No. 10-16645

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

Appeal from the United States district court
District of Arizona, Case No. 10-cv-1413-PHX-SRB
Honorable Susan Bolton

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN, ALABAMA, FLORIDA, IDAHO, LOUISIANA, NEBRASKA, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND VIRGINIA IN SUPPORT OF DEFENDANTS-APPELLANTS

Michael A. Cox
Michigan Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record

Joel D. McGormley
Michigan Appellate Division Chief
Mark G. Sands
Michigan Assistant Attorney General

Attorneys for Amici Curiae States
Solicitor General Division
P.O. Box 30212, Lansing, MI 48909
517/373-1124

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST OF *AMICI CURIAE* STATES

Michael A. Cox is the Attorney General for the State of Michigan, which shares constitutional and common law roots with Arizona. Attorney General Cox is authorized by statute to intervene on behalf of the People of the State of Michigan in any court or tribunal when, in his judgment, the interests of the People are implicated. Mich. Comp. Laws § 14.28. *See also Associated Builders and Contractors v. Perry*, 115 F.3d 386, 390-392 (6th Cir. 1997).

Like Arizona, the State of Michigan and the amici States Alabama, Florida, Idaho, Louisiana, Nebraska, Northern Mariana Islands, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia have the power to concurrently enforce federal immigration law, provided that the States do not create new categories of aliens or attempt to independently determine the immigration status of an alien. This is the regulatory scheme envisioned by Congress – which is one of concurrent enforcement – where the federal government must respond to *any* inquiry by a State or local government agency seeking to verify the immigration status of any person within its jurisdiction. 8 U.S.C. § 1373(c). Such a duty is predicated on the principle that the States have the authority to make those inquiries regarding whether aliens are residing illegally within their borders. Indeed, that is precisely what A.R.S. 11-1051 and A.R.S. 13-3883(A)(5) seek to do – identify unlawful aliens within the jurisdiction of Arizona and bring those

persons to the attention of federal immigration authorities. Arizona has by statute simply mandated that its law enforcement officials participate in assisting the federal government in enforcing immigration law to the full extent envisioned by Congress.

By lawsuit, rather than by legislation, the executive branch seeks to negate this pre-existing power of the States to verify a person's immigration status and similarly seeks to reject the assistance that the States can lawfully provide to the federal government. That result contravenes Congress's intent of cooperative enforcement and replaces it with a regulatory scheme whereby the executive branch may continue to selectively enforce – or selectively not enforce – the laws enacted by Congress. Because the amici States have a similar interest in exercising their prerogative under our federal system to assist in the enforcement of federal law, this brief will primarily address sections 2 and 6 of S.B. 1070.

The Amici Curiae Brief of the State of Michigan and amici States is being filed pursuant to Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

The district court's preliminary injunction against S.B. 1070 should be reversed for three reasons. First, the district court could only reach its conclusion that the United States was likely to prevail on the merits because it ignored principles of statutory interpretation. In doing so, the district court did not attempt to construe the statute to be constitutional; rather, it sought out interpretations to invalidate S.B. 1070. Second, in analyzing this facial challenge, the district court reached out for hypothetical circumstances it believed justified its conclusion, and improperly found that the executive branch's policy decisions to not enforce the law and Congress's intent could support a preemption claim. Hypothetical possibilities are insufficient to sustain a facial challenge. The first two errors are substantial and basic.

The third error goes to the heart of the sovereign States's ability to enforce federal law in conformance with Congress's clear intent and to not be subject to shifting political and policy winds. Congress's intent here, broadly stated, is to control illegal entry into the country and the presence of those who should be removed for crimes warranting such action. Congress has expressly indicated that this is a cooperative effort with the States through the exchange of information. Further, the sovereign States possess the inherent power to enforce federal law. It cannot be that when state law enforcement officers have reasonable suspicion that

an individual is in the country illegally that the verification and relay of that information to the federal government is against Congress's intent. It also cannot be that when law enforcement has probable cause that an individual has committed a removable offense, that individual is arrested, and the individual is referred to the federal government, that those actions are against Congress's intent. A contrary conclusion would otherwise require an illogical foundational premise – a State enforcing Congress's intent too well cannot violate Congress's intent.

ARGUMENT

I. The United States is not likely to succeed on the merits and, therefore, the preliminary injunction should not have been granted.

The district court arrived at its conclusion that the United States was likely to prevail on the merits because it ignored principles of statutory interpretation, incorrectly used hypothetical circumstances in deciding this facial challenge, and improperly found that the executive branch's policy decisions to not enforce either the law or Congress's intent could support a preemption claim. These errors are fatal to the district court's decision and the United States's request for a preliminary injunction.

A. The district court's interpretation of S.B. 1070 was unreasonable and violated the rules of statutory interpretation.

The district court in this case found that section 2(B) of S.B. 1070 was preempted based in large part on its interpretation of the second sentence of the statute. The sentence at issue states that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The district court read the sentence independently – rather than looking at the statute as a whole – and determined that the statutory language required all persons who were arrested to have their immigration status confirmed. Based on its interpretation of the statute, the district court concluded that the number of verifications would overwhelm the federal system and, therefore, would interfere with federal allocation of resources. In other words, the district court in this case

read an ambiguous statute in a manner that, in the district court's view, raised potential constitutional problems. Based on that erroneous interpretation, the court found that section (2)(B) was likely to be held unconstitutional.

But the district court's reliance on this flawed interpretation of section 2 is inconsistent with the rules of statutory interpretation set forth by this Court. In *United States v. Buckland*, this Court recognized that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. . . . [W]here an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid [constitutional] problems." *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002). Here, not only is such alternative interpretation available in this case, it is in fact mandated by the ordinary rules of statutory interpretation.

Both this Court and the United States Supreme Court will "read statutes as a whole, and avoid statutory interpretations which would produce absurd results." *See also United States v. Morton*, 467 U.S. 822, 828 (1984); *Arizona State Bd. for Charter Schools v. United States Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006). section 2(B) of S.B. 1070 states in pertinent part:

> 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 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.

Here, the first sentence of the statute indicates that a police officer's duty to verify immigration status after an arrest is triggered only where "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." In so providing, the Arizona Legislature clearly intended that the reasonable suspicion requirement apply to those who are placed under arrest. However, the second sentence of the statute states that a police officer "shall" verify the immigration status of any person who has been placed under arrest. According to the district court, the language of the second sentence makes the reference to "arrest" in the first sentence nugatory. But the United States Supreme Court has cautioned against reading a statute in a way that makes part of it redundant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The district court's decision to make the reference to "arrest" in the first sentence nugatory was not necessary, given the structure of the statute as a whole. The first sentence creates an exception to the general requirement to verify immigration status when doing so "may hinder or obstruct an investigation." The Legislature's use of the term "shall" indicates that the requirement to verify is mandatory when a person is arrested, i.e., there is no discretion on part of a police

officer not to verify even if it would "hinder or obstruct an investigation." In context, the most rational interpretation of the statute would be that the exception to the mandatory verification scheme does not apply where an arrest has been made. The second sentence complements the first, because it makes clear that a police officer must always verify the immigration status of an arrestee *when there is reasonable suspicion to believe the arrestee is in the United States illegally*. In other circumstances where an officer has stopped or detained a person – circumstances where it is more likely that an officer may need to obtain information on a more serious crime – then that mandatory verification can be excused where it would "hinder or obstruct an investigation." This interpretation is more rational than that proposed by the district court, and is also consistent with the rules of statutory interpretation because it does not render any portion of the statute nugatory. More critically, this interpretation eliminates the constitutional concerns raised by the district court.

The district court plainly erred by opting to read the statute in a way that – in the Court's view – created a constitutional infirmity. Accordingly, its determination that the United States is likely to succeed on the merits should be reversed.

B. The district court erred by relying on an "as applied" standard to reach its conclusion that S.B. 1070 is facially unconstitutional.

The district court further erred in this case because it failed to demonstrate that S.B. 1070 is unconstitutional in *all* its applications, rather than in some limited instances regarding burdens placed on legal immigrants and citizens. The United States Supreme Court has made clear that in order to succeed on a facial challenge, 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) (emphasis added). *See also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). In deciding a facial challenge, this Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *United States v. Raines*, 362 U.S. 17, 22 (1960).

But that is exactly what the district court did in this case. The district court speculated that an increase in the number of requests for determinations of immigration status "will divert resources from the federal government's other responsibilities and priorities." Yet that does *not* conflict with the immigration system set up by Congress, which *requires* the federal government to respond to such State requests. Rather, on its face, the statute is consistent with the federal immigration scheme. The district court also speculated that legal aliens and citizens would be swept up and unlawfully detained while their immigration status

was verified. But again, that is a hypothetical case. While the Court may have imagined a circumstance where a United States citizen – who is not required to carry identification – would have "difficulty" in proving his immigration status under the requirements of the statute, such a scenario is not sufficient to support a facial challenge.

In essence, the district court relied on an "as applied" standard to reach its conclusion that S.B. 1070 is likely to be found facially unconstitutional – when it is not predestined that there will be any violation. The district court did not determine that section 2(B) was unconstitutional in all aspects, or that the "verification upon reasonable suspicion" scheme could never be implemented in a constitutional fashion. Therefore, the district court's opinion is inconsistent with the high burden placed on proponents of a facial challenge to a statute by the United States Supreme Court. Indeed, the statute's requirements are constitutional as they apply to unlawful aliens, and, therefore, a facial challenge must fail. The district court's decision granting the preliminary injunction based on the likelihood of success of the United States's facial challenge should be reversed.

C. The district court erred in concluding that S.B. 1070 is preempted because it "interferes" with the enforcement priorities of the executive branch.

Finally, and most critically, the district court erred by holding that the executive branch's decision not to enforce federal law is a proper grounds for preemption. A preemption analysis begins "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group v. Good*, __ U.S. __; 129 S. Ct. 538, 543 (2008). Where the statute in question is susceptible to more than one plausible reading, the United States Supreme Court instructs that courts must generally "accept the reading that disfavors pre-emption." *Altria Group*, 129 S. Ct. at 543. As detailed above, however, the district court here created a reading of the statute that *favored* preemption. Moreover, the district court's preemption analysis focuses on the statute's "interference" with the priorities of the executive branch, even though Arizona's verification scheme is consistent with Congress's immigration scheme.

In the realm of the regulation of legal immigration, the United States Supreme Court explained that "state 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) (emphasis added). Thus, the touchstone of preemption law is

the intent of Congress. Here, the intent of Congress is clear – it has mandated that the federal government verify a person's immigration status when asked to do so by a State. But the district court has held in this case that the mandatory verification requirement in section 2(B) is preempted because it conflicts with the *executive branch's* policy determinations and would divert resources from other federal responsibilities. Essentially, the district court has concluded that if the executive branch decides not to enforce a federal law, a State is prohibited from doing so, even where it was invited to participate in the enforcement scheme designed by Congress.

United States Supreme Court precedent has held that it is not a foregone conclusion that State statutes touching upon immigration are necessarily preempted. In *De Canas v. Bica*, the Supreme Court held that a California statute that restricted an employer from knowingly employing an undocumented immigrant, if such employment would have an adverse effect on lawful resident workers, was not preempted. *De Canas v. Bica*, 424 U.S. 351 (1976). The Court used a three-part inquiry to address whether the California statute prohibiting an employer from knowingly employing an alien who was not entitled to lawful residence in the United States was preempted.

First, the Court addressed whether California was regulating immigration because immigration is within the federal government's exclusive power. *De*

Canas, 424 U.S. at 354, 356. The Court concluded that "standing alone, the fact that aliens are the subject of a State statute does not render it a regulation of immigration." *Id.* at 355. Second, the Court reviewed whether there was a "clear and manifest purpose of Congress" to effect a "complete ouster of state power--including state power to promulgate laws not in conflict with federal laws" in the area addressed by the California law. *Id.* at 354, 356. The Court in *De Canas*, concluded that such was not the case. *Id.* at 356. Third, the Court addressed whether the California law "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 363 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court in *De Canas* remanded that issue. *De Canas*, 424 U.S. at 363-365.

Senate Bill 1070 does not constitute a "regulation of immigration" because it does not define who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. Senate Bill 1070 does not create a class of aliens different from that set forth under federal law, nor does it impose restrictions on lawful aliens outside of those in federal law. Rather, the statute – and in particular sections 2 and 6 addressing the authority of Arizona to investigate or arrest unlawful aliens – simply exercises Arizona's inherent authority to act with respect to illegal aliens.

Moreover, S.B. 1070 does not stand as an "obstacle" to federal enforcement priorities, because the federal government at all times maintains its authority to determine how to proceed once an unlawful alien is brought to its attention by Arizona. The statute requires a police officer who has reasonable suspicion to believe that an individual in custody is in the United States illegally to ascertain that person's immigration status and report unlawful aliens to federal authorities. But it is ultimately those federal authorities who must identify the individual as being in the country illegally and who must determine whether the individual must be deported or if that person will be allowed to stay in the United States for humanitarian or other reasons. Accordingly, the district court's preemption analysis cannot stand.

1. Senate Bill 1070 does not regulate immigration.

A statute is a "regulation of immigration" if it defines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 354-355. For instance, a State cannot impose additional requirements for aliens to enter the State that go beyond those set by Congress to allow entry into the United States. A State is also forbidden from creating state-level criteria to determine which aliens were allowed to remain in the State. Arizona's policy of "attrition through enforcement" does neither of those things.

Rather, Arizona has decided to simply do what Congress has invited it to do – assist the federal government in identifying individuals who are in the United States unlawfully. *See* 8 U.S.C. § 1373(c). Arizona's policy statement in section 1 of S.B. 1070 highlights the obvious implications of that decision – enforcement of immigration laws will reduce violations of those laws. Any time a State chooses to enforce a federal law, it does so with the goal of reducing violations of that law – the goal of attrition through enforcement. A State's enforcement of Congressionally-approved immigration standards does not establish new immigrations standards. Rather, it reduces violations of the federal standards, which is unquestionably the policy goal Congress set when it enacted those standards in the first place.

It makes no sense to conclude that States doing what Congress has said they can do, for the purpose of upholding federal law, violate preemption principles. Such a conclusion renders the States subject to ever-changing political and policy winds. States would no longer be able to rely on Congress's clear intent to guide their actions, especially where inherent authority exists for States to enforce federal law. It cannot be that what matters is not what Congress says but rather what the executive branch chooses not to enforce. Such a result would place the States in an untenable position.

This whipsawing effect could arise, for example, in analogous areas where immigration issues are implicated and where States must verify immigration status because the federal government is concerned about its funding. For example, Medicaid is a jointly-funded state and federal program for medical assistance for eligible indigent individuals. Participating States "must comply with the requirements of Title XIX. [42 U.S.C. §§ 1396 et seq.]" *Harris v. McRae*, 448 U.S. 297, 301 (1980). One such general requirement, for example, 42 U.S.C. §§ 1320b-7(a)(1) and (d), explicitly requires States to condition medical assistance on verification of applicants' social security numbers and legal immigration status.

In the Medicaid context, there is a clear expression of Congress's intent to generally limit Medicaid to immigrants with legal status and requires the State's cooperation. If a State were vigilant in verifying a person's immigration status, the federal government should not hypothetically be able to claim that it has made a policy decision that it does not want States to verify and that the States are

screening out too many people who are ineligible. Such an action would clearly not be congruent with Congress's intent.[1]

Federal courts have long held that state law enforcement officers have inherent authority to arrest for violations of federal law, as long as the arrest is authorized by State law. *See Davida v. United States*, 422 F.2d 528, 530 (10th Cir. 1970). *See also United States v. Swarovski*, 557 F.2d 40, 43-49 (2d Cir. 1977); and *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (holding that as a matter of state law, Illinois officers "have implicit authority to make federal arrests"). Congress augmented the States's inherent authority by providing that States could arrest persons who are illegally present in the United States under federal authority where other conditions were met. 8 U.S.C. § 1252c. As explained by the United States Court of Appeals for the Tenth Circuit, Congress intended that § 1252c *enhance* State power and that it did not "limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. Instead, 1252c merely

[1] Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), there any number of other benefits, including joint federal/state benefits, that require verification of immigration status. *See* Dep't of Health & Human Services, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit" Notice, 63 Fed. Reg. 41658, 45658-01 (Aug. 4, 1998); 8 U.S.C. § 1611. Moreover, pursuant to 8 U.S.C. § 1625, "[a] State or political subdivision of a State is authorized to require an applicant for State and local public benefits (as defined in section 411(c) [8 USCS § 1621(c)]) to provide proof of eligibility."

creates an additional vehicle for the enforcement of federal immigration law." *United States v. Vasquez-Alverez*, 176 F.3d 1294, 1298, 1299 (10th Cir. 1999).

The Tenth Circuit's reasoning in *Vasquez-Alverez* is consistent with the conclusions reached by the circuits in the specific realm of immigration law. In *Gonzalez v. Peoria*, this Court held that a State may arrest a person for violating federal immigration law, so long as the police "have probable cause to believe either that illegal entry has occurred or that another offense has been committed." *Gonzalez v. Peoria*, 722 F.2d 468, 477 (9th Cir. 1983), overruled on other grounds by *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

Likewise, the Tenth Circuit held in *United States v. Salinas-Calderon*, that a police officer could inquire into a person's immigration status where he had "reasonable suspicion" that a person had violated federal immigration law. *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984). In *Salinas-Calderon*, a Kansas State Trooper pulled over a driver of Mexican descent based on his suspicion the driver was intoxicated. During the stop, the Trooper discovered that neither the driver nor the six adult males in the bed of his pickup truck could speak English. The Tenth Circuit held that the Trooper had "general investigatory authority to inquire into possible immigration violations" and that his questions to the driver's wife about the defendant's green card were reasonable under *Terry v. Ohio*, 392 U.S. 1, 19 (1968). *Salinas-Calderon*, 728 F.2d 1301 n. 3. When the

Trooper ascertained that the defendant was from Mexico and did not have identification papers or a green card, he had probable cause to make a warrantless arrest for violation of the immigration laws. *Salinas-Calderon*, 728 F.2d at 1301.

In fact, a 2002 memorandum by the Department of Justice's Office of Legal Counsel concludes that States have "inherent power" to make arrests for violations of federal law and that 8 U.S.C. § 1252c does not preempt State authority to arrest for federal violations.[2] This statement of the official position of the Department of Justice is consistent with decisions of both this Court and the United States Courts of Appeals for the Tenth Circuit holding that state law enforcement officers can specifically arrest a person suspected of violating federal immigration law.

Thus, S.B. 1070 does not "regulate" immigration because its requirements are consistent with the power of state law enforcement officers to inquire into a person's immigration status. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). The Tenth Circuit's decision in *Salinas-Calderon* – which sustained the argument made by the United States – is consistent with the Department of Justice's 2002 memorandum and with the provision of S.B. 1070 that requires an officer engaged in a lawful stop, detention, or arrest of a suspect to verify that person's immigration status where there is "reasonable suspicion" that the individual is an unlawful

[2] *See* Dep't of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (April 3, 2002) available at http://www.aclu.org/FilesPDFs/ACF27DA.pdf (last visited on September 2, 2010).

alien.[3] Likewise, *Salinas-Calderon*, *Gonzalez*, and the official memorandum of the Department of Justice, support section 6 of the statute which permits an officer to arrest a person where there is probable cause that the individual has committed an offense that could result in deportation. Accordingly, because S.B. 1070 does not "regulate" immigration, it is not preempted by federal law.

2. The incidental burdens of Arizona's new reporting scheme on the executive branch do not "stand as an obstacle" to the accomplishment of the full purposes and objectives of Congress.

The preemption doctrine, which rests on the Supremacy Clause, is intended to ensure that State action does not obstruct Congress's intent. However, the district court's decision is premised on the notion that S.B. 1070 interferes with the executive branch's discretionary allocation of resources.

The district court relied on *Hines v. Davidowitz* in concluding that sections 2 and 6 of S.B. 1070 are impliedly preempted. *Hines v. Davidowitz*, 312 U.S. 52 (1941). But *Hines* is inapposite because sections 2 and 6 do not on their face conflict with the federal immigration scheme by subjecting lawful aliens to further requirements. Nor does the argument logically flow from *Hines* that the States's

[3] The United States argues that enforcement of sections 2 and 6 could hypothetically lead to "harassment" of legal aliens and, therefore, those sections are preempted. This argument lacks merit, as a mere hypothetical or imaginary harm, is not sufficient to find a statute facially unconstitutional. *See United States v. Raines*, 362 U.S. 17, 22 (1960). Rather, the proper remedy for a person who claimed to have been harassed by Arizona law enforcement under section 2 or 6 would be a 42 U.S.C. § 1983 action, not a claim of preemption.

cooperative enforcement of federal law somehow contravenes Congress's purposes and objectives.

In *Hines*, the United States Supreme Court held that the federal government's alien registration scheme under Federal Alien Registration Act preempted Pennsylvania's more restrictive statutory scheme. *Id.* at 74. The Pennsylvania statute required aliens to register yearly and to carry registration cards, whereas the federal act required only a one-time registration and did not have a similar card requirement. *Id.* at 59-60. The Court's holding was premised on the federal government's exclusive responsibility for foreign affairs and the concern that the Pennsylvania statute could interfere with that responsibility. *Id.* at 63-64. The Court applied an implied-preemption analysis but recognized that there is no bright-line test or formula. *Id.* at 67. Rather, the Court concluded that its "primary function is to determine whether, under the circumstances of [the] particular case [the State's law] stands as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress." *Id.* at 67 (citation omitted).

Here, the determination of a person's immigration status when there is reasonable suspicion that a person is an illegal alien after a lawful stop under section 2, as well as the warrantless arrest upon probable cause under section 6, does not encroach upon "the personal liberties of law-abiding aliens" as in *Hines*.

Id. at 74. Sections 2 and 6 instead relate to aliens who have violated federal law by entering the country illegally or who have committed an offense that makes them subject to removal under federal law. In fact, sections 2 and 6 do not impose obligations on lawful aliens at all – distinguishing this case from *Hines*, in which State law imposed new obligations on all aliens. Rather, sections 2 and 6 are applicable only where there has already been a violation of federal law.

Further, sections 2 and 6 require law enforcement to have reasonable suspicion and probable cause. These provisions cannot be viewed as a drag-net where "[l]egal residents will certainly be swept up" as the federal court speculated here. Nor, as articulated in *Hines*, is it predestined that lawful aliens be subjected to "inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74. In fact, the district court noted that "[m]any law enforcement officials already have the discretion to verify immigration status if they have reasonable suspicion, in the absence of S.B. 1070." It is mere speculation by the district court that law enforcement will not apply the reasonable suspicion standard correctly and that law enforcement will improperly conclude that probable cause exists based on a removable offense. Rather, the State is presumed to obey the law. *In re Hergenroeder*, 555 F.2d 686 (9th Cir. 1977).

It is illogical to conclude that the States, in acting cooperatively as authorized by federal law and under the inherent authority to arrest for violations

of federal law, act as an obstacle to Congress's purposes and objectives. It cannot be that identifying and referring to the federal government those individuals who are in the country illegally or who should be removed under federal law is at the same time an obstacle to federal law.

The United States's speculative claims that there would be a dramatic increase in referrals from Arizona and potentially other States, causing the federal government to suffer resource problems, is unpersuasive for purposes of establishing a basis for preemption. The district court erroneously concluded here that any increase in requests for immigration status determinations arising from the mandatory verification requirements of section 2(B) is grounds for preemption. The district court relied upon *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001). But *Buckman* is distinguishable.

Buckman was decided on the grounds that "State-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Agency's judgment and objectives." *Id*. at 350. Yet the conflict in *Buckman* arose from a very specific set of facts that would have thwarted Congress's objectives under the applicable statutes. In *Buckman*, the state-law fraud-on-the-FDA claims would increase burdens on applicants by discouraging applicants from seeking beneficial off-label uses for fear of civil liability, and disclosures to the FDA could be found insufficient in state court, causing

applicants to submit unnecessary information in attempts to avoid liability. *Id.* at 350-351. The end result would be a slowed process that would delay medical professionals' ability to prohibit off-label uses. *Id.* at 351.

Here, in contrast Congress's objectives in controlling illegal aliens' entry and presence in the country, as well as in removing those who have committed certain crimes, is not impeded by the States identifying those very individuals and providing that very information to the federal government. This cooperative effort is not an "extraneous pull on the scheme established by Congress." *Buckman*, 531 U.S. at 353. Rather, Arizona is trying to do exactly what Congress intended.

Moreover, there is no actual – as opposed to hypothetical – conflict between the federal scheme and sections 2 and 6 of S.B. 1070. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). First, Congress has provided that the executive branch has no discretion regarding whether to answer an inquiry from a State regarding the immigration status of a person in custody. Under 8 U.S.C. § 1373(c), federal immigration authorities "shall respond" to an inquiry from a State agency seeking to verify the citizenship or immigration status of any individual within that State's jurisdiction. Again, Congress's use of the word "shall" demonstrates that the executive branch lacks any discretion whether to answer these inquiries. Nor does the statute limit in any way the number of inquiries a State might make. Therefore, the executive branch's discretionary allocation of resources cannot

justify its preemption argument. Indeed, this very argument has been rejected by this Court just last year. In *Chicanos Por La Causa v. Napolitano*, this Court held that Arizona's requirement to participate in E-Verify was not preempted because "while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866-867 (9th Cir. 2009). Likewise, nothing in the language of federal immigration law indicates that Congress sought to place an "outer limit" on the scope of a State's participation.

Second, Congress has stated that the Attorney General "shall" cooperate with the States to assure that information that would assist state law enforcement in arresting and detaining "an alien illegally present in the United States" under certain conditions is made available to such officials. 8 U.S.C. § 1252c(b). Congress's use of the word "shall" indicates a mandatory, rather than discretionary, duty on part of the executive branch to assist state law enforcement in carrying out the State's prerogative under 8 U.S.C. § 1252c(a). Because Congress has not given the executive branch any discretion in determining whether to assist Arizona, its complaints about draining federal resources cannot form the basis of a claim of preemption.

Finally, any claim that S.B. 1070 interferes with the executive branch's allocation of resources must fail because Arizona does not, and cannot, place any

obligation on the federal government after an unlawful alien is reported. Under A.R.S. 11-1051(C), a law enforcement agency "shall" notify federal immigration officials. Once that notification has been completed, it is ultimately up to the federal government how to proceed. The federal government could, for example, exercise its discretion by allowing the unlawful alien to remain in the United States in the interest of providing humanitarian relief. Or the federal government could simply refuse to process any unlawful alien referred to it by Arizona officials, as suggested in May 2010 by the head of the Immigration and Customs Enforcement Agency.[4] There is no provision in S.B. 1070 that would, or could, permit Arizona to overrule such an exercise of discretion.

Accordingly, the district court's conclusion that the United States is likely to succeed on its claim that S.B. 1070 is preempted because it "interferes" with the enforcement priorities of the executive branch should be reversed.

[4] *See* Avila, "ICE chief criticizes Arizona immigration law," *Chicago Tribune*, May 19, 2010, *available at* http://www.azcentral.com/news/articles/2010/05/19/20100519arizona-immigration-law-ICE-chief-opposes.html (last visited on September 2, 2010).

CONCLUSION

WHEREFORE, *Amici Curiae* States respectfully urge this Honorable Court to REVERSE the district court's preliminary injunction imposed on portions of sections 2 and all of section 6 of S.B. 1070.

Respectfully submitted,

Michael A. Cox
Michigan Attorney General

s/B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
RestucciaE@michigan.gov

Joel D. McGormley
Michigan Appellate Division Chief
Mark G. Sands
Michigan Assistant Attorney General

Attorneys for Amici Curiae
Solicitor General Division
P.O. Box 30212
Lansing, MI 48909
517/373-1124

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CERTIFICATE OF COMPLIANCE

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s/B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
RestucciaE@michigan.gov
Solicitor General Division
P.O. Box 30212
Lansing, Michigan 48909
517/373-1124

PROOF OF SERVICE

I certify that on September 2, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

Ray Elbert Parker
P.O. Box 320636
Alexandria, VA 22320

s/B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
RestucciaE@michigan.gov
Solicitor General Division
P.O. Box 30212
Lansing, Michigan 48909
517/373-1124