IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16645

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF ARIZONA and JANICE K. BREWER,
Governor of the State of Arizona, in her official capacity,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR THE PRESERVATION OF CONSTITUTIONALLY RESERVED RIGHTS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Foundation for the Preservation of Constitutionally Reserved Rights is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10% or more of *amicus*.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On July 28, 2010, the United States District Court for the District of Arizona preliminarily enjoined the State of Arizona from enforcing certain provisions of Senate Bill 1070 as amended by House Bill 2162 (collectively "SB 1070") one day before it was to become effective. In its order, the district court determined that the United States was likely to succeed on the merits in showing that four provisions of SB 1070 are preempted by federal law, specifically section 2(B) (A.R.S § 11-1051(B)), section 3 (A.R.S. § 13-1509), section 5(C) (A.R.S. § 13-2928(C)), and section 6 (A.R.S. § 13-3883(A)(5)). The district court further found that the United States is likely to suffer irreparable harm if the Court does not preliminarily enjoin enforcement of these sections, and that the balance of equities tips in favor of the United States considering the public interest.

In its order the district court also recognized that, since the United States presented a facial challenge to SB 1070, it incurred the additional burden appurtenant to such a challenge in that it must demonstrate that no set of circumstances exists where SB 1070 could be valid. Notwithstanding this observation, the district court failed to either analyze whether any circumstances exists where SB 1070 could be valid or make a conclusive statement that it had. The district court implicitly concluded, moreover, by enjoining only two entire provisions and two partial provisions of SB 1070's thirteen total provisions[1] that SB 1070 as a

1 The Court specifically did not enjoin enforcement of two provisions of SB 1070

whole does not have a plainly legitimate sweep.

Since the United States sought a preliminary injunction of a facially challenged statute it was required to *concurrently* meet the preliminary injunction burden and the facial challenge burden. This brief focuses on the nexus between the two burdens. *Amicus Curiae* page and volume restrictions limit this brief to review the district court's injunction of SB 1070 sections 2(B) and 5(C) only.

II. LEGAL STANDARDS

A. Standard for Issuance of a Preliminary Injunction

A plaintiff seeking a preliminary injunction must establish each of four elements before a court can grant a preliminary injunction. The plaintiff must demonstrate (a) that it is likely to succeed on the merits of its argument at trial, (b) that it will suffer irreparable harm absent a preliminary injunction, (c) that the harm it will suffer outweighs the burden to the defendant pending trial, and (d) that a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 U.S. 365, 374 (2008).

The Court enjoined four provisions of SB 1070 essentially finding in each that the United States was likely to succeed on the merits of its preemption argument. Federal preemption of State regulation can be either express or implied. *Chicanos Por La Causa v. Napolitano (Chicanos Por La Causa I)*, 544 F.3d 976, 982 (9th Cir. 2008), cert. granted, 78 U.S.L.W. 3065, 78 U.S.L.W. 3754, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

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that the United States sought to enjoin, and any of sections 1, 4, 7, 8, 9, 11, or 12, or the remainder of sections 2 and 5.

The United States did not argue, and the district court did not find, that Congress expressly preempted States from exercising their police powers in immigration issues. Rather, the district court found the United States was likely to succeed on the merits of its implied preemption argument. There are two types of implied preemption – field preemption and conflict preemption. Field preemption occurs "where 'the depth and breadth of a congressional scheme . . . occupies the legislative field.'" *Id.* Conflict preemption exists when "compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Id.* *See also De Canas v. Bica*, 424 U.S. 351, 355-56 (1976). When it sought to enjoin SB 1070 on preemption grounds, the United States must have established SB 1070 regulated immigration, an exclusively federal power, and either federal law so thoroughly occupies the field such that Arizona (or any other State) may not regulate in it, or that SB 1070 conflicts with federal law under *De Cannas* and *Napolitano*.

During its analysis, the district court was required to keep in mind that neither tension between federal and state law nor a hypothetical conflict would be sufficient to establish conflict preemption, *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005 (9th Cir. 2007), and "in all preemption cases, . . . the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 129 S. Ct. 1187, 1207 (2009) (Breyer, J., concurring).

B. Standard for a Facial Challenge to a Statute's Constitutionality

The United States sought facial review of SB 1070. "A facial challenge to a

legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "[A] facial challenge must fail where a statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)).

III. ARGUMENT

A. The Injunction of SB 1070 Section 2(B) (A.R.S. § 11-1051(B)) is Improper Because the District Court Failed to Apply the Proper Standard for Issuance of a Preliminary Injunction After It Improperly Interpreted Section 2(B).

In its analysis of SB 1070 section 2(B) the district court dissected each of the first two sentences and enjoined section 2(B) because it read the second sentence of section 2(B) independently from the first sentence. As a result of *its* interpretation, Arizona law enforcement officials and agencies will restrict the liberty of lawfully present arrested aliens because their immigration status *must* be determine before they can be released.[2] Arizona, conversely, argued that the first and second sentences must be read together such "that *only* where a reasonable suspicion exists that a person arrested is an alien and is unlawfully present in the

2 Emphasis added to highlight that the district court recognized in footnote 12 that "[m]any law enforcement officials already have the *discretion* to verify immigration status if they have reasonable suspicion, in the absence of SB 1070 [but] Section 2 of SB 1070 removes that discretion by making immigration status determinations mandatory where practicable." (Order at 20.)

United States *must* the person's immigration status be verified before the person is released." (Defs.' Resp. to Pl.'s Mot. at 10.) The first two sentences of section 2(B) as amended by H.B. 2162 read as follows:

> For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien who and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.
>
> Any person who is arrested shall have the person's immigration status determined before the person is released.

The district court recognized but rejected Arizona's interpretation that the first and second sentence of section 2(B) must be read together. It observed "[b]efore the passage of H.B. 2162, the first sentence of Section 2(B) of the original S.B. 1070 began, "For any lawful contact" rather than "For any lawful stop, detention or arrest." (*Compare* original SB 1070 § 2(B) *with* H.B. 2162 § 3(B).) The second sentence was identical in the original version and as modified by H.B. 2162." (Order at 14, emphasis in original.)

Under the district courts logic, the first and second sentences of section 2(B) as originally enacted were independent of each other because the first sentence used the phrase "any lawful contact" while the second used the phrase "arrest" to describe the conditions under which law enforcement may verify immigration status. Thus, it concluded, as originally enacted the second sentence of section

2(B) could not be read as modifying or explicating the first sentence. (Order at 15.)

The district court concluded when H.B. 2162 amended the first sentence of section 2(B) to use the phrase "any lawful stop, detention or arrest" and left the entire second sentence including the phrase "arrest" unchanged "it does not follow logically that by changing "any lawful contact" to "any lawful stop, detention or arrest" in the first sentence, the Arizona Legislature intended to alter the meaning of the second sentence in any way." (Order at 15.) Presumably, under the district court's logic, had H.B. 2162 amended the operative phrase in either the first or second sentence of section 2(B), or both, to be identical to each other then, and only then, would the second sentence modify the first.

In any event, the district court's conclusion that the United States established it was likely to succeed on the merits necessarily required *its* interpretation of section 2(B) and not any other, including Arizona's. Statutes must, however, be construed to avoid constitutional problems unless the the construction is "plainly contrary to the [legislature's] intent." *Ctr. For Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008). *See also Ariz. Downs v. Ariz. Horesemen's Found.*, 637 P.2d 1053, 1057 (Ariz. 1981) ("All statutes are presumed to be constitutional and any doubts will be resolved in favor of constitutionality.") (internal citations omitted.).

B. The District Court Failed to Apply the Proper Standard for a Facial Challenge to the Constitutionality of SB 1070 Section 2(B) (A.R.S. § 11-1051(B)).

Through its statutory construction of section 2(B) absent Arizona's implementation, and notwithstanding Arizona's succinct interpretation, by enjoining section 2(B) the district court implicitly presumed Arizona will not implement it in a constitutional manner. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 446 (1935) ("Every public officer is presumed to act in obedience to his duty, until the contrary is shown . . ."); *United States v. Booker*, 543 U.S. 220, 279-80 (2005) ("[In] facial invalidity cases . . . we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply 'the statute consistently with the constitutional command.'" (citation omitted).

Since at least 1987 the United States Supreme Court has placed the burden on a plaintiff facially challenging a statute to establish that no set of circumstances exists under which the statute would be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"). Once the proponent satisfies its burden, the burden then shifts to the opponent for rebuttal. To defeat a facial challenge Arizona need "merely to identify a possible [application of the state law] not in conflict with federal law." *California Coastal*

Comm'n v. Granite Rock Co., 480 U.S. 572, 593 (1987).

The proper analysis on review is not whether the district court's reading of section 2(B) is constitutionally valid or even logical, but whether Arizona's interpretation and planned implementation is a set of circumstances under which section 2(B) would be valid. Under *Salerno* Arizona is not even obligated to actually implement section 2(B) – specifically the second sentence – according to its stated intention such "that *only* where a reasonable suspicion exists that a person arrested is an alien and is unlawfully present in the United States *must* the person's immigration status be verified before the person is released" (Defs.' Resp. to Pl.'s Mot. at 10.), it merely has to demonstrate that such an implementation would be one (of possibly numerous) circumstances or implementations under which section 2(B) could be implemented and would be valid. Thus, on review, this Court does not have to determine whether the Arizona legislature intended the interpretation as advanced by the United States and the district court or the interpretation as advanced by Arizona if it concludes that Arizona's interpretation is a set of circumstances under which section 2(B) would be valid.

C. The District Court Failed to Apply the Proper Standard for Issuance of a Preliminary Injunction Because SB 1070 Section 5(C) (A.R.S. § 13-2928(C)) Does Not Regulate in a Federally Occupied Field.

The district court enjoined SB 1070 section 5(C) because it found Congress intended to wholly occupy the field of employer/employee relations where the

employee is an unauthorized alien. In doing so, the district court initially observed "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (Order at 24 citing *De Canas v. Bica*, 424 U.S. 351 (1976).) It further observed "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption appli[ed]." (Order at 24 citing *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 984 (9th Cir. 2009).) To find field preemption the district court adopted the flawed theory advanced by the United States and also created a flawed theory of its own.

The district court first concluded that Congress intended to wholly regulate employers of unauthorized aliens when it enacted the Immigration Reform and Control Act of 1986 (the "IRCA"). Most of the IRCA enacted by Congress provides for sanctioning employers who hired unauthorized alien workers. *See* 8 U.S.C. § 1324a(a)(1)(A), prohibiting employers from recruiting or referring for a fee unauthorized alien workers; 8 U.S.C. § 1324a(a)(2), prohibiting the continued employment of unauthorized alien workers; and 8 U.S.C. § 1324a(a)(4), prohibiting employers from using contractors or subcontractors to hire unauthorized alien workers. Whether the IRCA preempts State regulation of employers who hire unauthorized aliens is largely immaterial, however, because section 5(C) regulates only unauthorized alien workers, not employers, by making

it unlawful for a person who is unlawfully present in the United States to knowingly apply for work, solicit, or perform work. Section 5(C) states:

> It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.

To find the IRCA also regulates unauthorized alien workers the district court adopted the United States' argument that Congress preempted the field when it "initially discussed the merits of fining, detaining or adopting criminal sanctions against the employee, [but] it ultimately reject all such proposals." *Nat'l Ctr. For Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). The United States thus argued, erroneously, and the district court apparently agreed, that it was Congress' conscious choice not to criminally punish unauthorized alien workers through the IRCA. *Nat'l Ctr. For Immigrants' Rights* is fundamentally flawed to the extent it established precedential authority – relied upon by the district court – that Congressional contemplation is equivalent to Congressional action as it pertains to field preemption. A more logical conclusion, rather, given the statutory history recited in *Nat'l Ctr. For Immigrants' Rights* is that Congress deliberately intended to *not* wholly occupy the field when it considered both employer and employee sanctions but enacted employer sanctions only, but a much simpler and more practical explanation is that Congress simply lacked the votes required to pass the IRCA if it did include

unauthorized alien worker sanctions.

The fact that Congress considered some legislation but failed to enact it is not dispositive of its intent to wholly occupy the regulatory field of unauthorized alien employment, the sub-field of unauthorized alien employee sanctions, or – most importantly – any other field. If that were the case, then it may be well said that Congress intends to wholly occupy nearly *every* field. *See Members Offered Many Bills but Passed Few*,[3] dated December 1, 2008 reporting "[m]embers of the 110th Congress introduced nearly 14,000 pieces of legislation, more than any Congress since 1980, but only about 3.3 percent of the bills actually were signed into law."

But it is the second theory manufactured by the district court absent precedential authority that truly defies belief. After it recognized that the IRCA requires individuals seeking employment to "attest, under penalty of perjury . . . that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized . . . to be hired, recruited, or referred for such employment," 8 U.S.C. § 1324a(b)(2), (Order at 26), it observed the attestation is to be made on a form designated or established by the Attorney General and any information contained in or appended to such forms may not be used for purposes other than for enforcement of four sections of Title 18,

3 Available at http://www.rollcall.com/issues/54_61/news/30466-1.html as of August 31, 2010.

which essentially make it a federal crime to falsify alien worker documentation. Thus, the district court concluded, "[t]he provision limiting the use of attestation forms and the civil penalties outlined for documentation fraud in Title 8 and the robust sanctions for employers who hire, continue to employ, or refer unauthorized workers convince the Court that Congress has comprehensively regulated in the field of employment of unauthorized aliens." (Order at 27.) To say that Congress preempted states from regulating unauthorized alien workers because it directed the Attorney General to proscribe attestation forms with limited use is akin to saying the Internal Revenue Service can set marginal tax rates because it can proscribe the look and feel of Form 1040.

D. The District Court Failed to Find the United States Met its Facial Challenge Burden to the Constitutionality of SB 1070 Section 5(C) (A.R.S. § 13-2928(C)).

The United States failed to establish, and the district court failed to conclude, that the United States met its burden in showing that no set of circumstances exists under which the SB 1070 section 5(C) would be valid under *United States v. Salerno,* 481 U.S. 739 (1987). Arizona argues, conversely, that section 5(C) is entirely consistent with and furthers the federal policy of prohibiting unauthorized alien workers from seeking employment in the United States. (Appellant's Opening Brief at 52.) Absent some showing by the United States that no set of circumstances exists where section 5(C) would be valid the district court lacked the

discretion to issue a preliminary injunction of section 5(C).

IV. CONCLUSION

The district court erred both in its interpretation of SB 1070 section 2(B) and failed to conclude that no circumstances exist where section 2(B) would be valid. Even if its interpretation has merit, it could preliminarily enjoin section 2(B) only if the United States established that no circumstances exist where section 2(B) could be constitutionally implemented. Arizona's interpretation, and planned implementation, of section 2(B) is clearly a constitutional implementation and requires the preliminary injunction of section 2(B) be vacated.

The district court erroneously concluded that Congress intended to wholly occupy the field of unauthorized alien employment relations when it adopted the reasoning that Congressional contemplation is equivalent to Congressional action as it pertains to field preemption. The United States failed to allege or prove that no set of circumstances exists where section 5(C) would be valid. Absent such a showing the district court lacked the discretion to issue a preliminary injunction of section 5(C). For each of these reasons the preliminary injunction of section 5(C) should be vacated.

Dated: September 1, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached foregoing brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 3,389 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

s/ Brian K. Garlitz
Brian K. Garlitz

CERTIFICATE OF SERVICE

The undersigned certifies that he has electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 1st day of September, 2010.

The undersigned certifies that all participants in the case are registered CM/ECF users and that service will web accomplished by the appellate CM/ECF system.

s/ Brian K. Garlitz
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