No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA and JANICE K. BREWER,
Governor of the State of Arizona, in her official capacity,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL IMMIGRATION LAW CENTER, ACLU OF ARIZONA, ASIAN AMERICAN JUSTICE CENTER, ASIAN PACIFIC AMERICAN LEGAL CENTER, NATIONAL DAY LABOR ORGANIZING NETWORK, AND *FRIENDLY HOUSE v. WHITING* PLAINTIFFS IN SUPPORT OF RESPONDENT

Thomas A. Saenz
Victor Viramontes
Mexican American Legal
Defense and Educational Fund
634 S. Spring Street
Los Angeles, CA 90014

Linton Joaquin
Karen C. Tumlin
National Immigration
Law Center
3435 Wilshire Boulevard
Los Angeles, CA 90010

Jennifer Chang Newell
Counsel of Record
Cecillia D. Wang
American Civil Liberties
Union Foundation
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
jnewell@aclu.org

(*Counsel continued on inside cover*)

Nora A. Preciado
Melissa S. Keaney
National Immigration Law Center
3435 Wilshire Boulevard,
Suite 2850
Los Angeles, CA 90010

Nina Perales
Mexican American Legal
Defense and Educational Fund
110 Broadway, Suite 300
San Antonio, TX 78205

Daniel J. Pochoda
James Duff Lyall
ACLU Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014

Daniel R. Ortega, Jr.
Ortega Law Firm
A Professional Corporation
361 East Coronado Road
Phoenix, AZ 85004

Mee Moua
Jessica S. Chia
Asian American Justice Center,
Member of the Asian American
Center for Advancing Justice
1140 Connecticut Avenue NW,
Suite 1200
Washington, DC 20036

Aaron G. Leiderman
Munger, Tolles & Olson LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105

Steven R. Shapiro
Lee Gelernt
Omar C. Jadwat
Andre I. Segura
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Nicholás Espíritu
Mexican American Legal
Defense and Educational Fund
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014

Chris Newman
Jessica Karp
National Day Labor Organizing
Network
675 S. Park View Street, Suite B
Los Angeles, CA 90057

Laboni Hoq
Yungsuhn Park
Connie Choi
Carmina Ocampo
Asian Pacific American Legal
Center, Member of the
Asian American Center
for Advancing Justice
1145 Wilshire Boulevard,
Suite 200
Los Angeles, CA 90017

Bradley S. Phillips
Paul J. Watford
Joseph J. Ybarra
Lika C. Miyake
Benjamin J. Maro
Margaret G. Ziegler
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

FEDERAL STATUTES, REGULATIONS & LEGISLATIVE PROPOSALS

STATE STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a diverse group of organizations and individual Arizona residents who are counsel or plaintiffs in *Friendly House v. Whiting*, No. 10-CV-1061-PHX-SRB, 2012 WL 671674 (D. Ariz. Feb. 29, 2012), a class action lawsuit challenging the constitutionality of several provisions of S.B. 1070, including the provisions at issue in this case. Due to the large number of *amici*, their individual statements of interest are set forth in an Appendix, attached hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether Arizona's S.B. 1070, a comprehensive state immigration law designed to effectuate Arizona's preferred immigration policy of "attrition through enforcement," *see* § 1, violates the Supremacy Clause.

This brief responds specifically to Petitioners' assertion that state law enforcement officers may enforce the federal immigration laws—both civil and criminal—as provided for in S.B. 1070's stop and arrest provisions, because states have "inherent authority" to enforce federal law as a general matter. Pet. Br. at 23. *Amici* agree with the United States that S.B. 1070's stop and arrest provisions are preempted, but we take a more restrictive view of the

[1] Pursuant to Supreme Court Rule 37, both parties have lodged blanket consents for the filing of amicus briefs on behalf of either party. No counsel for either party authored this brief in whole or in part. No persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

authority of the states to enforce federal immigration law and provide additional grounds in this brief for finding preemption.

First, the authority of state officers to perform the functions of federal immigration officers is specifically delineated in the federal immigration statutes. It extends no further and does not include the authority to interrogate, arrest, and detain that Arizona has claimed in S.B. 1070. *See infra* Part I. Second, whatever "inherent authority" state officers may have to enforce federal law as a general matter does not extend to enforcement of the immigration laws given longstanding precedents from this Court holding that both the establishment of the immigration laws and the manner of their execution are committed solely to federal government. *See infra* Part II. Although the Court may resolve this case by finding Arizona's law preempted without addressing the precise limits of state authority in the immigration context, *amici* offer these arguments in further support of that conclusion.

This Court has long recognized the special need, expressed in the Constitution, for uniformity and federal supremacy in the immigration area. The federal government's exclusive immigration power extends not only to the entry and admission of noncitizens, but also to the conditions under which they may remain and determinations about whether and when they should be removed from the United States—including the determination whether to investigate, arrest, and detain a noncitizen for the purpose of removing him from the United States. Because these immigration powers arise from the sovereign authority of the United States, they are not

part of the states' police powers. Arizona's claim—that a general and "inherent authority" of states to enforce federal law applies with equal force in the immigration context—must therefore be rejected.

Even if it were true that states would otherwise have some "inherent authority" concerning immigration matters, Arizona ignores the touchstone of preemption analysis: congressional intent. Congress has acted to preclude state authority to engage in the immigration enforcement activities authorized under S.B. 1070's stop and arrest provisions. Those sections of S.B. 1070 also conflict fundamentally with Congress's comprehensive and detailed scheme regulating the status, presence, arrest, detention, and removal of noncitizens. Arizona's grant of authority to its officers to interrogate, arrest, and detain noncitizens for immigration purposes violates the Supremacy Clause because it intrudes on a field that Congress has occupied and because it conflicts with federal law. *See*, *e.g.*, *DeCanas v. Bica*, 424 U.S. 351, 356, 363 (1976) (setting out field and conflict preemption standards); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) (explaining that the "categories of preemption are not 'rigidly distinct'") (citation omitted).

In the Immigration and Nationality Act ("INA"), Congress has assigned authority over immigration interrogation, arrest, and detention to the federal government. Moreover, Congress has specifically authorized state law enforcement officers to perform these functions in only four narrow and limited circumstances. Congress's decision to provide such authority in four circumstances and no others

demonstrates that Congress deliberately considered and rejected the notion that state officers should have independent authority to investigate, arrest, and detain for immigration purposes. Other provisions in the INA concerning communications and "cooperation" with the federal government, *see* 8 U.S.C. §§ 1357(g)(10), 1373(c), 1644, provide no support for Arizona's claim of "inherent authority." By their express terms, and contrary to any suggestion by the parties, those federal statutes do not grant state or local officers any immigration enforcement authority. To read these provisions otherwise would render superfluous Congress's express, but limited, authorization for state and local enforcement.

Arizona's grant of authority to its officers is also inconsistent with Congress's basic delegation of power to the Executive Branch and the overall operation and structure of the INA. The scheme created by Congress delegates discretion to the Executive Branch to decide when to investigate, arrest, detain, and remove noncitizens from the United States—and when to forbear. Unlike the Arizona scheme embodied by S.B. 1070's stop and arrest provisions, the federal statutory scheme does not provide for the removal of every noncitizen without a lawful immigration status; rather, the immigration statutes provide alternatives that leave to the Executive Branch the decision whether such persons should (or in some cases must) be permitted to remain, either temporarily or permanently. In contrast, Arizona has empowered its officers to arrest, interrogate, and detain noncitizens independent of federal determinations, including noncitizens who are not lawfully present but are

nonetheless permitted under the immigration laws to remain in the United States. Arizona seeks to override these aspects of federal immigration law and to take into its own hands the decision whether to detain a particular noncitizen.

ARIZONA'S STATUTORY SCHEME

S.B. 1070 is an integrated set of state immigration regulations that establish new state immigration crimes and law enforcement mandates. *See* Arizona Senate Bill ("S.B.") 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010), as amended by Arizona House Bill ("H.B.") 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010). At issue in this case are four specific provisions of Arizona's immigration law: a provision making it a state law crime for noncitizens to fail to register with the federal government (Ariz. S.B. 1070 § 3; Arizona Revised Statute ("A.R.S.") § 13-1509(A)); a provision making it a state law crime for noncitizens to engage in unauthorized work (S.B. 1070, § 5(C); A.R.S. § 13-2928(C)); and the two stop and arrest provisions, authorizing state and local officers to investigate, detain, and arrest individuals for immigration purposes (§§ 2(B) and 6, A.R.S. §§ 11-1051(B), 13-3883(A)(5)).

This state immigration scheme purports to grant state and local officers independent authority to investigate, arrest, detain, and punish noncitizens who are deemed to be without legal authorization to remain in the United States.[2] Specifically, S.B. 1070

[2] Since the enactment of S.B. 1070, five other states have followed Arizona's lead by passing state immigration schemes targeting persons based on immigration status, including

empowers state and local law enforcement officers to exercise core immigration enforcement functions, making immigration-based investigation, arrest, and detention decisions without any federal supervision. Section 2(B) directs that any police officer who has conducted a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or [the State of Arizona]" *must* make a "reasonable attempt" to determine the

---

provisions allowing or requiring local law enforcement officials to investigate immigration status during stops and to make warrantless arrests based on suspicion of immigration offenses. Substantial parts of these state laws have been enjoined. *See* Ala. H.B. 56, 2011 Leg., Reg. Sess. (2011); Ga. H.B. 87, 2011-12 Leg., Reg. Sess. (2011); Ind. S. Enrolled Act 590, 117th Gen. Assemb., 1st Reg. Sess. (2011); S.C. Act 69, 2011-12 Gen. Assemb., 119th Sess. (2011); Utah H.B. 497, Leg., 2011 Gen. Sess. (2011); *see also Hispanic Interest Coal. of Ala. v. Bentley*, 5:11-CV-2484-SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011); *United States v. Alabama*, --- F. Supp. 2d ---, 2011 WL 4469941 (N.D. Ala. Sep. 28, 2011) (appeal pending, 11th Cir. No. 11-14532-CC); *Ga. Latino Alliance for Human Rights v. Deal* ("*GLAHR*"), 793 F. Supp. 2d 1317 (N.D. Ga. 2011) (appeal pending, 11th Cir. No. 11-13044-C); *United States v. South Carolina*, --- F. Supp. 2d ---, 2011 WL 6973241 (D.S.C. Dec. 22, 2011) (appeal pending, 4th Cir. No. 12-1096); *Utah Coal. of La Raza v. Herbert*, No.11-cv-00401 (D. Utah); *Buquer v. City of Indianapolis,* No. 11-cv-00708 SEB-MJD (S.D. Ind. 2011). These state laws also include provisions not at issue in this case. For example, Alabama's law, parts of which are enjoined, has provisions requiring school officials to inquire into and to report information about the birthplace of children enrolling in public elementary and secondary schools, and the immigration status of their parents; making it a felony for persons deemed not lawfully present to attempt to engage in any transaction with the state government; and rendering unenforceable any contract where one party knows or has reason to know that the other party is not lawfully present in the United States. *See* Ala. H.B. 56 §§ 27, 28, 30.

immigration status of the person who has been stopped, detained, or arrested, whenever "reasonable suspicion exists that the person is an alien and is unlawfully present." Ariz. S.B. 1070 § 2(B). Prior to releasing any person who has been arrested, officers must determine the person's immigration status and must detain the arrested person until such status is verified, regardless of whether any state charges are pending and whether the federal government has requested detention. *Id.* Section 2(B) places no limit on the length of time that individuals may be detained while their immigration or citizenship status is being determined.

Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." S.B. 1070, § 6; A.R.S. § 13-3883(A)(5). Because no federal law criminalizes removability by itself, § 6 effectively authorizes warrantless arrests by state officers for behavior that is a civil offense under federal law.[3]

---

[3] Section 1325 of Title 8 criminalizes the offense of illegal entry, and § 1326 criminalizes re-entry after removal, but neither criminalizes removability or illegal presence without more. 8 U.S.C. §§ 1325, 1326; *see also* Resp. Br. at 3, 31-32. This distinction is of great legal and practical importance. For example, a person may enter the United States lawfully on a tourist visa, but then remain beyond the authorized time period. Such a person would be unlawfully present in the country and therefore removable without having unlawfully entered, and would not be subject to any criminal charge due to the visa overstay.

Arizona contends that §§ 2(B) and 6 are valid because state and local officers have "inherent authority" to make arrests for all federal offenses, including immigration violations both criminal and civil. Pet. Br. at 23, 42. Arizona further contends that, in light of that "inherent authority," what the federal immigration laws do or do not provide "is beside the point." *Id.* at 23. Arizona suggests that certain provisions of the INA concerning communications and limited "cooperation" with the federal government "[e]xpressly [a]uthorize[]" the unilateral enforcement functions provided for in §§ 2(B) and 6. Pet. Br. at 31.

As shown below, the Ninth Circuit correctly rejected Arizona's arguments and held that the United States was substantially likely to prevail on its claim that §§ 2(B) and 6 are preempted. *See Ariz.*, 641 F.3d at 348-54, 360-66.

ARGUMENT

I. The State Enforcement Authority Claimed by Arizona is Fundamentally at Odds with the Immigration Laws Enacted By Congress

We begin with the statutes that Congress has enacted. Arizona claims that §§ 2(B) and 6 are justified by the "inherent authority" of its officers to enforce federal laws generally, but this argument fails to account for the specific statutory scheme that Congress has enacted in the immigration context. Whatever authority states might have in the absence of federal legislation, there can be no doubt that Congress has spoken. As shown below, §§ 2(B) and 6 are preempted by the INA's comprehensive and detailed immigration enforcement scheme.

A. The INA Permits State Interrogation, Arrest, and Detention Authority Only in Limited Circumstances that Do Not Encompass Arizona's Law

1. The INA Vests Enforcement Authority in *Federal* Immigration Officers, and Permits State Officers to Perform Immigration Officer Functions Only in Four Narrow Instances

Arizona's assertion of "inherent authority" to enforce federal immigration laws is directly at odds with the comprehensive enforcement scheme Congress has legislated in the INA. That federal scheme (1) delegates power to investigate, arrest, and detain for immigration purposes to the Attorney General and to *federal* immigration officers, and (2) specifies when state or local officers may perform these immigration officer functions through four limited authorizations. Sections 2(B) and 6 of S.B. 1070 go far beyond the limits set by Congress and are therefore preempted.

Congress has delegated authority over and responsibility for the enforcement of the immigration laws to the Executive Branch. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens[.]"); *id.* at § 1103(g) (granting the Attorney General authority to issue regulations and instructions necessary to carry out congressional goals on immigration enforcement). More

specifically, the INA entrusts immigration enforcement functions to "immigration officers," expressly defined as *federal* agents. *See* 8 U.S.C. §§ 1101(a)(18) (defining "immigration officer" as "*any employee or class of employees of the Service or of the United States* designated by the Attorney General . . . to perform the functions of an immigration officer specified by this chapter or any section of this title") (emphasis added). Section 1357 of Title 8, entitled "Powers of immigration officers and employees," grants the Attorney General the power to designate particular federal "officer[s] or employee[s]," to engage in a range of explicitly defined enforcement activities. 8 U.S.C. § 1357(a). The "[p]owers of immigration officers" defined in the INA include the very functions Arizona claims for its officers in §§ 2(B) and 6: investigation, arrest, and detention. *See*, *e.g.*, 8 U.S.C. § 1357(a)(1) (authority to "interrogate any alien . . . as to his right to be or to remain in the United States"); *id.* at § 1357(a)(2), (4) (authority to "arrest" for civil and criminal immigration violations); *id.* at § 1357(a)(3), (c) (limited authority to conduct searches); *id.* at § 1357(b) (authority "to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement" of the immigration laws); *see also id.* at § 1226(a) (providing for arrest and detention "[o]n a warrant issued by the *Attorney General*" and stating that the "*Attorney General* . . . may" either continue to detain or release an arrested alien) (emphasis added).[4]

[4] The Attorney General has also issued detailed regulations to implement Congress's grant of enforcement authority. *See, e.g.*, 8 C.F.R. § 287.5(a)(1) (designating officers authorized to

Numerous other provisions of the INA grant specific powers to federal "immigration officers."[5] Federal officers who are not "immigration officers" or who are not within the Department of Homeland Security may perform duties under the INA, but only with authorization from the Secretary of Homeland Security. *Id.* at § 1103(a)(4), (6).

Critically, Congress also has specifically addressed whether and when, under the complex immigration scheme it has established, state and local officers may have authority to perform the functions of an immigration officer, including specifically interrogation, arrest, and detention for immigration purposes.

First, 8 U.S.C. § 1324(c) authorizes state and local officers to make arrests for the federal immigration crimes of transporting, smuggling, or harboring certain aliens. *See id.* (authorizing "arrests" by "all … officers whose duty it is to enforce criminal laws").

"interrogate" aliens pursuant to 8 U.S.C. § 1357(a)(1)); *id.* at § 287.5(b) (designating officers authorized to patrol the border pursuant to 8 U.S.C. § 1357(a)(3)); *id.* at § 287.5(c) (designating officers authorized to make certain arrests under 8 U.S.C. § 1357(a)(2), (4)-(5), and establishing standards for exercise of arrest authority).

[5] For example, "immigration officers" are responsible for periodically registering the presence of aliens under removal orders who are still in the country, *see* 8 U.S.C. § 1231(a)(3)(A); inspecting, examining and screening aliens for admission, *see id.* at §§ 1159(a)(2), 1225(a)(3), 1225(b)(1)(A), 1184(b), 1201(f), 1222(a), 1232(a)(2)(B); determining whether to detain certain inadmissible aliens, *id.* at § 1225(b)(2)(A); and ordering the removal of an arriving alien upon suspicion of certain grounds of inadmissibility, *see id.* at § 1225(c)(1).

Second, under 8 U.S.C. § 1252c, "State and local law enforcement officials" may arrest and detain a noncitizen for the federal crime of illegal reentry into the United States by a deported felon, but only if the federal government provides "appropriate confirmation" of the suspect's status, and if the detention is only for such time as may be required for the federal government to take the individual into custody.

Third, pursuant to 8 U.S.C. § 1103(a)(10), the Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens." Unlike §§ 1324(c) and 1252c, this provision allows the Attorney General to confer upon local officials the powers granted to federal immigration officers, but only in an extremely narrow circumstance that has never been invoked in the history of our Nation.

Fourth, the detailed provisions of 8 U.S.C. § 1357(g), entitled "Performance of immigration officer functions by State officers and employees," permit state officers to perform certain functions of immigration officers if the Attorney General enters into a written agreement with the state or local government that satisfies specific conditions. Section 1357(g) follows §§ 1357(a)-(f) which, as discussed above, set forth specifically the authority of federal immigration officers to interrogate, arrest, and perform other immigration officer functions under certain circumstances. If the statutory requirements of subsection (g) are met, state or local officers designated by the Attorney General may perform, even in the absence of a mass influx, any "function of

an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1). Section 1357(g) thus reinforces that, under the INA, "investigation, apprehension, or detention of aliens in the United States"–the functions Arizona empowers its officers to undertake in § 2(B) and 6–are "function[s] of an immigration officer" delegated to federal agents or, with a written agreement and subject to § 1357(g)'s other requirements, to designated state officers. *Id.*

Under § 1357(g) the state officers "shall be subject to the direction and supervision of the Attorney General" when performing these immigration officer functions pursuant to written agreement. *Id.* at § 1357(g)(3). Section 1357(g) also requires that the "written agreement" explicitly set forth "the specific powers and duties that may be, or are required to be, exercised or performed by the individual [officer], the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." *Id.* at § 1357(g)(5). The statute also requires that the Attorney General determine that the designated state and local officers are "*qualified* to perform [the] function[s] of an immigration officer," *id.* at § 1357(g)(1) (emphasis added), and that the officers adhere to and receive training on the relevant federal laws relating to the immigration officer function(s) and the enforcement of federal immigration law. *See id.* at § 1357(g)(2).[6]

[6] Further illustrating that Congress's enactments have preempted any "inherent authority" on the part of state or local officers to investigate, arrest, or detain individuals for

The legislative history of 8 U.S.C. §§ 1252c and 1357(g) confirms what is clear in their plain terms: that Congress was not enacting a sweeping authorization for state and local enforcement of immigration laws such as that asserted by Arizona in §§ 2(B) and 6 of S.B. 1070. Instead, Congress surgically authorized state and local officers, who otherwise would not have authority to investigate or apprehend noncitizens, or to enforce the immigration laws, to do so only in the specified, limited circumstances.

Section 1252c was first introduced as an amendment to the House Bill that later became the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Representative Doolittle (R. Calif.) introduced the measure, expressing concern about the absence of authority for state and local law enforcement officials to arrest people for criminal immigration violations:

> In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed

---

immigration law violations, a federal bill has recently been proposed which expressly authorizes "State or local law enforcement officer[s]" to detain individuals who, *inter alia*, have been apprehended for a Driving While Intoxicated ("DWI") offense where the federal government has verified that the individual is unlawfully present. Scott Gardner Act, H.R. 1459, 112th Cong. § 2 (2012). Such a proposal would be unnecessary if state and local officers already had such authority under Congress's scheme, as Arizona claims here.

> to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties.

142 Cong. Rec. H 2190, 2191 (1996) (statement of Rep. Doolittle). In the very same set of introductory remarks, he noted that some members had expressed concern about the state and local authority created by the bill, and that he had assuaged those concerns by limiting his bill to encounters with "criminal aliens" and requiring prior confirmation with INS officials:

> Mr. Chairman, by way of summary, I would like to allay fears or concerns that Members may have about the scope of my amendment.
>
> . . . .
>
> [M]y amendment is very narrow and only covers situations in which the State or local officer encounters criminal aliens within his routine duties. . . . Only confirmed criminal aliens are at risk of being taken into custody.

Id.

Likewise, the legislative history of § 1357(g), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), reinforces that Congress intended to give the Executive Branch the option of designating state or local officers to carry out certain immigration officer functions for

which they otherwise would lack the authority, but only under congressionally mandated, federal controls. Representative Latham, who sponsored an amendment that would have gone even further than Section 1357(g) in authorizing state and local involvement in immigration enforcement,[7] noted that under then-existing federal law

> there is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case. . . . My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens. . . . [This amendment operates] [b]y allowing–not mandating–State and local agencies to join the fight against illegal immigration.

142 Cong. Rec. H 2475, 2476-77 (1996) (statement of Rep. Latham).[8]

By enacting these provisions and no others, Congress deliberately chose to circumscribe state and

---

[7] Representative Latham's amendment would have authorized the Attorney General to "deputize" any law enforcement officer of any state or local government with the consent of that state's governor and pursuant to a written agreement, but without the detailed requirements contained in § 1357(g). *See* Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. Section 365 (1996).

[8] *See also, e.g.,*142 Cong. Rec. H 2475, 2477 (statement of Rep. Doolittle).

local officers' participation in the enforcement of federal immigration laws to specific and narrow circumstances. Taken together, the broad delegation of "immigration officer" functions to federal agents and the very narrow authorizations of such functions for state or local officers fully occupy the field as to the power to arrest, detain and investigate for immigration purposes. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *cf. Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Congress's enactments leave no room for any "inherent authority" of the states to carry out these functions, as contemplated by §§ 2(B) and 6 of S.B. 1070.

2. 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644 Do Not Authorize Civil Immigration Arrests by State Officers

Contrary to Petitioners' assertions, nothing in 8 U.S.C. §§ 1357(g)(10), 1373(c), or 1644 provides support for the notion of "inherent authority" or for Arizona's assumption of the power to investigate, arrest and detain in §§ 2(B) and 6.

a. 8 U.S.C. § 1357(g)(10) Grants No Authority to State Officers

Rather than granting any power to state or local officers, § 1357(g)(10) merely establishes that the written agreement provided for in § 1357(g) does not impose any new requirement on state or local officers who wish to communicate with the federal government about immigration status or "otherwise to cooperate" with the federal government on authorized activities. Section 1357(g)(10) provides in full:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State-
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

Petitioners contend that § 1357(g)(10) "reinforces" or "acknowledges" the authority of state officers to enforce federal immigration law. *See* Pet. Br. at 32-33. The United States suggests that § 1357(g)(10) grants authority for state officers to cooperate with the federal government in immigration enforcement in a manner consistent with federal immigration directives and priorities. Resp. Br. at 7, 45-46. Neither construction is supported by the language of § 1357 or its overall structure.

By its plain terms, and read in light of the other subsections of § 1357 and in the context of the overall structure of the INA, § 1357(g)(10) is not an affirmative grant of authority. *See*, *e.g.*, *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav.*

Bank, 510 U.S. 86, 94-95 (1993) (stating that in construing statutory text, the Court is "guided not by a 'single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy'") (citation omitted). As discussed *supra*, the provisions of §§ 1357(a)-(f) carefully delineate the powers of immigration officers and the limits on those powers. Section 1357(g) then provides a mechanism, pursuant to written agreement, for state officers to "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens." *Id.* at § 1357(g)(1) (emphasis added). The only reading of § 1357(g)(10) consistent with the INA's specific provisions regarding enforcement by state officers in § 1357 and elsewhere in the statute (as discussed above) is that Congress wanted to make clear that the authorization in § 1357(g) for written agreements empowering state and local officers to perform immigration officer functions did not create a new prerequisite for all otherwise-authorized forms of "cooperat[ion]" (or "immigration status" communication). Thus, for example, § 1357(g)(10) makes clear that no agreement is necessary for state and local officers to exercise the authority in § 1252c or § 1324(c). If § 1357(g)(10)(B) were read (contrary to its text) as an affirmative grant of authority, then the INA provisions expressly authorizing state immigration enforcement activities would be rendered superfluous. *See United States v. Arizona*, 641 F.3d 339, 365 (9th Cir. 2011).

Finally, even assuming that § 1357(g)(10) contained an affirmative grant of authority to state officers, the authority granted in §§ 2(B) and 6 can in no way be considered to be "cooperat[ive]" because, as

the United States explains, it allows Arizona officers to enforce the federal immigration laws without regard for the Executive Branch discretion provided for by Congress and reflected in the immigration laws. *See* Resp. Br. at 46, 47-50, 53-55.

b. 8 U.S.C. §§ 1373 and 1644 Do Not Authorize State Immigration Enforcement

Arizona's reliance on 8 U.S.C. §§ 1373 and 1644 also fails. Neither of those statutes provides support for the notion that states have authority to investigate, arrest, or detain for immigration purposes.

Section 1644 bars federal and state actors from "prohibit[ing], or in any way restrict[ing]," any government entity, "from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644. Section 1373 contains nearly identical information sharing provisions, *see id.* at § 1373(a), and also requires federal immigration officials to respond to inquiries by governmental agencies "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law." 8 U.S.C. § 1373(c). Sections 1644 and 1373 thus facilitate communication between the federal government and state or local officials, but neither grants the states any authority to detain, arrest, or even to investigate immigration status.

The backdrop against which § 1644 was enacted confirms that Congress's intent was to

facilitate information sharing, but only for authorized activities. Congress enacted § 1644 as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat 2105 (1996), which established restrictions on public benefits for noncitizens. *See* 8 U.S.C. §§ 1621-22 (setting forth state authority to grant or deny state and local public benefits to noncitizens). Section 1644 furthers the operation of those provisions by facilitating states' access to the immigration-related information needed to determine eligibility for benefits – a purpose independently authorized by law.

While § 1373 requires the federal government to respond to certain immigration status inquiries, it does not grant any power to state or local officials to arrest, detain or investigate for immigration purposes. Rather, as noted, the statute requires federal officials to respond to immigration status inquiries if made for a purpose "authorized by law." 8 U.S.C. § 1373(c). For example, § 1373(c) would facilitate information sharing for state and local officers operating under written agreements pursuant to 8 U.S.C. § 1357(g) or seeking confirmation of a previously deported felon's status under 8 U.S.C. § 1252c, two examples that Congress must have had in mind as it enacted those provisions during the same year as § 1373. *See supra* at 14-16 (discussing history of §§ 1357(g) and 1252c)).

B. Arizona's Claimed Authority Conflicts with the Operation and Structure of the INA

Arizona's claim that its officers have "inherent authority" to investigate, detain, and arrest

individuals based solely on civil removability is also wholly incompatible with the INA's comprehensive scheme regulating the status, presence, detention, and removal of noncitizens. Under the system established by Congress, it is the Executive's prerogative to decide whether and when to investigate, arrest, and detain – and when to forbear from doing so. By attempting to take these decisions out of the federal government's hands and to place them in the state's hands, §§ 2(B) and 6 assume state authority in ways that conflict with Congress's scheme.

Congress "has developed a complex scheme governing admission to our Nation and status within our borders." *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *see also Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011). This complex scheme includes regulation of the conditions under which noncitizens can be admitted, the status and presence of noncitizens, and when they can be removed. *See* 8 U.S.C. §§ 1181-89 (admission); *id.* at §§ 1222-31 (entry, inspection, apprehension, detention, removal). Federal law establishes when federal officers may arrest individuals based upon alleged violations of civil immigration laws,[9] and when federal officers may detain individuals during removal proceedings. *See id.* at § 1357 (establishing criteria for

[9] While the INA permits a federal officer to carry out a warrantless immigration arrest only upon belief that an individual "is likely to escape before a warrant can be obtained for his arrest," 8 U.S.C. § 1357(a)(2), (4), § 6 of SB 1070 permits warrantless immigration arrests without any such limitation. Arizona officers would thus have greater authority to arrest removable persons under § 6 than federal officers do under federal law.

warrantless arrest by federal immigration officers); *id.* at § 1226(a) (allowing for, on a warrant issued by the Attorney General, the arrest and detention of a noncitizen pending a decision on whether the noncitizen is to be removed from the United States); *see also id.* at §§ 1226a(a), 1231(a). Federal law also provides the exclusive mechanism for adjudicating whether a noncitizen will be permitted to remain in the country, through an administrative process subject to judicial review. *See* 8 U.S.C. §§ 1229a(a)(3); *id.* at § 1252(a)(1).

The INA reflects Congress's intent that the Executive Branch have ultimate discretion to decide when, how, and whether to take particular enforcement actions in individual cases. *See* Resp. Br. at 18-21 (citing statutory examples). Arizona's grant of enforcement authority to its own officers in §§ 2(B) and 6 attempts to supplant that discretion. In particular, under Congress's statutory scheme, the Executive is authorized to exercise discretion in determining whether to initiate enforcement action against any noncitizen. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) (explaining that in "the initiation or prosecution of various stages in the deportation process[, . . .] [a]t each stage the Executive has discretion to abandon the endeavor"); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The many INA provisions granting discretion to the Executive reflect Congress's intent that the federal government must balance important national objectives in enforcing the immigration laws, weighing the desire to remove or to detain an alien against countervailing interests, including humanitarian concerns, sensitive foreign relations considerations,

and special individualized circumstances. Because §§ 2(B) and 6 authorize state and local officers to make contrary judgments, these provisions are fundamentally incompatible with the INA's core delegation of authority to the Executive Branch.

Sections 2(B) and 6 assume that all persons who currently lack a lawful immigration status are wanted for removal and must be removed, but that is not the system enacted by Congress. On the contrary, federal immigration statutes and U.S. treaty obligations affirmatively prohibit the removal of certain persons from the United States, even if they are unlawfully present. *See, e.g.*, 8 U.S.C. § 1231(b)(3) (mandatory withholding of removal for persons facing persecution); 8 U.S.C. § 1231 note (Foreign Affairs Reform and Restructuring Act of 1998, implementing Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT")); 8 C.F.R. §§ 208.16-18 (deferral of removal under CAT). In addition, many persons who currently lack immigration status, including those who have already been found by an immigration judge to be removable, may be permitted by the Executive to remain in the United States, even indefinitely. *See*, *e.g.*, 8 U.S.C. §§ 1229b, 1229b(b)(2) (cancellation of removal); *id.* at § 1158 (political asylum); *id.* at § 1255(m) (adjustment of status pursuant to Violence Against Women Act); *id.* at § 1255(i) (adjustment of status for certain unlawful entrants); *id.* at § 1254a (temporary protected status). *See also* Resp. Br. 20-21. For this reason, state statutes that assume power over immigration verification, arrest, or detention "work at odds with" federal decisionmaking authority and undermine the

federal government's ability to enforce immigration law. Dep't of Homeland Sec., Guidance on State and Local Government's Assistance In Immigration Enforcement and Related Matters ("DHS Guidance"), at 9, *available at* http://www.dhs.gov/files/resources/guidance-state-local-assistance-immigration-enforcement.shtm.

By authorizing state officers to make determinations regarding investigation, arrest, and detention of noncitizens regardless of federal determinations, §§ 2(B) and 6 upend the federal scheme.

Further, under the foregoing analysis it makes no difference that § 6 of S.B. 1070 authorizes, rather than mandates, civil immigration-based arrests.[10] In either case, it is not the degree of burden on federal resources engendered by the state verification, arrest, and detention scheme that is the fundamental problem.[11] Rather, the state's assumption of

---

[10] Two other states have enacted schemes authorizing, but not requiring, state or local law enforcement officers to verify immigration status and detain noncitizens. *See* Utah H.B. 497 § 3, 2011 Leg., Gen. Sess. (2011) (including a combination of mandates and authorizations); Ga. H.B. 87 § 8, 2011-12 Leg., Reg. Sess. (2011); *see also Utah Coalition of La Raza v. Herbert*, No.2:11-cv-401 CW, 2011 WL 7143098 (D. Utah 2011); *Georgia Latino Alliance for Human Rights v. Deal* ("*GLAHR*"), 793 F. Supp. 2d 1317 (N.D. Ga. 2011) (appeal pending, 11th Cir. No. 11-13044-C).

[11] *Amici* note that a proliferation of state regimes, whether mandatory or discretionary, would nevertheless increase the burden on federal resources by flooding the federal system with indiscriminate requests for verification in cases in which the federal government may have no desire to initiate enforcement. *See*, *e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001).

authority is fundamentally at odds with Congress's intent that the Executive Branch balance numerous national interests in the execution of the immigration laws, including decisions as to arrest and detention.

II. Arizona's Claimed "Inherent Authority" Is Incompatible with the Federal Government's Exclusive Power Over Immigration.

In enacting the complex immigration scheme discussed above, Congress was exercising its exclusive authority to regulate immigration. Under the Constitution, "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977). The federal government's exclusive authority to regulate immigration—reflecting the special need for uniformity and federal supremacy—demonstrates that any general criminal law concepts of concurrent jurisdiction or "inherent authority" have no application in the immigration context.

As set forth below, Arizona's claimed "inherent authority" to investigate, detain and arrest people on the basis of civil immigration violations is not supported by any authorities. And Petitioners' contention is fundamentally inconsistent with the federal government's sovereign power to determine which noncitizens will be permitted to stay in the country and the conditions under which they will be allowed to remain.

A. Arizona's Claim of "Inherent Authority" is Unsupported By Petitioners' Cited Authorities

Arizona's claim that "state law enforcement officers have inherent authority … to investigate and arrest for violations of federal law" is not supported by the authorities it cites. *See* Pet. Br. at 42-43 (citing *In Re Quarles*, 158 U.S. 532, 535 (1895), *United States v. Di Re*, 332 U.S. 581 (1948), and *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928)).

None of the three cases concerns enforcement of civil laws and, critically, they do not involve immigration, which has special constitutional status as an area of exclusive federal concern. This Court has previously recognized that where special federal concerns are at stake, state or local officers lack authority to arrest for federal offenses. For example, in *Kurtz v. Moffitt*, 115 U.S. 487 (1885), this Court held that a local police officer had no authority to arrest or detain a deserter from the United States Army. *Id.* at 505. The Court examined the particular context of military law and reasoned that Congress had never conferred on state or local law enforcement officers any power over persons punishable for military offenses. *Id.* at 500.

Moreover, the cases cited by the Petitioners do not even establish that state or local officers have general authority to enforce all federal laws. *Quarles* concerned the question whether a *federal* deputy marshal could enforce certain provisions of the federal internal revenue code, 158 U.S. at 537, and accordingly, the Court had no occasion to decide

whether a state or local officer could make arrests for violations of federal law.

In *Di Re*, although the Court did consider the validity of a criminal arrest made by a local police officer, 332 U.S. at 583, the opinion does not support the notion that state officers have inherent authority to make arrests for violations of federal law. From the opinion it appears that the defendant, charged with a federal crime, challenged his arrest only on the ground that it was not authorized under state law, *id.* at 588-89, and not on the ground that the state officer had no authority to make the arrest under federal law. *Id.* at 332 U.S. at 589. Because federal law did not shed light on whether the warrantless arrest was proper, the Court held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity," *id.* at 589, and based on state law, declined to uphold the arrest by the state officer. *Id.* at 595. *Di Re* therefore sheds no light on the scope of state authority at issue here.

Marsh is likewise inapposite. *Marsh* concerned an arrest by a state trooper for violation of the federal Prohibition law. 29 F.2d at 172-74. Judge Hand held that no "implication [could be made] from the powers of arrest given to [federal] prohibition officers under … the National Prohibition Law" that state officers lacked arrest authority, because the Eighteenth Amendment explicitly gave the states concurrent jurisdiction in the area. *Id.* at 174. Thus, Judge Hand's statement about the authority of state officers to assist in federal enforcement was specific to the Prohibition context:

> The Eighteenth Amendment gave concurrent jurisdiction to the states, and it would be in conflict with its underlying purpose to assume that, so far as the state laws assist in its enforcement, they were to be curtailed by any administrative system which Congress might set up. The purpose of such a system was to secure obedience as far as possible; it cannot be supposed that, within a state which has no independent system of her own, such co-operation as she does extend must be rejected.

Id.

Petitioners also cite *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), and *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984), for the proposition that state officers have authority to investigate and make arrests for violations of the civil immigration laws. Pet. Br. at 45.[12] *Salinas-Calderon*, however, concerned the validity of a criminal arrest for transporting undocumented aliens, *see* 728 F.2d at 1299, and

[12] Several *amici* cite an Office of Legal Counsel ("OLC") memorandum in support of Arizona's inherent authority argument. That memorandum is not persuasive because it fails to address Congress's specific authorizations for state immigration enforcement (other than § 1252c), and it overlooks the federal government's exclusive power over immigration matters. *See also United States v. Arizona*, 641 F.3d 339, 365 n.24 (noting that "the OLC's conclusion about the issue in the 2002 memo was different in 1996 under the direction of President Clinton, and was different in 1989, under the direction of President George H.W. Bush").

therefore does not support Petitioners' assertion of civil arrest authority. *Vasquez-Alvarez* concerned an arrest made by a local officer at the direction of a federal immigration officer, 176 F.3d at 1295, rather than any independent or unilateral action by a state or local officer (let alone an entire state legislative scheme). Additionally, *Vasquez-Alvarez* is not persuasive because it completely failed to address the distinction between civil and criminal immigration offenses and because it failed to consider whether 8 U.S.C. §§ 1103(a)(10) and 1324(c), taken together with §§ 1252c and 1357(g) and the numerous provisions of the INA regulating the conduct of federal immigration officers, preempted the local officer's authority.[13]

Finally, Petitioners assert as a general matter that "[t]his Court's preemption cases [] establish that the States may authorize 'parallel' enforcement of federal standards." *See* Pet. Br. at 29 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996), *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 437 (2005), and *Riegal v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008)). But each of those cases involved statutory provisions in which Congress explicitly permitted states to enforce requirements that were not "different from, or in addition to" the federal requirements, and each case involved an area of traditional state concern. *See Lohr*, 518 U.S. at 494-

[13] Petitioners also cite *Muehler v. Mena*, 544 U.S. 93 (2005), but that case was decided on Fourth Amendment grounds and did not consider whether the police officer independently had authority to detain or arrest an individual for a civil immigration violation. *See id.* 544 U.S. at 101.

95; *Bates*, 544 U.S. at 447-49; *Riegal*, 552 U.S. at 330, 334.

B. The Power to Establish Immigration Laws and the Responsibility for the Manner of Their Execution Belong Solely to the Federal Government.

Finally, Petitioners' "inherent authority" argument is inconsistent with this Court's longstanding precedents holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *see also, e.g.*, *Passenger Cases,* 48 U.S. (7 How.) 283, 409 (1849) (McLean, J); *id.* at 410-12 (Wayne, J.); *id.* at 463-64 (Grier, J.); *Truax v. Raich*, 239 U.S. 33, 42 (1915); Resp. Br. at 17-18. Indeed, the "power to expel" aliens is an inherent sovereign power of the federal government. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). As such, this sovereign power is recognized in the Constitution's provisions granting Congress powers to establish "an uniform Rule of Naturalization" (U.S. Const. art. I, § 8, cl. 4) and to regulate Commerce with foreign Nations (U.S. Const. art. I, § 8, cl. 3). *See also Hines v. Davidowitz*, 312 U.S. 52, 64 (1941); *Haig v. Agee*, 453 U.S. 280, 293-94 (1981); *Toll v. Moreno*, 458 U.S. 1, 10 (1982). The Constitution also grants to the federal government "all the powers of government necessary to maintain . . . control [over international relations], and to make it effective." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). *See also* U.S. Const. art. II, Sec. 3, cl. 4 (providing that the President

"shall take Care that the Laws be faithfully executed").

This Court has repeatedly recognized a special need for nationwide consistency in matters affecting foreign nationals, given the "explicit constitutional requirement of uniformity" in immigration matters, *Graham v. Richardson*, 403 U.S. 365, 382 (1971), and the myriad problems that would result if each of the 50 states adopted its own rules for the treatment of noncitizens. *See Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "the Nation's need 'to speak with one voice' in immigration matters"). *See also* Resp. Br. at 18.

Consistent with this special need for uniformity, "[t]he Federal Government [possesses] broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). *See also, e.g.*, *DeCanas*, 424 U.S. at 355 (describing "a regulation of immigration" as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").[14] Both the establishment of substantive immigration laws *and* the responsibility "for the manner of their execution, belong[] solely to the national government." *Chy Lung v. Freeman*, 92

[14] As these cases demonstrate, this Court has described various aspects of the federal government's immigration authority in various ways, in different contexts. The cited statement from *DeCanas* thus does not provide an exhaustive definition of the scope of the federal government's authority in this area.

U.S. 275, 280 (1875). In contrast, "[u]nder the Constitution the states are granted no such powers." *Takahashi*, 334 U.S. at 419. States enjoy no power to deny aliens "entrance and abode," *Truax,* 239 U.S. at 42, and "no power with respect to the classification of aliens," *Plyler v. Doe*, 457 U.S. 202, 225 (1982). States "can neither *add to* nor *take from* the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states." *Toll*, 458 U.S. at 11 (emphasis added) (quoting *Takahashi*, 334 U.S. at 419). Thus, the federal government's exclusive power includes not only power over entry and admission, but also power over the decisions whether and when to remove a noncitizen and relatedly, whether to initiate immigration enforcement action against a particular individual.

Accordingly, this Court struck down state attempts to regulate immigration as impermissible intrusions on the Nation's sovereignty, even before Congress enacted a comprehensive, affirmative national immigration policy. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273-75 (1875) (voiding a New York law which required vessel owners to post a bond for each landing foreign passenger); *Chy Lung*, 92 U.S. at 280-81 (striking down a California statute requiring vessel owners to pay a bond for certain classes of arriving passengers); *see also Passenger Cases,* 48 U.S. at 283 (holding unconstitutional New York and Massachusetts laws that imposed head taxes on landing foreign persons likely to become public charges). These cases decided in the Nation's first century establish that even absent any federal immigration regulation, states would have no authority to regulate immigration. *See generally*

Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("The Nation's first 100 years was 'a period of unimpeded immigration.' . . . It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country") (internal citations omitted).

Because the immigration power vested exclusively in the federal government is an inherent attribute of sovereignty, the states cannot turn to their general police power to allow them to enforce the immigration laws. The power to investigate, arrest, and detain for a civil immigration offense is an integral part of the federal government's exclusive sovereign power to remove, and as such, does not fit into well-established notions of state police power. As this Court made clear in *Henderson*, "whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." 92 U.S. at 271. *See also id.* at 271-72 ("[W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."); *Passenger Cases,* 48 U.S. (7 How.) at 410-12 (Wayne, J.). Thus, the rationale advanced by Arizona—that it needs to protect itself from purported social costs related to immigration (Pet. Br. at 2-8)—cannot justify the intrusion on the exclusive federal immigration power worked by Sections 2(B) and 6.

Indeed, the federal government's sovereign power over foreign affairs and immigration was not "carved from the mass of state powers" as were many of the other powers reserved for the federal government. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316. Rather, the states individually have "never possessed international powers." *Id.* Because the federal government's sovereign power over the entire realm of foreign affairs passed from Great Britain to the colonies "in their collective and corporate capacity as the United States of America." *Id.* Arizona cannot rely upon its police powers to justify the authority it seeks to grant to its officers to investigate, arrest, and detain for immigration purposes.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Thomas A. Saenz
Victor Viramontes
Nicholás Espíritu
Mexican American Legal Defense and Educational Fund
634 S. Spring Street
Los Angeles, CA 90014

Jennifer Chang Newell
Counsel of Record
Cecillia D. Wang
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
jnewell@aclu.org

Nina Perales
Mexican American Legal Defense and Educational Fund
110 Broadway, Suite 300
San Antonio, TX 78205

Linton Joaquin
Karen C. Tumlin
Nora A. Preciado
Melissa S. Keaney
National Immigration Law Center
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010

Daniel J. Pochoda
James Duff Lyall
ACLU Foundation of
Arizona
3707 N. 7th Street,
Suite 235
Phoenix, AZ 85014

Steven R. Shapiro
Lee Gelernt
Omar C. Jadwat
Andre I. Segura
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Chris Newman
Jessica Karp
National Day Labor
Organizing Network
675 S. Park View Street,
Suite B
Los Angeles, CA 90057

Daniel R. Ortega, Jr.
Ortega Law Firm
A Professional
Corporation
361 East Coronado Road
Phoenix, AZ 85004

Laboni Hoq
Yungsuhn Park
Connie Choi
Carmina Ocampo
Asian Pacific American
Legal Center, a member
of Asian American
Center for Advancing
Justice
1145 Wilshire Blvd.,
Suite 200
Los Angeles, CA 90017

Mee Moua
Jessica S. Chia
Asian American Justice
Center, a member of
Asian American Center
for Advancing Justice
1140 Connecticut Avenue
NW, Suite 1200
Washington, DC 20036

Bradley S. Phillips
Paul J. Watford
Joseph J. Ybarra
Lika C. Miyake
Benjamin J. Maro
Margaret G. Ziegler
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071

Aaron G. Leiderman
Munger, Tolles & Olson LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105

Dated: March 23, 2012

APPENDIX

STATEMENTS OF INTEREST

Amici curiae are counsel and plaintiffs in *Friendly House v. Whiting*, No. 10-CV-1061-PHX-SRB (D. Ariz. filed May 17, 2010), a class action challenge to several provisions of Arizona's S.B. 1070, including the four provisions before this Court.

Attorneys for the following *amici* serve as counsel in the *Friendly House* case:

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU of Arizona is a state affiliate of the national ACLU. The ACLU has appeared before this Court in numerous cases involving the rights of noncitizens, including *INS v. St. Cyr*, 533 U.S. 289 (2001). The ACLU has also litigated numerous cases involving federal preemption of state and local immigration-related laws, including challenges against state laws recently enacted in Alabama, Georgia, Indiana, South Carolina, and Utah, in addition to Arizona's law, as well as municipal laws enacted in Hazleton, Pennsylvania and Farmers Branch, Texas.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in the federal courts throughout the nation, including the Supreme Court. MALDEF's

mission includes a commitment to protect the rights of immigrant Latinos in the United States. MALDEF has brought constitutional challenges to attempts by states and localities to engage in the regulation of immigration in multiple jurisdictions throughout the country, including in Arizona, Alabama, Indiana, South Carolina, Nebraska, California and Texas.

The National Immigration Law Center ("NILC") is a nonprofit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC uses multiple strategies to carry out this mission, including impact litigation, policy advocacy and education, and trainings and technical assistance. A major concern of the organization over the past six years has been the enactment of state laws that seek to regulate immigration and particularly threaten low-income immigrants. Accordingly, NILC is co-lead counsel in class action litigation challenging Arizona S.B. 1070. That case, *Friendly House v. Whiting*, raises preemption challenges advanced in the instant case as well as additional legal challenges to S.B. 1070. NILC is also co-lead counsel in class action litigation challenging similarly sweeping state immigration enforcement schemes in Utah, Georgia, Alabama, and South Carolina. NILC has a direct interest in the issues in this case.

The Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization working to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all.

Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including immigration and anti-discrimination. AAJC is committed to defending the rights of all Americans, particularly underserved populations such as immigrants, communities of color, and other minorities, whom Arizona's S.B. 1070 threatens. AAJC believes that any state's attempt to create its own set of immigration laws interferes with federal power and authority over immigration matters and is unconstitutional.

The Asian Pacific American Legal Center ("APALC"), a member of the Asian American Center for Advancing Justice, was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific Islander community. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific Islander community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC advocates for the full and equal integration of immigrant communities in a variety of contexts and focuses particularly on the needs of Asian and Pacific Islander immigrants.

The National Day Laborer Organizing Network ("NDLON") is a non-profit organization that works to improve the lives of day laborers in the United States. It has 38 member organizations

throughout the country, including two in Arizona, and it advocates for the interests of day laborers, many of whom are immigrant workers, in matters of national concern. NDLON fosters safer, more humane environments for day laborers and migrant workers to earn a living, contribute to society, and integrate into the community. It also works to unify and strengthen its member organizations to be more strategic and effective in their efforts to develop leadership, mobilize, and organize to protect and expand day laborers' civil, labor and human rights. As an organization composed of predominantly immigrant workers, NDLON has long been involved in efforts to monitor the enforcement of immigration law by state and local police, and has a special interest in the question of state and local authority to enforce immigration law.

The following *amici* are individuals and organizations who are plaintiffs in the *Friendly House* case:

Arizona South Asians For Safe Families ("ASAFSF") is a volunteer-based advocacy organization that helps victims of domestic violence get back on their feet. ASAFSF's clients include many immigrant women who are eligible for relief under the Violence Against Women Act ("VAWA"), the Trafficking and Violence Protection Act ("TVPA"), or asylum procedures.

Asian Chamber of Commerce of Arizona ("ACC") is an association of Asian-owned businesses whose clientele will be reluctant to shop or visit their establishments out of fear of being stopped, questioned, or asked to show papers by police if S.B. 1070 goes into effect. ACC members

and employees include U.S. citizens and noncitizens, individuals born in the U.S. and recent immigrants, monolingual non-English speakers, limited English-proficient speakers, and individuals who speak English with an accent. ACC has diverted its resources to address the considerable confusion and fear surrounding S.B. 1070 among its members.

Border Action Network ("BAN") is a statewide membership organization devoted to protecting the human rights and dignity of immigrant and border communities. BAN builds the political and social capacity of its constituency through grassroots organizing, leadership development, policy advocacy, and educational activities. BAN has over 1,000 members distributed across 6 Arizona counties. The great majority of BAN's membership is Latino. BAN has some members who do not have permission to work or remain in the United States, while other BAN members are legal residents or U.S. citizens, and some live in families of mixed immigration status and nationality. BAN is concerned that its members will be stopped, detained, or arrested under S.B. 1070 due to their appearance or lack of acceptable documents if the law is allowed to take effect, and BAN's own mission would be frustrated by S.B. 1070. BAN's staff frequently buses members to events and organizational functions without regard to their passengers' "immigration status," and they are concerned that this could subject them to prosecution under S.B. 1070. In addition, BAN has had to divert significant resources to a public education campaign to inform its members about their rights and responsibilities under the new law and address their fears and concerns. Finally, some of BAN's members

have already left the state; S.B. 1070 has made it harder for its staff to maintain its membership base and to recruit new members. For all of these reasons, BAN is a plaintiff in the litigation challenging S.B. 1070.

Maura Castillo, an Arizona resident, is a lawful permanent resident of the United States who is originally from Mexico, appears Latina, and speaks limited English. Subsequent to the enactment of S.B. 1070, Ms. Castillo was stopped, forcefully arrested, and detained by an Arizona Department of Public Safety officer after she failed to provide immigration documents upon request. The officer wrestled Ms. Castillo out of her vehicle, pushed her to the ground, and injured her shoulder before she was eventually booked into Maricopa County Jail. Ms. Castillo was released from jail with no criminal charges filed after state officials confirmed her lawful status. Ms. Castillo experienced great trauma from this incident and fears that S.B. 1070 puts her at greater risk of being stopped and questioned about her immigration status again due to her appearance and limited English ability.

Derechos Humanos is a grassroots organization in Arizona that promotes respect for human/civil rights. Derechos Humanos fights the militarization of the Southern Border region, discrimination, and human rights abuses by federal, state, and local law enforcement officials affecting U.S. and non-U.S. citizens alike. It promotes human rights and justice on the border through educational outreach and actions. When S.B. 1070 was first being considered, and after it passed, Derechos Humanos began to receive questions from community members expressing concern that their daily

activities might subject them to liability under various provisions of S.B. 1070. These community members expressed that they were afraid to leave their homes out of fear that they will be subject to detention, investigation, arrest, criminal charges, and imprisonment under S.B. 1070.

John Doe, an Arizona resident, became a lawful permanent resident in 2008 after being granted asylum on the basis of political persecution by the government of the People's Republic of China. A taxi driver, he fears that if S.B. 1070 goes into effect he will be stopped by state or local law enforcement officers and questioned about his immigration status on the basis of his Asian appearance and accent. John Doe also fears that he will be detained if he is stopped without his green card. In light of his experience as a victim of official persecution, John Doe is deeply distressed by the possibility of S.B. 1070 going into effect.

Jane Doe #3 is a resident of Tucson, Arizona. Ms. Doe is of Mexican descent and speaks Spanish and very limited English. In 2009, she entered into a relationship with a man who later became abusive. When she tried to end the relationship, he slashed her tires; broke into her home; destroyed her furniture and clothes; and defaced the walls of her apartment. Due to his violence, Ms. Doe became afraid for her life, and for the safety of her two children. She applied for and just recently received U nonimmigrant status based on her status as a victim of violent crime. Federal immigration authorities are aware of Ms. Doe's presence in the country, and chose not to initiate removal proceedings against her while the case was adjudicated. Because of Ms. Doe's Latino appearance

and her limited English speaking ability, she fears that she will be subject to interrogation, arrest, and detention under S.B. 1070.

Japanese American Citizens League ("JACL") is a membership organization working to advance the civil rights of Japanese Americans and others. Its members in Arizona include U.S. citizens and noncitizens and racial minorities, all of whom may be profiled under S.B. 1070. JACL has diverted its resources to address the considerable confusion and fear surrounding S.B. 1070 among its members, especially the elderly who were imprisoned in Japanese internment camps during World War II.

Jim Shee is an elderly Arizona resident of Spanish and Chinese descent. He has been stopped twice since S.B. 1070 was signed into law and asked to produce "his papers." Mr. Shee fears that he will be at even greater risk of being stopped, questioned, and detained by Arizona law enforcement officials because of his appearance if all of the provisions of S.B. 1070 are enforced.

Luz Santiago is a pastor for a church in Mesa, Arizona. Approximately 80 percent of her congregation lacks authorization by the federal government to remain in the United States. In her role as a pastor, Ms. Santiago provides transportation, shelter, and assistance to members of her congregation, including those members who are not authorized by the federal government to remain in the United States. Ms. Santiago fears for the well-being of vulnerable congregation members who could be stopped, detained, arrested, and questioned under S.B. 1070 and is concerned that she could be subject

to prosecution under the transporting and harboring provisions of S.B. 1070. Ms. Santiago also fears being stopped, detained and/or arrested by state or local law enforcement officers due to her Latino appearance and because she speaks Spanish in public.

Southside Presbyterian Church is a church in Tucson, Arizona whose religious mission is to serve all God's people, and it provides services to a variety of people in its congregation, in its community, and in the wider Southern Arizona area. These include the establishment of a day laborer center to providing a place for day laborers to wait for work and to negotiate fair wages with potential employees. The church does not inquire into the immigration status of the members of its day labor center. The church is concerned that members of the day labor center will be subject to detention, investigation, arrest, criminal charges, and imprisonment due to the various provisions of S.B. 1070. Further, the pastor of the church, Alison Harrington, provides transportation, shelter, and assistance to members of her congregation and other members of the community without regard to whether these individuals are authorized by the federal government to remain in the United States. She is concerned that she could be subject to prosecution under the transporting and harboring provisions of S.B. 1070.

Valle del Sol is a community based non-profit organization that provides behavioral health, social services, and leadership development programs to several Arizona communities. Many of the Valle del Sol's clients are Latino and many come from families of mixed immigration status, meaning that even if

Valle del Sol's client is a United States citizen, their parents or other family members might be undocumented immigrants. Valle del Sol believes S.B. 1070 has and will negatively impact its ability to provide services to these clients of mixed status families because the fear of implementation of S.B. 1070. This fear has caused some of Valle del Sol's clients and their families to stop engaging in many public activities, interfering with Valle del Sol's ability to ensure that its clients continue to receive its treatment and services, and necessitating that Valle del Sol expend additional resources to ensure that its clients continue to receive the services they require.