No. 10-16645

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, *et al.*
Appellants

v.

UNITED STATES OF AMERICA
Appellee,

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

BRIEF OF *AMICUS CURIAE* AMERICAN UNITY LEGAL DEFENSE FUND, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus American Unity Legal Defense Fund 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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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century. www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chicanos Por La Causa v. Candelaria*, 544 F.3d 976 (9th Cir. 2008), *cert. granted, sub nom., Chamber of Commerce v. Candelaria*, No. 09-115. AULDF filed an *amicus* brief in the court below. (Doc. 50.)

On August 17, 2010, all parties to this case, through counsel, consented to the filing of this brief. Fed. R. App. P. 29(a).

AULDF will not repeat the preemption and constitutional analyses in Appellants' Opening Brief ("Ariz. Br."), with which it agrees. AULDF files this brief to address the lower court's identification of "federal priorities" sufficient to oust important protected State interests.

SUMMARY OF ARGUMENT

Should a federal court decide that "ineffective enforcement" of the immigration laws is the "real federal policy from which state law should not deviate?" One federal judge in Arizona said no,[1] and this Court agreed.[2] But the lower court here says yes, and, on that basis, barred Arizona from enforcing measures intended to mirror the actual federal policy established by Congress and proclaimed by the last three Presidents.

The lower court issued a preliminary injunction based on a belief that the federal government's failure to enforce the immigration laws in the interior of the United States was a "priority" sufficient to oust Arizona's power to enact harmonious legislation. The lower court was led to that conclusion by the federal government's presentation of agency testimony claiming that it must "balance the purposes and objectives of federal law." In fact, there is no such balance, at least not as intended by Congress and announced by the President; instead, there is a complete collapse of immigration law enforcement in the workplace.

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[1] *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008).

[2] *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted, sub nom., Chamber of Commerce v. Candelaria*, No. 09-115.

For over a hundred years, Congress has intended federal immigration law to protect American workers. In 1986, Congress removed the "Texas Proviso," which had effectively prevented prosecution of employers of illegal immigrants, as "the most practical and cost-effective way to address this complex problem."

Since 1986, Congress has steadily increased worksite immigration law enforcement mandates and resources. The last three Presidents – including President Obama as recently as July 1, 2010 – have made strong pronouncements about the federal priority on enforcing the immigration laws in the workplace. The federal enforcement agency (first the Immigration and Naturalization Service in the Department of Justice, and later Immigration and Customs Enforcement in the Department of Homeland Security) seemed to take seriously the new Congressional and Presidential emphasis on workplace enforcement. In 1996, INS developed "Operation Vanguard," which the Government Accountability Office ("GAO") called an "efficient and effective capability to bar unauthorized workers from employment in any given sector."

In 1998, however, when senior INS officials learned that Operation Vanguard was successful in generating sanctions against employers who hired illegal immigrants, INS issued an internal memorandum cutting off workplace

enforcement. The change in agency priority was not required or approved by Congress, but was in response to "complaints."

As a result, from Fiscal Year 1997 to FY 2005, interior immigration law enforcement "declined" more than 99%. Worksite arrests, for example, fell from 17,554 in FY 1997 to an estimated 81 in FY 2005. This collapse of immigration law enforcement was due solely to INS internal policy.

There was an uptick in enforcement from FY 2005 to FY 2009, but in 2010, another internal agency memorandum, dated June 30, 2010, has cut interior immigration law enforcement except against serious criminals and national security risks. A second internal memorandum, dated August 20, 2010, has released thousands of illegal immigrants from deportation proceedings because the agency has decided to deport only national security risks and aliens with serious criminal records (more than one misdemeanor). These agency memoranda, untethered to any legislative delegation of authority, contradict President Obama's announced priorities and Congressional intention.

These internal agency guidelines are not sufficient authority to oust State legislative power. They contradict settled Congressional intent. They were not even legislative regulations, but only internal guidelines. Nevertheless, in its presentations to the court below, the Department of Justice offered this agency

"balance" as justification for ousting Arizona's SB 1070, and the lower court agreed. The lower court felt that allowing Arizona to report non-criminal illegal immigrants could "divert resources from the federal government's other responsibilities and priorities," which, in the context of the immigration enforcement collapse, means simply that the agency does not wish to enforce immigration laws in the workplace. For the first time, a federal court was declaring "ineffective enforcement" of the immigration laws to be the "real federal policy."

Under long-settled Supreme Court precedent, a State has the right to protect its own local interests against illegal immigration, particularly when the federal government fails to enforce protective laws. There is a distinction between legal immigration, where State power is very limited, and the broader powers States may use against illegal immigration. State actions against illegal immigration must be harmonious with federal law (meaning Congressional intention) and must protect legitimate State interests. The Supreme Court and President Obama have identified the protection of low-income Americans and American workers as among those legitimate State interests, yet the current failure of immigration law enforcement disproportionately injures those two groups.

The use of these internal agency guidelines to oust Arizona's ability to protect those vulnerable groups is not in the public interest. The preliminary

injunction should not have been issued, and the lower court opinion should be reversed.

ARGUMENT

I. INTERNAL AGENCY MEMORANDA WHICH CONFLICT WITH STATUTORY MANDATES AND PRESIDENTIAL PRONOUNCEMENTS OF FEDERAL PRIORITIES CANNOT ESTABLISH FEDERAL POLICY SUFFICIENT TO OUST ARIZONA'S LEGISLATION.

> "[I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – **unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate**."[3]

At the time, Judge Neil Wake's projection of the "real federal policy" in an earlier case assessing federal immigration enforcement in the workplace appeared to be hollow. What federal court would have upheld "ineffective enforcement" of the immigration laws as a "real federal policy?" In retrospect, it was an accurate prediction of the federal position – and the lower court's rationale – in this case.

The position asserted below by the federal government as the federal "policy" is only that of the agency leadership, which rejects enforcement of

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[3] *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008) (emphasis added), *quoting*, Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 U.CHI.LEGAL F., 57, 79-80 (2007), *affirmed, sub nom., Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted, sub nom., Chamber of Commerce v. Candelaria*, No. 09-115.

immigration laws in the interior of the country. The agency's position is so contradictory to its statutory authorization, settled Congressional and judicial understanding of immigration law, and public pronouncements of the last three Presidents as to be vulnerable to an *ultra vires* challenge.

Yet the lower court's preemption analysis conflates this agency position with Congressional intent.[4] The court below thus rewards sharp litigation tactics, provides the non-enforcing agency with legitimacy it does not deserve, and deprives Arizona of its rights without reason. Under the lower court's analysis, Judge Wake's warning in *Arizona Contractors Association* that "ineffective enforcement [is] to be the 'real' federal policy from which state law must not deviate" becomes federal constitutional doctrine. Neither the federal position nor the lower court's analysis should stand.

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[4] The Department of Justice position in this case is that Arizona's SB 1070 focuses too much on stopping illegal immigration, Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof ("P. Mem."), 13, and that it must "balance the purposes and objectives of federal law." P. Mem., 3. The court below found that Arizona's law will "divert resources from the federal government's other responsibilities and priorities." *See, e.g., United States of America v. State of Arizona*, __ F.Supp. 2d ___, ___, 2010 WL 2926157, *11 (D. Ariz., July 28, 2010), ("Slip Op.") ("Thus, an increase in the number of requests for determinations of immigration status, such as is likely to result from the mandatory requirement that Arizona law enforcement officials and agencies check the immigration status of any person who is arrested, will divert resources from the federal government's other responsibilities and priorities.").

A. A "Primary Purpose" of the Immigration Laws Is To Protect American Workers:

A "primary purpose in restricting immigration is to preserve jobs for American workers." *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). One of the "great purposes was to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 244 (1929).

In 1986, Congress decided that stopping illegal immigration was necessary to maintain legal immigration. H. Rep. 99-682 (I) (1986), at 46 ("close the back door on illegal immigration so that the front door on legal immigration may remain open."). Congress closed a loophole which effectively prevented enforcement of penalties against employers of illegal immigrants as "the only effective way to reduce illegal entry and in the Committee's judgment it is the most practical and cost-effective way to address this complex problem." *Id*., at 49.

Prior to 1986, the Immigration and Nationality Act ("INA") did not prohibit the employment of illegal immigrants. The relevant federal crime, 8 U.S.C. § 1324, prohibited smuggling, harboring or transporting illegal immigrants, *U.S. v. Evans*, 333 U.S. 483 (1948)(Congress intended to punish both bringing in and aiding the continued presence of illegal immigrants), but the so-called "Texas Proviso"

excluded "the usual and normal practices incident to employment" from § 1324. *De Canas v. Bica*, 424 U.S. 351, 360 (1976); *U.S. v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976)(Texas Proviso not unconstitutional discrimination between those who harbor and those who employ illegal immigrants).

In the 1986 Immigration Reform and Control Act, Congress deleted the Texas Proviso and prohibited the employment of illegal immigrants. 8 U.S.C. § 1324a. The new law "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law'." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147-48 (2002) (internal citation omitted). In other words, immigration law enforcement in the workplace became an important federal enforcement priority.

In 1996, a Congressional conference declared that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended". H.R. Conf. Rep. 104-725, at 383 (1996). Congress reinforced federal enforcement resources by adding State and private enforcement authority, including the "287g" program to expressly promote state-federal cooperation in immigration law enforcement. 8 U.S.C. § 1357(g).

In addition, Congress applied RICO[5] to the hiring of illegal immigrants. Section 274 (the harboring and smuggling prohibition) was expanded to include multiple hiring of illegal immigrants. 8 U.S.C. § 1324(a)(3)(A), Pub. L. 104-208, Div. C, Title II, § 203(b)(4). Congress also amended the list of RICO predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

B) Presidents' Public Announcements of Immigration Law Enforcement Priorities Reflect Congress's Concern With Enforcing Immigration Laws:

The last three Administrations have generally announced the Executive Branch's agreement[6] with these Congressional declarations of immigration enforcement policy. It is, for example, the expressed position of the Obama

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[5] The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1). State courts have concurrent jurisdiction over civil RICO claims. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[6] The President has a "constitutional obligation to ensure the faithful execution of the laws." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, __ U.S. __, __, 130 S.Ct. 3138, 3147 (June 28, 2010), *quoting, Morrison v. Olson*, 487 U.S. 654, 693 (1988).

Administration to stop illegal immigration through enhanced worksite immigration law enforcement:[7]

> [B]usinesses must be held accountable if they break the law by deliberately hiring and exploiting undocumented workers. We've already begun to step up enforcement against the worst workplace offenders. And we're implementing and improving a system to give employers a reliable way to verify that their employees are here legally. But we need to do more. We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers. And ultimately, if the demand for undocumented workers falls, the incentive for people to come here illegally will decline as well.

The Administration's public priority is the same as statements from the prior two Administrations.[8] President Bush said: "We've got to crack down on employers who flout our laws."[9] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal

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[7] President Barack Obama, *Remarks by the President on Comprehensive Immigration Reform*, July 1, 2010, www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform ("Obama remarks").

[8] "Seven weeks after the collapse of comprehensive immigration reform in the Senate, the Bush administration is shifting to a plan the president once said could not work: stepped up enforcement of existing laws." Gail Russell Chaddock, "US crackdown on hiring illegals irks business community," *Christian Science Monitor*, Aug. 14, 2007, www.csmonitor.com/2007/0814/p03s03-uspo.html.

[9] "President Signs Homeland Security Appropriations Act for 2006," Oct. 2005, 4, www.whitehouse.gov/news/releases/2005/10/20051018-2.html.

immigration." Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37. In Fiscal Year 1996, President Clinton requested, and Congress approved, "significant funding increases for interior enforcement, including worksite enforcement and employment eligibility verification." *Id.*

C) In 1998, An Internal Agency Memorandum, Not Authorized by Congress, Undercut the Congressional and Presidential Priorities.

For a time after the 1986 enactment of "employer sanctions," the enforcing agencies seemed to abide by the statutory and Presidential priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law." CRS, *Immigration Enforcement*, at 37.

By 1996, as Congress was strengthening enforcement, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

By 1998, however, INS abandoned the "effective" strategy, *because* it was effective. "When the capability was realized, it was stopped." *Id*.; *see*, *also, id.*, at 61-62 (describing May 1998 "Immediate Action Directive for Worksite Enforcement Operations" memorandum by INS Executive Associate Commissioner for Field Operations Michael Person ("the Person memo") ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id*. at 38, 62, not because Congress changed the law.

D) As a Result of the 1998 Person Memorandum, Illegal Immigration Enforcement in the Interior of the United States Collapsed.

As a result of the Person internal agency memorandum, the reality of worksite immigration enforcement was substantially different from Congress's intention and the Presidential public priorities: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ." [10] U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*,

[10] INS itself agreed: "Between 1998 and 2001 the number of cases completed declined 80 percent. . . . The number of arrests declined sharply in the next six years, dropping to 445 in 2003." U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, 147, www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003ENF.pdf.

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

GAO's bland language masks the true extent of the "decline[]". Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998[11]	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162

[11] The Person memo cutting off worksite enforcement was issued in May 1998.

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
2004	159	3
2005[12]	81	N/A[13]
2006	3,667	N/A
2007	4,077	N/A
2008	5,184	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. 2006-2008 data from ICE, "Fact Sheet: Worksite Enforcement," April 29, 2010, www.ice.gov/pi/news/factsheets/worksite.htm.

For three years beginning in FY 2005, there were increases in worksite immigration law enforcement, but the level (5,184 in FY2008) was still a "decline"

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[12] ICE, which uses different criteria than GAO, later reported a higher number (1,116) for FY 2005. Immigration and Customs Enforcement, "Fact Sheet: Worksite Enforcement," April 30, 2009, www.ice.gov/pi/news/factsheets/worksite.htm. This reduces the "decline" to only 93.4%.

[13] These statistics are no longer available in conforming format.

of 70% from the FY1997 peak level. Congress continued to increase the immigration enforcement budget,[14] but worksite arrests have not returned to FY 1997 levels.

E) This Year New Internal Agency Memoranda Have Cut Interior Immigration Law Enforcement and Many Deportations.

On June 30, 2010 – the day before President Obama's declaration that "We've already begun to step up enforcement against the worst workplace offenders", Obama statement, *supra* – John Morton, the head of ICE, issued a memorandum[15] which reduced immigration law enforcement as a federal priority. "New guidance telling U.S. Immigration and Customs Enforcement agents to focus on apprehending terrorists and criminals has many of ICE's rank-and-file agents wondering who then is responsible for tracking down and detaining the millions of other illegal border-crossers and fugitive aliens now in the country."[16]

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[14] The ICE budget from FY 2005 to FY 2009 increased 67%, and the detention and removal budget increased 104%. Transactional Records Access Clearinghouse, Syracuse University, *Detention of Criminal Aliens: What Has Congress Bought?*, Feb. 2010, http://trac.syr.edu/immigration/reports/224/include/3.html.

[15] Available at www.cis.org/articles/2010/civil_enforcement_priorities-1.pdf.

[16] Jerry Seper, "Lack of resources curtails ICE tracking of illegals," *The Washington Times*, Aug. 8, 2010, P. A1,

The Morton memo resulted in a unanimous "no confidence" condemnation vote by the labor union representing ICE agents and employees. "The resolution said ICE leadership had 'abandoned the agency's core mission of enforcing U.S. immigration laws and providing for public safety'"[17]

Despite President Obama's assertion that "We've already begun to step up enforcement against the worst workplace offenders," Obama remarks, *supra*, media reports[18] indicate that the actual enforcement of immigration laws in the workplace has evaporated yet again. "So far this fiscal year, federal criminal charges have been brought against only 147 managers nationwide for hiring illegal immigrants. That's nearly the same as the number of illegal employees who have been arrested during the same period, statistics show."[19]

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www.washingtontimes.com/news/2010/aug/8/lack-of-resources-curtails-ice-tracking-illegals ("Curtails ICE Tracking Illegals").

[17] Jerry Seper, "Agents' Union Disavows Leaders of ICE," *The Washington Times*, Aug. 9, 2010, P. A1, www.washingtontimes.com/news/2010/aug/9/agents-union-disavows-leaders-of-ice/.

[18] In June, AULDF filed a Freedom of Information Request for the most recent data, but ICE has not yet responded to the request.

[19] Jason Trahan and Dianne Solís, "Ex-FBI agent accused of illegal hiring at Rockwall deli," *Dallas Morning News*, August 20, 2010, www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-immworkers_20met.ART0.State.Edition2.35abc68.html.

Only 147 worksite arrests in FY 2010 would again bring immigration enforcement in the workplace below 99% of FY 1997 levels, despite recent public pronouncements of immigration enforcement priorities: "The Obama Administration said it would focus its enforcement of illegal immigration laws by targeting workplace activities, but a recent report shows that while audits of employers are slightly up over the Bush Administration, worker arrests are down drastically since the end of 2008."[20]

A second blow against immigration law enforcement landed on August 20, 2010: another Morton memo[21] cut deportation of illegal immigrants. Once illegal immigrants are apprehended, they are to be let go, unless they have serious criminal records or are national security risks. "Immigration enforcement officials have started to cancel the deportations of thousands of immigrants they have detained".[22]

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[20] Nicole Busch, "Company Audits Up, Illegal Worker Arrests Way Down Since 2008," FoxNews.com, August 23, 2010, www.foxnews.com/politics/2010/08/23/company-audits-illegal-worker-arrests-way.

[21] Available at http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

[22] Julia Preston, "Immigration Agency Ends Some Deportations," *The New York Times*, Aug. 27, 2010, A14,

> The Department of Homeland Security is systematically reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal immigrants who have no serious criminal records, according to several sources familiar with the efforts. Culling the immigration court system dockets of noncriminals started in earnest in Houston about a month ago and has stunned local immigration attorneys, who have reported coming to court anticipating clients' deportations only to learn that the government was dismissing their cases.[23]

The August 20, Morton memo suspending deportations generated ICE employee disapproval similar to that sparked by the June 30 Morton memo:

> Current and former ICE attorneys in New York, Houston and other offices nationwide say they are angry that they have been instructed to drop efforts to deport some immigrants. "We can't find a supervisor or manager that supports Morton or his initiatives," said Chris Crane, president of the American Federation of Government Employees' National Council 118, the union that issued the no-confidence vote.[24]

Thus, when Arizona said "interior immigration enforcement remains weak," Ariz. Br. at 10, it was understating the situation. There is, in fact, no interior immigration law enforcement for the vast majority of millions of illegal

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www.nytimes.com/2010/08/27/us/27immig.html?_r=1&scp=1&sq=Immigration%20Agency%20Ends&st=cse

[23] Susan Carroll, "Feds Moving to Dismiss Some Deportation Cases," *The Houston Chronicle*, August 24, 2010, www.chron.com/disp/story.mpl/special/immigration/7169978.html ("Dismiss Deportation Cases").

[24] Andrew Becker, "Tension Over Obama Policies Within Immigration and Customs Enforcement," *The Washington Post*, Aug 27, 2010, B3, www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606561.html.

immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. If other illegal immigrants are apprehended, they are to be released, not deported.

The public record thus shows that, no matter what Congress intended and the President proclaims as "federal priorities," the enforcement agency has determined, twice over the last fifteen years, that immigration enforcement in the workplace is not a federal priority. The agency recognized Congressional intent and in response discovered a means to enforce the immigration laws efficiently and effectively, but now chooses, as an internal matter, not to enforce the immigration laws in the workplace. This was the position offered to the court below as the "federal priorities," without reference to any contrary Congressional or Presidential declarations of policy or priority. *See, e.g.*¸ P. Mem., at 3 ("balance the purposes and objectives of **federal law**." Emphasis added.).

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

As Arizona notes in its opening brief, preemption analysis does not credit mere agency pronouncements. Ariz. Br. 34-35. *See, also, Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979) (internal agency rules without certain safeguards do

not have the force of law). "For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Id.*, *quoting NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

ICE did not undertake any steps necessary to effectuate a legislative rule when it promulgated the Morton memoranda. Even if it had attempted to issue a legislative rule, ICE does not have the authority to decide not to enforce the immigration laws. *See, Lousiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986) ("we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."). ICE simply decided on its own and without authorization to cease interior immigration law enforcement and deportations.

The Court should not credit an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97

(1983), *quoting, American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965).[25] Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Only Congress should decide to cease enforcement. Congress has not done so. The agency is acting *ultra vires*.

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[25] *See also*, Judge Wake's unreported opinion in *Ariz. Contractors Ass'n v. Napolitano*, 2007 WL 4570303, *6, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW (D. Ariz. Dec. 21, 2007) (emphasis added):

> People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. **It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests**. . . . The balance now struck is in favor of an economy for those who may work in the United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) . . . The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized alien labor.

Thus, the agency's description of its own internal decision as "federal priority" was over-reaching. By offering that description and explanation to the court below, without any description of the President's contrary priority proclamation or Congressional mandates, the Department of Justice was assisting that over-reach. The net effect was to mislead the lower court into thinking that a "balance" was being struck, which in reality was non-existent or not authorized.

When the District Court cited to the Declaration of David Palmatier, the Unit Chief for DHS's Law Enforcement Support Center, as establishing "the federal government's other responsibilities and priorities," Slip Op., at *11, it was adopting the collapse of immigration law enforcement as federal government policy, even though the collapse was the opposite of decades of Congressional and Presidential priorities. *See, e.g.*, "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement. H.R. Conf. Rep. 104-725, at 383 (1996); "We cannot continue just to look the other way as a significant portion of our economy operates outside the law." Obama remarks, *supra*.

When the lower court found that those "priorities" superseded State law, it was saying that the agency's unauthorized decision not to enforce the law operated as a "clear and manifest purpose of Congress" sufficient to preempt State law. *De*

Canas, 424 U.S. at 357. This was clear error, which has adverse consequences which both the Supreme Court and President Obama have sought to avoid.

For purposes of the preliminary injunction at issue here, there is no probability that the federal government will prevail on a showing that its decision not to enforce the immigration laws in the workplace should displace Arizona's right to protect its citizens. Nor is it in the public interest to support an *ultra vires* decision not to enforce the immigration laws.[26] The decision below should be reversed.

II. THE DISTRICT COURT MISAPPLIED THE APPLICABLE STANDARD OF REVIEW TO DENY ARIZONA ITS LEGITIMATE RIGHTS TO LEGISLATE WHEN THE FEDERAL AGENCY FAILED ITS ENFORCEMENT OBLIGATION.

In choosing to credit the agency's non-enforcement "priorities," the court below endorsed the collapse of immigration law enforcement. By doing so, it distorted and misapplied the appropriate standard of review for Arizona's SB 1070. The effect of that misapplication falls most heavily on those Americans least able

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[26] *See, e.g.*, "It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Sherley v. Sebelius*, __ F.Supp. 2d __, __, 2010 WL 3296974, *9 (D.D.C. Aug 23, 2010), *quoting Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000).

to withstand the injury, and denies Arizona its legitimate rights to protect its people.

A) State Laws Targeting Illegal Immigrants Are Subject to Less-Restrictive Preemption Standards Which Permit States to Protect Local Interests.

There are two standards for reviewing State laws which affect immigrants – one for lawful residents,[27] and a lower one for illegal immigrants.

> With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, **of course**, follow the federal direction.

Plyler v. Doe, 457 U.S. 202, 219 n. 19 (1982) (emphasis added). "Persuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is the product of their own unlawful conduct." *Id.*

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[27] "[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982), *quoting*, *De Canas v. Bica*, 424 U.S. at 358 n. 6 (1976); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971).

The burden to preempt a State law targeting illegal immigrants is very high; it is not enough just to have "strong evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982). Congress must clearly and manifestly intend to oust the State's power.

> Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "the **clear and manifest purpose of Congress**" would justify that conclusion. *Florida Lime & Avocado Growers v. Paul*, [373 U.S. 132] at 146 [1963].

De Canas, 424 U.S. at 357 (emphasis added); *See, also,* Ariz. Br., at 21-22, *citing Altria Group v. Good*, __ U.S. __, __, 129 S.Ct. 538, 543 (2008) ("the purpose of Congress is the ultimate touchstone" for preemption), and *Wyeth v. Levine*, __ U.S. __, __, 129 S.Ct. 187, 1194-95 (2009) ("historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

A State has the "right" to enforce its own laws, absent clear and manifest preclusion, when the federal government is not enforcing its protective laws:

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

De Canas v. Bica, 424 U.S. at 362-63 (emphasis added).

State laws affecting illegal immigrants, however, must "mirror federal objectives and further[] a legitimate state goal." *Plyler*, 457 U.S. at 225. "Legitimate state goals" of State laws against illegal immigration include protecting jobs, wages and working conditions, a State's "fiscal interests," and the effectiveness of labor unions. *De Canas*, 424 U.S. at 356-57. Nevertheless, within those limitations, States may impose any non-conflicting burden on illegal immigrants that Congress did not "unmistakably" intend to oust, and State laws need not be exactly the same as federal law. *De Canas*, 424 U.S. at 356.[28]

The court below did not address this lower standard of review for laws targeting illegal immigration. In particular, the lower court did not address Arizona's right to protect its people when the federal government did not.

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[28] Even though the California statute upheld in *De Canas* added penalties and local enforcement beyond those permitted by federal law, the Supreme Court rejected challenges to the statute based on both Supremacy Clause and preemption grounds, and specifically conflict, 424 U.S. at 357-58, full occupation of the field, 424 U.S. at 357, n. 5, and 359-60, n. 8, and Congress' desire for national uniformity, 424 U.S. at 359. The Court reserved the question of whether the California law was an "obstacle" to federal enforcement by prohibiting employment of aliens authorized to accept work in the United States. *Id*., 424 U.S. at 363. This would have been an application of the presumption against State power to regulate the conditions of admission for legal immigrants. The Court would have upheld the statute if it only applied to illegal immigrants, but could not determine if the lower court had prepared an adequate record to construe the statute. *Id*., 424 U.S. at 363-65.

B) The Impact of The Immigration Enforcement Collapse Falls Most Heavily on American Low-Income Workers and Cannot Be Considered in the Public Interest.

On July 1, 2010, President Obama declared: "We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers." Obama remarks, *supra*.

The President's announcement echoed the Supreme Court's description of the deleterious effects of unchecked employment of illegal immigrants:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.

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

There is significant evidence that the Court's 1976 assessment is still correct. Given the obvious economic incentives to hire cheaper illegal immigrant workers and the lack of any realistic enforcement threat, employers apparently

choose to preferentially hire illegal immigrants. "A startling new study[[29]] shows that all of the growth in the employed population in the United States over the past few years can be attributed to recently arrived immigrants."[30] "This is striking because natives account for 61 percent of the net growth in the number of people 18 to 64 in the United States, yet they earned only 9 percent of the net increase in jobs between March 2000 and March 2005."[31]

This job "capture" has also decreased the wages paid to native-born workers. "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, at 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of

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[29]Sum, Fogg, Khatiwada and Palma, "Foreign Immigration and the Labor Force of the U.S.," Center for Labor Market Studies, Northeastern University, July 2004. The study does not distinguish between legal and illegal immigrants. *See, also*, Steven Camarota, *Immigration's Impact on U.S. Workers*, Center for Immigration Studies, November 2009, www.cis.org/node/1582.

[30] Bob Herbert, "Who's Getting the New Jobs," *The New York Times*, July 23, 2004, A23, col. 6, http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482.

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

Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374. This wage decrease is not equally shared. Professor Borjas noted that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24.[32]

These are exactly the type of ills President Obama and the Supreme Court warned against. The Supreme Court has said absent clear Congressional ouster, States have the authority to act to prevent these ills. *De Canas v. Bica*, 424 U.S. at 356-57. Yet the lower court found that only federal non-enforcement "priorities" would be given preclusive effect. This was clear error.

C) The Agency Memoranda Do Not Identify A "Clear and Manifest" Congressional Purpose Not to Enforce the Immigration Laws, and Cannot Oust State Power.

The lower court failed to identify any "clear and manifest" statement by Congress that Arizona's law was to be ousted. Instead it offered general statements about "burden[s] on federal resources and priorities." *See, e.g.*, Slip Op. at *13.

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[32] *See, also*, Steven Camarota, *From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007 to 2010*, Center for Immigration Studies, Aug. 27, 2010, www.cis.org/bad-to-worse.

In its decision, the District Court below noted that the "United States argues that the influx of requests for immigration status determination directed to the federal government or federally-qualified officials would 'impermissibly shift the allocation of federal resources away from federal priorities.'", Slip Op. at *10, *quoting* P. Mem. at 30. The lower court found, based on an affidavit of an ICE official, that "Thus, an increase in the number of requests for determination of immigration status, such as is likely to result from the mandatory requirement that Arizona law enforcement officials and agencies check the immigration status of any person who is arrested, will divert resources from the federal government's other responsibilities and priorities." Slip Op. at *11. "Further, the number of requests that will emanate from Arizona as a result of determining the status of every arrestee is likely to impermissibly burden federal resources and redirect federal agencies away from the priorities they have established." *Id.*

This was not a sufficient analysis under the prevailing Supreme Court precedents. *See, e.g.,* Ariz. Mem. at 34-36 and n. 19. Neither the federal government nor the lower court pointed to any statute or legislative history indicating either that ICE has the power to unilaterally determine "federal priorities" or that immigration law enforcement is no longer a top federal priority. The lower court's error was compounded by the fact that the "federal resources and

priorities" it found likely to be burdened (which sustained its finding that the federal government was likely to prevail) conflicted with Congressional intention, public proclamations by the last three Administrations, and decades of judicial precedent.

This Court should not encourage misleading testimony and argument from federal officials, or allow preemption analysis to shift from the "clear and manifest purpose of Congress" to the whims of agency administrators. The federal agency whose actions appear to be *ultra vires* does not have a significant likelihood of prevailing. The public interest argues against any preliminary injunction whose deleterious effects fall on the most vulnerable Americans. All of these factors suggest that the preliminary injunction was not warranted, and the decision below should be reversed.

CONCLUSION

For the reasons stated in the State of Arizona's Opening Brief and *supra*, the decision below should be reversed.

RESPECTFULLY SUBMITTED,

/s/
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Local Rule 29.1(d) because this Brief contains 5,387 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 2003.

September 1, 2010 /s/_____

Barnaby W. Zall

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 September 1, 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.

September 1, 2010 /s/_____

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