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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, *Plaintiff* v. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, *Defendant*.	)	CASE NO. CV-10-1413-SRB

BRIEF OF *AMICI CURIAE*, MEMBERS OF THE UNITED STATES CONGRESS TRENT FRANKS, BRIAN BILBRAY, SENATOR JOHN BARRASSO, SENATOR JIM DEMINT, SENATOR JAMES INHOFE, SENATOR DAVID VITTER, SENATOR ROGER WICKER, ROBERT ADERHOLT, RODNEY ALEXANDER, MICHELE BACHMANN, SPENCER BACHUS, GRESHAM BARRETT, GUS BILIRAKIS, ROB BISHOP, MARSHA BLACKBURN, JOHN BOOZMAN, KEVIN BRADY, PAUL BROUN, GINNY BROWN-WAITE, MICHAEL BURGESS, KEN CALVERT, JOHN CAMPBELL, JOHN CARTER, JASON CHAFFETZ, HOWARD COBLE, MIKE COFFMAN, JOHN CULBERSON,

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[1] This brief is filed upon Motion to the Court. No counsel for any party authored in whole or in part this brief and no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

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INTEREST OF *AMICI*

Amici, the above-captioned Members of Congress, are currently serving in the One Hundred Eleventh Congress. *Amici* are committed to the constitutional principles of federalism and separation of powers, both of which are jeopardized by the Plaintiff's attack against Arizona.

ARGUMENT

I. CONGRESS HAS PLENARY POWER OVER IMMIGRATION, AND PLAINTIFF'S CLAIM THAT ITS AUTHORITY TO ENFORCE THE LAW PREEMPTS S.B. 1070 IS MERITLESS.

Congress has plenary power over immigration law, *INS v. Chadha*, 462 U.S. 919, 940 (1983), and as Plaintiff notes, the immigration laws Congress has passed reflect national and foreign policy goals. Cmpl. ¶ 19. S.B. 1070, Leg. 49, 2d Sess. (Ariz. 2010) ("S.B. 1070"), does not interfere with U.S. foreign policy goals as prescribed by Congress.

Plaintiff argues that "S.B. 1070 is independently preempted because it impermissibly conflicts with U.S. foreign policy," Pl.'s Mot. for Prelim. Inj. and Mem. of Law in Supp. Thereof ("Pl. Br.") at 22. Plaintiff claims that S.B. 1070 infringes on the Executive's "broad authority over foreign affairs," Cmpl. ¶ 16, to ensure immigration law has minimal impact on U.S. foreign policy. *See id.* ¶¶ 2, 4, 19, 22, 36-39, 42, 62, 65. Plaintiff imagines that this "broad authority" comes from a congressional grant of "discretion" in the immigration laws to balance "multiple interests as appropriate," such

as humanitarian and foreign policy interests. Cmpl. ¶¶ 17, 19. Plaintiff misapprehends the nature of its authority to enforce immigration law.

While the Executive has power to conduct United States foreign policy, Congress has plenary power to prescribe the immigration laws. *Chadha*, 462 U.S. at 940 ("The plenary authority of Congress over aliens . . . is not open to question"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1893) (identifying different sources for Congress's power over aliens). Where Congress has prescribed those laws, the Executive must follow Congress's direction. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696-99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6)); *Jama v. ICE*, 543 U.S. 335, 368 (2005) (Souter, J., dissenting) ("Congress itself . . . significantly limited Executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens").[2]

As Plaintiff notes, "[t]he Supreme Court has recognized the 'Nation's need to "speak with one voice" in immigration matters.'" Pl. Br. at 23 (quoting *Zadvydas*, 533 U.S. at 700). Plaintiff also recognizes that, "[i]n crafting federal immigration law and policy, Congress has necessarily taken into account multiple and often competing

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

national interests," including foreign policy. Cmpl. ¶ 19; *see Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (Immigration policy "is vitally and intricately interwoven with contemporaneous policies in regard to [among other things] the conduct of foreign relations."). While some immigration laws grant Executive officials discretion, the laws balance these concerns within the constraints of each statute's text, not the Executive's exercise of prosecutorial discretion. *Cf., Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909) (Congressional authority over aliens "embraces every conceivable aspect of that subject."); *Jama*, 543 U.S. at 368 (Souter, J., dissenting) ("Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it."). Where Congress exercises plenary power to prescribe laws, Executive officers must work within those constraints. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Federal agency regulation only preempts state law when the agency is acting within the scope of its congressionally-delegated authority. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). The Department of Homeland Security ("DHS") has no formal regulations expressly preempting S.B. 1070. Instead, Plaintiff relies on a novel claim that a general implied "prosecutorial discretion" not to impose federal sanctions on an alien violator, based on complex political policy considerations, can preempt in lieu of actual regulations. Pl. Br. at 24. However, where agency preemption is only implied, the presumption *against* preemption is at its strongest:

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

Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717 (1985). As for the scope of the agency's delegated authority, the Court may not, "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Public Serv. Comm'n*, 476 U.S. at 374. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374-75.

The Executive's power to enforce federal immigration law does not confer the power to preempt state immigration enforcement by choosing, for foreign policy or other reasons, to selectively enforce the laws. Only Congress's "'clear and manifest purpose'" preempts state laws. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As Section II describes below, S.B. 1070 is not preempted because it is fully consonant and integrated with federal immigration laws.

II. S.B. 1070 IS FULLY CONSONANT WITH FEDERAL IMMIGRATION POLICY THAT PROMOTES INCREASINGLY GREATER ROLES FOR STATES IN ENFORCING IMMIGRATION LAW.

As discussed above, Acts of Congress express federal immigration policy, not the Executive's enforcement authority or the current Administration's political views.

Congress has passed numerous acts that welcome state involvement in immigration control. Congress has expressed its intent by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10) (2006)), (2) banning sanctuary policies that interfere with the exercise of that authority (8 U.S.C. §§ 1373(a)-(b), 1644 (2006)), (3) requiring federal officials to respond to state inquiries (8 U.S.C.§ 1373(c) (2006)), (4) simplifying the process for making such inquiries (Law Enforcement Support Center ("LESC")), (5) deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1) (2006)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11) (2006)). This body of law illustrates that it was not Congress's "clear and manifest purpose" to preempt state laws such as S.B. 1070. *See Altria Group*, 129 S. Ct. at 543.

In encouraging cooperative enforcement of immigration law, Congress did not displace State and local enforcement activity. *See Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (State and local officers have "general investigatory authority to inquire into possible immigration violations."). Instead, Congress wanted to expand state authority because it worried that "perceived federal limitations" could "'tie[] the hands of . . . law enforcement officials . . . .'" *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298 (10th Cir. 1999) (quoting 142 Cong. Rec. 4619 (1996) (comments of Rep. Doolittle)). Congress enacted 8 U.S.C. § 1252c (2006) to clarify that federal law does not preempt state and local officers from arresting an illegally present alien convicted of a felony and ordered deported. *Vasquez-Alvarez*, 176 F.3d at 1298. However, Section

1252c does not preempt states from assisting in enforcement outside of those preconditions, as Plaintiff implies, Pl. Br. at 6, but instead "displace[s] a perceived federal limitation on the ability of state and local officers to arrest aliens . . . in violation of Federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1298-99.

Congress was also concerned that cities were prohibiting officers from contacting the then-INS about possible immigration violations. *See, e.g., City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999). In response, Congress passed two statutes in 1996 to ban such sanctuary policies.[3] 8 U.S.C. § 1644 forbids state or local official actions that "prohibit[] or in any way restrict[]" a state or local government entity's ability to "send[] to or receiv[e] . . . information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1373(a)-(b) expands preemption of sanctuary policies to those that prohibit or restrict government entities or officials from sending or receiving information regarding "citizenship or immigration status," and also preempts laws that prohibit or restrict immigration status information sharing. Arizona integrated Congress's preemption of sanctuary policies into S.B. 1070. *See, e.g.,* S.B. 1070, § 2.

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

[3] Although Plaintiff claims to be concerned that our country "speak with one voice in the immigration context," *see* Pl. Br. at 24, it has not sued any cities with sanctuary policies.

contact between state officers and federal immigration agents for verifying immigration status. *See* Pl. Br. at 6. Citing § 1373(c), Arizona incorporated Congress's intent that DHS must respond to such inquiries. *See* S.B. 1070, § 2(B),(D). Plaintiff appears to refuse to comply with this mandate by claiming that Section 2 distracts DHS from other "priorities." *See* Pl. Br. at 19-20, 30-32 (DHS will have to divert resources to answer more local inquiries). But when Congress tells an agency to act, the agency must comply. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (agency cannot refuse to obey statutory commands to pursue its own priorities).

In 1996, Congress also enacted 8 U.S.C. § 1357(g)(1), which allows state and local officers to be deputized as immigration agents. This congressionally-delegated authority is distinct from officers' inherent authority to inquire into immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 478 (2008). But Congress reaffirmed that a state's inherent authority to enforce federal immigration law was not restricted and that states could continue to assist in immigration enforcement. 8 U.S.C. § 1357(g)(10). In claiming preemption, Plaintiff ignores Congress's intent expressed in 8 U.S.C. § 1357(g)(10). *See* Pl. Br. at 6, 12.

Congress also directs state motor vehicle departments to verify that alien applicants for state licenses are lawfully present. REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302. Thus, Congress encouraged states to verify immigration status and further ensured that states are not safe-havens for illegal aliens. Finally, Congress has used its spending power, *see* Art. I Sec. 8, Cl. 1, to support cooperative immigration enforcement

by appropriating federal funds for state and local governments that assist in enforcing immigration laws. *See e.g.* 8 U.S.C. § 1103(a)(11).

Plaintiff's lawsuit also ignores the Executive's fourteen-year recognition that Congress encourages concurrent immigration enforcement. Since 2001, the Department of Justice ("DOJ") has entered warrants ("detainers") for civil immigration violations into the National Crime Information Center database ("NCIC"), available nationally to state and local officers. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 180 (2005). In 1996, the DOJ's Office of Legal Counsel ("OLC") supported state and local enforcement of criminal INA provisions and also concluded that state and local officers could detain aliens for registration law violations. 20 Op. Off. Legal Counsel 26, 29, 37 (1996) (Exhibit A).[4] In 2002, a revised OLC memo dropped the "criminal law enforcement only" limitation and analyzed the statutes and cases expressing Congress's intent to allow broad concurrent enforcement. Mem. from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, 5-8 (Apr. 3, 2002), *available at* http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf (Exhibit B).

[4] Courts also recognize state and local authority to arrest aliens for violating alien registration laws. *Martinez-Medina v. Holder*, No. 06-75778, 2010 U.S. App. LEXIS 10663, *2-4 (9th Cir. May 25, 2010); *see also Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010).

Because S.B. 1070 integrates this body of federal law, it is not preempted. Section 2 directs Arizona officers to verify immigration status through a statute that requires a federal response, regardless of the number of inquiries (8 U.S.C. §1373(c)).[5] Section 3 mirrors the federal alien registration laws by relying on federal requirements and procedures, not creating its own state system (8 U.S.C. §§ 1304(e), 1306(a) (2006)). Section 4, prohibiting the smuggling of illegal aliens, reinforces federal laws criminalizing the same conduct (8 U.S.C. § 1324(a) (2006)). Section 5 promotes federal laws that penalize employing illegal aliens (8 U.S.C. § 1324a(a)-(c) (2006)) and recognizes that Congress only preempted sanctions on *employers* employing unauthorized aliens, not unauthorized aliens' acceptance of employment. (8 U.S.C. § 1324a(h)(2) (2006)).[6] Section 5 also mirrors the federal "harboring" statutes (8 U.S.C. § 1324(a)(1)(A)(ii)-(iv) (2006)) by prohibiting the same conduct. Section 6 is consistent with federal law reserving states' authority to arrest individuals for immigration violations. *Salinas-Calderon*, 728 F.2d at 1301 n.3 (validating a warrantless arrest for a violation of immigration law and noting that officers have "general investigatory authority to inquire into possible immigration violations"). Finally, Section 12 clarifies that Arizona complied with federal immigration laws in enacting S.B. 1070. Complete integration between S.B. 1070 and federal law is not only possible, it is virtually guaranteed. *See Michigan Canners & Freezers v. Agric. Mktg. and Bargaining Bd.,* 467

[5] Section 2 codifies an officer's judicially-recognized power to detain and contact ICE on reasonable suspicion of unlawful status. *See e.g. Vasquez-Alvarez*, 176 F.3d at 1297-99; *United States v. Soriano-Jarquin*; 492 F.3d 495, 497-99, 501 (4th Cir. 2007).

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

U.S. 461, 469 (1984) (conflict preemption exists if it is impossible to comply with both state and federal law). Because S.B. 1070 and federal law do not conflict, dual sovereignty allows them to coexist. *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976); *State v. Reyes*, 989 So. 2d 770, 777 (La. Ct. App. 2008).

CONCLUSION

Congress has plenary authority to regulate aliens. Congress has continuously encouraged states to assist in enforcing federal immigration law. S.B. 1070 is consistent with that intent. Therefore, this Court should deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted this 20th day of July, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2010, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the ECF System for the District of Arizona, which will send notification of that filing to all counsel of record in this litigation.

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