to certain criminal aliens during immigration proceedings. *Demore*, 538 U.S. at 518. The first piece of evidence was a study indicating that deportable criminal aliens who remained in the United States often commit more crimes before being removed. *Id.* (*citing* Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). The second piece of evidence was an Inspector General Report which found that "one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Demore*, 538 U.S. at 519 (*citing* Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996)). The third piece of evidence was a Senate Report which found that "20% of deportable criminal aliens failed to appear for their removal hearings." *Demore*, 538 U.S. at 520 (*citing* S. Rep. No. 104-48, at 2).[3]

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[3] Recent data from immigration courts show a bleaker picture than that in *Demore*. "From 1996 through 2009, the

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The en banc panel did not credit Arizona with any of the *Demore* evidence in invalidating Proposition 100, which ignores the statutory interpretation principle that courts are to presume that a legislature is aware of existing law. *See Corley v. United States*, 556 U.S. 303, 315-16 (2009) (stating "we presume Congress was aware of existing law") (citations omitted); *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1979) ("Congress is presumed to be aware of an administrative or judicial determination of a statute. . . .") (citations omitted). In this case, that presumption is quite obvious. *Demore* was decided just three years prior to Proposition 100's passage. Thus, the *Demore* evidence was plainly available to the Arizona legislature when Proposition 100 was passed. Yet, the en banc panel does not explain why the above evidence cannot be used to support Proposition 100 – especially given the record evidence that Proposition 100 addressed the concern that criminal illegal aliens were flight risks. *See* Pet. 23-24. Instead, it cites to the *Demore* studies as a reason to *distinguish* this case from *Demore*. Pet. App. 20a n.5. In contrast, the original Ninth Circuit

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United States permitted 1.9 million aliens to remain free pending trial. Forty percent of this group never showed for trial. From this same group nearly one million aliens were ordered deported – and 78 percent of these orders were against those who evaded court." Mark H. Metcalf, *Built to Fail*, p. 12 (2015); *see also id.* at 70, n.40 (data used to calculate) (*available at* http://www.cis.org/sites/cis.org/files/articles/2011/built-to-fail-full.pdf).

panel correctly acknowledged in upholding Proposition 100 that this Court "has previously acknowledged that there is support for the proposition that criminal aliens pose a greater flight risk." Pet. App. 92a n.10.

Furthermore, the en banc panel ignores the "intuitive proposition" that illegal aliens arrested for serious offenses in Arizona would be at least as likely to avoid trial as they are to abscond from immigration proceedings. Pet. App. 92a n.10 ("There is no requirement that a legislature support an intuitive position borne out by anecdotal evidence with statistical studies."). Arizona could rightly assume this increased flight risk consistent with *Demore* because of the Department of Homeland Security's ("DHS") deportation priorities. Proposition 100's applicability is limited to individuals charged with class 1-4 felonies or with driving under the influence. *See* Pet. 2-3. Conviction for any of these crimes makes it more likely that an alien will be targeted for removal by DHS. *See* Memorandum from Jeh Johnson, Secretary, DHS, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, Alan D. Bersin, Acting Assistant Secretary for Policy, regarding *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, 3-4 (Nov. 20, 2014) (*available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf). Aliens who have been " 'convicted of an offense classified as a felony

in the convicting jurisdiction" and those "convicted of an 'aggravated felony'" are categorized as "Priority 1" and "removal of these aliens must be prioritized. . . ." *Id.* at 3. "[D]riving under the influence" is a "Priority 2" category offense and a conviction for that offense means the alien "should be removed. . . ." *Id.* at 4. Federal immigration enforcement has, at least since 2000, purported to focus on aliens who have committed serious crimes. *See* Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, regarding Exercising Prosecutorial Discretion, 7 (Nov. 17, 2000) (*available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view) (stating "[o]fficers should take into account the nature and severity of any criminal conduct" when exercising prosecutorial discretion). Because Proposition 100 is limited to the aliens that DHS most aggressively targets for removal, it would be logical to presume that aliens who would abscond from civil immigration courts to avoid removal would also avoid a criminal proceeding, especially considering a conviction would render the alien more likely to be removed.[4]

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[4] In rejecting Arizona's flight risk concern, the en banc panel considered that "many undocumented immigrants were brought here as young children and have no contacts or roots in another

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The record also contains additional anecdotal evidence that the en banc panel deemed not credible. Pet. App. 21a n.6. During the debate of Proposition 100, the Maricopa County Attorney stated that Arizona has a "tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding, and not facing trial for their crimes." Pet. App. 53a, 58a (*quoting Lou Dobbs Tonight* (CNN television broadcast Oct. 13, 2006). The dissent rightly noted that the Maricopa County attorney is on the "front line" in dealing with criminal illegal aliens, Pet. App. 58a, and should have insight into the unique problems his county faces where "[illegal] aliens are reported to be responsible for a disproportionate share of serious crime." *Arizona v. United States*, 132 S. Ct. 2942, 2500 (2012). Seventy-five percent of Arizonans apparently agreed that illegal aliens avoiding trial was a problem when they voted in favor of Proposition 100.[5] The dissent below

country. Many have 'children born in the United States' and 'long ties to the community.' " Pet. App. 27a (*quoting Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)). This Court rejected a similar argument. *Demore*, 538 U.S. at 515. What is more, *Demore* involved a challenge to 8 U.S.C. § 1226(c) by a lawful permanent resident, an alien in the category that the Ninth Circuit called "the most favored." *Id.* In contrast, this case concerns aliens whose status "is the product of conscious, indeed *unlawful*, action." *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (emphasis added).

[5] The en banc panel finds that the former Maricopa County attorney is not credible because he was disbarred six years after Proposition 100 passed. Pet. App. 21a n.6. In his proceedings, the only finding against the former county attorney that occurred prior to Proposition 100's passage was that he

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was incredulous that "an Article III court [would] tell Arizona, based on the record and considering the majority vote of the Arizona legislature and electorate in favor of Proposition 100, that its perceived problem is not really a problem." Pet. App. 59a. The en banc panel's decision which decides what is and what is not credible evidence for the legislature and the Arizona citizens to weigh represents "a slippery slope . . . which threatens the delicate balance between the judiciary and the people [it] serve[s]." Pet. App. 61a; *see also Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (courts "do not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . .").

B. The En Banc Panel's View that Certain Arizona Class 1-4 Felonies are "Relatively Minor" and thus Cannot Satisfy Due Process is Inconsistent with *Demore*.

The en banc panel's reasoning that Proposition 100 encompasses some "relatively minor" offenses and

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disclosed client information through a press release when he criticized the legal positions taken by Supervisors in two cases. *In re Thomas*, PDJ-2011-9002, 40-44 (2012) (*available at* http://www.azcourts.gov/Portals/9/Press%20Releases/2012/041012ThomasAubuchonAlexander_opinion.pdf). The disciplinary judge of the Arizona Supreme Court does not question the veracity of the press release.

thus cannot withstand constitutional scrutiny also conflicts with *Demore*. Pet. App. 23a.

The en banc panel begins its brief analysis by dismissing Arizona's judgment that offenses such as "unlawful copying of a sound recording, altering a lottery ticket with intent to defraud, tampering with a computer with the intent to defraud and theft of property worth between $3,000 and $4,000" are "serious felonies." The court instead deemed these offenses as "relatively minor." Pet. App. 23a. The court erred for two reasons.

First, the en banc panel fails to acknowledge that many of the offenses it singled out as being "relatively minor" actually have stricter punishments than offenses for which 8 U.S.C. § 1226(c) mandates detention. For example, the "unlawful copying or sale of sounds or images involving one hundred or more articles containing sound recordings . . . is a class 3 felony." Ariz. Rev. Stat. § 13-3705(H).[6] Likewise, the alteration of a lottery ticket "with the intent to defraud" is also a class three felony. Ariz. Rev. Stat. § 5-566. Class three felonies carry a presumptive three-and-one-half-year sentence. Ariz. Rev. Stat. § 13-3702(D). In contrast, 8 U.S.C. § 1226(c) mandates detention for deportable aliens convicted of "two or

[6] Three different thresholds of offenses exist for this crime, dependent on the number of articles unlawfully copied. Ariz. Rev. Stat. § 13-3705(H). Only the most serious violation, the copying of one hundred or more, is considered a class three felony. Ariz. Rev. Stat. § 13-3691.

more crimes involving moral turpitude . . . regardless of whether confined thereof . . . ", 8 U.S.C. § 1227(a)(2)(A)(ii), and for inadmissible aliens convicted of a crime involving moral turpitude with a minimum sentence of not less than one year and who, if convicted, was sentenced to more than six months' imprisonment. 8 U.S.C. § 1182(a)(2)(A)(i)-(ii). In short, the en banc panel's analysis creates the odd situation where it considers a crime that presumes a three-and-one-half-year prison sentence "relatively minor" while punishments of at least a year are part of "a specific category of extremely serious offenses" under federal law. Pet. App. 23a; *see also Hernandez v. Lynch*, 216 Ariz. 469, 480 (Ariz. Ct. App. 2007) ("Therefore, at the least, Proposition 100 does not impact criminal offenses that are less severe than those that were implicated by the federal statute in *Demore*.").

Second, the last crime the en banc panel references, "theft of property worth between $3,000 and $4,000," is actually a crime for which 8 U.S.C. § 1226(c) mandates detention. Section 1226(c)(1)(B) requires detention of aliens who are "deportable by reason of having committed any offense covered" in section 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii)). Section 1227(a)(2)(A)(iii) renders deportable "[a]ny alien convicted of an aggravated felony at any time after admission." The Ninth Circuit has previously construed the very Arizona statute the en banc panel is citing, Ariz. Rev. Stat. § 13-1802, to be an "aggravated felony." *See Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1170 (9th Cir. 2006).

Thus, under the en banc panel's own reasoning, the statute upheld in *Demore* should be constitutionally suspect. Pet. App. 23a. Every offense that the en banc panel cites, carries a stricter penalty than other crimes for which 8 U.S.C. § 1226(c) mandates detention. It also overlooks that one of the crimes that it cites has been held to be an aggravated felony, which also requires mandatory detention, by the Ninth Circuit. Given the multiple of analytical problems in the en banc decision, this Court should grant certiorari to resolve the conflicts the decision has caused.

II. THE EN BANC PANEL'S FACIAL CHALLENGE ANALYSIS IS INCONSISTENT WITH THIS COURT'S PRECEDENT

The en banc panel's decision to invalidate the entirety of Proposition 100 is inconsistent with this Court's instructions on facial challenges. Pet. App. 32a. To succeed in a facial challenge, Respondents had to establish that "no set of circumstances exist[ed] under which [Proposition 100] would be valid," *Salerno*, 481 U.S. at 745, and "that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Thus to successfully defend against a facial challenge, Arizona only had to present an application in which the challenged law would operate constitutionally. In *California Coastal Com. v. Granite Rock Co.*, 480 U.S. 572 (1987), decided the same year as *Salerno*, this Court explained how a court must analyze a facial challenge:

> Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow. Granite Rock argued that any state permit requirement, whatever its conditions, was per se preempted by federal law. To defeat Granite Rock's facial challenge, the Coastal Commission *needed merely to identify a possible set of permit conditions not in conflict with federal law*.

Id. at 593 (emphasis added); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) ("[B]ecause respondents challenged the [state] Rule on its face by seeking to enjoin its enforcement altogether, . . . they could not sustain their burden even if they showed that a possible application of the rule . . . violated federal law.").[7]

In this case, Petitioner provided numerous examples of how Proposition 100 could be applied constitutionally. Pet. 29-30. The en banc panel thus erred in invalidating the entirety of Proposition 100 when it has constitutional applications.

[7] Of course, an "as applied" challenge to Proposition 100 at a later date is always available to an aggrieved party if the statute at issue is unconstitutionally applied. *See Arizona*, 132 S. Ct. at 2510-11.

CONCLUSION

Amicus respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar,
DC Bar pending; under direct
supervision of DC Bar member)