

CA No. 10-16645
**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
No. CV 10-1413-PHX-SRB
(Honorable Susan R. Bolton)**

**BRIEF OF WASHINGTON LEGAL FOUNDATION;
U.S. REPRESENTATIVES DAN BURTON, LYNN JENKINS,
TOM McCLINTOCK, AND JERRY MORAN;
ALLIED EDUCATIONAL FOUNDATION;
CONCERNED CITIZENS AND FRIENDS OF ILLEGAL IMMIGRATION
LAW ENFORCEMENT; & NATIONAL BORDER PATROL COUNCIL
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS,
URGING REVERSAL**

Daniel J. Popeo
Richard A. Samp
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

September 2, 2010

CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in Arizona.¹ WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

U.S. Rep. Dan Burton represents Indiana's 5th congressional district and serves on the Foreign Affairs and Oversight and Government Reform Committees. U.S. Rep. Lynn Jenkins represents Kansas's 2nd congressional district and serves on the Financial Services Committee. U.S. Rep. Tom McClintock represents California's 4th Congressional district and serves on both the Education and Labor Committee and the Natural Resources Committee. U.S. Rep. Jerry Moran represents Kansas's 1st congressional district and serves on the Agriculture,

¹ All parties have consented to the filing of this brief.

Transportation and Infrastructure, and Veterans Affairs Committees. All believe that Congress has never sought to bar State and local governments from adopting immigration-related enforcement legislation.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Concerned Citizens and Friends of Illegal Immigration Law Enforcement is a nonpartisan group of concerned citizens committed to reasonable and effective immigration reform through direct action and public education. To that end, CCFIILE strongly supports efforts by local and state law enforcement officials to enforce immigration laws.

The National Border Patrol Council is a professional labor union representing more than 17,000 front-line Border Patrol Agents and support staff. Since its founding in 1967, the NBPC has demonstrated an unwavering commitment to protecting America's borders.

While *amici* agree with Appellants that the United States has failed to demonstrate any likelihood of success on the merits, *amici* are filing separately to focus on the United States's claim that SB 1070's employment provision, the first

portion of § 5 of SB 1070 (referred to herein as “§ 5(C)”), conflicts with – and thus is impliedly preempted by – federal immigration policy. Contrary to the United States’s claim, § 5(C) is designed to assist with implementation of the immigration policies established by Congress, and nothing in the legislation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Amici are particularly concerned that the United States’s preemption claim ignores the fact that it is the clear policy of the United States that those who are not authorized to be present in the United States should not seek or undertake employment in this country. Section 5(C), by criminalizing the solicitation and/or performance of employment by such individuals, directly advances that policy.

Amici also submit that federal law does not preempt the arrest powers granted to Arizona law enforcement authorities by § 6 of SB 1070. The effect of § 6, which amends A.R.S. § 13-3883(A) to authorize the arrest of anyone who “has committed any public offense that makes the person removable from the United States,” is to grant Arizona officials an extremely modest increase in their arrest authority. *Amici* do not believe that the remote possibility that some Arizona officials might misinterpret the circumstances under which they are permitted to exercise their new authority can justify a facial challenge to the

statute.

STATEMENT OF THE CASE

This case is a facial challenge to Arizona Senate Bill 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010), as amended by Arizona House Bill 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010) (“SB 1070”). The legislation is a multi-faceted effort to assist federal authorities in implementing several well-established federal policies: removing illegal aliens from the United States and eliminating incentives that cause many such aliens to seek to remain here. On July 6, 2010, the United States filed suit against the State of Arizona and Governor Janice K. Brewer (collectively, “Arizona”), challenging SB 1070 on its face. The U.S.’s principal argument is that SB 1070 conflicts with – and thus is preempted by – federal immigration statutes. The United States moved to enjoin enforcement of SB 1070 even before it was scheduled to take effect on July 29, 2010.

This *amicus* brief focuses on two provisions of SB 1070: §§ 5(C) and 6. Section 5(C) makes it a crime for illegal immigrants to seek or perform employment within the State of Arizona; specifically, it creates a new statutory provision, A.R.S. 13-2928(C), which provides as follows:

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

in this state.

The statute goes on to define the terms “solicit” and “unauthorized alien,” A.R.S. 13-2928(E), and provides that a violation of the statute is a misdemeanor. A.R.S. 13-2928(D).

Section 6 of SB 1070 amends A.R.S. § 13-3883(A), the Arizona statute that outlines the circumstances under which a law enforcement officer is permitted to arrest a person without an arrest warrant. The prior version of § 13-3883(A) listed four broadly-worded circumstances under which warrantless arrests were permissible; Section 6 of SB 1070 adds a fifth: “The person to be arrested has committed any public offense that makes the person removable from the United States.” A.R.S. § 13-3883(A)(5).

On July 28, 2010, the district court issued a preliminary injunction against enforcement of four provisions of SB 1070, including both § 5(C) and § 6. ER 1-36. Citing various provisions of the Immigration Reform and Control Act of 1986 (IRCA), the district court concluded that “Congress has comprehensively regulated in the field of employment of unauthorized aliens.” ER 27. Based on what it perceived as the comprehensiveness of this federal regulation, the district court further concluded that Congress intended to preclude regulation by state and local governments in this field. *Id.* Because § 5(C) seeks to regulate solicitation

and performance of employment by illegal aliens, the district court concluded that § 5(C) was impliedly preempted by IRCA. *Id.*

The district court held that § 6 was also preempted by federal immigration law, based on its conclusion that the statute “would impose a ‘distinct, unusual and extraordinary’ burden on legal resident aliens that only the federal government has the authority to impose.” *Id.* at 33 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 65-66 (1941)). The court explained its conclusion as follows:

Considering the substantial complexity in determining whether a particular public offense makes an alien removable from the United States and the fact that this determination is ultimately made by federal judges, there is a substantial likelihood that officers will wrongfully arrest legal resident aliens under the new A.R.S. § 13-3883(A)(5).

Id.

Arizona has appealed to this Court from the district court’s grant of a preliminary injunction.

SUMMARY OF ARGUMENT

The United States has failed to demonstrate a likelihood of success in its challenge to § 5(C). The district court’s holding – that § 5(C) is impliedly preempted because Congress has occupied “the field of employment of unauthorized aliens” – is demonstrably incorrect. Although Congress imposed some regulations within that field when it adopted IRCA in 1986, those statutory

provisions do not begin to approach anything akin to “pervasive” regulation of the field, a prerequisite to any field preemption finding.

Nor has the U.S. demonstrated that § 5(C) is preempted because it conflicts with federal law. The U.S. attempts to read into IRCA a congressional determination that illegal aliens should never be subject to criminal penalties for soliciting or performing work. Remarkably, however, the U.S. cannot point to any statutory language that supports its interpretation of IRCA. Moreover, § 5(C) is fully consistent with federal immigration policy. The Supreme Court has recognized that “IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). Although § 5(C) imposes sanctions on illegal aliens above and beyond those imposed by IRCA, those sanctions create no conflict with federal law because they serve simply to further congressional policy – by reducing the likelihood that illegal aliens will be employed in this country.

Nor has the U.S. demonstrated a likelihood of success in its challenge to § 6, which slightly broadens the arrest authority of Arizona law enforcement officials. The U.S. argues that § 6 is subject to implied conflict preemption because it will impose “extraordinary” burdens on resident aliens. But the issue that the court must address is whether Congress intended to bar state officials from

exercising this type of arrest authority, and the U.S. has presented no evidence that Congress ever harbored such an intent. Moreover, a facial challenge is a wholly inappropriate means of raising a challenge based on predictions that enforcement of a statute is “likely” to impose future burdens. Rather, the proper procedure is to permit § 6 to take effect and then, if its feared burdens materialize, to bring an as-applied challenge to the statute.

ARGUMENT

I. THE UNITED STATES HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS PREEMPTION CLAIM AGAINST SB 1070’S EMPLOYEE SANCTION PROVISION

The United States is not entitled to a preliminary injunction in the absence of a showing that it is likely to succeed on the merits of its claims. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). It has failed to demonstrate such a likelihood with respect to its challenge to § 5(C) of SB 1070.

A. In Determining that § 5(C) Is Preempted, the District Court Misconstrued the Concept of “Field Preemption”

In determining whether a federal law preempts a challenged State law, the Supreme Court has established two guiding principles. First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 485 (1996). Thus, in the absence of evidence that the federal government intended to displace State law, there can be no preemption. Such congressional intent “primarily is discerned from the language of the pre-emption statute and the ‘statutory framework’ surrounding it.” *Id.* at 486 (citation omitted). The United States’s inability to point to *any* federal statute containing preemptive language severely weakens its case.

The second guiding principle is that courts “have long presumed” that the federal government “does not cavalierly pre-empt” State law because of its recognition that “the States are independent sovereigns in our federal system.” *Id.* at 485. This presumption against preemption is particularly strong when States are acting to “protect the health and safety of their citizens,” because “the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, health, comfort, and quiet of all persons.” *Id.* at 475. “In *all* pre-emption cases,” a court must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose* of Congress.” *Id.* at 485 (emphasis added); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009).

This Court similarly has recognized “a strong presumption against a finding that state law is preempted by federal law.” *Committee of Dental Amalgam Mfrs.*

and Distributors v. Stratton, 92 F.3d 807 (9th Cir. 1996); *Kennedy v. Collagen Corp.*, 67 F.3d 1453, 1456 (9th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). That presumption cannot be overcome unless the federal intent to preempt state law is “clear and manifest.” *Industrial Truck Ass’n, Inc. v. Henry*, 125 F.3d 1305 (9th Cir. 1997).

The Supreme Court has held explicitly that the presumption against preemption applies even when the state law at issue touches upon immigration matters. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). The Ninth Circuit recently applied the presumption against preemption in a challenge to a different Arizona statute that regulates the employment of illegal aliens, finding that the presumption was particularly appropriate because the field being regulated (employment) is one that has traditionally been subject to state regulation. *Chicanos Por La Causa, Inc. v. Napolitano* [“CPLC”], 588 F.3d 856, 865 (9th Cir. 2009) (concluding that *De Canas* was not superseded by subsequent federal legislation and stating, “We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers, an assumption of non-preemption applies here.”), *cert. granted sub nom., Chamber of Commerce of the United States v. Candelaria*, 130 S. Ct. 3498 (2010).

In seeking to ascertain congressional intent regarding preemption, the courts

initially determine whether the federal statute at issue contains language that *expressly* preempts some portion of State law. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1986). If the express language does not directly answer the question at issue, “courts must consider whether the federal statute’s ‘structure and purpose,’ or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent.” *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Findings of such “clear, but implicit, preemptive intent” have generally been grouped into two categories: (1) field preemption; and (2) conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Field preemption is said to occur:

[I]f a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” if “the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,” or if the goals “sought to be obtained” and the “obligations imposed” reveal a purpose to preclude state authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991). Conflict preemption is said to occur:

[T]o the extent that state and federal law actually conflict. Such a conflict arises when compliance with both federal and state regulation is a physical impossibility, or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (citations omitted).

The United States does not contend that § 5(C) (or any other provision of SB 1070) is *explicitly* preempted by either federal statute or any provision of the Constitution. Rather, it asserted below that § 5(C) is impliedly preempted, under both a field preemption theory and a conflict preemption theory. U.S. Prel. Inj. Br. 42-44. The district court accepted the U.S.’s field preemption argument, stating, “Congress has comprehensively regulated in the field of employment of unauthorized aliens” and inferring from the comprehensiveness of the regulation that Congress intended to preclude additional regulation by the States. ER 27.

That mode of analysis misapprehends the field preemption doctrine. A decision by Congress to regulate a given field extensively does not by itself give rise to an inference that it intended to “occupy the field” and thereby preclude parallel state regulation. Rather, that inference arises only when Congress’s regulation is “so pervasive as to make reasonable the inference that Congress left no room for States to supplement it.” *Mortier*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. at 230). No such inference can be drawn from Congress’s adoption of IRCA in 1986 with respect to the field identified by the district court: “the field of employment of unauthorized aliens.” ER 27.

As noted by the district court, IRCA (1) provides for penalties for employers

who knowingly hire or continue to employ an alien without work authorization; (2) requires employers to comply with an employment verification system designed to prevent the employment of illegal aliens; and (3) provides for penalties for illegal aliens who use false documents for the purpose obtaining employment. ER 25-26. Those provisions do not begin to approach anything akin to “pervasive” regulation of “the field of employment of unauthorized aliens.” IRCA is silent regarding numerous employment issues that are routinely regulated under state law, such as: (1) minimum wages; (2) overtime pay; (3) maximum hours; and (4) employment discrimination based on such factors as race, national original, religion, sex, age, and disability. Unless one is willing to conclude that Congress left “no room” for States to regulate these and the numerous other aspects of the employment relationship between an employer and an illegal alien, the district court’s determination that Congress intended to occupy “the field of employment of unauthorized aliens” cannot stand.

The Supreme Court has declined to preempt state laws under a field preemption rationale whenever, as here, the federal statute “leaves ample room for States and localities to supplement federal [regulatory] efforts.” *Mortier*, 501 U.S. at 613. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-136y, “addresses numerous aspects of pesticide control

in considerable detail.” *Id.* But because FIFRA “left substantial portions of the field vacant, including the area at issue in this case,” *Mortier* concluded that Congress’s creation of a comprehensive regulatory scheme for pesticides did not by itself create an inference that Congress intended to preempt State regulation of pesticides. *Id.* Similarly, IRCA’s failure to regulate numerous aspects of the employment relationship between employers and their illegal-alien employees precludes a field preemption finding in this case.

Indeed, this Court’s recent decision in *CPLC* rejected an implied preemption challenge to an Arizona statute that regulates one aspect of the relationship between employers and illegal aliens. The statute requires employers to use E-Verify, a federal computer database that provides information to help determine whether a prospective employee is authorized to work in the United States. That Arizona statute undoubtedly regulates “the field of employment of unauthorized aliens,” but the Court nonetheless found no evidence that Congress impliedly preempted the statute. *CPLC*, 544 F.3d at 985-86.

The Supreme Court has been very wary of field preemption claims in recent decades. Indeed, some justices have gone so far as to declare that field preemption is “suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted.” *Wyeth v. Levine*, 129 S. Ct. at 1213 n.4 (Thomas,

J., concurring in the judgment). States have long exercised their traditional police powers to regulate virtually all aspects of employment relationships, regardless whether the employee is a citizen or an alien. In the absence of evidence that Congress adopted IRCA with the “clear and manifest purpose,” *id.* at 1194-95, of ousting States from regulating any aspect of the relationship between employers and illegal-alien employees, the district court’s field preemption determination must be reversed.

B. Section 5(C) Does Not Conflict with Federal Law

The United States argues alternatively that Section 5(C) is preempted because it conflicts with federal law. It argues that IRCA “reflects Congress’s deliberate choice not to criminally penalize unlawfully present aliens for performing work, much less for attempting to perform it.” U.S. Prel. Inj. Br. 42. Discerning a congressional desire “to strike a balance between employing criminal sanctions and other immigration values,” *id.* at 18, the United States argues that Congress determined that only employers should be held criminally liable when an illegal alien is improperly hired to undertake employment. *Id.* at 43-44.

Remarkably, the United States does not cite any statutory provision to support its argument that Congress intended to prohibit States from sanctioning illegal aliens for seeking and performing employment. Instead, the United States

relies on snippets from the legislative record. But the statements of individual Members of Congress cannot be deemed to represent the views of the body as a whole and fall far short of supplying evidence of the “clear and manifest [preemptive] purpose” necessary to overcome the presumption against preemption.

More importantly, § 5(C) is fully consistent with federal immigration policy. Recognizing that illegal immigration is spurred to a significant degree by the availability of employment in the United States, Congress adopted the Immigration Reform and Control Act of 1986 (“IRCA”) for the purpose of preventing the employment of illegal aliens and thereby reducing the incentive for illegal entry into the country. As the Supreme Court has repeatedly recognized, “IRCA ‘forcefully’ made combating the employment of illegal aliens central to [t]he policy of immigration law.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 & n.8 (1991)).

The United States asserts that IRCA sought a “balanced” approach toward employment of illegal aliens, an approach that sought to balance a desire to discourage employment of illegal aliens against a desire to treat such individuals compassionately. U.S. Prel. Inj. Br. 44. That assertion finds no support in the statutory language. Such a policy may be the approach of the Obama

Administration, but it is not the approach adopted by Congress. *See* U.S. Const., Art. I, § 8, cl. 4 (assigning to Congress primary responsibility for establishing immigration policy). As the Supreme Court has explained, IRCA adopted a combination of restrictions upon employers (a requirement that they verify the work eligibility of all job applicants) and employees (criminal prohibitions against the submission of fraudulent work-eligibility papers) designed to ensure that *no* illegal aliens would be employed in this country:

Employers who violate IRCA are punished by civil fines, [8 U.S.C.] § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents, § 1324c(a). It thus prohibits aliens from using or attempting to use “any forged, counterfeit, altered, or falsely made document” or “any document lawfully issued to or with respect to a person other than the possessor” for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). There is no dispute that [the illegal-alien plaintiff’s] use of false documents to obtain employment with Hoffman violated these provisions. Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Hoffman Plastic, 535 U.S. at 148.²

² In finding § 5(C) impliedly preempted, the district court apparently was operating under the impression that IRCA generally treats an illegal alien’s

There is no conflict between the policy established by IRCA (preventing *all* employment of illegal aliens) and § 5(C) of SB 1070. Although § 5(C) imposes sanctions on illegal aliens above and beyond those imposed by IRCA, those sanctions create no conflict because they serve simply to further the existing congressional policy. Because Congress sought “forcefully” to combat *all* employment of illegal aliens, a state law that makes it that much more difficult for illegal aliens to find employment cannot reasonably be understood as being in conflict with federal policy.

To support their view that Congress sought to protect illegal aliens from criminal sanctions for seeking employment, the district court and the United States both relied on this Court’s 1990 decision in *Nat’l Ctr. for Immigrants’ Rights, Inc. v. INS* [“*NCIR*”], 913 F.2d 1350 (9th Cir. 1990). But as the U.S. concedes, that

presentation of false documents for the purpose of obtaining employment as a “civil” infraction and, at most, permits “limited” criminal sanctions against those engaged in such conduct. ER 25-27. As the quoted language from *Hoffman Plastics* makes clear, the district court’s impression was mistaken. IRCA provides for severe criminal sanctions against an illegal alien who obtains employment by misrepresenting his work eligibility; he is off the hook only when the employer fails to take required steps to verify his employment status – and thereby relieves him of the necessity of choosing between an admission of ineligibility or committing document fraud (*e.g.*, presentation of a fake Social Security card). Illegal aliens routinely receive significant federal prison sentences for such document fraud. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

decision no longer serves as binding precedent within this circuit – it was reversed by the Supreme Court. 502 U.S. 183 (1991).³ Nor is *NCIR*'s analysis of IRCA persuasive, particularly in light of the Supreme Court's conflicting analysis of IRCA in *Hoffman Plastic*. In concluding (in *dicta*) that "Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work," *NCIR*, 913 F.2d at 1368, the *NCIR* panel relied primarily on: (1) the congressional testimony of an "Executive Assistant to the INS Commissioner"; and (2) the statements of an individual Senator. *Id.* at 1368-69.⁴ Such statements provide

³ Moreover, *NCIR* is not even a preemption case. The appeals court ruled 2-1 that in light of Congress's decision not to impose federal sanctions on illegal aliens who seek employment, the INS exceeded its statutory authority in adopting regulations that threatened federal sanctions. But nothing in *NCIR* (even if it were still good law) indicated that IRCA imposed similar restrictions on States.

⁴ The panel also cited a 1986 House report that asserted that IRCA's approach to employment sanctions was "the most practical and cost-effective way to address this complex problem." *Id.* at 1369 (quoting H.R. Rep. No. 99-682(I), 99th Cong., 2nd Sess. 49 (1986)). But even if that report accurately reflected the views of the entire Congress, a congressional determination that it would not be "cost-effective" for federal authorities to pursue criminal sanctions against illegal immigrants who seek or perform employment is a far cry from a determination that Congress sought to prevent States from doing so on their own. Indeed, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Supreme Court rejected preemption claims under analogous facts. The Court held that even though the Coast Guard had invoked a cost-effectiveness rationale in declining to adopt regulations – pursuant to the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301 *et seq.* – requiring propeller guards on motor boats, an Illinois rule

very little indication regarding what Congress as a whole intended, and certainly do not supply evidence of a “clear and manifest purpose” to preempt the States’ traditional exercise of their police powers.

C. State Regulation of the Employment of Illegal Aliens Was Permissible Prior to IRCA, and That Statute Cannot Reasonably Be Understood To Have *Decreased* State Authority to Regulate Employment of Illegal Aliens

Prior to adoption of IRCA in 1986, Congress had not adopted any restrictions – on either employers or employees – regarding the employment of illegal aliens. The Supreme Court determined in 1976 in *De Canas* that Congress had not intended thereby to preclude States from adopting restrictions of their own. *De Canas v. Bica*, 424 U.S. 351, 356-63 (1976). The Court rejected a preemption challenge to a California criminal statute providing that “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States.” California Lab. Code § 2805(a) (West 1976). *Id.* The Court concluded that nothing in federal immigration law indicated “that Congress intended to preclude even harmonious state regulation touching on aliens in

requiring propeller guards did not conflict with the federal regulatory scheme. *Id.* at 66-67.

general, or the employment of illegal aliens in particular.” *Id.* at 358.⁵

Although § 5(C) of SB 1070 would have been constitutionally unassailable if adopted before adoption of IRCA, the United States argues that Congress – when it adopted IRCA in 1986 – intended to deprive States of the authority they possessed pre-1986 to regulate efforts by illegal aliens to solicit and perform employment. Nothing in IRCA’s statutory language supports that conclusion. It is simply inconceivable that a statute adopted for the purpose of making “combating the employment of illegal aliens central to the policy of immigration law,” *Hoffman Plastic*, 535 U.S. at 147, was also intended to deprive States of existing authority to engage in that same combat. *See also INS v. Nat’l Ctr. for Immigration Rights*, 502 U.S. 183, 194 (1991) (“A primary purpose in restricting immigration is to preserve jobs for American workers.”).

At the same time that it imposed restrictions on employers regarding their hiring of illegal aliens, IRCA adopted an express preemption provision that limited the authority of States to impose additional restrictions on employers. *See* 8 U.S.C. § 1324a(h)(2). But IRCA does not include a provision that expressly preempts States from imposing restrictions on illegal aliens’ solicitation or

⁵ The quoted language made plain that States were free to regulate employment of illegal aliens by imposing requirements on *either* employers *or* employees.

performance of employment. The absence of such an express preemption provision speaks volumes. This court held in *CPLC* that Congress's adoption of § 1324a(h)(2) without adopting a similar restriction on State requirements regarding employer participation in the E-Verify system was strong evidence that Congress did not intend preemption in the latter situation. The appeals court explained, "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly" preempt state laws of the sort set forth in § 1324a(h)(2). *CPLC*, 558 F.3d at 867. By similar logic, Congress's failure to expressly preempt States from imposing restrictions on solicitation or performance of employment by illegal aliens indicates that it did not intend to preempt such restrictions.

Congress subsequently adopted legislation requiring States to adopt practices designed to reduce the incentives for illegal aliens to remain in the country. *See, e.g.*, 8 U.S.C. §§ 1611, 1621 (prohibiting States – with very few exceptions – from paying public benefits to illegal aliens, regardless whether funding for the benefits derives from federal or state sources). It also adopted numerous statutory provisions encouraging state and local governments (and their employees) to cooperate with federal authorities in enforcing the immigration laws. *See, e.g.*, 8 U.S.C. §§ 1103(a), 1252c, 1357(g), 1373(a)-(c), & 1644; 42 U.S.C. § 611a

(requiring a State receiving certain federal grants to report to ICE *at least* four times annually the names and addresses of those known to the State to be unlawfully in the United States). It defies logic to suggest that Congress demands that States ferret out illegal aliens to ensure that they are not receiving welfare benefits and actively solicits their cooperation in enforcing immigration laws, yet simultaneously prohibits them from taking steps to prevent illegal aliens from seeking employment. Certainly, nothing in IRCA's statutory language provides "clear and manifest" evidence that that was Congress's intent.

D. The Administration's Pro-Preemption Position in This Case Is Inconsistent with Its Anti-Preemption Position in Analogous Cases Outside the Context of Immigration

The Obama Administration's motion for a preliminary injunction made a sweeping argument in support of preemption of state laws touching on immigration issues, even laws that operate in fields (such as regulation of employment) traditionally occupied by the States. The Court ought to be made aware, however, that the Administration has adopted anti-preemption positions in other areas of the law – particularly with respect to preemption of state common-law tort actions – that are extremely difficult to reconcile with the position it has taken in this case.

Most prominently, the Administration has taken an anti-preemption position in *Williamson v. Mazda Motor of America*, No. 08-1314, a pending Supreme Court

case that will determine whether federal policy regarding the installation of lap/shoulder seat belts in rear car seats preempts tort suits alleging that cars lacking such belts are defectively designed. In August, the Administration filed a brief arguing that the lower courts erred in finding preemption. The brief acknowledged that the National Highway Traffic and Safety Administration (NHTSA) had made a conscious choice, based on cost-benefit considerations, not to adopt a regulation requiring installation of lap/shoulder seat belts in rear car seats. The Administration nonetheless argued against implied preemption, asserting:

[A] determination that a federal agency's decision not to impose a particular regulation was 'intentional and carefully considered' is not enough to show that the agency also precluded the States from imposing the same requirement.

Brief for the United States as Amicus Curiae Supporting Petitioner in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, at 19 (quoting *Sprietsma*, 537 U.S. at 67). The Administration added, "[A] determination that mandating a particular safety standard is not economically justified under a specific federal statutory framework at a particular point in time is not enough to establish implied conflict preemption." *Id.* at 23. It is difficult to reconcile those assertions with the argument here that IRCA's inclusion of only limited sanctions against employees

impliedly preempts State efforts to impose more stringent sanctions. *See also* Executive Order 13132 – Federalism, 64 Fed. Reg. 43255-59 (Aug. 10, 2009) (directing all branches of the federal government to be “deferential” to the States and to limit the circumstances under which they deem State regulatory actions to be preempted by federal law).

The Administration has also been inconsistent in its arguments regarding when courts should defer to federal government determinations that a state statute is preempted by federal law. In the district court, the United States not only declined to concede the existence of a presumption against preemption of § 5(C) but also asserted that it is the *U.S.*’s position that is entitled to deference. U.S. Prel. Inj. Br. 25. But in its *amicus* brief in *Williamson*, the Administration conceded that “an agency’s view that a state law *is* preempted” is not entitled to deference, asserting instead that deference is owed only when an agency adopts an anti-preemption position. *Williamson* Br. 29 (emphasis in original).

Amici respectfully submit that the U.S. got it right in its *Williamson* brief. The U.S.’s assertion that its views in this case regarding preemption are entitled to deference have no basis in law, particularly when (as here) the position of the Executive Branch was developed solely in connection with litigation. *See, e.g., Wyeth v. Levine*, 129 S. Ct. at 1201-03. Cases cited below by the United States,

U.S. Br. 25 (citing, *e.g.*, *Holder v. Humanitarian Law Proj.*, 130 S. Ct. 2705 (2010)), support judicial deference to foreign policy assessments undertaken by *Congress* in adopting legislation, not deference to litigation-driven assessments by the Executive Branch. The Supreme Court has explicitly rejected efforts by the President to unilaterally preempt a State's actions on the basis of the President's assessment of the likely foreign-policy impact of those actions, in the absence of evidence that Congress has authorized the President to act. *Medellin v. Texas*, 552 U.S. 491, 524-25, 532 (2008).

II. THE UNITED STATES HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS PREEMPTION CLAIM AGAINST SECTION 6 OF SB 1070

Section 6 of SB 1070 amends A.R.S. § 13-3883(A) to expand somewhat the circumstances under which a law enforcement officer is permitted to arrest a person without a warrant. The new provision permits such arrests when “[t]he person to be arrested has committed a public offense that makes the person removable from the United States.” A.R.S. § 13-3883(A)(5).

Although the district court held that § 6 is preempted by federal immigration law, it recognized that the new statute effects a relatively modest expansion of current arrest authority. All parties agree that Arizona law enforcement authorities already are authorized to make a warrantless arrest of an individual if they have

probable cause to believe that the individual committed a “public offense” in Arizona that violates either Arizona law or federal law. ER 31. Thus, according to the district court, the principal impact of § 6 is on a “public offense” committed in some other State. ER 31.⁶ The district court stated that it is “a task of considerable complexity” to determine whether a resident alien would be subject to removal if convicted of the offense for which he is to be arrested. ER 32. Concluding that Arizona law enforcement officials had not been well trained in making such determinations, the district court held that: (1) there is a substantial likelihood that officers will wrongfully arrest legal resident aliens under the authority granted by § 6; and (2) that likelihood “would impose a ‘distinct, unusual and extraordinary’ burden on legal resident aliens that only the federal government has the authority to impose.” ER 33 (quoting *Hines*, 312 U.S. at 65-66).

Amici do not dispute that determining precisely which criminal offenses render a resident alien subject to removal is not an easy task. The task is difficult for anyone – whether an Arizona law enforcement official or a federal judge – because the statutes governing the removability of convicted criminals are written

⁶ In order to qualify as a “public offense,” out-of-state conduct (1) must violate the criminal law of the State in which the conduct occurred; and (2) would have been punishable under Arizona law had the conduct occurred in Arizona. A.R.S. § 13-105(26).

in broad terms, and their precise meanings are still being worked out by the courts.⁷ But the issue before the Court is not whether § 6 raises complex legal questions; the question is whether Congress intended to preempt state law in this area and thereby bar state officials from even attempting to answer those questions. Neither the district court nor the United States has pointed to any evidence suggesting that Congress harbored such an intent. In the absence of such evidence, the preliminary injunction against enforcement of § 6 is unwarranted.

We note, for example, that the United States has never suggested that Arizona is prohibited from granting law enforcement officials authority to make arrests for *any* public offense committed in another State, not just for those public offenses that render the person removable. If a grant of this greater authority has not been preempted by Congress, it is difficult to conceive of a rationale that would have caused Congress to preempt a grant of a more restricted arrest

⁷ *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that an alien convicted of an “aggravated felony” at any time after admission is subject to removal); 8 U.S.C. § 1227(a)(2)(A)(i) (providing that an alien convicted of a crime involving “moral turpitude” committed within five years of his admission into the country is subject to removal). Federal law nonetheless can fairly be summarized as follows: the more serious the crime, the more likely it is to be a removable offense, and *all* serious felonies are removable offenses.

authority.⁸

Even if § 6 were subject to implied conflict preemption because of its potential to impose extraordinary burdens on resident aliens, a facial challenge to the statute is wholly inappropriate. A plaintiff is entitled to pursue facial invalidation of a statute only “by establishing that no set of circumstances exists under which the [statute] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). The U.S. cannot know whether § 6 is unconstitutional in all its applications (*i.e.*, that it could not possibly be applied in a manner that would not impose “extraordinary” burdens on resident aliens) because the law has not been allowed to take effect.⁹

⁸ In the district court, the U.S. appeared to have been confused by the nature of the arrest authority granted by § 6. It asserted, “Notably, warrantless arrest authority under Section 6 does not depend on coordination with DHS to verify removability.” U.S. Prel. Inj. Br. 33. But such coordination would be pointless at the arrest stage. Aliens are made subject to arrest under § 6 because, if convicted of the public offense they are suspected of having committed, they would be subject to removal, not because (as the U.S. appears to have believed) they are currently removable.

⁹ It is very plausible to surmise, for example, that § 6 will impose no burdens whatsoever, either because arrests of aliens for out-of-state offenses will arise very infrequently, or because Arizona decides to implement § 6 in a conservative fashion (*e.g.*, exercising § 6 arrest authority only for the most serious felonies that all would agree are removable offenses).

The courts should allow § 6 to take effect; if resident aliens then find that the statute is imposing “extraordinary” burdens on them, they will be in a position to bring an as-applied challenge. The Supreme Court has cautioned that facial challenges are inappropriate when based on predictions regarding constitutional infirmities that *might* arise if a law is allowed to go into effect. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (rejecting facial challenge to statute and stating, “It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.”). Rather, the proper approach is to allow a statute to take effect and then entertain as-applied challenges, which “are the basic building blocks of constitutional adjudication.” *Id.* By awaiting as-applied challenges, federal courts permit state officials an opportunity “to construe the law in the context of actual disputes” or “to accord the law a limiting construction to avoid constitutional questions.” *Washington State Grange*, 552 U.S. at 450. “Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.” *Id.* Given the considerable uncertainty regarding precisely how § 6 will be applied and how it might affect resident aliens, the U.S. has failed to establish likelihood

of success in its facial challenge to the statute.

CONCLUSION

Amici respectfully request that the Court reverse the district court's decision and vacate the preliminary injunction.

Respectfully submitted,

/s/ Richard A. Samp

Daniel J. Popeo

Richard A. Samp

Cory L. Andrews

Washington Legal Foundation

2009 Massachusetts Ave., NW

Washington, DC 20036

(202) 588-0302

Dated: September 2, 2010

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,999, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

Dated: September 2, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2010, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp