No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff,

v.

STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, IN HER OFFICIAL CAPACITY
Defendants.

On Appeal from the United States District Court
for the District of Arizona, Case No. CV 10-1413-PHX-SRB
The Honorable Susan Bolton, United States District Judge

AMICUS CURAE BRIEF OF SENATE MAJORITY LEADER DEREK SCHMIDT AND HOUSE SPEAKER MICHAEL O'NEAL OF THE KANSAS LEGISLATURE IN SUPPORT OF DEFENDANTS AND PARTIALLY REVERSING THE DECISION OF THE DISTRICT COURT

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STATEMENT OF INTEREST

Derek Schmidt and Michael O'Neal are the Senate Majority Leader and the Speaker of the House, respectively, of the Kansas Legislature. Amici, like their counterparts in Arizona, are duly-elected state legislators vested with the power to help enact laws for the citizens of their state as authorized through their state and the federal constitutions. *See generally* KANSAS CONST., Art. II, §2; UNITED STATES CONST., Art. IV. As such, Amici file this brief as a matter of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

The ability of Kansas legislators to enact laws that protect their citizens under the state's general police power lies at the core of their constitutional duty and authority. This police power is not limited to the enactment of unique Kansas legislation. It must extend as well to the enforcement of federal law (including federal immigration law) that provides vital protection to Kansas citizens. *See generally De Canas v. Bica*, 424 U.S. 351, 357 (1976) (recognizing a state role in federal immigration law unless prohibiting such state action was "the clear and manifest purpose of Congress"). The position of the United States (and of the District Court) if affirmed on appeal would substantially diminish the constitutional authority of Amici to exercise such state legislative power by allowing federal preemption without "the clear and manifest purpose of Congress."

To argue against establishing such dangerous precedent striking at the constitutional fabric of federalism, Amici submit this brief.

ARGUMENT

I. The Right of States to Exercise Their Own Police Powers Is a Vital Part of the United States Constitution's Federal System.

A. The Ability of States to Govern Themselves and Protect Their Citizens Is the Hallmark of the Federal System Established by the United States Constitution.

The American system of federalism does not assume that Washington always knows best. Nor does it assume that only federal authorities can enforce national laws or protect American citizens. As James Madison wrote,

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

JAMES MADISON, THE FEDERALIST PAPERS NO. 45.

As Madison illustrated in Federalist #45, "Article 4, Section 4, of the Constitution of the United States guarantees to every state in the Union a republican form of government…." *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771, 789 (1963). *See also* UNITED STATES CONST., Amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or

disparage others retained by the people."); UNITED STATES CONST., Amend. X (Any powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Although the Supreme Court has expressed reticence about judicial enforcement of this constitutional provision, "recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[1] *New York v. United States*, 505 U.S. 144, 185 (1992).

Applying these constitutional principles, the Kansas Supreme Court, like its Arizona counterpart and countless other state courts across the country, has recognized the important role of state legislative action in our federal system.

> Under our form of government, all governmental power is inherent in the people. Some governmental powers are delegated to Congress, or to the federal government, by our federal Constitution. Those not so delegated are retained by the people. Hence Congress has no legislative power not granted to it by the federal Constitution. This is not true of a state Constitution. Since the people have all governmental power, and exercise it through the legislative branch of

[1] The Court found the Guarantee Clause nonjusticiable when California sought to use that Clause to recover funds from the federal government by claiming that "federal immigration policy has forced [California] to spend money that it would otherwise not have been required to spend." *State of California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997). Here, however, the United States is seeking to prevent Arizona from using its police powers to address "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns…." Dist. Ct. Opin. at 1. Unlike federal actions that merely force a state to spend money, prohibiting Arizona from exercising its inherent police power to promote public safety within its borders could "depriv[e] it of a republican form of government." *State of California*, 104 F.3d at 1091.

> the government, **the Legislature is free to act except as it is restricted by the state Constitution, and, except, of course, the grant of authority to the federal government by the federal Constitution…. [Otherwise], a legislative act… cannot be said to be unconstitutional.**

Lemons v. Noller, 63 P.2d 177, 180 (Kan. 1936) (quotations omitted) (emphasis added).

These federal principles are not mere puffery, lost in the sands of time and constitutional jurisprudence. They place real limits on national power and provide the authority underlying essential state actions. Nowhere is this fact more clear than in the preemption jurisprudence at the heart of this litigation.

Under Article VI of the Constitution, federal law usurps state authority when state law expressly conflicts with its federal counterpart. *See generally Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1039 (9th Cir. 2007). Strict limits exist, however, on such federal preemption. State law "can be enjoined only to the extent that it imposes obligations inconsistent with [federal law]. In a pre-emption case such as this, state law is displaced only to the extent that it actually conflicts with federal law." *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 474 (1996).

These limits on federal preemption are more pronounced when (as here) the United States attempts to invalidate state laws based on implied (rather than express) preemption. "In a dual system of government in which, under the

Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

B. The United States Constitution Grants States Broad Powers to Regulate Law and Order within Their Borders.

Federal preemption is used even more sparingly when it attempts to limit the exercise of a state's police powers. As the Court knows well, any powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." UNITED STATES CONST., Amend. X. As such, it is well established that the United States government does not possess (and may not exercise) a general police power. *See generally Hamilton v. Kentucky Distilleries and Co.*, 251 U.S. 146, 156 (1919).

By contrast, a fundamental basis for state authority lies in its general police powers. *See Brown v. Brannon*, 399 F.Supp. 133, 147 (M.D.N.C. 1975). States exercise their general police powers (as Arizona has here) to enact laws that promote public safety and order within their borders. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

Accordingly, the Supreme Court carefully limits claims that federal law preempts exercise of a state police power. "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting

preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 241 (2nd Cir. 2006) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 544 (1977) (Rehnquist, J., dissenting in part and concurring in part); and *Kelly v. Washington*, 302 U.S. 1, 10 (1937)). "When Congress legislates 'in a field which the States have traditionally occupied [the Court] start[s] with the assumption that the 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.'" *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 983 (9th Cir. 2008) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). Thus, "the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Madeira*, 469 F.3d at 241-42 (quotations omitted).

Such reticence makes sense. The Ninth and Tenth Amendments establish this vital realm of exclusive state power. Lacking a federal police power, allowing excessive preemption in this realm would permit the national government to extinguish an authority (general police powers) that Congress itself lacks. Thus, to usurp this constitutional grant of state power through federal actions, Congress must express a strong intent to preempt the state action. Otherwise, the continued

viability of the very powers "reserved to the States respectively, or to the people" by the Tenth Amendment is threatened. UNITED STATES CONST., Amend. X. *See also Chicanos Por La Causa*, 544 F.3d at 983 (holding that when a state law pertains to a subject that "is traditionally an area of state concern, there is a presumption against preemption.").

II. The United States Cannot Meet the High Preemption Standard that Applies when (as Here) Arizona Asserts Its Basic Police Power and Ability to Maintain Law and Order by Enforcing Existing Federal Law.

A. The Federal Government Cannot Preempt S.B. 1070 Because that Law "Mirrors Federal Objectives and Furthers a Legitimate State Goal."

Given the high threshold that the United States must overcome to preempt S.B. 1070, the District Court erred in granting the preliminary injunction. Certainly, the federal government has the authority to regulate immigration. *See* UNITED STATES CONST., Art. 1, §8, cl. 4; *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982). This power, however, is not exclusive. Congress has exclusive jurisdiction only over the "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Concurrent jurisdiction exists for the remaining aspects of immigration law, under which states retain "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).

S.B. 1070 is a valid exercise of Arizona's police power that "mirrors federal objectives and furthers a legitimate state goal…." *Plyler*, 457 U.S. at 225. *See also Madeira*, 469 F.3d at 241-42 (quoting *Jones*, 430 U.S. at 544 (Rehnquist, J., dissenting in part and concurring in part) and *Kelly*, 302 U.S. at 10) (preemption of an exercise of state police power can occur only "where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"). As the District Court noted, Arizona enacted S.B. 1070 "[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns…." Dist. Ct. Opin. at 1. Using state power to address these threats to "public safety" is a fundamental police power that, by definition, "furthers a legitimate state goal." Finding otherwise, would seriously jeopardize efforts by Arizona, Kansas, and every other state to protect its citizens from issues such as "drug and human trafficking crimes" where concurrent jurisdiction exists. *See De Canas*, 424 U.S. at 355-56 (refusing to preempt a state law banning the hiring of unauthorized aliens because such employment regulations fall "within the mainstream" of state police powers); *Chicanos Por La Causa*, 544 F.3d at 983-87 (same).

S.B. 1070 "mirrors federal objectives" in that it seeks to enforce existing federal law; it does not attempt to alter federal immigration law. Section 2 of S.B. 1070, for instance, seeks only to promote "the enforcement of federal immigration

laws…." Dist. Ct. Opin. at 6-7. Section 2 requires Arizona law enforcement "to make a reasonable attempt, when practicable" to: (a) verify immigration status "during any lawful stop, detention, or arrest where reasonable suspicion exists" of unlawful presence in the United States; (b) notify "ICE or Customs and Border Protection whenever an unlawfully present alien is discharged or assessed a monetary obligation;" and (c) cooperate to "transport unlawfully present aliens" and/or "exchange information related to immigration status." *Id.* Section 6 "permit[s] an officer to arrest a person without a warrant if the officer has probable cause to believe that 'the person to be arrested has committed any public offense that makes the person removable from the United States.'" *Id.* at 9 (quoting ARS §13-3883(A)(5)). Removal is determined by existing federal law. *Id.* at 5.

As the District Court noted, Congress has expressly envisioned joint federal and state enforcement of many immigration laws. Dist. Ct. Opin. at 6. S.B. 1070 further promotes such joint enforcement. Even if its methods do not mirror those of the current federal Administration, enforcement of existing federal law "mirrors federal objectives" and prevents preemption of S.B. 1070.

B. Implied Preemption of a State's Police Power Should Not Exist when the State Merely Attempts to Protect Its Citizens by Enforcing, not Altering or Contradicting, Existing Federal Law.

Finally, preemption should rarely (if ever) exist where the alleged conflict is not between the substance of state and federal law, but is between state law and

federal procedures for enforcement of a Congressional act. The Court promoted this narrow view of preemption recently in another Arizona immigration case – *Chicanos Por La Causa*. In that case, the Court refused to find federal preemption of a 2007 Arizona immigration law in part because that statute was "premised on enforcement of federal standards as embodied in federal immigration law." *Chicanos Por La Causa,* 544 F.3d at 985. Likewise, through S.B. 1070, Arizona does not seek to alter or usurp federal law; it merely attempts to use its own police power to enforce "federal standards as embodied in federal immigration law" and protect its citizens. Indeed, such shared responsibility for enforcement of federal law is not only constitutionally permissible but is common in the arena of public safety. It is routine, for example, for state and local law enforcement officials to arrest persons for unlawful conduct they have probable cause to believe violates state criminal law and, upon further investigation, to conclude that federal prosecution for violation of a similar federal law, rather than a state prosecution, is the more appropriate course of action. In such cases, states effectively act to enforce federal law – just as Arizona seeks to do with S.B. 1070.

Amici raise this important point because they believe that such an interpretation of implied preemption will preserve Arizona's important right to protect its citizens from "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns…." Dist. Ct. Opin. at 1.

This limited application of implied preemption has broader importance as well. Under the District Court's ruling, states could not enforce federal laws through different means or penalties than the federal executive branch. *Id.* at 22-23.

Such a broad view of preemption would dramatically limit state police power. For instance, recognizing some of the same societal ills as the District Court, Kansas enacted a new human trafficking law this year. *See* 2010 Kansas Senate Bill 353. Congress has also enacted legislation in this area, which is being actively enforced by the Federal Bureau of Investigation, along with other federal agencies. *See* 22 U.S.C. §7101, *et. seq.* If federal courts permit preemption based on conflicts between state and federal enforcement of "federal standards as embodied in federal… law[,]" important state efforts like this one will be subject to the whims of a new Administration's enforcement policy. This result would harm many state laws outside the realm of immigration and threaten the already tenuous federal-state balance imposed by the Ninth and Tenth Amendments. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (holding that the desire for "uniform operation of a federal law" should not "preclude[] the execution of state laws by state authority in a matter normally within state power.").

CONCLUSION

If the position of the federal government is affirmed on appeal, then the ability of all states to preserve law and order within their borders through the

exercise of their inherent general police powers will be substantially diminished. The traditional ability of states to secure and promote public safety within their borders should not be restricted merely because a state's citizens, through their elected representatives, choose to: (a) apply their public safety laws to persons who are in the United States in violation of federal law; or (b) enact state law that prohibits or regulates conduct that is also prohibited or regulated by federal law. Similarly, the federal government must not be presumed to have preempted a state's traditional ability to use its general police power to promote public safety within its borders unless Congress, by enactment of federal law, has expressly and explicitly prohibited state action within an area of authority granted to the federal government by the United States Constitution. Such is not the case here, where the primary alleged conflict is only between state law and federal procedures for enforcement of a Congressional act.

Therefore, Amici respectfully request that the Court reverse the District Court's preliminary injunction imposed on portions of Sections 2 and 5 and all of Sections 3 and 6 of S.B. 1070.

Respectfully submitted,

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Dated: August 11, 2010

CERTIFICATION OF COMPLIANCE

In accordance with Fed. R. App. P. 28.1(e)(2)(B) & 32(a)(7)(C), this is to certify that Amici Derek Schmidt and Michael O'Neal's Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 29.1(d) because this Brief contains 2967 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface (Times New Roman, 14-point) using Microsoft Word 2002.

/s/ Jeffrey R. King
Attorney for Amici

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 11, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey R. King
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