No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, OREGON, RHODE ISLAND, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici, the States of California, New York, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont are the homes of some of the largest populations of both documented and undocumented immigrants in the country. *See* Jeffrey Passel & D'Vera Cohn, Pew Hispanic Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010*, at 14-15 (Feb. 1, 2011).[1] As States, Amici do not lightly support federal preemption of state law. Amici States have a wide variety of laws affecting all persons within their borders, and Amici seek to preserve their authority to enact and enforce such laws, even as applied to immigrants. At the same time, Amici States have a strong interest in recognizing that the singular question of whether and how to remove undocumented immigrants is one that is committed to the federal government.

As demonstrated below, the Arizona statute at issue here conflicts with federal law on removal. Although Arizona claims that the law merely assists the federal government in the enforcement of federal law, the Arizona law in fact implements a distinct state policy on removal that supplants federally mandated enforcement priorities and disregards the federal requirement that state assistance in this area proceed under federal oversight.

Amici States have a compelling interest in preventing Arizona from enforcing its own removal policy. Without federal oversight and enforcement of federal priorities, individual state removal policies would place

1. http://www.pewhispanic.org/files/reports/133.pdf.

disproportionate demands on federal resources and have other interstate effects. Amici States may have differing views about precisely what removal priorities and enforcement practices would be optimal, but they agree that, where removal is concerned, Congress and the Executive Branch are the appropriate bodies for determining these national policies.

Amici, no less than Arizona, have undocumented immigrant populations within their borders, and they have adopted diverse measures to address the impacts of that population, in a manner reflecting individual state priorities and resources. A narrow preemption ruling that recognizes the ways in which Arizona's statute conflicts with Congress's delegation of removal authority and oversight power to federal officials would preserve the States' authority to enforce laws addressing conduct and persons within their borders, while promoting Amici States' overarching interest in a unified, national removal policy.

SUMMARY OF ARGUMENT

States have broad authority to enact and enforce laws affecting all persons within their borders, including documented and undocumented immigrants, in the manner that best accommodates local concerns. Federal immigration law does not preempt that authority generally, notwithstanding Congress's comprehensive regulation of immigration—particularly when a state law serves an independent state interest that does not rely on federal law, or regulates in an area of traditional state concern.

Some areas of immigration policy, however, are vested in the federal government alone. The removal of undocumented immigrants is one such exclusively federal function—a reflection of removal's close relationship to the federal government's sole authority to determine "who should and should not be admitted into the country." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). And in aid of its exclusive removal authority, Congress has carefully regulated not only *who* may be removed from the United States, but *how* such individuals should be identified, apprehended, and detained.

Federal law has long recognized that both removal and enforcement activities in aid of removal have uniquely devastating effects, often on people who are otherwise law-abiding and productive members of society. Congress has responded to these concerns by prioritizing certain classes of dangerous undocumented immigrants for removal, by delegating substantial discretion to the Executive Branch over the removal process, and by specifically requiring federal oversight over nonfederal officers who engage in enforcement activities in aid of removal.

Arizona's immigration statute, S.B. 1070 (2010 Ariz. Sess. Laws, ch. 113, *as amended by* 2010 Ariz. Sess. Laws, ch. 211), establishes Arizona's own removal policy, in conflict with this federal scheme, and is thus preempted. Arizona contends here that the purpose of the statute is to "enforc[e] the precise legal rules . . . prescribed by Congress." Pet. Br. 15. But S.B. 1070 departs from federal removal policy in two fundamental ways. First, the statute requires state and local officers to engage in their own enforcement activities in aid of removal—including arrest and detention—without *any* federal

oversight. Second, the statute supplants the Executive Branch's delegated discretion over the administration of the removal process and interferes with the achievement of the federal priorities that Congress has set. Because S.B. 1070 conflicts with Congress's national removal policy, the Court of Appeals properly held that Arizona's statute is preempted.

ARGUMENT

I. FEDERAL LAW PREEMPTS UNILATERAL STATE EFFORTS TO APPREHEND AND REMOVE UNDOCUMENTED IMMIGRANTS.

The Constitution authorizes Congress to "establish an *uniform* Rule of Naturalization." U.S. Const. art. 1, § 8, cl. 4 (emphasis added). Removal—as "an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country," *Trop v. Dulles*, 356 U.S. 86, 98 (1958) (Warren, C.J., plurality opinion)—is a crucial element of that constitutional authority.

Removal's inherently national character extends to enforcement activities in aid of removal, such as arrest and detention. Such enforcement inevitably targets foreign nationals, whose treatment within this country is "[o]ne of the most important and delicate of all international relationships," *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)—and particularly so when the "drastic measure" of removal is at stake, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). *See* U.S. Br. 22. A patchwork of separate removal policies would undermine "the Nation's need to 'speak with one voice' in immigration matters." *Zadvydas v. Davis,* 533 U.S. 678, 700 (2001). In recognition of the

importance of a nationwide removal policy, Congress has set national priorities over immigration enforcement and vested federal officials alone with discretionary authority over enforcement activities in aid of removal, including oversight of nonfederal officers engaging in such enforcement.

But preemption of unilateral efforts to establish single-state removal schemes will not prevent the States from taking other measures to address the impact of undocumented immigrants. A preemption rule based on the exclusive federal nature of removal, and Congress's delegation of enforcement and removal powers to federal officials, does not limit the States' ability to otherwise apply their laws to undocumented immigrants within their borders. *See DeCanas*, 424 U.S. at 355. As this Court has recognized, an immigrant's unlawful entry "into the United States" and the fact that the immigrant may for that "reason be expelled . . . cannot negate the simple fact of his presence within [a] State's territorial perimeter." *Plyler v. Doe*, 457 U.S. 202, 215 (1982). "Given such presence," undocumented immigrants "are subject to the full range of obligations imposed by the State's civil and criminal laws." *Id.*

Thus, States are not barred from enforcing generally applicable laws—such as those regulating civil rights, consumer protection, or workplace safety for *all* persons in the State—even if doing so may have some incidental effects on immigration. *See, e.g.*, *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 358-59 (2006) (applying New York labor laws equally); Cal. Stats. 2002, ch. 1071 (S.B. 1818) (applying various provisions of California law equally). Nor would preemption forbid the States from addressing

"essentially local problems," such as the regulation of licensed entities or the best way to use state funds. *De Canas*, 424 U.S. at 357; *see, e.g.*, Cal. Unemp. Ins. Code § 1264 (restricting unemployment benefits). Absent an express congressional statement to the contrary, or an independent constitutional bar on the state law at issue, States remain broadly free to pass laws addressing the impact of undocumented immigrants—whether their goal is to assist immigrants or to minimize the effect that such immigrants may have.

Accordingly, federal immigration law only narrowly preempts the States' otherwise plenary authority to regulate as they see fit within their borders. Arizona's unprecedented immigration statute falls within this narrow band of preemption by attempting to "enforce *federal* rules" in aid of removal, Pet. Br. 23 (emphasis added), in conflict with Congress's specific provisions for federal-state cooperation on this very issue.

A. Federal law requires federal oversight of state cooperation with federal authorities in connection with the removal of undocumented immigrants.

In this case, the Court of Appeals correctly found that federal law preempts Arizona's unilateral effort to enact a separate state removal scheme outside the supervision of the federal government. Congress has permitted the expulsion of undocumented immigrants from this country only through federal removal proceedings, which are "the *sole and exclusive* procedure for determining whether an alien may be . . . removed from the United States." 8 U.S.C. § 1229a(a)(3) (emphasis added). Federal law delegates discretionary authority to Executive Branch officials alone to make decisions about removability. *See* 8 U.S.C. § 1103(a),

(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484-87 (1999); *see also* U.S. Br. 18-21. And in aid of that removal authority, Congress has provided guidelines for enforcement activities directed at the ultimate remedy of removal, including the identification, apprehension, and detention of suspected undocumented immigrants. *See, e.g.*, 8 U.S.C. § 1357(a)-(f) (specifying powers of federal immigration officers and employees); 8 C.F.R. § 236.1 *et seq.* (regulations implementing statutory prescriptions).

Congress could have delegated to the States, as it did to the Executive Branch, the same broad enforcement authority to arrest and detain undocumented immigrants for purposes of removal. But Congress declined to adopt that model. Instead, federal law authorizes States to enforce federal immigration law in aid of removal only in certain limited circumstances, with oversight by federal authorities.

Thus, federal law authorizes state and local officers to cooperate with the Department of Homeland Security ("DHS") to "arrest and detain" undocumented immigrants who previously left the country after a felony conviction for the purpose of transferring such immigrants to federal custody. *See* 8 U.S.C. § 1252c ("[a]uthorizing State and local law enforcement officials to arrest and detain *certain* illegal aliens") (emphasis added). Similarly, state and local officers who have arrested a drug offender may request that a federal official issue an immigration detainer if they make the request "expeditiously" and there is reason to believe that the offender is an undocumented immigrant. *See id.* § 1357(d). And outside these specific classes of undocumented immigrants, the Secretary of DHS may authorize state and local officers to act as federal immigration officers if the Secretary "determines

that an actual or imminent mass influx of aliens" near the United States "presents urgent circumstances requiring an immediate Federal response." *Id.* § 1103(a)(10).

More generally, the Secretary may designate state and local officers to engage in "the investigation, apprehension, or detention of aliens in the United States" in aid of removal, under "a written agreement" between the Secretary and the State or political subdivision at issue. *Id.* § 1357(g)(1). But any authorization of these immigration enforcement functions under § 1357(g) is subject to strict requirements that ensure continuing federal oversight of such nonfederal officers. The agreement must require officers to have knowledge of and adhere to federal law; and in performing any function under the cooperation agreement, officers are "subject to the direction and supervision of the [Secretary]." *Id.* § 1357(g)(1)-(3). State or local officers "acting under color of authority" of § 1357(g) are deemed to be federal officers for purposes of workers' compensation and civil liability—a reflection of Congress's judgment that such officers are performing a *federal* function when they identify, apprehend, or detain undocumented immigrants for purposes of removal. *See id.* § 1357(g)(7)-(8). And if a State seeks to aid the United States in performing this function without an agreement, it must still do so by "cooperat[ing] with the [Secretary]," *id.* § 1357(g)(10)(B), and not by enforcing a competing policy.

B. Federal law mandates the establishment and implementation of federal enforcement priorities concerning the removal of undocumented immigrants.

Congress's choice to preserve federal primacy over both removal proceedings and the arrest and detention of individuals for purposes of removal makes sense in

light of the inherently sovereign nature of the removal power. *See supra* at 4-5. But federal oversight also reflects broader humanitarian and civil-rights concerns. Federal law has long recognized that the impact of removal and related enforcement activities is uniquely broad and devastating. Reflecting these concerns, Congress has set enforcement priorities that target particularly dangerous classes of undocumented immigrants, and delegated to the Executive Branch the discretion to determine how best to implement and exercise the federal government's removal power.

There are currently millions of undocumented immigrants living in the United States. *See* Passel & Cohn, *supra*, at 1. The apprehension, detention, and removal of these immigrants necessarily implicates "the rights, liberties, and personal freedoms of human beings." *Hines*, 312 U.S. at 68. Most of these undocumented immigrants are otherwise law-abiding, fully contributing members of society. *See Plyler*, 457 U.S. at 228. Indeed, undocumented immigrants are often deeply embedded in their communities: they work and pay taxes (including contributions to Social Security and Medicare); they establish families and raise children; and, whatever their current status, "many will remain [in the United States] permanently and . . . some indeterminate number will eventually become citizens." *Id.* at 222 n.20. Because of the depth of these ties, enforcement activities in aid of removal have uniquely broad effects, disrupting families, communities, and other economic and social relationships.

Overzealous and indiscriminate attempts to identify and remove undocumented immigrants also pose many risks for civil-rights violations—a risk that spills over to legal residents. Because the United States is a diverse, multiethnic nation, there is often no easily verifiable way

to distinguish between an undocumented immigrant and a person with legal permission to be in this country, including full citizens. Enforcement measures targeted at "removable" immigrants—such as documentation checks or other investigatory measures—therefore threaten to sweep in many legal immigrants and U.S. citizens who simply share the same race, ethnicity, or cultural markers as undocumented immigrants common to a particular area. *See* Pet. App. 145a; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975).

Federal law has long reflected these concerns about the collateral harms that would follow from indiscriminately placing excessive burdens on undocumented immigrants. Thus, for example, Congress has never criminalized mere unlawful presence in this country, absent some other aggravating factor. *See* Michael John Garcia, Cong. Research Serv., *Criminalizing Unlawful Presence: Selected Issues* 2 (May 3, 2006).[2] Nor is it a federal crime for an undocumented immigrant to seek work in the United States. *See* U.S. Br. 4. Instead, Congress has repeatedly rejected these penalties as inhumane and inconsistent with this nation's tradition and history. *See, e.g.*, Pet. App. 33a-35a; H.R. Rep. No. 99-682, pt. 1, at 46 (1986) ("[L]egislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.").

These same concerns about the harmful effects of overzealous and indiscriminate enforcement also demonstrate why Congress would have delegated discretionary removal authority to federal officials and

2. http://trac.syr.edu/immigration/library/P585.pdf.

subjected removal enforcement efforts to mandatory federal oversight. Discretion allows the Executive Branch to set priorities and policies that strike a proper balance between the harsh effects of immigration enforcement and the sovereign interest in removing undocumented immigrants. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (discretion permits agency "to deal with the many variables involved in the proper ordering of its priorities"). And oversight ensures that both federal and nonfederal enforcement activities in aid of removal advance—or at least do not conflict with—these national priorities and policies.

Executive Branch officials have traditionally been delegated broad discretion to grant relief from removal on a number of grounds, including political asylum and abused-victim status. *See generally* U.S. Br. 19-22; *infra* at 23-24 & n.14. Congress also granted the Attorney General authority to cancel removal for particular categories of undocumented immigrants. *See, e.g.*, 8 U.S.C. § 1229b; *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479-80 (2010) (statute preserves long tradition of executive discretion in implementing federal removal power).

Likewise, Congress has directed DHS not to treat all undocumented immigrants as equivalent for removal purposes, but instead to "prioritize the identification and removal" of undocumented immigrants convicted of serious crimes. Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, tit. II, 123 Stat. 2142, 2149 (2009). This directive requires the Department to focus its enforcement and removal efforts on "aliens who pose a danger to national security or a risk to public safety." J.A. 108; *see* Memorandum from

John Morton, Director of Immigration and Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* 1 (Mar. 2, 2011).[3] And in order to implement Congress's priorities, Immigration and Customs Enforcement has adopted an official policy directing the exercise of restraint for other populations of undocumented immigrants with no history of criminal conduct, or for whom removal would exact other social or humanitarian costs—for example, U.S. military veterans, victims of serious crimes, elderly or juvenile immigrants, witnesses in pending criminal investigations or prosecutions, and individuals engaged in protected civil-rights activities. *See* Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 5 (June 17, 2011);[4] Memorandum from John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* 2 (June 17, 2011).[5]

Without federal oversight of state enforcement efforts in aid of the removal of undocumented immigrants, there would be no way for the federal government to advance a uniform and coherent enforcement policy (including the setting of national priorities) with respect to the "harsh measure" of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Because the interests are sensitive, and

3. http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

4. http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

5. http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

the balancing of enforcement costs and risks delicate, Congress reasonably centralized the enforcement power in the federal government—the only way that it could ensure that federal priorities and national interests in removal would be served.

States are not precluded from cooperating in efforts to remove undocumented immigrants. But Congress provided for state cooperation under defined circumstances: to arrest and detain certain classes of undocumented immigrants, who *Congress itself* determined should be an enforcement priority; or under the supervision and direction of *federal officials*, guaranteeing coherent enforcement of federal removal power in light of federal objectives and priorities.

II. ARIZONA'S S.B. 1070 IS PREEMPTED BECAUSE IT CONFLICTS WITH CONGRESS'S DELEGATION OF ENFORCEMENT OVERSIGHT AND ENFORCEMENT PRIORITIES TO FEDERAL OFFICIALS.

Arizona's immigration statute, S.B. 1070, conflicts with the federal government's exclusive control of removal in two fundamental ways. S.B. 1070 requires Arizona officers to enforce federal immigration law without federal oversight. Moreover, by eliminating federal oversight, S.B. 1070 impermissibly establishes a unilateral policy of "attrition through enforcement," S.B. 1070, § 1—the type of sensitive policy choice that Congress committed to federal officials alone.

A. S.B. 1070's unilateral immigration policy conflicts with the requirement of federal oversight in cooperative federal-state immigration enforcement.

As explained above, Congress provided multiple avenues for state and local officers to cooperate with the federal government in enforcing federal removal policy. *See supra* at 7-8. But cooperating through the means Congress specified would subject Arizona officers to the oversight of federal officials whenever they engaged in enforcement in aid of removal—a result that Congress intended, but that Arizona seeks to avoid.

Ignoring the other provisions of 8 U.S.C. § 1357(g), Arizona argues that S.B. 1070's provisions for state and local officers' *independent* enforcement are authorized by § 1357(g)(10)(B). *See* Pet. Br. 32. Section 1357(g)(10)(B) permits state and local officers to "cooperate with the [Secretary] in the identification, apprehension, detention, or removal" of undocumented immigrants, even without a formal written "agreement." But, as the text of the statute makes clear, that provision does not exempt such officers from the fundamental requirement of *cooperation*, which entails compliance with the Secretary's stated priorities and requirements when state and local officers engage in enforcement activities in aid of removal.

If Arizona were correct that § 1357(g)(10)(B) permits state and local officers to pursue independent removal policies against undocumented immigrants, without regard to federal priorities and requirements, the resulting scheme would undermine Congress's careful reservation of federal officials' oversight of the "[p]erformance of immigration officer functions by State

officers and employees." 8 U.S.C. § 1357(g). There would be little point in carefully delineating the oversight mechanisms for written cooperative agreements if States could simply bypass oversight by avoiding an agreement entirely. Moreover, Arizona's reading of § 1357(g)(10)(B) would paradoxically give state and local officers *more power* to pursue suspected federal immigration violations than federal law itself grants to only *some* specially trained officers. *See* 8 C.F.R. § 287.5(c) (identifying government officials that can arrest and detain undocumented immigrants); *id.* § 287.8(c)(2)(ii) (limiting authority for warrantless arrests); *id.* § 236.1(b) (providing other limitations on arrest).

There is no indication in the statutory text or legislative history that Congress intended such perverse results. By recognizing that state and local officers can cooperate with the Secretary even without a formal written agreement, Congress did not eliminate § 1357(g)'s requirement of cooperation or the federal oversight that such cooperation entails.

The cooperative scheme enacted by Congress is a meaningful, available mechanism for States to assist in the enforcement of federal immigration law—even with respect to the functions at the core of the federal removal process (*i.e.*, identifying and apprehending undocumented immigrants). U.S. Immigration and Customs Enforcement currently has formal relationships with sixty-eight law enforcement agencies in twenty-four states (including two state agencies and six local law enforcement offices in Arizona) pursuant to express § 1357(g) agreements that authorize state and local officers to apprehend and detain undocumented immigrants for purposes of removal. *See*

U.S. Immigration and Customs Enforcement, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*.[6] These cooperative efforts, unlike the alternate scheme S.B. 1070 sets up, retain the fundamental feature of federal oversight, thus preserving the ability of federal officials to prioritize enforcement efforts and to implement safeguards for the arrest and detention of suspected undocumented immigrants. *See* Statement of Richard M. Stana, U.S. Gov't Accountability Office, *Immigration Enforcement: Controls over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened* 2-3, 7-8 (2009) (testimony before House Comm. on Homeland Security) (recommending changes to federal supervision to prioritize dangerous criminals, rather than low-level offenders, and to avoid racial profiling).[7] Like all other States, Arizona can choose to cooperate or not cooperate with federal enforcement efforts.[8] But, however much Arizona may disagree with federal removal priorities, it cannot operate its own unilateral removal policy outside of any federal oversight.

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6. http://www.ice.gov/news/library/factsheets/287g.htm (last visited Mar. 23, 2012).

7. http://www.gao.gov/new.items/d09381t.pdf.

8. The federal government cannot, of course, compel the States or their officers to aid in the enforcement of federal law. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

B. S.B. 1070 enacts a separate state removal scheme that conflicts with Congress's own priorities and with its delegation of enforcement discretion to federal authorities.

Arizona enacted S.B. 1070 to supplant, in Arizona, Congress's immigration policies and the Executive Branch's exercise of its delegated discretion to target the most dangerous populations of undocumented immigrants for investigation, detention, and removal. In doing so, Arizona has undermined the very removal priorities that Congress intended the Executive Branch to establish and follow.

Arizona enacted S.B. 1070 specifically in response to the federal government's asserted "[l]ack of effective enforcement of the existing immigration rules," which Arizona blames for its "shoulder[ing] a disproportionate burden of the national problem of illegal immigration." Pet. Br. 1-2. Arizona's solution to "the federal executive's lax enforcement policy," *id.* at 26, was a parallel state-mandated removal process. Section 1 of S.B. 1070 expressly declares that the goal of the statute is "attrition through enforcement." That phrase is a familiar one in anti-immigration circles. As Arizona's statute explains, the policy of attrition through enforcement seeks to "discourage and deter the unlawful entry and presence" of undocumented immigrants, as well as their "economic activity." S.B. 1070, § 1. Because the States have no inherent power to remove undocumented immigrants, S.B. 1070 accomplishes its aims by making life so difficult for undocumented immigrants in Arizona

that they will choose to leave the State.[9] Aside from creating a hostile environment for undocumented immigrants, attrition through enforcement also aims to "interrupt[]" and "atroph[y]" "networks of relatives, friends, and countrymen" who may support and encourage undocumented immigrants.[10]

The provisions of S.B. 1070—including the four at issue in this case—"work together" (*id.* § 1) to accomplish these goals by imposing "distinct, unusual and extraordinary burdens and obligations upon aliens" in order to pressure them to leave Arizona. *Hines*, 312 U.S. at 65. S.B. 1070's arrest and detention provisions—Sections 2(B) and 6—subject undocumented immigrants to "indiscriminate and repeated interception and interrogation by public officials," *id.* at 66, including prolonged detention for immigration status checks and expanded authority for warrantless arrests, *see* Pet. App. 12a n.7, 162a. Likewise, the penalty provisions of S.B. 1070—Sections 3 and 5(C)—deliberately expose undocumented immigrants in Arizona to greater risk of criminal liability than they would face in other States or from the federal government, by criminalizing mere unlawful presence and attempts to seek or perform work. *See* U.S. Br. 31, 34-38. Finally, an extraordinary

9. *See* NumbersUSA, *Attrition Through Enforcement Is the True Middle-ground Solution* ("The goal is to make it extremely difficult for unauthorized persons to live and work in the United States."), http://www.numbersusa.com/content/learn/issues/american-workers/attrition-through-enforcement-true-middl.html (last visited Mar. 23, 2012).

10. Mark Krikorian, Center for Immigration Studies, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement* 4 (May 2005), http://www.cis.org/articles/2005/back605.pdf.

provision—Section 2(H)—compels local and state officers and agencies to enforce S.B. 1070 to the maximum extent possible by authorizing private citizens to seek penalties of up to $5,000 for each day that the policy of "attrition through enforcement" is not maximally pursued.[11]

"The manifest purpose and inevitable effect" of S.B. 1070's provisions, *Wis. Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986), taken as a whole, is "to discourage and deter" both the entry and the mere presence of undocumented immigrants, S.B. 1070, § 1, leading to "the attrition (self-deportation) of the majority of those here illegally."[12] But attrition through enforcement "has never been the immigration strategy of the United States," as one of the principal drafters of Arizona's law has admitted. Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 Tulsa J. Comp. & Int'l L. 155, 156 (2008). Federal law has never tolerated subjecting *all* undocumented immigrants to broad "inquisitorial practices and police surveillance"; to the contrary, "[o]pposition to laws . . . singling out aliens" in that way "is deep-seated in this country." *Hines*, 312 U.S. at 70, 74. Similarly, neither mere unlawful presence nor work

11. Although Section 2(H) is not directly at issue before this Court, its broad mandate of maximum enforcement necessarily affects the implementation of the four provisions that this Court is considering.

12. Fed'n for Am. Immigration Reform, *Encouraged Reverse Migration: A Sensible Seven-Step Strategy for Promoting the Outbound Flow of Illegal Immigration* 1 (2006), http://www.fairus.org/site/DocServer/research_%20backgrounder_may102006.pdf?docID=981 (last visited Mar. 23, 2012).

by undocumented immigrants has ever been a federal crime. *See supra* at 10; U.S. Br. 31, 34-38; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378 (2000) ("[The] statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions."). Yet with S.B. 1070 Arizona is impermissibly attempting to chart its own course in the identification, apprehension, and detention of undocumented immigrants for purposes of expelling them from the State.

By delegating enforcement authority to federal officials, including the ability to prioritize the classes of persons targeted for removal, Congress preempted Arizona's attempt to create a separate and "additional enforcement mechanism"—outside of and independent of federal oversight—to serve Arizona's own removal objectives and not the federal government's *national* objectives in enforcing federal immigration law. *Id.* at 373 n.7, 379; *cf. Villas at Parkside Partners v. City of Farmers Branch*, --- F.3d ----, 2012 WL 952252, at *7 (5th Cir. Mar. 21, 2012) (finding preempted a local ordinance that barred undocumented immigrants from renting property when "[t]he undeniable practical effect of the Ordinance is thus to compel the departure of aliens from the City to other cities, states, or foreign countries"). Here, Congress itself has repeatedly declined to impose the penalties that Arizona imposes as a matter of state law, and neither Congress nor the Executive Branch agencies charged with enforcing immigration law have endorsed the type of maximum, indiscriminate enforcement that Arizona mandates.

S.B. 1070 improperly displaces and supplants federal authority over removal of undocumented immigrants,

a subject that the Constitution leaves to Congress, and that Congress delegated to the discretion and exclusive oversight of federal executive officials. S.B. 1070 thus obstructs and impedes federal efforts to establish national priorities for the removal of undocumented immigrants. Accordingly, the Court of Appeals correctly found the four provisions of S.B. 1070 preempted by federal law, and its judgment should be affirmed.

III. ARIZONA'S SINGLE-STATE REMOVAL POLICY HAS NATIONAL AND INTERNATIONAL EFFECTS.

The indiscriminate harshness of S.B. 1070 is no accident: Arizona deliberately chose "to use an iron fist" to remedy what it perceived to be the federal government's unjustifiable use of "kid gloves" against undocumented immigrants. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003). But Arizona's attempt to address the "disproportionate burden" it bears of a "national problem," Pet. Br. 1, has inevitable consequences beyond Arizona's borders. And those consequences only reinforce why the Constitution mandates a "uniform" rule of naturalization, and why Congress accordingly provided for unified federal oversight over enforcement activities in aid of removal.

Because Arizona cannot compel the federal government to remove undocumented residents, S.B. 1070's provisions have the primary effect of redirecting undocumented immigrants to other States. *See Plyler*, 457 U.S. at 229-30 (recognizing that undocumented immigrants may move between States); *see also* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. Rev. 1749, 1799 & nn.303-307 (2011) (citing multiple studies on migration

flows).[13] Indeed, one of Arizona's chief complaints against federal immigration policy is that the federal government's allegedly disproportionate enforcement efforts in California and Texas have led to "a funneling of an increasing tide of illegal border crossings into Arizona." Pet. Br. 2. Regardless of whether other States welcome or object to the migration of undocumented immigrants, SB 1070's effect is to deter immigrants from residing *in Arizona*; Arizona cannot implement a policy that removes immigrants *from the United States*. As a result, Arizona's unilateral effort to impose its own removal policy will inevitably have interstate effects.

Moreover, the effects of S.B. 1070 are not limited to undocumented immigrants alone. Because S.B. 1070's regime of maximum enforcement operates against all persons *suspected* of being undocumented, and subjects those persons to the threat of police interrogation and detention, Arizona's law threatens to affect legal residents from other States, who may be deterred from visiting Arizona, or who may suffer from greater "inquisitorial practices and police surveillance" while in the State. *Hines*, 312 U.S. at 74. In addition, S.B. 1070 will affect foreign visitors, many of whom are authorized to enter and reside in the United States (including Arizona) *without* registering with the federal government or obtaining advance authorization. *See* J.A. 38-49. For this reason, Arizona's statute has already provoked strong objections

13. Some studies have estimated that the mere threat of S.B. 1070's enforcement has already led "100,000 Hispanics, mostly of Mexican descent," to leave Arizona "for Mexico or for other states." *Adios Arizona: Lots of People Are Leaving*, The Economist, Nov. 25, 2010, http://www.economist.com/node/17581892 (last visited Mar. 23, 2012).

from several foreign countries and international groups. *See* J.A. 150-156. Such responses from other nations to Arizona's policy will not be limited to Arizona residents or businesses; instead, other States—and the country as a whole—will be tarred with the same brush. *See Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875). In light of these interstate and international effects, Congress sensibly delegated to federal authorities the oversight of enforcement and removal policies with potential national and international implications.

Arizona's unilateral policy of maximum enforcement also threatens to divert federal resources and prioritization of immigration enforcement efforts in other States by monopolizing federal attention. For example, Section 2 of S.B. 1070 pressures the federal government to prioritize certain immigration status checks by precluding the release of arrested individuals who are suspected to be undocumented immigrants until the federal government can verify immigration status. Arizona would essentially require federal officials to respond *immediately* to Arizona officers' demands for information or status checks, or risk that detained suspects (who may be legal residents or U.S. citizens) would remain detained for lengthy periods of time.

Likewise, S.B. 1070 requires Arizona law enforcement officers to refer any undocumented immigrant to federal custody for removal, without regard to the federal government's resources, priorities, or desire to remove particular classes or types of immigrants. *See* J.A. 120-123. But many undocumented immigrants may be entitled to remain in this country as political refugees, victims of abuse, or other exempted statuses—statutory protections

that federal proceedings alone can determine.[14] Moreover, other undocumented immigrants—such as U.S. veterans and young children—will fall within the very categories of persons that federal officials have deemed low priority for removal purposes. *See supra* at 12. Yet Arizona's law would ignore these federal choices and instead funnel to the federal government tens of thousands of persons whom federal officials would not independently target for removal.

The federal government may or may not have enough resources to satisfy Arizona's demands. But that is not the relevant question. Simply to respond to the flood of requests and referrals mandated by S.B. 1070, federal officials would be forced to divert resources from other enforcement priorities in both Arizona and other States—including the removal of dangerous terrorists and convicted criminals. Compelling the federal government to spend more resources to advance Arizona's unilateral policy necessarily detracts from the resources available to other States and interferes with the constitutional and statutory commitment to a national removal policy.

Moreover, a ruling upholding Arizona's law would undermine a coherent national policy in another respect:

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14. *See, e.g.*, 8 U.S.C. § 1158(a)(1) (undocumented immigrant in United States may apply for asylum "irrespective of such alien's status"), (c)(1)(A)-(B) (once granted asylum, undocumented immigrant may reside and work in the United States); *id.* § 1182(a)(6)(A)(ii) (exempting from inadmissibility certain undocumented immigrants who have been battered or abused by family members); *id.* § 1231(b)(3)(A) (removal must be withheld when undocumented immigrant's "life or freedom would be threatened" in his home country).

such a ruling would authorize and encourage other States, in all parts of the country, to enact their own versions of S.B. 1070, reflecting their own conflicting removal preferences. Such a patchwork of competing, inconsistent, and irreconcilable removal policies would wholly undermine Congress's provision for nationwide federal direction and oversight.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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