

Case 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.

On Appeal From the United States District Court for the District of Arizona,
Phoenix Division, Case No. 2:10-cv-01413-SRB,
The Honorable Susan R. Bolton, District Judge

BRIEF AMICI CURIAE OF MEMBERS OF CONGRESS BRIAN BILBRAY, TRENT FRANKS, SENATOR JOHN BARRASSO, SENATOR JIM DEMINT, SENATOR JAMES INHOFE, SENATOR DAVID VITTER, SENATOR ROGER WICKER, ROBERT ADERHOLT, RODNEY ALEXANDER, MICHELE BACHMANN, SPENCER BACHUS, J. GRESHAM BARRETT, ROB BISHOP, MARSHA BLACKBURN, JOHN BOOZMAN, PAUL BROUN, GINNY BROWN-WAITE, MICHAEL BURGESS, DAN BURTON, KEN CALVERT, JOHN CAMPBELL, JOHN CARTER, JASON CHAFFETZ, HOWARD COBLE, MIKE COFFMAN, JOHN CULBERSON, GEOFF DAVIS, JOHN FLEMING, RANDY FORBES, VIRGINIA FOXX, ELTON GALLEGLY, SCOTT GARRETT, PHIL GINGREY, LOUIE GOHMERT, BOB GOODLATTE, RALPH HALL, DEAN HELLER, WALLY HERGER, PETE HOEKSTRA, DUNCAN HUNTER, WALTER JONES, JIM JORDAN, STEVE KING, JACK KINGSTON, JOHN KLINE, DOUG LAMBORN, ROBERT LATTA, DON MANZULLO, PATRICK MCHENRY, GARY MILLER, JEFF MILLER, JERRY MORAN, SUE MYRICK, RANDY NEUGEBAUER, JOE PITTS, TED POE, BILL POSEY, TOM PRICE, ED ROYCE, JOHN SHADEGG, BILL SHUSTER, LAMAR SMITH, JOHN SULLIVAN, GENE TAYLOR, TODD TIAHRT, AND ED WHITFIELD IN SUPPORT OF APPELLANTS AND PARTIALLY REVERSING THE DISTRICT COURT

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INTEREST OF *AMICI*

Amici, United States Senators and Representatives Brian Bilbray, Trent Franks, Senator John Barrasso, Senator Jim DeMint, Senator James Inhofe, Senator David Vitter, Senator Roger Wicker, Robert Aderholt, Rodney Alexander, Michele Bachmann, Spencer Bachus, J. Gresham Barrett, Rob Bishop, Marsha Blackburn, John Boozman, Paul Broun, Ginny Brown-Waite, Michael Burgess, Dan Burton, Ken Calvert, John Campbell, John Carter, Jason Chaffetz, Howard Coble, Mike Coffman, John Culberson, Geoff Davis, John Fleming, Randy Forbes, Virginia Foxx, Elton Gallegly, Scott Garrett, Phil Gingrey, Louie Gohmert, Bob Goodlatte, Ralph Hall, Dean Heller, Wally Herger, Pete Hoekstra, Duncan Hunter, Walter Jones, Jim Jordan, Steve King, Jack Kingston, John Kline, Doug Lamborn, Robert Latta, Don Manzullo, Patrick McHenry, Gary Miller, Jeff Miller, Jerry Moran, Sue Myrick, Randy Neugebauer, Joe Pitts, Ted Poe, Bill Posey, Tom Price, Ed Royce, John Shadegg, Bill Shuster, Lamar Smith, John Sullivan, Gene Taylor, Todd Tiahrt, and Ed Whitfield are currently serving in the One Hundred Eleventh Congress. *Amici* are committed to the constitutional principles of federalism and separation of powers, both of which are jeopardized by the Administration's attack against Arizona's immigration law, S.B. 1070.

ARGUMENT

I. THE ADMINISTRATION'S PREEMPTION CLAIMS MUST BE EVALUATED IN LIGHT OF THE UNDERLYING TENSION THAT EXISTS BETWEEN FEDERAL LAW AND THE ADMINISTRATION'S ASSERTED POLICY OBJECTIVES.

This lawsuit arose out of the current Administration's objection to S.B. 1070, but the case brings to light a significant conflict between the Executive and Legislative branches of the federal government. The gravamen of the Administration's Complaint is that S.B. 1070 independently (and impermissibly) enforces federal immigration law. The district court's preemption analysis implicitly assumed that the Executive's enforcement and foreign policy priorities should trump Congress's intent in enacting federal immigration laws. The preemption claims in this case must therefore be considered against the backdrop of the clash between federal law and the Administration's policy goals. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (noting that if the case had presented a conflict between federal law and presidential foreign policy objectives, *Youngstown* would control).

Youngstown established that where the Executive asserts a claim of authority (here, preemption authority) that is

incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress

over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive *must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added, footnote omitted); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) (Justice Jackson’s concurrence in *Youngstown* sets forth the “accepted framework” for evaluating claims of presidential power).

The heart of the Administration’s claims against sections 2 and 3 of S.B. 1070 is that those provisions seek to enforce federal provisions that the Executive chooses either not to enforce, or to enforce selectively.¹ For example, Congress

¹ The current Administration’s laxity toward enforcing immigration laws is well-documented. The DHS is now “reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal immigrants who have no serious criminal records” Susan Carroll, *Feds Moving to Dismiss Some Deportation Cases*, *Houston Chronicle*, Aug. 24, 2010, <http://www.chron.com/disp/story.mpl/metropolitan/7169978.html>.

The Administration also has limited both federal and local officers’ authority to arrest illegal aliens who are discovered during traffic stops. Local law enforcement officers may arrest and detain illegal aliens when ICE confirms that the aliens are unlawfully present. *See United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007). Additionally, state and local officers can have an even more expanded role in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the “287(g)” program. *See* 8 U.S.C. § 1357(g)(1) (2006); U.S. Immigration and Customs Enforcement, Fact Sheet: Section 287(g) Immigration and Nationality Act, Aug. 16, 2006, *available at* <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>; Jessica Vaughn and James R. Edwards Jr., *The 287(g) Program: Protecting Home Towns*

requires the Department of Homeland Security (“DHS”) to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information.” 8 U.S.C. § 1373(c) (2006). Congress placed no limits on the number of requests that state and local officials could submit and no conditions on the LESC’s obligation to respond to inquiries. Congress also enacted other statutory provisions to ensure that state and local authorities make maximum use of this federal database.²

Despite Congress’s clear purposes, the Administration argued, and the district court held, that the increased number of immigration status verifications which S.B. 1070, section 2 contemplates would burden the Executive branch and

and Homeland, Center for Immigration Studies, Oct. 2009, <http://www.cis.org/287greport>. The new ICE policy, however, seeks to significantly limit an officer’s authority under the 287(g) program: “Immigration officers shall not issue a detainer unless an LEA [law enforcement agency] has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e. roadside or *Terry* stops) but not arrested.” Jessica Vaughn, *ICE Chief Morton to Field: See No Illegal Aliens*, Center for Immigration Studies, Aug. 19, 2010, <http://cis.org/vaughan/see-no-illegal-aliens> (quoting ICE Draft Policy *available at* <http://www.cis.org/articles/2010/ice-draft-080110.pdf>). Vaughn summed up the new policy: “all illegal aliens who violate traffic laws will get a free pass from ICE, unless they also happen to have committed other ‘real’ crimes.” *Id.*

² See, e.g., 8 U.S.C. § 1357(g)(10) (2006) (expressly reserving inherent state authority in immigration law enforcement); *Id.* §§ 1373(a)-(b), 1644 (2006) (banning sanctuary policies that interfere with the exercise of that authority).

hamper “federal priorities.” *United States v. Arizona*, No. 2:10-cv-01413-SRB, 2010 U.S. Dist. LEXIS 75558, at *33 (D. Ariz. July 28, 2010).³

What is more, the district court held that Section 2 was preempted, not because Congress intended to preempt such laws, but because Arizona commanded its own officers to perform a function that they already had the authority to perform—verify an individual’s immigration status with the federal government if the officer has reasonable suspicion that the person is unlawfully present. *Compare id.* at *35-36, 42 with *Estrada v. Rhode Island*, 594 F.3d 56, 61 (1st Cir. 2010); *United States v. Alvarado-Martinez*, 255 Fed. App’x. 645, **3-4 (3d Cir. 2007); *Soriano-Jarquín*, 492 F.3d at 501; *United States v. Vasquez*, 225 Fed. App’x. 831, **10-11 (11th Cir. 2007); *United States v. Rodríguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001); *United States v. Vasquez-Alvarez*, 176 F.3d 1294

³ In reality, the Law Enforcement Support Center is equipped to handle 1.5 million requests annually, and currently handles 1 million inquiries per year. Approximately 80,000 of those requests come from Arizona. Even if S.B. 1070’s operation doubled the number of Arizona’s inquiries, the increase would constitute a fraction of the requests that the LESC is capable of processing. David C. Palmatier, Aff. ¶ 13, June 28, 2010, <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf>; Press Release, Senator John McCain, Arizona Senators Introduce Amendment to Aid Law Enforcement Support Center (Aug. 4, 2010), http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=3dbde1cc-b458-6145-dad1-a8af38866944&Region_id=&Issue_id= (“According to Mr. Palmatier [LESC Unit Chief], the LESC currently employs 153 Law Enforcement Specialists, enough personnel to handle approximately 1.5 million status inquiries per year.”).

(10th Cir. 1999); *Lynch v. Canatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1300-02 (10th Cir. 1984); *United States v. Contreras-Diaz*, 575 F.2d 740, 743-745 (9th Cir. 1978).

Similarly, Congress has required aliens to register with the federal government. 8 U.S.C. §§ 1304(e), 1306(a) (2006). Section 3 of S.B. 1070 merely codifies Arizona's lawful authority to enforce this provision, and imposes state penalties for noncompliance. Nevertheless, conjuring a preemption claim, the Administration argued, and the district court held, that Section 3 is unconstitutional under *Hines v. Davidowitz*, 312 U.S. 52 (1941), a *conflict* preemption case.⁴ *Arizona*, 2010 U.S. Dist. LEXIS 75558, at *46. The Executive Branch's real quarrel, however, is with 8 U.S.C. §§ 1304(e) and 1306(a), as evidenced by the fact that it rarely enforces the federal alien registration requirements.

Because this case reveals incompatibility between Acts of Congress and Presidential policy, *Youngstown* requires the Court to scrutinize the Administration's preemption claims with great caution. Contrary to the district court's holding, the Executive's prosecutorial discretion and foreign policy objectives do not have preemptive force in this case. If this Court does not reverse

⁴ For a more in-depth discussion of why the district court's reliance on *Hines* is erroneous, see *infra* § II(C)(3).

the district court's decision, preemption analysis will no longer turn on congressional intent, but on each Administration's political preferences.

II. CONGRESS HAS PLENARY POWER OVER IMMIGRATION, AND THE DISTRICT COURT ERRED IN HOLDING THAT THE ADMINISTRATION'S ENFORCEMENT AUTHORITY SUFFICES TO PREEMPT KEY PROVISIONS OF S.B. 1070.

A. Congress Has Plenary Power Over Immigration, and the Executive Must Follow Congress's Direction.

Congress has plenary power to prescribe the immigration laws. *INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over aliens . . . is not open to question”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens”) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (identifying different sources for Congress's power over aliens). While the Executive has power to conduct United States foreign policy, federal immigration laws reflect national and foreign policy goals in the immigration context. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (Immigration policy “is vitally and intricately interwoven with contemporaneous policies in regard to [among other things] the conduct of foreign relations . . .”).

Where Congress exercises plenary power to prescribe laws, the Executive must follow Congress's direction. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696-

99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6) (2006)); *Jama v. ICE*, 543 U.S. 335, 368 (2005) (Souter, J., dissenting) (“Congress itself . . . significantly limited Executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens”).⁵ Though some immigration laws grant Executive officials discretion, the laws balance the various concerns they embody within the constraints of each statute’s text, not the Executive’s exercise of prosecutorial discretion. *Cf. Oceanic Navigation Co.*, 214 U.S. at 339-40 (Congressional authority over aliens “embraces every conceivable aspect of that subject”); *Jama*, 543 U.S. at 368 (Souter, J., dissenting) (“Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it.”).

⁵ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), is not contrary to this principle. One issue in *Knauff* was whether Congress unconstitutionally delegated legislative power to the President. *Id.* at 542. The Court found that it had not, noting that “[t]he exclusion of aliens is a fundamental act of sovereignty” that “stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.” *Id.* Thus, “Congress may in broad terms authorize the executive to exercise the power” *Id.* at 543. “Executive officers may be entrusted with the duty of specifying the procedures *for carrying out the congressional intent.*” *Id.* (emphasis added). *Knauff* thus presupposes that the Executive must act in accord with Congress’s wishes.

B. Preemption Is A Matter of Congressional Intent, Not Executive Policy Preferences.

It is congressional intent that matters in preemption. *See Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). Therefore, federal agency regulation can preempt state law only when the agency is acting within the scope of its congressionally-delegated authority, that is, when the agency is furthering Congress's intent. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). In other words, when Congress tells an agency to act, the agency must comply. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (agency cannot refuse to obey statutory commands to pursue its own priorities).

There is a strong presumption against implied administrative agency preemption, which is all that the Administration could potentially claim here because DHS has no formal regulations expressly preempting state laws:

[A]gencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717 (1985). As for the scope of the agency's delegated authority, a court may not "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon

itself.” *Louisiana Public Serv. Comm’n*, 476 U.S. at 374. “To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.” *Id.* at 374-75.

To determine whether federal immigration laws preempt state laws then, Congressional enactments and goals must be the focal point, not administrative agency policy as dictated by the Executive Branch’s prosecutorial preferences, or its foreign policy objectives.⁶ See *Altria Group, Inc.*, 129 S. Ct. at 543; *De Canas v. Bica*, 424 U.S. 351, 363 (1976) (state law dealing with aliens is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (quoting *Hines*, 312 U.S. at 67) (emphasis added)).

C. S.B. 1070’s Provisions Are Consistent With Federal Immigration Policy That Promotes Increasingly Greater Roles For States In Enforcing Immigration Law.

Congress has passed numerous acts illustrating the clear and manifest intent to welcome state involvement in immigration control. Congress has expressed its intent not to preempt state cooperation by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10) (2006)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§

⁶ The district court only cited Article I powers in the United States Constitution in describing the authority to regulate immigration, not Article II powers. See *Arizona*, 2010 U.S. Dist. LEXIS 75558, at *21-22, n.4. Yet the district court looked to *Executive* Branch policies, not *legislative* Acts in determining preemption.

1373(a)-(b), 1644 (2006)), (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) simplifying the process for making such inquiries (Law Enforcement Support Center (“LESC”)), (5) deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1) (2006)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11) (2006)).

In encouraging cooperative immigration law enforcement, Congress did not displace State and local enforcement activity. *See Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983); *Salinas-Calderon*, 728 F.2d at 1301 n.3 (State and local officers have “general investigatory authority to inquire into possible immigration violations.”). Instead, Congress wanted to expand state authority because it worried that “perceived federal limitation[s]” could hamper law enforcement officials. *See Vasquez-Alvarez*, 176 F.3d at 1298 (quoting 142 CONG. REC. 4,619 (1996) (comment of Rep. Doolittle)). Congress enacted 8 U.S.C. § 1252c (2006) to clarify that federal law does not preempt state and local officers from arresting an illegally present alien convicted of a felony and ordered deported. *Vasquez-Alvarez*, 176 F.3d at 1298. Section 1252c also does not preempt states from assisting in enforcement outside of those preconditions; instead Section 1252c “displace[s] a perceived federal limitation on the ability of state and local officers to arrest aliens . . . in violation of Federal immigration laws.” *Vasquez-Alvarez*, 176 F.3d at 1298-99.

Congress was also concerned that municipal sanctuary policies were prohibiting officers from contacting the then-INS about possible immigration violations. In response, Congress passed two statutes in 1996 to ban sanctuary policies. 8 U.S.C. § 1644 forbids state or local official actions that “prohibit[], or in any way restrict[]” a state or local government entity’s ability to “send[] to or receiv[e] . . . information regarding the immigration status, lawful or unlawful, of an alien in the United States.” 8 U.S.C. § 1373(a)-(b) expands preemption of sanctuary policies to those that prohibit or restrict government entities or officials from sending or receiving information regarding “citizenship or immigration status” and also preempts laws that prohibit or restrict immigration status information sharing. *See, e.g., City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of law banning sanctuary policies).

To ensure cooperation by federal officials, Congress *required* immigration authorities to respond to state and local inquiries seeking to “verify or ascertain the citizenship or immigration status of any individual” 8 U.S.C. § 1373(c). Congress had already begun allocating funds to create the LESC, which is now the primary point of contact between state officers and federal immigration agents for verifying immigration status.

In 1996, Congress also enacted 8 U.S.C. § 1357(g)(1), which allows state and local officers to be deputized as immigration agents. This congressionally-

delegated authority is distinct from an officer's inherent authority to inquire into immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 478 (2008); *see also Vasquez-Alvarez*, 176 F.3d 1294; *Contreras-Diaz*, 575 F.2d at 743-745. But Congress reaffirmed the states' inherent authority to enforce the law. 8 U.S.C. § 1357(g)(10).

Congress has also used its spending power, U.S. Const. art. I, §8, cl. 1, to support cooperative immigration enforcement by appropriating federal funds for state and local governments that assist in enforcing immigration laws. 8 U.S.C. § 1103(a)(11).

Finally, the Executive Branch itself has encouraged concurrent immigration enforcement. In 1996, the Justice Department's Office of Legal Counsel ("OLC") supported state and local enforcement of criminal INA provisions and also concluded that state and local officers could detain aliens for registration law violations. 20 Op. O.L.C. 26, 29, 37 (1996) (Exhibit A).⁷ Since 2001, the Justice Department has entered warrants ("detainers") for civil immigration violations into the National Crime Information Center database ("NCIC"), available nationally to state and local officers. Kris W. Kobach, *The Quintessential Force Multiplier: The*

⁷ Courts also recognize state and local authority to arrest aliens for violating alien registration laws. *See Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010); *Contreras-Diaz*, 575 F.2d at 743-745; *Dameshghi*, 2009 U.S. Dist. LEXIS 66819 at *22.

Inherent Authority of Local Police to Make Immigration Arrests, 69 Alb. L. Rev. 179, 191 (2005). In 2002, a revised OLC memo dropped the “criminal law enforcement only” limitation and analyzed the statutes and cases expressing and recognizing Congress’s intent to allow broad concurrent enforcement. Mem. from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, 5-8 (Apr. 3, 2002) (Exhibit B).

Because S.B. 1070 integrates this body of federal law, it promotes Congress’s purposes and objectives. Section 2 directs Arizona officers to verify immigration status through a statute that requires a federal response. 8 U.S.C. §1373(c).⁸ Section 3 mirrors the federal alien registration laws by relying on federal requirements and procedures, 8 U.S.C. §§ 1304(e), 1306(a). Section 5 promotes federal laws that penalize employing illegal aliens, 8 U.S.C. § 1324a(a)-(c) (2006), and recognizes that Congress only preempted sanctions on *employers* employing unauthorized aliens, not unauthorized aliens’ acceptance of

⁸ Section 2 codifies an officer’s judicially-recognized power to detain and contact ICE on reasonable suspicion of unlawful status. *See e.g. Soriano-Jarquín*; 492 F.3d at 497-99, 501; *Vasquez-Alvarez*, 176 F.3d at 1297-99;; *Contreras-Diaz*, 575 F.2d at 743-745.

employment. (8 U.S.C. § 1324a(h)(2) (2006)).⁹ Section 6 is consistent with federal law reserving states' authority to arrest individuals for immigration violations. *Salinas-Calderon*, 728 F.2d at 1301 n.3 (validating a warrantless arrest for a violation of immigration law and noting that officers have "general investigatory authority to inquire into possible immigration violations"). Because Section 2 and 3 are the primary sections of S.B. 1070 the district court enjoined, we examine these sections in more detail below.

1. The District Court's Ruling that S.B. 1070, Section 2 Is Preempted Is Wrong Because the Court Failed to Consider Congress's Objectives.

The district court erred in accepting the Administration's arguments that S.B. 1070, section 2 conflicts with "federal priorities," and "divert[s] resources from the federal government's other responsibilities." *Arizona*, 2010 U.S. Dist. LEXIS 75558, at **35, 71. The district court did not evaluate whether S.B. 1070's provisions harmonize or conflict with Congress's intent in enacting the federal immigration provisions with which section 2 corresponds. Nor did the court evaluate whether the Administration's "priorities" and policy objectives comport with those reflected in federal immigration law.

⁹ The express preemption clause (8 U.S.C. § 1324a(h)(2)) shows that Congress could have, but did not, preempt sanctions against unauthorized alien employees.

By adopting the Administration's assumption that the LESC was created to serve the Executive's "priorities," the court ignored Congress's purpose for establishing the LESC. The LESC exists to *foster* state and local police cooperation in the "apprehension, detention, or removal of [illegal] aliens." 8 U.S.C. 1357(g)(10). Congress intended the LESC's primary users to be "state and local law enforcement officers in the field who need information about foreign nationals they encounter in the course of their daily duties." U.S. Immigration and Customs Enforcement, Programs, Law Enforcement Support Center, http://www.ice.gov/partners/lesc/lesc_factsheet.htm (last visited September 1, 2010).

Congress did not establish a hierarchy of inquiries according to national security considerations. Instead, 8 U.S.C. § 1373(c) requires LESC staff to answer all inquiries about immigration status. No valid basis exists for the court's conclusion that because Section 2 requires Arizona police to make greater use of the LESC, Section 2 unconstitutionally threatens the Executive's enforcement priorities. If the Executive Branch thinks Congress should establish priorities for LESC inquiries, it can ask Congress to establish priorities. The Executive does not have the authority to do so itself and then claim that exercising that claimed authority preempts state laws. *See Hillsborough County*, 471 U.S. at 717.

The Executive's power to enforce federal immigration law does not confer the power to preempt state immigration enforcement by choosing, for foreign policy or other reasons, to selectively enforce the laws. Only Congress's "clear and manifest purpose" preempts state laws. *Altria Group, Inc.*, 129 S. Ct. at 543.

2. Failure to Consider Congress's Purpose and Objectives Also Tainted the District Court's Analysis of S.B. 1070, Section 3.

The district court also failed to consider congressional objectives when it enjoined Section 3, which mirrors the federal alien registration laws by incorporating federal requirements and procedures. *See* 8 U.S.C. §§ 1304(e), 1306(a). Relying exclusively upon a Supreme Court case, *Hines v. Davidowitz*, 312 U.S. 52 (1941), that predated the current federal alien registration scheme, the court held Section 3 preempted without identifying how it conflicted with Congress's purposes. *Arizona*, 2010 U.S. Dist. LEXIS 75558, at **45-46 (holding that Section 3 "stands as an obstacle to the uniform, federal registration scheme," causing it to be "an impermissible attempt by Arizona to regulate alien registration").

a. *The Alien Registration Provisions of S.B. 1070 Section 3 Fully Comport with the Purposes of Federal Alien Registration Legislation.*

Section 3 does not stand as an obstacle to Congress's objectives; in fact Section 3 furthers Congress's purpose for the alien registration law. When

Congress passed the 1952 law making an alien's failure to carry his registration document a crime, it stated, "the provisions have been modified . . . to require . . . the registration and fingerprinting of all aliens in the country and to assist in the enforcement of those provisions." *H.R. REP. NO. 82-1365 (1952)*, reprinted in 1952 U.S.C.C.A.N. 1723.

Section 1304(e) of the federal alien registration law provides:

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$ 100 or be imprisoned not more than thirty days, or both.

Section 1306(a) provides:

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$ 1,000 or be imprisoned not more than six months, or both.

Opponents and proponents both recognized that the legislation made it a crime for aliens not to carry their registration documents with them. *See* 98 CONG. REC. 4,432-33 (1952) (statement of Rep. Chudoff) ("Alien registration cards are not new in the law, yet this is the first time where it becomes a necessity for an alien to carry the card with him and, if he does not, it becomes a crime."). Furthermore, in rejecting an Amendment by Representative Chudoff, that would

have weakened the “carry” requirement by making only “willful” violations a crime, *id.*, the law’s proponents argued that aliens must be required to carry their registration document on their persons. 98 CONG. REC. 4,433 (statement of Rep. Walter) (“[I]f an alien forgot his card, lost it or misplaced it, it is a matter of defense; the burden of proof [that he did not violate the alien registration law] is on [the alien.]”); *id.* (statement of Rep. August H. Andresen) (“I do not think it would be very difficult for the aliens to carry these cards with them. Does not the gentleman believe they should do that as a matter of identification? . . . I should think they would be happy to carry it.”). Even Representative Chudoff, who offered the “willful failure” amendment, had “no objection to the carrying of the card.” 98 CONG. REC. 4,433.

The Supreme Court has recognized that Congress sought to restrict aliens in the United States to those persons with demonstrated eligibility for classification in some valid immigration status. In *United States v. Campos-Serrano*, 404 U.S. 293, 299-300 (1971), the Court noted that the purpose of alien registration is to identify aliens and govern their activity and presence in this country. *See also United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (requiring lawfully present

aliens to comply with alien registration laws is an entirely foreseeable and permissible inconvenience).¹⁰

Section 3 furthers Congress's goal of ensuring that all aliens are properly registered with the federal government. The Arizona law merely codifies federal requirements and requires state officers to rely entirely on the federal government's determination of an alien's immigration status. S.B. 1070, Sec. 3(A)-(B).

Moreover, contrary to the district court's ruling, *Arizona*, 2010 U.S. Dist. LEXIS 75558, at *46, Section 3 does nothing to alter the penalties established by Congress. While Section 3 imposes state penalties, that alone does not mean that the law frustrates Congress's objectives. States can enact laws that impose state penalties for conduct that federal law also sanctions. *See Bartkus v. Illinois*, 359 U.S. 121, 131-132 (1959); *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852); *CPLC v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009) (rejecting preemption arguments against Arizona state law prohibiting hiring illegal aliens). In fact, the Supreme Court has held in the immigration context that states can enact laws that sanction a defendant, even though the federal law lacks a corresponding sanction, so long as the state law does not conflict with Congress's purposes. *See De Canas*, 424 U.S. at 358, 360.

¹⁰ The information displayed on an alien registration document is not confidential. *Ascencio-Guzman v. Chertoff*, 2009 U.S. Dist. LEXIS 32203 (S.D. Tex. 2009).

There can be no principled basis for holding that state and local officers may arrest an alien for violating the alien registration laws, but a state law *codifying* that authority frustrates Congress’s purposes. *See Estrada*, 594 F.3d at 65 (because state trooper had probable cause to believe alien violated the alien registration laws and other immigration laws he could arrest); *Salinas-Calderon*, 728 F.2d at 1301; *Contreras-Diaz*, 575 F.2d at 743-745; *United States v. Dameshghi*, 2009 U.S. Dist. LEXIS 66819, at *22 (D. Utah 2009). Similarly, this Court has held that state and local officers can enforce the criminal provisions of the INA. *Gonzales*, 722 F.2d at 475. Like the enforcement actions at issue in *Gonzales*, SB 1070 Section 3 has an “identical purpose” to federal law—“the prevention of the misdemeanor” of failing to carry or register for one’s alien registration documents. *See id.* at 474.¹¹

b. The District Court’s Reliance Upon Hines v. Davidowitz Is Misplaced.

Hines v. Davidowitz does not support the district court’s conclusion that Section 3 is preempted. Reading *Hines* as a field preemption, or possibly

¹¹ This Court has stated in *dicta* that it “assumes” enforcing the “authorized entry, length of stay, residence status, and deportation” civil provisions of the INA is preempted under federal law. *Gonzales*, 722 F.2d at 475. S.B. 1070 does not attempt to enforce these INA provisions. Instead, S.B. 1070 deals with verifying an alien’s immigration status with the federal government, arrests of aliens for immigration violations, and violations of the federal alien registration laws.

“regulation of immigration” preemption case,¹² the district court stated, “[T]he Supreme Court has also evaluated the impact of the comprehensive federal alien registration scheme and determined that the complete scheme of registration precludes states from conflicting with or complementing the federal law.” *Arizona*, 2010 U.S. Dist. LEXIS 75558, at *46 (citing *Hines*, 312 U.S. at 66-67).

Hines, however, is strictly a conflict preemption case. The *Hines* Court sustained an as-applied conflict-preemption challenge to Pennsylvania’s alien registration law, acknowledging at the outset that the Court’s “primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to . . . the full purposes and objectives of Congress.” *Hines*, 312 U.S. at 67. The Court expressly declined to consider “the argument that the federal power in this field, whether exercised or unexercised, is exclusive.” *Id.* at 62.

In *Hines*, a clear conflict existed between the Pennsylvania law and the federal scheme. First, the Pennsylvania law established a separate, state-specific alien registration scheme that required all aliens to register with the state and required the state to collect and maintain its own registration records. The Court,

¹² The district court also suggested that *Hines* may have dealt with regulation of immigration preemption. *See Arizona*, 2010 U.S. Dist. LEXIS 75558, at *46 (Section 3 is an “impermissible attempt by Arizona to regulate the alien registration scheme.”).

however, determined that Congress intended an integrated national registration system maintained by the federal government. *Id.* at 60-61, 74. Second, the Pennsylvania law required aliens to carry their registration with them at all times. *Id.* at 60-61. But Congress had explicitly rejected such a provision in the 1940 Federal Act. *Id.* at 72.

By contrast, no such conflict exists between Section 3 and 8 U.S.C. §§ 1304(e) and 1306(a). Section 3 does not create an Arizona-specific registration system or improperly “complement” the federal scheme, but instead directly relies on the federal alien registration scheme. Also, Congress amended the alien registration laws in 1952 to require aliens to carry their registration documents on their persons. As a result, Section 3 does not suffer the same conflict preemption problem that the 1939 Pennsylvania statute did when Congress excluded a “carry” requirement in the 1940 Federal Act. As the district court recognized, the conduct Section 3(A) prohibits is *identical* to the conduct federal law prohibits. *Arizona*, 2010 U.S. Dist. LEXIS 75558, at *43. Arizona expressly provides for and defers to federal control of prosecutions by: (1) requiring prior federal verification of immigration status, Ariz. Rev. Stat. § 13-1509(B) (LexisNexis 2010); (2) exempting from state prosecution “any person who maintains authorization from the federal government to remain in the United States,” Ariz. Rev. Stat. § 13-

1509(F) (LexisNexis 2010)¹³; and (3) requiring state deferral to federal authority in statutory construction and interpretation, S.B. 1070, § 12.

Hines does not support the district court's conclusion that 8 U.S.C. §§ 1304(e) and 1306(a) preempt Section 3. The federal and Arizona alien registration laws in this case are seamlessly integrated.

III. THE DISTRICT COURT REFUSED TO APPLY THE HIGH STANDARD NECESSARY TO SUSTAIN A FACIAL CHALLENGE.

The Supreme Court disfavors facial challenges because they “often rest on speculation,” lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and prevent government officers from implementing laws in a manner consistent with the Constitution. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008). Thus, the Administration can only succeed in a facial challenge by “establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Id.* at 449 (internal citations omitted). A facial challenge must fail where the statute has a “plainly legitimate

¹³ Subsection (F) exempts from prosecution aliens who are authorized by the federal government to remain in the United States. Police would verify with the federal government an alien's immigration status pursuant to 8 U.S.C. § 1373(c). If the required government response confirms lawful presence, the alien is exempt from state prosecution.

sweep.’” *See Washington v. Glucksberg*, 521 U.S. 702, 739-40 n.7 (1997) (citation omitted).

The district court articulated this standard, *see Arizona*, 2010 U.S. Dist. LEXIS 75558, at *23, but then ignored it. The court disregarded S.B. 1070’s legitimate sweep and concluded that hypothetical scenarios, which might just as easily have occurred before the law’s passage, doom the statute.

For example, the district court worried that legal aliens might be burdened by having their liberty restricted while their immigration status is checked. *Id.* at *41. The possibility that legal aliens could be detained while police check their immigration status existed before Arizona passed S.B. 1070. Congress recognized state and local officials’ authority to detain aliens when it reserved inherent state authority to enforce immigration law and banned sanctuary policies that interfere with exercising that authority. 8 U.S.C. §§ 1357(g)(10), 1373(a)-(b), 1644. In so doing, Congress understood that legal aliens might be detained during status checks. In fact, Congress codified that possibility in 8 U.S.C. §§ 1373 and 1644 by expressly stating that immigration status checks are for both *lawful* and *unlawful* status. *See also Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (rejecting an unlawful detention argument against officers who inquired into the immigration status of a lawful permanent resident).

If Congress did not wish legal aliens to risk detention during arrest, it could have revoked the statute requiring aliens to carry their certificate of alien registration. 8 U.S.C. §§ 1304(e), 1306(a). Arizona's effort to effectuate Congress's enforcement goals more vigorously does not convert the detention of legal aliens into an unconstitutional deprivation of liberty.

Because S.B. 1070 mirrors federal immigration provisions, its plainly legitimate sweep is indisputable, and a facial challenge cannot succeed.

CONCLUSION

This Court should reverse the district court's decision and order that the Administration's motion for a preliminary and permanent injunction be denied.

Respectfully submitted this 2nd day of September, 2010,

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**CERTIFICATE OF COMPLIANCE WITH
RULE 29(C)(5) AND RULE 32(A)**

The undersigned counsel of record for *Amici* certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned counsel of record for *Amici* certifies that 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 using Microsoft Word 2007 in font size 14, Times New Roman.

Dated September 2, 2010

s/ Jay Alan Sekulow
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the ECF System for the Court of Appeals for the Ninth Circuit, which will send notification of that filing to all counsel of record in this litigation.

Dated September 2, 2010

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