No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, v. State of Arizona; Janice K. Brewer, Governor of the State of Arizona , in her Official Capacity, Defendants-Appellants.	)	Appeal from the United States District Court for the District of Arizona No. CV 10-1413-PHX-SRB

AMICUS CURIAE BRIEF OF THE ARIZONA CITIES OF FLAGSTAFF, TOLLESON, SAN LUIS, AND SOMERTON IN SUPPORT OF PLAINTIFF-APPELLEE

Noel Fidel, Ariz. Bar 002486
MARISCAL, WEEKS. MCINTYRE & FRIEDLANDER, P.A.
2901 N. Central Ave., Suite 200, Phoenix, AZ 85012
(602) 285-5000; Fax: (602) 285-5100, Noel.Fidel@mwmf.com

José de Jesús Rivera, Ariz. Bar 004604,
Robert E. Pastor, Ariz. Bar 021963, Nathan J. Fidel, Ariz. Bar 025136
HARALSON, MILLER, PITT, FELDMAN & MCANALLY, P.L.C.
2800 N. Central Ave., Suite 840, Phoenix, AZ 85006
(602) 266-5557; Fax: (602) 266-2223, jrivera@hmpmlaw.com,
rpastor@hmpmlaw.com, nfidel@hmpmlaw.com

Stanley G. Feldman, Ariz. Bar 00838
Rebecca Reed, Ariz. Bar 23419, Jeffrey A. Imig, Ariz. Bar 25552
HARALSON, MILLER, PITT, FELDMAN & MCANALLY, P.L.C.
1 S. Church Ave., Ste. 900, Tucson, AZ 85701
(520) 792-3836; Fax: (520) 624-5080, sfeldman@hmpmlaw.com,
rreed@hmpmlaw.com, jimig@hmpmlaw.com

David L. Abney, Ariz. Bar 09001
LAW OFFICES OF DAVID L. ABNEY
4025 E. Chandler Blvd., No. 70-A8, Phoenix, AZ 85048
(480) 833-8800, abneymaturin@aol.com
Co-Counsel for Amici Curiae Arizona Cities of
Flagstaff, Tolleson, San Luis, and Somerton

Corporate Disclosure Statement

Under Fed. R. App. P. 28(a)(3) and 26.1, the undersigned attorney for Amici Curiae Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton certifies that these Amici Curiae have no parent corporations. And because they have never issued stock, there is no publicly held corporation that owns ten percent or more of their stock.

DATED this 30th day of September, 2010.

/s/ David L. Abney
David L. Abney
Co-Counsel for Amici Curiae
Arizona Cities Flagstaff, Tolleson, San Luis, and Somerton

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Amici Curiae: Identities, Interests, and Source of Authority to File Amicus Curiae Brief

Amici Curiae Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton are Arizona municipal public entities. They are all providing costly and extensive police, social, and other government services that require constant contact with undocumented immigrants living, working, and passing through their jurisdictions. If the key provisions of Arizona Senate Bill 1070 are revived on appeal, those revived provisions will impose expensive, unwieldy, and unconstitutional requirements on Amici Curiae.

Those requirements will strain already overstrained budgets, divert funds and public safety resources needed for the detection and suppression of serious and violent crime, and force the cities to enforce divisive and questionable state mandates.[1]

A telling example of this impact is contained in the Declaration of San Luis Police Chief Rick Flores:

> S.B. 1070 also requires me to divert department resources

[1] *See* the Declarations of Flagstaff Police Chief Brent Cooper and San Luis Police Chief Rick Flores. These Declarations were lodged by the Amici Cities to support their motion to intervene the motion for preliminary injunction lodged in *Escobar v. Brewer*, Case No. CV 10-249-TUC-SRB, a related Senate Bill 1070 challenge that was dismissed on standing grounds and is now on appeal. Although these Declarations (Attachments 1 and 2 to Dkt 64 in the *Escobar* record, available on PACER) are not part of the record here, we submit them to demonstrate the nature of the Amici Cities' interest.

> away from serious crimes not only to conduct immigration-status inquiries but to arrest persons who pose no threat to public safety. Under the new law, my officers must arrest any person who fails to carry alien registration documents or who cannot prove his or her legal status. My officers must make those arrests, and take the time needed to process those arrests. San Luis is in a Jail District and therefore the costs of jail booking fees and detentions at the jail do not result in a direct bill to the city. But the Yuma County Jail is located in the northern part of the City of Yuma and the time to transport a person, book that person, and travel back to the City takes the officer out of the city for anywhere from 3 to 3 ½ hours. There are times there is only one officer on patrol for a city of 32 square miles. This means the city is unprotected for the time needed to book into the Yuma County Jail. If one projects the impact of booking an additional 920 persons into the county jail, this means the City will not be covered by a patrol officer for more than 2750 hours or more than 100 days during the fiscal year of 2010/2011.[2]

The Chiefs additionally tell us that the provisions at issue will jeopardize the relationships and undermine the trust their forces rely on to protect the communities they serve: They will impede investigation of serious crimes by deterring victims, witnesses, and others with useful information from interacting with police out of fear that they will subject themselves or friends or family members to immigration status investigation. And it will make immigrant victims more vulnerable, including victims of domestic violence and human trafficking, as the perpetrators take advantage of their reluctance to come forward. In these and other ways, the Chiefs tell us, the Act will undermine their Departments' "law enforcement priorities

[2] *Escobar v. Brewer*, Case No. CV 10-249-TUC-SRB, Dkt 64, Ex.2.

and ability to protect people from serious crime."[3]

If the key provisions of SB 1070 are revived on appeal, they will also foster a flawed, second-rate image of Arizona that will reduce tourism and commercial development—costing jobs in each city and reducing municipal tax receipts.[4]

The City of Tucson is contemporaneously filing an amicus curiae brief illustrating similar burdens that a larger city will face if the preliminarily enjoined provisions of Senate Bill 1070 take hold. We agree with the City of Tucson that our municipalities should be spared the disruptive, destructive impact of mandates that the trial court correctly found to be federally preempted. Rather than duplicating the City of Tucson's well-presented arguments, however, or echoing the comprehensive arguments on the issue of preemption that the Department of Justice has advanced in its Brief for the United States, the present Amici Cities confine their brief to a reminder of the historical lessons that have eluded comment in other briefs and that will help provide context for the issues before this Court.[5]

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[3] *Id.* at Dkt 64, Exh. 1 at ¶¶ 13-18; Exh. 2 at 13-18.

[4] *See*, *e.g.*, Molly O'Toole, *Warning Away Visitors*, NEWSWEEK 14 (May 15, 2010) (If Mexicans follow Mexican President Felipe Calderón's warning for them to avoid Arizona, "the economic impact on Arizona could be devastating").

[5] We will, however, echo the City of Tucson in one respect. The Cities of Flagstaff, Tolleson, San Luis, and Somerton also object to Appellants'

For each Amicus Curiae, the proper municipal authorities have granted authority to prepare and file this amicus curiae brief.

Summary of Argument

The federal government has exclusive control over immigration law. The Arizona Legislature has ignored or forgotten that federal control over immigration law is the result of a long history of failed and repudiated state immigration-control efforts. In the early history of our nation, the colonies, and then the states, exercised what control there was over immigration. Gradually, the United States Supreme Court, and then Congress, recognized that immigration is a problem of national and international commerce, of federal control over the borders, of a unified foreign policy, and of plenary federal powers. A series of United States Supreme Court decisions, and a series of congressional enactments, ended any real debate over federal control over a century ago. Of course, there can be, and always has been, some state and federal cooperation in matters that affect immigration. In passing Senate

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pejorative references to "sanctuary cities." The Amici Cities, like Tucson and other cities in Arizona, have established the detection and prevention of serious and violent crime as a priority for their scarce law-enforcement resources. It is no coincidence, but rather a matter of sound public administration, that this priority matches federal priorities in the enforcement of federal immigration law. In the course of their law-enforcement efforts, the Amici Cities have engaged, now engage, and shall engage in coordinating and cooperating with federal immigration authorities as far as the law permits and as far as their overstretched municipal resources allow.

Bill 1070, the Arizona Legislature has undertaken to set aside federal enforcement priorities and take back state control over immigration law. But immigration law is a federal matter under federal control. Senate Bill 1070 is thus not only unworkable and unconstitutional—it's an anachronism.

Legal Argument

1. In our nation, colonial and state efforts to create and control immigration law have a long history.

In 1637, Massachusetts became the first American jurisdiction to create its own immigration law. In that year, the Massachusetts General Court ordered that no town in the colony should receive any stranger who meant to reside there without official permission.[6]

Not surprisingly, the major problem with immigration into the America colonies was not that too many people were immigrating. After all, war and European diseases had largely emptied the colonies of their native inhabitants. And so the American colonies needed many immigrants to populate and develop the colonies. The major problem was that the British government began restricting immigration and obstructing the passage of adequate immigration and naturalization laws. In fact, the Declaration of Independence complained that George III had endeavored "to prevent the Population of

[6] Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1566 (Sept. 2008).

these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migration hither, and raising the Conditions of new Appropriations of Lands."[7]

Other than that sort of monarchical interference, the colonies largely controlled immigration into their territories. After 1776, the states naturally assumed the same role. It is true that Congress passed two constitutionally-suspect and short-lived immigration statutes in 1798.[8] But after that, federal legislation over immigration matters remained ineffective and sporadic until 1882.[9]

To the extent that the states had immigration-related problems, the states dealt with them, filling the void that Congress had left. State efforts to regulate immigration were reactions to local overcrowding, to rising criminal activity, to health concerns, and to competition with native workers. Periodic waves of immigrants from Northern and Southern Europe, and eventually from Asia, had allegedly caused or exacerbated all of those problems.

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[7] The Declaration of Independence ¶ 9 (U.S. 1776).

[8] Alien Enemy Act of 1798, ch. 66, 1 Stat. 577 (allowing removal of aliens from countries at war with the United States when the President deemed them to endanger the nation); Aliens Act of 1798, ch. 58, 1 Stat. 570 (granting to the President exclusive power to expel even friendly aliens).

[9] Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Escondido's Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 857 (Summer 2008) ("Between 1780 and 1882, Congress enacted only piecemeal immigration legislation," leaving control over immigration "to the States largely unfettered.").

While immigration was relatively unrestricted, it was not an open door. The American colonies—and then the American states—periodically banned, restricted, or regulated immigration. Those efforts focused on barring the immigration of criminals, of the poor, disabled, and mentally ill, and of those suspected of having contagious diseases. Because of federal indifference, states were able to adopt laws and pass regulations on inspecting and accepting immigrants, "mainly on the basis of wealth health, and race considerations."[10] Colonial and state control over immigration law extended to the importation of slaves from Africa and the Caribbean.[11] And as the *Dred Scott* case reminds us, state control over immigration law even extended to internal migration of slaves seeking freedom from their masters.[12]

In a forerunner to states-rights arguments supporting Arizona Bill 1070, nineteenth-century state efforts at immigration legislation reflected the strong states'-rights movement that would culminate in the Civil War.[13] The states'-rights doctrine led to national disaster in 1861. And the Arizona Legislature

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[10] Francesca Strumia, *Tensions at the Borders in the U.S. and the E.U.: The Quest for State Distinctiveness and Immigrant Inclusion*, 25 AM. U. INT'L L. REV. 969, 984 (2010).

[11] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93(8) COLUM. L. REV. 1833, 1841-84 (Dec. 1993).

[12] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 398 (1856).

[13] EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 40-41 (1981) (Before the Civil War, a strong state-rights movement sought "state control over immigration.").

seems determined to use similar unwise states'-rights logic about who can control immigration law and thus control immigration itself.

2. The United States Supreme Court gradually approved full federal control over immigration law.

Although it took decades, the United States Supreme Court eventually ended any support for comprehensive state immigration laws, setting the stage for eventual comprehensive congressional immigration legislation. First, in the 1824 *Gibbons v. Ogden* case, Chief Justice John Marshall explained that the carriage of passengers was included within the meaning of commerce—and that the federal government had exclusive control over commerce.[14] *Gibbons* laid the groundwork for strong federal control over commerce that would eventually justify strong federal control over immigration. Indeed, *Gibbons* also reflected a simmering debate over whether passengers, many of whom were immigrants, should be considered "articles of commerce" within the congressional control over commerce. To this day, federal control over commerce is one of the accepted justifications for federal control over immigration law.[15]

The Supreme Court backtracked slightly from *Gibbons* in the 1837

[14] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 215-16 (1824).

[15] *See generally* Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (Fall 1996).

Mayor of New York v. Miln opinion, which upheld a state's power to demand that a vessel's master provide information about passengers arriving in New York after a transatlantic voyage.[16] Even so, Justice Joseph Story dissented, arguing that the commerce power gave exclusive control over immigration law to the federal government, and not to the states.[17] In line with that dissent, in the 1849 *Passenger Cases* the Supreme Court invalidated state-imposed head taxes on passengers, reasoning that the taxes unconstitutionally interfered with foreign commerce.[18]

Then, in the 1875 case of *Chy Lung v. Freeman*, the Supreme Court struck down a California statute regulating Chinese immigration, upholding the supremacy of federal control over immigration law.[19] The Supreme Court explained that the "passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States," because "otherwise, a single State can, at her pleasure, embroil us

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[16] *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

[17] *Id.* at 160.

[18] *Smith v. Turner* (*Passenger Cases*), 48 U.S. (7 How.) 283 (1849) (Court holds that New York and Massachusetts laws imposing head taxes on landing foreign persons likely to become public charges were unconstitutional because they regulated foreign commerce, which is exclusively a federal power).

[19] *Chy Lung v. Freeman*, 92 U.S. 275 (1875). *See also Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875) (Supreme Court invalidates New York law requiring vessel owners to give a bond for each foreign passenger.).

in disastrous quarrels with other nations."[20] (In passing Senate Bill 1070, the Arizona Legislature has already embroiled our nation in a harmful quarrel with Mexico.[21])

In the 1889 case of *Chae Chan Ping v. United States*, often called the *Chinese Exclusion Case*, the Supreme Court held that the federal government had plenary power—discretion without constitutional limits—over national security, foreign affairs, and immigration law.[22] In that case, the Supreme Court ruled that the federal political branches had almost unlimited power to exclude noncitizens seeking entry into the United States.[23] The Court explained that, for "local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[24]

In the 1893 *Fong Yue Ting v. United States* opinion, the Supreme Court extended the plenary-power reasoning to removal of noncitizens in American

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[20] *Chy Lung*, 92 U.S. at 280.

[21] *See, e.g.*, *Mexico Opposes Immigration Law*, LOS ANGELES TIMES A-8 (June 23, 2010). *See also* "Motion for Leave to File and Brief of the United Mexican States in Support of Plaintiffs" [Docket No. 216], *Friendly House v. Whiting*, Dist. Ariz. Case No. 10-CV-01061-SRB (June 21, 2010) (available on PACER).

[22] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[23] *Id*. at 604.

[24] *Id*. at 606.

territory.[25] The opinion declared that the "right to exclude or to expel all aliens, or any class of aliens [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."[26] In short, by the end of the nineteenth century, the Supreme Court had already established that federal power had preempted state action over the control of immigration law.[27] That included assertions of state control over the "comings and goings of noncitizens and the length and conditions of their stay."[28] The Arizona Legislature is re-igniting a war that the states lost at the Supreme Court over a century ago.[29]

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[25] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

[26] *Id*. at 711.

[27] Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 510 (2001) ("Since the late nineteenth century, when federal regulation of immigration intensified, the Court has been even more likely to conclude that state or local measures singling out immigrants are preempted.").

[28] Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1573 (Sept. 2008). *See also* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (The author contends that it is unconstitutional for non-federal authorities even to participate in immigration enforcement because it is a power solely of the federal government.).

[29] *See also* PRESCOTT FARNSWORTH HALL, IMMIGRATION AND ITS EFFECTS UPON THE UNITED STATES 206 (1906) ("It is obvious that any State law regulating immigration must have proved nugatory sooner or later, owing to the impossibility of preventing the entrance of aliens from contiguous territory. This has proved a troublesome matter even in regard to Federal laws, and the wisdom of the framers of the Constitution in making the regulation of immigration a Federal matter is apparent.").

3. While the United States Supreme Court was holding that federal control over immigration law was preeminent, Congress was finally passing comprehensive immigration laws.

A supposed invasion of Chinese immigrants finally led Congress to enact the strong, comprehensive, federal immigration legislation that the Supreme Court's decisions made possible. Invited and imported into the United States to help build the intercontinental railroad and other railroads, tens of thousands of Chinese immigrants were living uneasily with the American residents of California and other western states.[30]

When the United States Supreme Court blocked state laws aimed at regulation and controlling immigration, western congressional representatives pressed federal authorities to ban, or at least limit, Asian immigration.[31] Congress responded, passing the Immigration Act of 1875, which "marks the beginning of direct federal regulation of immigration."[32] The Act was narrow, barring immigration of "cooly" laborers, prostitutes, and immigrants under "contract or agreement . . . for lewd and immoral purposes."[33] But it was a start to strong congressional control over immigration law.

In 1882, after growing opposition to Chinese immigration, Congress

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[30] ROGER DANIELS, GUARDING THE OPEN DOOR 16 (2004).

[31] ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 325-26 (1997).

[32] EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 66 (1981).

[33] Immigration Act of 1875, ch. 141, 18 Stat. 477.

passed the Chinese Exclusion Act, which halted entry of Chinese laborers for ten years.[34] In the Act's preamble, Congress explained that, in the "opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities."[35]

The Chinese Exclusion Act soon led to other federal laws tightening immigration restrictions.[36] In 1891, Congress passed legislation to bar entry of the diseased, the insane, polygamists, and those convicted of immoral crimes.[37] The 1891 Act also created the federal Bureau of Immigration, and led to opening Ellis Island as a receiving station in 1892.[38]

In 1917, Congress imposed literacy tests and racial quotas designed to reduce the number of what it deemed to be undesirable entrants.[39] Then, after World War I ended and immigrants from Europe were clamoring to enter the United States, Congress passed the Immigration Act of 1924, which limited "the annual quota of any nationality" to 2% "of the number of foreign-born individuals of such nationality resident in the continental United States as

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[34] Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882).

[35] *Id*. at 58.

[36] ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 363 (1997).

[37] *Id*.

[38] ROGER DANIELS, GUARDING THE OPEN DOOR 29 (2004).

[39] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874.

determined by the United States census of 1890."[40] The new law created a system of mandatory visas (with photographs), imposing re-entry fees for those who left and wanted to return.[41] For Mexican immigrants used to crossing unchecked between Mexico and the United States, the new system was unexpected and notably harsh.[42]

But the immigration-law pendulum always swings back. To reward the Chinese contribution to the American effort in the Second World War, and to encourage further cooperation with China, Congress repealed the Chinese Exclusion Act in 1943.[43] In that year, the United States also entered into a worker-exchange program with Mexico that let hundreds of thousands of Mexican agricultural workers enter the United States to aid in wartime food production.[44]

The middle of World War II is a good place to interrupt the history of congressional immigration policy and law, since it completes an arc from inaction, to exclusion, and then to liberalization. Nothing indicates that Congress will ever return to its pre-1875 tradition of scant immigration laws. After 1875, Congress accepted the invitation that the Supreme Court had

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[40] Immigration Act of 1924, ch. 190, 43 Stat. 153, 159.
[41] DANIELS at 53.
[42] *Id*.
[43] Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.
[44] DANIELS at 90.

proffered, and took full control over the task of creating immigration laws for the nation. Based on its constitutional power over commerce and over foreign policy, and based on the plenary federal power over immigration, Congress controls immigration law. The states have a cooperative role, subject and subordinate to federal policies and priorities, but they no longer have the right or power to create comprehensive, independent immigration laws—a historical fact that the Arizona Legislature has ignored.

Conclusion

"A page of history is worth a volume of logic."[45] Over a century ago—both judicially and legislatively—the federal government wrested from the states the power to make comprehensive immigration laws. The Arizona Legislature's attempt to pass its own comprehensive immigration law is constitutionally and legally wrong. The district court properly invalidated key parts of Arizona Senate Bill 1170. This Court should affirm that holding, which is constitutionally and legally sound—and historically irrefutable.

DATED this 30th day of September, 2010.

/s/ David L. Abney
David L. Abney
Co-Counsel for Amici Curiae
Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton

[45] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Certificate of Compliance

This amicus curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and 29(d). It contains 2,859 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), complies with the typeface rules of Fed. R. App. P. 32(a)(5), and complies with the typestyle rules of Fed. R. App. P. 32(a)(6), since it uses proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2003-2007.

DATED this 30th day of September, 2010.

/s/ David L. Abney
David L. Abney
Co-Counsel for Amici Curiae
Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton

Certificate of Service

I hereby certify that I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on this 30th day of September 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 service.

DATED this 30th day of September, 2010.

/s/ David L. Abney
David L. Abney
Co-Counsel for Amici Curiae
Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton

Statement of Related Cases

Counsel for Amici Curiae is unaware of any related cases, as Ninth Circuit Rule 28-2.6 defines them.

DATED this 30th day of September, 2010.

/s/ David L. Abney
David L. Abney
Co-Counsel for Amici Curiae
Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton