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 FOR PETITIONERS

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

PARTIES TO THE PROCEEDING

Petitioners, the State of Arizona and Governor Janice K. Brewer, were the appellants in the court below. Respondent, the United States, was the appellee in the court below.

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The opinion of the Ninth Circuit is reported at 641 F.3d 339 and reproduced in the appendix to the Petition for Certiorari ("App.") at 1a. The opinion of the District Court for the District of Arizona is reported at 703 F. Supp. 2d 980 and reproduced at App. 116a.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 11, 2011. App. 1a. On June 30, 2011, Justice Kennedy extended the time to petition for certiorari to and including August 10, 2011. App. 205a. The jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 1292(a)(1). App. 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of S.B. 1070 (as amended by H.B. 2162) and Title 8 of the United States Code are reproduced at the Statutory Appendix to this brief, App. 1a and 12a.

STATEMENT

A. Illegal Immigration's Disproportionate Impact on Arizona.

Arizona shoulders a disproportionate burden of the national problem of illegal immigration. Arizona and its 370-mile border are a conduit for rampant illegal entries and cross-border smuggling to a degree unparalleled in any other State. The public-safety and economic strains that this places on Arizona and its residents have created an emergency situation, which demanded a response.

The President fairly describes our Nation's system of immigration regulation and enforcement as "broken."[1] Lack of effective enforcement of the existing immigration rules has permitted an estimated 11 million aliens to reside in the United States unlawfully.[2] Compounding this problem for Arizona is the fact that, despite Congress' manifest resolution that "the immigration laws of the United States should be enforced vigorously and uniformly," Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384, in the last decade federal enforcement efforts have focused primarily on areas in California and Texas, leaving Arizona's border to suffer from comparative neglect.[3] The result has been the funneling of an increasing tide of illegal border crossings into Arizona. Indeed, over the past decade, over a third of the Nation's

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[1] Remarks by the President at the American University School of International Service on Comprehensive Immigration Reform (July 1, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

[2] Jeffrey Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010,* Pew Hispanic Center 1 (2011), http://www.pewhispanic.org/files/reports/133.pdf.

[3] Joint Appendix ("JA") 244-246, 264-265; *see generally* Raquel Rubio-Goldsmith *et al.*, Binat'l Migration Inst., The "Funnel Effect" & Recovered Bodies of Unauthorized Migrants Processed By the Pima County Office of the Medical Examiner, 1990-2005 (2006), http://www.ushrnetwork.org/sites/default/files/bmi%20report.pdf; Dan Nowicki, *Arizona Immigration Law Ripples Through History, U.S. Politics*, Ariz. Republic (July 20, 2010), http://www.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html

illegal border crossings occurred in Arizona.[4] These illegal entries are not quick dashes across the border: They instead often involve multi-day hikes by large groups through rural areas, typically escorted by heavily armed smugglers. This flood of unlawful cross-border traffic, and the accompanying influx of illegal drugs, dangerous criminals and highly vulnerable persons, have resulted in massive problems for Arizona's citizens and government, leaving them to bear a seriously disproportionate share of the burden of an already urgent national problem.[5]

Illegal drug and human smuggling pose severe crime problems in Arizona. "Coyotes" smuggling persons across the border often are more heavily armed than the border patrol agents who pursue them. JA 242. Unlawfully entering aliens include criminals evading prosecution in their home countries and members of Mexican drug cartels—organizations the federal government has called "more sophisticated and dangerous than any other

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[4] As there is no precise method for measuring the number of illegal crossings, immigration-related arrests are widely used as a proxy. In every year between 2001 and 2010, more than one-third of all such arrests nationwide occurred in Arizona. U.S. Dep't of Homeland Sec., 2010 Yearbook of Immigration Statistics 93 tbl. 35 (2011), http://www.dhs.gov/files/statistics/immigration.shtm. To the extent enforcement resources have been focused in Texas and California, the number of arrests may actually understate the problem Arizona faces.

[5] *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007) (costs of illegal immigration are mostly local, while benefits are mostly national).

organized criminal enterprise."[6] Such cartels have repeatedly threatened the lives of American police officers working near the border. JA 201-202. The City of Phoenix has experienced numerous "home invasions" and hundreds of reported kidnappings, most of which were "closely linked to the drug trade and human smuggling."[7] Fifty-one drug smuggling tunnels have been discovered in the border town of Nogales, Arizona, alone between 2006 and 2010—compared with only five such tunnels discovered in California.[8] Drop houses—waystations in the illegal smuggling networks that are often rented properties in unsuspecting neighborhoods—also pose serious problems. They can house dozens of illegal immigrants in dangerous conditions while smugglers await payment.[9] Some local law enforcement

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[6] Majority Staff of House Comm. on Homeland Sec. Subcomm. on Investigations, A Line in the Sand: Confronting the Threat at the Southwest Border (2006), http://www.house.gov/sites/members/tx10_mccaul/pdf/Investigations-Border-Report.pdf.

[7] City of Phoenix Kidnapping Statistics Review Panel Report 5 (2011), http://phoenix.gov/webcms/groups/internet/@inter/@newsrel/documents/web_content/059403.pdf.

[8] U.S. Dep't of Justice Nat'l Drug Intelligence Ctr., National Drug Threat Assessment 2010, http://www.justice.gov/ndic/pubs38/38661/swb.htm; Marc Lacey, *Smugglers of Drugs Burrow on Border*, N.Y. Times (Oct. 2, 2010), http://www.nytimes.com/2010/10/03/us/03tunnels.html; Lourdes Medrano, *Drug War's Hidden Front: Nogales's Tunnels*, The Christian Sci. Monitor (Aug. 20, 2009), http://www.csmonitor.com/USA/Foreign-Policy/2009/0820/p22s01-usfp.html.

[9] Ariz. Dep't of Pub. Safety, Drop House Awareness Program, http://www.azdps.gov/information/Drop_Houses. In May 2011, 108 illegal aliens were found in a house on the west side of Phoenix. Press Release, U.S. Immigration & Customs

agencies near the border have had to devote more than a third of their assets to human-smuggling issues. JA 310.

As a result of unlawful cross-border activity, large portions of public and private lands have become extremely dangerous and environmentally degraded. National Park rangers in Arizona have been forced to patrol with M-16 carbines[10] and prohibit or discourage public access to parklands.[11] National Park websites that should warn about encounters with wild animals instead counsel visitors how to emerge safely from encounters with smugglers.[12] Incredibly, the federal government has placed sternly-worded road signs warning the public to stay away from smuggling areas. These signs have been posted on Arizona land as far as 80 miles from the border and within 30 miles of Phoenix and they read:

Enforcement, ICE Arrests 108 at Phoenix Human Smuggling Drop House (May 25, 2011), http://www.ice.gov/news/releases/1105/110525phoenix.htm.

[10] Ralph Vartabedian, *The Law Loses Out at U.S. Parks*, L.A. Times (Jan. 23, 2003), http://articles.latimes.com/2003/jan/23/nation/na-ranger23; *see also* Monica Yancy, *Budget Woes Reduce Patrols, Assistance in Parks*, Our Nat'l Parks (May 10, 2007), http://ournationalparks.us/index.php/site/story_issues/budgetwoes_reduce_patrols_assistance_in_parks/ (park rangers voted Organ Pipe Cactus National Monument the nation's most dangerous national parkland, seizing 14,000 pounds of marijuana and engaging in more than 30 car chases there in 2001 alone).

[11] Joshua Rhett Miller, *Five Federal Lands in Arizona Have Travel Warnings in Place*, FOXNews.com (June 18, 2010), http://www.foxnews.com/us/2010/06/18/federal-lands-arizona-travel-warnings-place/.

[12] http://www.nps.gov/orpi/planyourvisit/border-concerns.htm.

"Danger – Public Warning – Travel Not Recommended" – "Active Drug and Human Smuggling Area" – "Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed."[13]

Private ranchers living near the border constantly face the epidemic of crime, safety risks, serious property damage, and environmental problems (including large deposits of trash and human waste, and cut water lines and fences) associated with a steady flow of illegal crossings on their land. JA 174-178, 187-192, 311-313. The illegal traffic and the hundreds of informal trails and roads associated with it also take their toll on the fragile desert habitat and the irreplaceable cultural artifacts therein. [14]

The fiscal and economic effects of illegal immigration and unauthorized work by aliens in Arizona also are severe. Arizona spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens unlawfully present in the State, with local governments spending many millions

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[13] *See* JA 167-170 (photo of warning sign).

[14] ER 141, 246-249; U.S. Immigration & Naturalization Serv., U.S. Dep't of Interior, U.S. Forest Serv., and U.S. Envtl. Prot. Agency, Report to the House of Representatives Committee on Appropriations on Impacts Caused by Undocumented Aliens Crossing Federal Lands in Southeast Arizona, http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/undoc_aliens/02_report.Par.82778.File.dat/SEAZ_REPORT2.pdf (hereinafter "House Impacts Report").

more.[15] The Arizona Department of Corrections estimates that criminal aliens now make up more than 17% of Arizona's prison population, and the Maricopa County Attorney's Office, which serves the City of Phoenix, estimates that 21.8% of the felony defendants in the County's Superior Court are unlawfully present aliens. ER 264-274; JA 303-304. Of Arizona's total inhabitants, approximately 6%—an estimated 400,000 individuals—are aliens who are unlawfully present and not authorized to work.[16] Nonetheless, more than half—230,000—work anyway. They compose 7.4% of all Arizona workers[17] and drive down wages for citizens and legal residents in numerous job markets.[18]

By 2005, the problems posed by aliens unlawfully present in Arizona had become so severe that then-Governor Janet Napolitano (currently the Secretary of Homeland Security) declared a state of emergency.[19] The sheer numbers illustrate why: between 2000 and 2007, the number of aliens

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[15] Ninth Circuit Excerpts of Record ("ER") 429; *see also* House Impacts Report at 24 (in 1999, Cochise County spent $42 for every resident on illegal-immigration-related expenses).

[16] Passel & Cohn, n.2 *supra*, 15 tbl.5.

[17] *Id.* at 21 tbl. A1.

[18] JA 36-37; Congressional Budget Office, The Role of Immigrants in the US Labor Market 23-24 (2005), http://www.cbo.gov/doc.cfm?index=6853 (wages of Americans without a high-school education drop by 9% as a result of illegal immigration).

[19] Ralph Blumenthal, *Citing Border Violence, 2 Border States Declare a Crisis*, N.Y. Times (Aug. 17, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C0CE2DF133EF934A2575BC0A9639C8B63&pagewanted=all.

unlawfully present in Arizona increased by nearly 30,000 per year,[20] with the influx set to increase with Arizona's economic recovery. Arizona has repeatedly asked the federal government for more vigorous federal enforcement, JA 320-327, but to no avail.

B. Federal Immigration Law

Federal immigration law reflects an "express public policy against an alien's unregistered presence in this country." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984). In furtherance of this policy, the federal immigration laws expressly contemplate and authorize cooperative communication and enforcement efforts between federal and state officials. Indeed, they go further and affirmatively *require* federal officials to cooperate with state and local efforts to ascertain individuals' immigration status.

The principal federal immigration statute is the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("the INA"), which has been amended on numerous occasions, including by the Illegal Immigration Reform and Immigrant Responsibility Act, 110 Pub. L. No. 104-208 div. C, 110 Stat. 3009-546 ("IIRIRA"), and the Immigration Reform and Control Act, 100 Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). The INA "set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 359 (1976)). IIRIRA, as is relevant here,

[20] Passel & Cohn, n.2 *supra*, 23 tbl. A3.

established formal structures for state involvement in immigration enforcement and clarified that States retain their inherent authority to cooperate in such enforcement outside the statutory structures. Pub. L. No. 104-208 div. C, § 287(g). IRCA imposed regulations on employers to prevent and punish the hiring of aliens not authorized to work, a field the original INA had largely left to the States. *See Whiting*, 131 S. Ct. at 1974-75.

"Unsanctioned entry into the United States is a crime, and those who have entered unlawfully are subject to deportation." *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (citing 8 U.S.C. §§ 1325, 1251, and 1252). Accordingly, one of the paramount policies "embodied in the INA" is "the objective of deterring unauthorized immigration." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984). To that end, the INA requires almost all aliens present in the United States for longer than 30 days to apply for registration documents verifying their lawful status, and to carry those documents at all times. 8 U.S.C. § 1302. Failure to register is a federal misdemeanor punishable by up to six months' imprisonment and a $1,000 fine, § 1306(a), and failure to carry the registration documents is a misdemeanor punishable by up to 30 days' imprisonment and a $100 fine. § 1304(e).

The INA authorizes federal officials to investigate, apprehend, and detain aliens who are unlawfully present in the country and thus removable. 8 U.S.C. §§ 1226, 1357. But Congress has expressed, time and again, its intent that States enforce the immigration laws as well. For instance, while IIRIRA created express provisions allowing federal

officers to deputize state officials to enforce the immigration laws, 8 U.S.C. § 1357(g)(1)-(9), it also includes a savings clause recognizing state and local authority to assist in immigration enforcement even without any deputization or other affirmative executive-branch action. Subsection 1357(g)(10) provides:

> 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 …; 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.

Congress' intent in IIRIRA was to enhance the resources and tools available to enforce the immigration laws. Even the deputization authority IIRIRA provided was later described by its House author as intended to permit States "to enforce the immigration laws in whatever way they thought best."[21] Accordingly,"[f]rom its initiation [the deputization authority] was viewed by members of Congress as an opportunity to provide ICE [U.S. Immigration and Customs Enforcement] with more resources,"[22] rather than an attempt to limit or

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[21] *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H.R. Comm. on Homeland Sec.*, 111th Cong. 64 (Mar. 4, 2009) (Rep. Smith); *cf. id.* at 76 (Rep. Souder).

[22] U.S. Gov't Accountability Office, GAO-09-109, Immigration Enforcement: Better Controls Needed Over Program

preempt other state enforcement measures. And in § 1357(g)(10), Congress went out of its way to explicitly preserve State immigration enforcement authority even in the absence of such agreements.

State and local authorities understood the law in this way, as none of them accepted deputization from the federal government for more than six years. *Id.* at 2, 4 (Rep. Souder) ("[T]he law was enacted in 1996, the first agreement signed in 2002"). If the law had been understood to limit the States' pre-existing inherent authority—rather than provide a specific mechanism for augmenting that authority—States surely would have acted with greater dispatch.

Congress contemplated that States would use this reserved enforcement authority to investigate individuals' immigration status, for IIRIRA amended the INA to require federal officials to respond to all immigration status inquiries generated by state and local law enforcement. 8 U.S.C. § 1373(c). That section provides that federal authorities "shall respond to an inquiry by a Federal, State, or local government agency, 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, by providing the requested verification or status information." IIRIRA further prohibits any restrictions on the authority of state and local governments to send to or receive from federal officials "information

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Authorizing State and Local Enforcement of Federal Immigration Laws 9 (2009), http://www.gao.gov/new.items/d09109.pdf.

regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); *see also* § 1373(b) (protecting state authority to maintain such information and communicate it with non-federal government agencies), § 1644 (protecting communications).

To fulfill these statutory mandates, for more than a decade the federal government has maintained the Law Enforcement Support Center (LESC), a 24-hour-a-day, 365-day-per-year centralized database and response service, which "provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity."[23] The LESC offers state and local law enforcement officers remote access via computer to "immigration information from every alien file maintained by DHS [Department of Homeland Security]—approximately 100 million records"—and also operates numerous "dedicated law enforcement phone lines."[24] Many state and local authorities have made it their policy regularly to contact the LESC to determine the immigration status of persons they encountered.[25] In 2010 the LESC

[23] U.S. Immigration & Customs Enforcement, Law Enforcement Support Center, http://www.ice.gov/lesc/.

[24] *Id.*

[25] *See, e.g.,* Mo. Rev. Stat. § 577.680(1); JA 218-222 (R.I. Exec. Order 08-01); David W. Chen & Kareem Fahim, *Immigration Checks Ordered in New Jersey*, N.Y. Times (Aug. 23, 2007), http://www.nytimes.com/2007/08/23/nyregion/23immig.html; JA 172-173; 294-296 (59 surveyed State and local jurisdictions "generally" inquire into arrestees' immigration status, while only 34 do not—and many others ask for serious criminals or

received more than one million requests for information, "primar[ily]" from "State and local law enforcement officers seeking information about aliens."[26] Requesting and receiving information from the LESC is quick and can be done during an investigatory stop. JA 171-173.

"A primary purpose in restricting immigration is to preserve jobs for American workers[.]" *Sure-Tan*, 467 U.S. at 893. IRCA addresses the problem of the unlawful employment of aliens from the demand side, by prohibiting employers from hiring or employing those not authorized to work. 8 U.S.C. §§ 1324a(a) & 1324a(e)(4). IRCA also requires employers to follow certain procedures to verify that prospective employees are authorized to work. § 1324a(b). IRCA permits the use of these verification documents for the enforcement of federal work-authorization law, or federal perjury and similar laws, but prohibits their use for other purposes. § 1324a(b)(5) & (d)(2)(F). This prohibition, however, does not preclude States from making unauthorized employment an element of a state-law offense—indeed, it does not even prohibit States from making compliance with IRCA's requirements relevant to State-law proceedings, as compliance can be proved by means other than producing the documents themselves. *See Whiting*, 131 S. Ct. at 1983 n.9.

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later in the booking process); Prince William Cnty., Va. Police Dep't Gen. Order 45.01, Local Enforcement Response to Illegal Immigration (2008), http://www.pwcgov.org/government/dept/police/Documents/008511.pdf.

[26] *Supra* at 12 n.23.

IRCA also contains an express and limited preemption provision, § 1324a(h)(2), which addresses only state regulations of the demand side of the unauthorized employment problem:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

IRCA does not address unlawful employment on the supply side, *i.e.*, by imposing sanctions on illegal immigrants who seek and obtain work in violation of federal law, and its express preemption provision does not reach state laws that do so.

C. Arizona's S.B. 1070

S.B. 1070 encourages "the cooperative enforcement of federal immigration laws throughout all of Arizona." *Id.* § 1. The bill was signed by Governor Brewer on April 23, 2010, and clarified and amended a week later by Arizona H.B. 2162, 2010 Ariz. Sess. Laws ch. 211.[27]

In attempting to supplement the federal government's inadequate immigration enforcement, Arizona was acutely aware of the need to respect federal authority to set the substantive rules governing immigration, and carefully crafted a bill to respect Congress' policy determinations and definitions while enhancing the State's contribution to the enforcement efforts. Throughout the legislative process and in its post-enactment

[27] All references to "S.B. 1070" herein are to the bill as amended.

amendment, S.B. 1070 was revised to clarify and reinforce its express adoption of federal immigration standards, and the necessity that it be enforced in conformity with those standards. For instance, when some legislators questioned the wisdom of the details of federal registration requirements, S.B. 1070's Senate sponsor replied that "[w]e can enforce the law, and we can write provisions on how to enforce … immigration law, but I can't change policy; that is an exclusive area of Congress."[28] As a result, S.B. 1070 is fully consistent with Congress' policies and it is simply an attempt by the State, pursuant to its inherent authority under Our Federalism, to add its own resources to federal ones in enforcing the precise legal rules, and using many of the procedures, prescribed by Congress.

Four provisions of S.B. 1070 are at issue here: two directly addressed to inquiries and arrests by law enforcement—sections 2(B) and 6—as well as two others, 3 (federal registration requirements) and 5(C) (employment).

Section 2, Ariz. Rev. Stat. § 11-1051—captioned "Cooperation and assistance in enforcement of immigration laws"—is designed to facilitate communications between federal, state and local officials regarding potential violations of the federal immigration laws—communications specifically

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[28] *Hearing Before Ariz. H.R. Comm. on Military Affairs and Public Safety* (Mar. 31, 2010) (hereinafter "Ariz. House Hrg."), *video available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7286, at 2:44:04-15 (Sen. Pearce); *id.* at 26:16-27:47 (Sen. Pearce) (This simply mirrors federal law…. [O]nly the feds can change the requirements of immigration status. States can enforce it; we can't alter federal law.").

authorized by Congress in 8 U.S.C. §§ 1373 and 1644. Section 2(B) provides that "[f]or any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person." Incorporating federal law, Section 2(B) states that "[t]he person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c)." For a person who is arrested and whose status cannot be determined or presumed, the status verification must be performed "before the person is released." § 2(B). The subject is *presumed* to be lawfully present if he presents a valid Arizona driver's license, tribal identification, or identification from any unit of government in the United States that requires proof of lawful presence. *Id.* Section 2(E) provides that immigration status may be verified only by a federally-authorized officer or pursuant to the procedures provided by Congress in 8 U.S.C. § 1373(c). Section 2(L) requires that the law be implemented "in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens"—meaning that Section 2 does not require any immigration status verification prohibited by federal law.

Section 6, Ariz. Rev. Stat. § 13-3883(A)(5), adds to Arizona peace officers' warrantless arrest authority by authorizing such arrests when "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."

Section 3, Ariz. Rev. Stat. § 13-1509, incorporates and enforces the requirements of the federal alien registration laws. It provides that "[i]n addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)." § 3(A). Immigration status may be determined only pursuant to 8 U.S.C. § 1373(c) or by an officer otherwise qualified by the federal government. § 3(B). Section 3(H) imposes the same maximum penalties for violations of subsection (A) that Congress has imposed for failure to carry an alien registration in violation of 8 U.S.C. § 1304(e), which in turn are less than the penalties for failure to register in violation of § 1306(a). The only substantive difference between Section 3 and the federal statutes is that Section 3 has no application at all to persons authorized to be in the United States. § 3(F). S.B. 1070's legislative history reveals that this exception was intended in part to avoid punishing lawfully present aliens who have validly registered, but have not yet received their registration documents.[29]

Section 5(C), Ariz. Rev. Stat. § 13-2928(C), reinforces the federal work-authorization rules, which focus only on the demand side, by addressing the supply side—*i.e.*, would-be employees. Section 5(C) makes it a misdemeanor for "a person who is

[29] Ariz. House Hrg. at 26:00-39:31.

unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." Section 5(G)(2) defines "unauthorized alien" to mean "an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 [U.S.C. §] 1324a(h)(3)," and Section 5(E) again requires that immigration status be determined only by a federally-qualified officer or pursuant to 8 U.S.C. § 1373(c), *id.* § 13-2928(E).

D. Proceedings Below

Respondent filed suit against the State of Arizona and Governor Brewer, claiming that S.B. 1070 was unconstitutional on its face, and seeking to enjoin Arizona's law before it could even take effect.[30] Although the district court recognized that Arizona faces "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns," App. 117a, it preliminarily enjoined enforcement of Sections 2(B), 3, 5(C), and 6, finding that Respondent was likely to succeed in establishing that these sections are facially preempted. App. 122a-123a.

On appeal, the Ninth Circuit also recognized that Arizona faces "a serious problem of unauthorized immigration." App. 2a. The court affirmed the

[30] The Attorney General repeatedly voiced concerns about S.B. 1070 and threatened to file a lawsuit before he had even read the law. *Holder Admits to not Reading Arizona's Immigration Law Despite Criticizing It*, FOXNews.com (May 14, 2010), http://www.foxnews.com/politics/2010/05/13/holder-admits-reading-arizonas-immigration-law-despite-slamming/.

preliminary injunction, albeit by a divided vote as to Sections 2(B) and 6.

With respect to Section 2(B), the majority interpreted § 1357(g)(1)-(9)'s deputization provisions as precluding other state immigration enforcement efforts, despite § 1357(g)(10)'s express savings clause. The court held that this grant "demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General." App. 17a. The majority acknowledged § 1357(g)(10), and that 8 U.S.C. §§ 1373 and 1644 expressly permit communications between state and federal authorities regarding possible immigration violations, but nonetheless viewed them as limited to circumstances where "the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis." App. 15a. Because Section 2(B) reflected a systematic policy, rather than anything ad hoc or "incidental," the Ninth Circuit found it likely preempted.

As to Section 6, the majority held that "states do not have the inherent authority to enforce the civil provisions of federal immigration law." App. at 45a. The majority therefore found S.B. 1070 likely preempted on its face because it "significantly expands the circumstances in which Congress has allowed state and local officers to arrest immigrants" under 8 U.S.C. § 1252c. App. 44a-45a.

Although the majority recognized that the federal government had brought a facial challenge, it declined to determine whether there were

constitutional applications of S.B. 1070's contested provisions and instead concluded that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent." App. 7a. The majority also rejected Arizona's construction of its own statute, holding that Section 2(B) requires Arizona officers to confirm with LESC the immigration status of every arrestee. App. 10a-11a.

The Ninth Circuit found Section 3, regarding alien registration, likely preempted by viewing 8 U.S.C. §§ 1304 and 1306 as "a comprehensive scheme for immigrant registration." App. 28a. Because Congress did not expressly authorize it, the court concluded that Congress did not "intend[] for states to participate in the enforcement or punishment of federal immigration registration rules." App. 29a. Examining this Court's precedents, the court concluded that while state laws creating remedies that parallel those of federal law often are not preempted even if they have "significantly wider applications than the federal statutes," Section 3 was preempted, despite it having the identical application as federal law, because "the substantive INA registration requirements [are] 'a critical element'" of the state-law violation. App. 31a-32a.

As to Section 5(C), the panel began by acknowledging that this employment provision addresses an area of traditional state authority and so a presumption against preemption applies. App. 41a. Nevertheless, it concluded that "Congress' inaction" in IRCA "in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers," implies that Congress necessarily "intended to prohibit states from

criminalizing work." App. 39a. The Ninth Circuit stated that this conclusion was compelled by its previous decision in *National Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991) ("*NCIR*"), that Congress' imposition of sanctions only on employers meant that the Immigration and Naturalization Service (INS) could not prohibit work by aliens pending their deportation proceedings. App. 33a-35a. The panel did not acknowledge this Court's holding, in reversing *NCIR*, that the no-work bond conditions at issue there *were* consistent with Congress' intent "to preserve jobs for American workers," which "was forcefully recognized … in the IRCA." 502 U.S. at 194 & n.8. Nor did the panel explain why a limitation on the INS, which like all federal agencies depends on statutory authorization, would apply to States who enjoy both plenary power and the presumption against preemption in areas of traditional state authority. App. 35a. The panel also did not discuss the reach and implications of IRCA's limited express preemption provision in 8 U.S.C. § 1324a(h)—perhaps because the provision explicitly does not preempt the provision at issue.

With respect to all four provisions of S.B. 1070, the panel majority buttressed its preemption analysis by referring to criticisms of the law "attributable to foreign governments," and statements by "senior United States' officials" that some foreign countries dislike S.B. 1070. App. 26a. The majority viewed this as demonstrating that S.B. 1070 "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs," which it regarded as establishing "the

frustration of congressional objectives by the state Act." App. 25a-26a. The majority also stated that "the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption." App. 26a.

3. Judge Bea dissented as to Sections 2(B) and 6. As to Section 2(B), Judge Bea emphasized that both the savings clause in § 1357(g)(10) and § 1373(c)'s mandatory duty on federal officials to respond to requests by state law enforcement foreclosed the majority's effort to read the express authorization for deputization in § 1357(g)(1)-(9) as implicitly precluding other cooperative efforts. App. 93a.

Judge Bea also took issue with the majority's view that States lack inherent authority to enforce federal civil immigration laws. He found that view inconsistent with, *inter alia*, this Court's decision in *Muehler v. Mena*, 544 U.S. 93, 101 (2005), upholding the authority of state officers to ask individuals about their immigration status even absent any reasonable suspicion of unlawful conduct. App. 104a. Judge Bea regarded 8 U.S.C. § 1252c as simply codifying a portion of the states' pre-existing inherent authority without impliedly negating the balance. He also noted that Section 6 should survive a facial challenge even under the majority's understanding of state authority, because some of the arrests it authorizes are also expressly permitted by § 1252c. App. 114a.

Finally, Judge Bea disagreed with the majority's view that complaints from foreign officials about S.B. 1070 inform the preemption analysis. He noted that S.B. 1070 does not conflict with any "established foreign relations policy goal," and that

the majority's finding of preemption in this case gave a "heckler's veto" to "other nations' foreign ministries." App. 91a, 95a (emphasis omitted). Rebutting the majority's fears that non-preemption would lead to an unworkable patchwork of state enforcement regimes, Judge Bea stated that Congress surely must have "contemplate[d] that states would make use of the very statutory framework that Congress itself enacted" by requiring federal responsiveness to state inquiries in 8 U.S.C. § 1373(c). App. 93a. "In light of this, all 50 states enacting laws for inquiring into the immigration status of suspected illegal aliens is *desired* by Congress, and weighs against preemption." App. 93a.

SUMMARY OF ARGUMENT

This is an implied preemption case. As such, there must be some clear conflict between a federal statute and S.B. 1070. The failure of federal law to authorize Arizona's efforts in express terms is beside the point. Arizona officials have inherent authority to enforce federal law and such cooperative law enforcement is the norm, not something that requires affirmative congressional authorization. S.B. 1070 does not impose its own substantive immigration standards, but simply uses state resources to enforce federal rules. This is no different from "parallel" tort claims—where both state and federal law enforce the same federal standard. They are the easy cases under this Court's preemption cases. With no conflict between the state and federal standards, there is simply no scope for implied conflict preemption.

Despite all this, the Ninth Circuit and the federal government have concluded that Arizona's effort to enforce federal law immigration standards is preempted. They suggest that immigration is so different from every other area of law that even parallel efforts at cooperative law enforcement are forbidden. Both this Court's cases and the text of the federal immigration statutes are to the contrary.

The Ninth Circuit found the law enforcement provisions of S.B. 1070 preempted by ignoring these bedrock principles and committing fundamental errors of law. Those provisions—Sections 2(B) and 6—simply require inquiries into immigration status during certain arrests and supplement officers' authority to make warrantless arrests. In finding those provisions facially preempted, the Ninth Circuit lost sight of the reality that States have inherent authority to enforce federal law. State law enforcement officers need state-law authority—precisely what S.B. 1070 supplies—but they do not require some express federal authorization akin to that needed by a federal agency. By ignoring the State's inherent authority, the court of appeals mistakenly read the authorization for a specific deputization program in § 1357(g)(1)-(9), accompanied by a savings clause in § 1357(g)(10), as precluding state efforts not authorized in (1)-(9). That analysis reads the savings clause out of the statute, a result irreconcilable with the most basic principles of statutory interpretation.

But the savings clause of § 1357(g)(10) was not the only obstacle to the Ninth Circuit's conclusion. The federal immigration laws not only decline to preempt state law enforcement efforts, they affirmatively

require federal cooperation. *See* §§ 1373(a), (c), and 1644. To avoid the clear intent of those provisions, the court of appeals invented a distinction between permissible ad hoc inquiries to which federal authorities *must* respond and systematic efforts to verify immigration status, which are preempted. That distinction has no mooring in the statutory text, and produced the remarkable conclusion that a statute requiring state law enforcement to seek the assistance that federal authorities *must* (and do) provide is preempted. To complete its remarkable inversion of text and precedent, the court of appeals found Section 2(B) facially invalid despite acknowledging constitutional applications, a result forbidden by this Court's precedents addressing facial challenges.

Similar and additional errors were committed in invalidating Section 6. That section simply authorizes warrantless arrests where there is probable cause of removability. Here, the court of appeals read a federal authorization for such arrests in narrow circumstances, 8 U.S.C. § 1252c, as foreclosing all other arrests. But that ignores both the State's inherent authority to make arrests for violations of federal law and this Court's facial challenge rules.

The court of appeals then invalidated provisions that impose parallel state penalties for the violation of federal rules requiring federal registration documents and prohibiting the employment of aliens ineligible for employment. There is absolutely no conflict between these provisions and federal law because S.B. 1070 adopts the federal rule as its own. In virtually any other context, such state laws would

be viewed as obviously permissible efforts to enforce the federal standard without possibility of conflict. The result is no different here. There is no immigration exception to the general rules of preemption. The bottom line is that there is no preemption unless state law conflicts with some identifiable federal statute. Since Sections 3 and 5 adopt the federal rule, there is nothing in federal law with preemptive effect. Certainly, neither foreign criticism nor the speculative concerns of the federal government have preemptive effect. Nor does the federal executive's preference, contrary to Congressional intent, for a relaxed and indeterminate enforcement posture.

No one doubts that unlawful immigration has a disproportionate impact on Arizona. That reality does not empower Arizona to adopt its own substantive immigration law. But neither is Arizona impliedly stripped of its plenary authority and at the mercy of the federal executive's lax enforcement policy. Unless and until Congress expressly forecloses such efforts, Arizona has the inherent authority to add its own resources to the enforcement of federal law. The resulting parallel efforts are a perfectly valid example of cooperative law enforcement and raise no serious question under this Court's preemption precedents.

ARGUMENT

I. STATES HAVE AUTHORITY TO REGULATE UNLAWFULLY PRESENT ALIENS IN A MANNER CONSISTENT WITH FEDERAL IMMIGRATION LAW.

A. General Preemption Principles

Of the various varieties of preemption—express preemption, field preemption, and implied preemption—only the last is at issue here. Respondent does not contend, and the courts below did not hold, that federal law expressly preempts any of the four enjoined provisions of S.B. 1070 or that federal law "occupies the field" to the exclusion of those provisions. Thus, the four S.B. 1070 provisions are valid unless they have been impliedly preempted by Congress.

Whether a state statute "is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' " *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). And "courts may not find state measures pre-empted in the absence of *clear evidence* that Congress so intended." *California v. FERC*, 495 U.S. 490, 497 (1990) (emphasis added). "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify th[e] conclusion" that states could not act in areas where federal laws exist. *DeCanas*, 424 U.S. at 357 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

Because Congress is the branch of government whose intent controls the preemption inquiry, a state law is not preempted merely because the Executive Branch claims the law is out of step with its enforcement priorities. *See North Dakota v. United States*, 495 U.S. 423, 442 (1990) ("It is Congress—not the DoD—that has the power to pre-empt otherwise valid state laws."); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994) ("Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting."). The federal executive's preference for a relatively lax enforcement regime does not drive the preemption analysis.

Since this case involves at most implied conflict preemption, the burden is on the federal government to point to some specific Act of Congress that does the preempting. The requisite congressional intent to preempt state law may be inferred only "to the extent it [the state law] actually conflicts with federal law." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Thus, in a context where Congress has affirmatively authorized and even required cooperative efforts, the need to identify a specific provision that creates the conflict is particularly acute.

One of the "cornerstones" of this Court's pre-emption jurisprudence is the rule that

> in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police

> powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quotation marks and ellipses omitted). In every preemption case, this Court starts "with a presumption that the state statute is valid" and asks whether the party supporting preemption "has shouldered the burden of overcoming that presumption." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-662 (2003). That burden is only heightened when there is an effort to enjoin a statute on its face before the law even takes effect.

This Court's preemption cases also establish that the States may authorize "parallel" enforcement of federal standards. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (recognizing that "Florida [has] the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements"); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005). Such parallel claims are the easy preemption cases, since they survive even when efforts to impose a different state-law standard are preempted. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

B. State Authority to Regulate Unlawfully Present Aliens

Although the federal government has exclusive authority to regulate "immigration"—meaning the "determination of who should or should not be admitted into th[is] country, and the conditions under which a legal entrant may remain"—this Court "has never held that every state enactment

which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." *DeCanas*, 424 U.S. at 355. *See id.* ("[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration."). In *DeCanas*, this Court put to rest any notion that the INA occupies the field with respect to the regulation of unlawfully present aliens. This Court upheld a California statute by which the State "sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment." *Id.* The *DeCanas* Court held that the INA does not preempt a State's regulation of illegal aliens that is "harmonious with federal regulation." *Id.* at 356.

This Court in *Plyler v. Doe*, 457 U.S. 202 (1982), again recognized that the States possess "authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Id.* at 225. The *Plyler* Court squarely rejected the notion that the States are powerless to deal with the problems caused by illegal aliens: "Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Id.* at 228 n.23.

Last Term, this Court sustained an Arizona statute regulating unauthorized work by aliens—the Legal Arizona Workers Act—against the contention that it was preempted by the INA as amended by IRCA. *See Whiting*, 131 S. Ct. 1968. *Whiting* reiterated

that this Court's "precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act' "—including the INA and IRCA. *Id.* at 1985 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)). "Implied preemption analysis," this Court said, "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.' " *Id.* (quoting *Gade, supra*, at 111).

II. THE LAW ENFORCEMENT PROVISIONS OF S.B. 1070—SECTIONS 2(B) AND 6—ARE CONSTITUTIONAL.

A. Federal Law Expressly Authorizes States and the Federal Government to Communicate and Cooperate With Each Other on Immigration Enforcement.

Section 2(B) provides that "[f]or any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" by having it "verified with the federal government pursuant to 8 [U.S.C. §] 1373(c)." Ariz. Rev. Stat. § 11-1051(B). Section 2(L) further provides that "[t]his section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." *Id.* § 11-1051(L).

Far from affirmatively preempting such state laws, Congress expressly authorized such communications and cooperation between States and the federal government in connection with immigration enforcement in multiple provisions. In 8 U.S.C. § 1357(g)(1)-(9), Congress authorized one particularly formalized mode of cooperation in which the Attorney General enters written agreements with States and their political subdivisions to deputize state officers to perform immigration officer functions. But that program was not intended to be an exclusive route to cooperation. Congress removed any doubt on that score by including a savings clause, § 1357(g)(10). In that provision, Congress provided that "[n]othing in this subsection shall be construed to require an agreement" in order for state officers "(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." Section 1357(g)(10) reinforces the fact that state officers have inherent authority to enforce federal law and makes crystal clear that no agreement is necessary for state officers to communicate with the Attorney General regarding an individual's immigration status or to cooperate with the Attorney General in enforcing the law with respect to unlawfully present aliens. *See also id.* § 1357(g)(9) (States not required to enter into agreements with the Attorney General).

While § 1357(g)(10) affirmatively acknowledges the appropriateness of communications and cooperation by States outside the specific deputization mechanism of (g)(1)-(9), 8 U.S.C. § 1373(c)—the statute incorporated in Section 2(B)—goes much further and imposes an *affirmative duty* on the federal government to respond to a State's inquiry. Section 1373(c) provides that federal immigration authorities "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of an individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." And 8 U.S.C. § 1644 provides: "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States." *Accord* 8 U.S.C. § 1373(a).

These provisions place an affirmative obligation on federal authorities to respond to state law enforcement officers. While such an affirmative obligation is by no means necessary to avoid preemption, it should doom any serious effort to conclude that federal law preempts Section 2(B). Section 2(B) authorizes and directs Arizona officers to make verification inquiries to which federal authorities must respond and to do so when practicable and subject to federal and state constitutional requirements.

In *Whiting*, this Court rejected the contention that IRCA preempted the Legal Arizona Workers Act,

explaining that "IRCA expressly reserves to the States the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws." 131 S. Ct. at 1987. "In exercising that authority," this Court said, "Arizona has taken the route least likely to cause tension with federal law." *Id.* So too here, §§ 1357(g)(10), 1373(c), and 1644 expressly reserve to the States the authority exercised by Arizona in Section 2(B) and Section 2(B) avoids tension with federal law by incorporating the status verification procedure of § 1373(c).

In light of the clear import of §§ 1357(g)(10), 1373(c), and 1644, the Ninth Circuit's path to a finding of preemption was tortuous. While recognizing that the language of § 1357(g)(10) "is broad," the panel majority proceeded to give it a "narrow interpretation." App. 14a, 15a. Remarkably, the panel majority interpreted § 1357(g)(10) to mean that "Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General" pursuant to a written agreement under § 1357(g)(1). App. 17a (emphasis in original). That is, of course, the opposite of what the savings clause explicitly provides. The panel majority then took a further leap by pronouncing that § 1357(g)(10) "does not permit states to adopt laws dictating how and when state and local officials *must* communicate" with the federal government. App. 16a (emphasis in original). Acknowledging that it had to give the savings clause some meaning, the panel majority suggested that while state officers may "cooperate with federal immigration

enforcement on an *incidental* and *as needed* basis," an agreement is "required for *systematic* and *routine* cooperation." App. 15a-16a (first two emphases added). That is a strange conclusion indeed. The supposed distinction between systematic policies and "incidental and as needed" inquiries has no grounding in the statutory text. And the law generally frowns on ad hoc government action, and favors generally applicable rules and consistent policies. The law also frowns on courts adding limiting language to statutes that Congress omitted. Moreover, just last Term, this Court rejected the notion that a state law making resort to a voluntary federal system for verifying employment status (which presumably produced "incidental and as needed" inquiries) mandatory (*i.e.,* "systematic") was preempted. *Whiting*, 131 S. Ct. at 1985-87.

The panel majority believed, quite wrongly, that giving effect to the plain language of § 1357(g)(10) would "completely nullify the rest of § 1357(g)." App. 14a-15a. But that belief rests on its erroneous view that § 1357(g)'s other provisions constitute "restrictions" on state authority. App. 15a. In fact, those subsections did not restrict state authority at all, but rather enhanced federal authority by granting authority to the Attorney General to enter into agreements with States; activity the Attorney General, a federal official with statutory, not inherent, authority, otherwise could not conduct. Those subsections do not, expressly or by implication, restrict state authority, as § 1357(g)(10) expressly confirms. Entering into an agreement under § 1357(g)(1) is one way that a State can cooperate with the Attorney General, but it is by no

means the only way. *See* § 1357(g)(9) ("Nothing in this subsection shall be construed to require any State … to enter into an agreement with the Attorney General…."). With § 1357(g)(10), Congress made crystal clear that, even without a formal deputization agreement, state officers remain free to communicate with the Attorney General regarding a person's immigration status and cooperate with the Attorney General in enforcing the law as to unlawfully present aliens.

Petitioners' construction of § 1357(g)(10) does not "nullify" the remainder of § 1357(g) any more than any saving clause nullifies the associated text. Section 1357(g)(1)-(9) creates a much more formal relationship between federal and state authorities than in normal cooperative law enforcement in general or in the kind of verification inquiries envisioned by Section 2(B) in particular. Most dramatically, a state official deputized under § 1357(g)(1)-(9) is considered to be acting under color of federal law for purposes of civil liability and immunity. § 1357(g)(8). It hardly undermines that very formal arrangement for § 1357(g)(10) to make clear that the possibility of entering into that unusual and formal relationship in no way forecloses more typical and informal cooperative law enforcement efforts.

The panel majority compounded its erroneous construction of § 1357(g) by subordinating three other statutes—§§ 1373(a), (c) and § 1644—to that erroneous construction. App. 18a-20a & n.11. While conceding that "§ 1373(c) demonstrates that Congress contemplated state assistance in the identification of undocumented immigrants," the

panel concluded that "Congress contemplated this assistance within the boundaries established in § 1357(g)." App. 18a. Yet absolutely nothing in § 1373(c) suggests that DHS's obligation to respond to state inquiries is subject to whether the inquiring State has entered into an agreement with the Attorney General under § 1357(g)(1).

The panel majority also dismissed (in a footnote, no less) § 1373(a) and § 1644 as "anti-sanctuary provisions" that prohibit *States* from impeding immigration enforcement. App. 19a n.11. But these provisions expressly confirm that nothing in *federal law* stands in the way of state statutes such as Section 2(B). *See* § 1644 ("Notwithstanding any other provision of Federal … law, no State or local government entity may be prohibited, or in any way restricted" from communicating with DHS regarding an alien's immigration status).

Section 1357(g)(10)'s reservation of broad state enforcement authority is confirmed by the actual practice of both state and federal officers. There is no indication that any of the million-plus verification requests that state and local law enforcement make to the LESC every year are initiated pursuant to "the Attorney General's close supervision," as the panel majority would have required. Indeed, far from conducting immigration status verifications only on an "incidental or as needed basis," many state and local law enforcement agencies, as well as individual officers, make immigration status verification a standard part of their reasonable-suspicion stops or jail booking processes. *See supra* at 12 n.23. It cannot be that codifying those already systematic and routine practices crosses the line.

And the consistent practice from the time of the establishment of the LESC until now confirms that § 1357(g) places no restrictions on the sovereign States' authority to enforce the immigration laws laid down by Congress.

B. The Ninth Circuit Erred in Holding Section 2(B) Facially Invalid.

Even if the panel majority were correct that § 1357(g) preempts *some* immigration enforcement activities by States outside of the context of an agreement with the Attorney General, it surely erred in enjoining Section 2(B) on a facial challenge.

To succeed on a facial challenge to a state law, the challenger must show "that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno*, 481 U.S. 739 (1987)). Here, the panel majority conceded, as it had to, that Section 2(B) has at least some non-preempted applications. The majority interpreted § 1357(g)(10)(B) to mean that state officers may "cooperate with federal immigration enforcement on an incidental and as needed basis" even "without the written agreements that are required for *systematic* and *routine* cooperation." App. 15a-16a (emphases in original). And it interpreted § 1357(g)(10)(A) to mean that "state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties." App. 16a. Given those interpretations, Section 2(B) easily passes the *Salerno* test. The Ninth Circuit reached a contrary decision only by erroneously deeming a

state statute unconstitutional in all its applications when "on its face, [it] conflicts with Congressional intent." App. 7a. But "bad intent" cannot convert a statute with valid applications into one that is facially invalid without simply ignoring *Salerno*.

In all events, there is no basis for attributing such an intent to Section 2(B), which requires Arizona officers to perform immigration status checks only to the extent consistent with federal law. Section 2(B) provides that "a *reasonable* attempt shall be made, when *practicable*," Ariz. Rev. Stat. § 11-1051 (emphases added), to verify a person's immigration status when reasonable suspicion exists that the person is an unlawfully present alien. And Section 2(L) expressly provides that Section 2(B) "shall be implemented in a manner consistent with federal laws regulating immigration." *Id.* In other words, by its very terms S.B. 1070 does *not* require or permit Arizona officers to perform immigration status checks if doing so would conflict with federal law.

C. The Ninth Circuit Misconstrued Section 2(B).

The supposed conflict that the panel majority perceived between Section 2(B) and federal law was exacerbated by its improper rejection, in the context of a facial challenge, of Arizona's construction of its own statute. The majority opined that "Section 2(B) requires officers to verify—with the federal government—the immigration status of *all* arrestees before they are released, regardless of whether or not reasonable suspicion exists that the arrestee is an undocumented immigrant." App. 11a (emphasis

in original). In so doing, the majority rejected Arizona's interpretation of Section 2(B).

In the court below, Arizona explained that it does not interpret Section 2(B) to require state officers to perform an immigration status check on every person who is arrested. App. 10a-11a. Rather, the first sentence of Section 2(B) indicates that when "*reasonable suspicion* exists that the person" is an unlawfully present alien, "a *reasonable attempt* shall be made, *when practicable*, to determine the immigration status of the person" (emphases added). Furthermore, 2(B) also provides that a person is "presumed to not be an alien who is unlawfully present" if the person has certain common forms of identification.[31] Ariz. Rev. Stat. § 11-1051. In Arizona's view, the second sentence of Section 2(B)—"Any person who is arrested shall have the person's immigration status determined before the person is released"—must be read in light of the qualifying language contained in the first sentence and the presumptions specified in the statute. *Id.* This reading does not render the second sentence superfluous, because that sentence adds a timing element that the first sentence lacks. That is, the second sentence indicates that a status determination on an arrestee shall be performed "before the person is released."

In the context of a facial challenge to a new statute that has not been construed by the Arizona courts, the panel majority should not have dismissed

[31] This includes an Arizona driver license or nonoperating identification license, a tribal enrollment card or identification from any unit of government in the United States that requires proof of lawful presence.

Arizona's interpretation of its own statute. Indeed, this Court has cautioned against finding a state statute facially invalid where "[t]he State has had no opportunity to implement [its statute], and its courts have had no occasion to construe the law in the context of actual disputes … or to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange*, 552 U.S. at 450.

Finally, the panel majority's (mis)construction of Section 2(B) was wholly unnecessary because its preemption decision would have been the same even if it had accepted Arizona's construction. As Judge Bea noted in dissent, the majority's construction of 2(B)—as requiring immigration status checks for all arrestees, regardless of reasonable suspicion—made no difference to its analysis. App. 70a n.6. And if the competing constructions of Section 2(B) did make a difference, the majority should have given effect to Section 2(L)'s direction that "this section shall be implemented in a manner consistent with federal laws regulating immigration."

D. The Authority Conferred by Section 6 to Make Arrests for Removable Crimes Is Constitutional.

Section 6 of S.B. 1070 authorizes, but does not require, Arizona law enforcement officers to make warrantless arrests of persons they have probable cause to believe are removable from the United States by reason of having committed a crime. Ariz. Rev. Stat. § 13-3883(A)(5). As the court below noted, even without Section 6, Arizona officers have statutory authority to make warrantless arrests for most crimes; Section 6 adds to that authority by

permitting arrests if the crime creating removability was committed outside the State, or if the alien was previously convicted and imprisoned for the crime but for some reason was released without being deported—or was previously deported from the country for the crime but subsequently re-entered illegally. App. 42a.

States have concurrent authority to make arrests in enforcement of federal law. The Ninth Circuit, however, adopted an artificial distinction between criminal and civil immigration offenses and held that Section 6 is preempted because only federal officers, not state officers, may arrest aliens based on their removability. This holding was erroneous for numerous reasons. First, States have inherent authority to make arrests for immigration-law violations, both civil and criminal. Second, 8 U.S.C. § 1357(g)(10) expressly recognizes the States' authority to participate in the "apprehension" of unlawfully present aliens, without regard to whether they have committed another crime. Third, even under the Ninth Circuit's contrived view of the law, Section 6 does not require *any* arrests, but only authorizes them. Its application can be limited to arrests authorized by federal law, and the statute thus is not facially preempted.

1. State Officers Have Inherent Authority to Enforce the Immigration Laws, Both Criminal and Civil.

It is well established that state law enforcement officers have inherent authority, subject to any state-law limitations, to investigate and arrest for violations of federal law. This Court recognized long ago that "[i]t is the duty and the right, not only of

every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." *In re Quarles*, 158 U.S. 532, 535 (1895); *see Sure-Tan*, 467 U.S. at 895 (citing *Quarles* with approval). That this rule extends specifically to state law enforcement is confirmed by *United States v. Di Re*, 332 U.S. 581 (1948), in which this Court held that even "in absence of an applicable federal statute," States remain free to authorize their officers to make warrantless arrests for violations of federal law—"the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. As Judge Learned Hand explained in holding that States were authorized to enforce Prohibition, when Congress forbids certain conduct, "[t]he purpose of such a system [is] to secure obedience as far as possible," and in Congress' pursuit of that goal, "it cannot be supposed that … such co-operation as [the States] extend must be rejected." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

The panel majority did not deny that state officers may enforce those provisions of the immigration laws that Congress has designated as *criminal*, such as the prohibitions on an alien's unlawful entry to the country, failure to register as an alien, failure to notify the Attorney General of a change of address, or failure to carry registration papers once issued. Instead, it held that States may not make arrests based solely on the civil status of removability, unaccompanied by suspicion of any crime. App. 45a-46a. This was error.

In our system of cooperative federalism, the laws of the United States can be enforced by either federal or state officers unless Congress specifically states otherwise. The panel below identified no such pronouncement of Congress, and gave no reason why civil immigration offenses should be an exception to this rule. This Court has upheld state immigration enforcement or investigatory activities without any inquiry into the "civil" or "criminal" nature of the potential violation at issue. In *Muehler v. Mena*, 544 U.S. 93 (2005), this Court held that under the Fourth Amendment, local police do not require reasonable suspicion to request an individual's "name, date and place of birth, or immigration status." *Id.* at 101.

The Courts of Appeals have upheld the authority of state and local police to investigate immigration-related offenses without any discussion of whether the police could have determined the civil or criminal nature of the offense. *See*, *e.g.*, *Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010) (passengers' admission "that they were in the country illegally" permitted extension of traffic stop by Rhode Island officer based on reasonable suspicion that they "had committed immigration violations"); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001) (statement by one occupant of a stopped vehicle that another "was not legally present in the United States" provided reasonable suspicion for South Dakota officer "to inquire into [the other's] alienage"); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007) (Virginia State Police officer could contact ICE and extend traffic stop on being told that "passengers were illegal aliens");

Lynch v. Cannatella, 810 F.2d 1363, 1367, 1371 (5th Cir. 1987) (Port of New Orleans Harbor Police had authority to detain alien stowaways in incoming vessel). And the Tenth Circuit has held that "state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws," including civil removability. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999); *see also United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) ("A state trooper has general investigatory authority to inquire into possible immigration violations.").

This view is the correct one. While the distinction between criminal and civil offenses may be important for many purposes, it makes very little sense as the boundary for the States' inherent powers to enforce federal law. Civil offenses warranting arrest typically are closely intertwined with, or even indistinguishable from, complementary criminal offenses. This is especially true in immigration law, where the category of aliens who have managed to render themselves removable without committing any technically criminal act likely is quite small. Aliens commit federal crimes by entering the country unlawfully, by making false statements on their registration forms, 8 U.S.C. § 1306(c)**,** by failing to notify the Attorney General of any change of address, *id.* § 1306(b), and by failing to carry their registration documents at all times, *id.* § 1304(e). These things are crimes primarily because they facilitate unlawful presence in this country. It would make little sense to hold that state officers may arrest persons committing one of these

crimes—who surely will comprise the vast majority of unlawfully present aliens—but must look the other way when they have probable cause to believe an individual is unlawfully present despite carrying a registration card.

2. Section 1357(g)(10) Recognizes States' Ability to Make the Arrests Authorized By Section 6.

If there were any doubt regarding States' ability to arrest based on civil removability, it would be eliminated by § 1357(g)(10)(B)'s express recognition of state authority to cooperate in the "identification, *apprehension, detention*, or removal of aliens not lawfully present" (emphasis added). Section 6 recognizes the authority of Arizona officers to apprehend and detain unlawfully present aliens pending their transfer to federal custody for removal proceedings (or, possibly, their prosecution for state-law crimes). The court below erred by failing to acknowledge even the existence, let alone the controlling nature, of this federal statute.

Instead, the panel majority inappropriately ascribed preemptive force to 8 U.S.C. § 1252c, which authorizes state officers, "[n]otwithstanding any other provision of law" and "to the extent permitted by relevant State and local law," to "arrest and detain" unlawfully present aliens in a very narrow set of circumstances—specifically, when the officers receive confirmation from federal officials that the alien is unlawfully present, and has previously left the country or been deported following a felony

conviction.[32] From this specific authorization of arrests in somewhat unusual circumstances, the panel inferred a congressional intent to preempt *any* other removability-based arrests by state officers.

This is highly implausible. Section 1252c plainly was intended to *authorize* a specific category of state enforcement activity, not to prohibit activity that it does not address. As this Court has recognized, "[t]hat Congress has specifically saved state laws in some instances indicates no general policy save clarity." *People of State of California v. Zook,* 336 U.S. 725, 732 (1949) (internal citation omitted).

Indeed, § 1252c's legislative history indicates that it was introduced under the mistaken impression that the arrests it authorizes previously had been positively prohibited by federal law—a state of affairs which explains the "[n]otwithstanding any other provision of law" formulation and that the provision's sponsor found "dismay[ing]"—and that it was intended to help "give law enforcement all the tools it needs to remove … criminal [aliens] from our streets." 142 Cong. Rec. H2191 (daily ed. Mar. 13, 1996) (Rep. Doolittle); *cf. United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298-99 & n.4 (10th Cir. 1999) ("[T]his court has not been able to identify any pre-§ 1252c limitations on the powers of state and local officers to enforce federal law."). Neither the

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[32] The panel majority asserted that "[n]othing in [§ 1252c] permits warrantless arrests." App. 43a. This is incorrect: by authorizing arrests "to the extent permitted by relevant State and local law," § 1252c invokes the rule of *Di Re* that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." 332 U.S. at 589.

text nor the legislative history of § 1252c mentions preemption, and "th[e] legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Vasquez-Alvarez*, 176 F.3d at 1299.

Section 1252c does not address other state enforcement efforts, and there is no indication that Congress intended § 1252c itself somehow to perpetuate any prohibition on them. Indeed, nearly contemporaneously with the 1996 enactment of § 1252c, Congress passed IIRIRA, including §1357(g)(10)(B)'s express authorization of state cooperation in the "apprehension" and "detention" of unlawfully present aliens. It would make no sense to conclude that in enacting § 1252c Congress intended to preempt by the most oblique implication the very same arrests that it nearly contemporaneously expressly preserved in § 1357(g)(10)(B).

3. Respondent's Facial Attack on Section 6 Cannot Succeed.

Even if § 1252c has some implied preemptive effect, it undisputedly permits some arrests covered by Section 6, and therefore the Ninth Circuit's holding contravenes this Court's precedents regarding facial challenges.[33] Section 6 does not

[33] Not only does § 1252c authorize some Section 6 arrests on the basis of removability, but many of them will be justified based solely on the alien's commission of the predicate crime. As the Ninth Circuit noted, Section 6 authorizes Arizona officials to arrest without a warrant persons who committed crimes in another State. App. 42a. These crimes are wrongful, and a constitutional basis for an arrest, quite independently of

require even a single arrest—it merely permits certain warrantless arrests as a matter of state law. If, therefore, federal law permits only a subset of the arrests covered by Section 6, the proper approach is not to invalidate Section 6 on its face but to presume that state officers will exercise their discretion under it consistent with federal law and permit the law to be clarified in the context of concrete as-applied challenges.

III. SECTION 3 IS CONSTITUTIONAL.

Section 3 makes "[w]illful failure to complete or carry an alien registration document" a misdemeanor under Arizona law. Ariz. Rev. Stat. § 13-1509. The statute is violated only by unlawfully-present aliens who are "in violation of [8 U.S.C. §§] 1304(e) or 1306(a)," which respectively require registration and the carrying of registration papers. The maximum penalties for repeat violations of Section 3 are identical to those under federal law for violation of § 1306(a), and less than those for violating § 1304(e).

Section 3 thus fits squarely within a long line of cases in which this Court has found that, absent field preemption by Congress, the States are well within their authority to prohibit the same conduct that is forbidden by federal law. In *Zook*, for instance, this Court held that a California statute criminalizing the sale or arrangement of

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their ramifications for the suspect's immigration status. And if many arrests authorized by Section 6 thus are justified on this basis, the fact that Section 6 makes removability a further condition of its warrantless arrest authority surely does not invalidate them. In this way too, Section 6 plainly has constitutional applications.

transportation by a carrier lacking a federal permit was not preempted by the federal Motor Carrier Act, which had "substantially the same provision." 336 U.S. at 727. This Court said that "[t]he case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict in terms, *and no possibility of such conflict, for the state statute makes federal law its own in this particular*." *Id.* at 735 (emphasis added). *See also Asbell v. Kansas*, 209 U.S. 251, 258 (1908) (upholding Kansas law punishing the transportation of cattle not federally inspected since the law "recognizes the supremacy of the national law and conforms to it"); *Fox v. Ohio,* 46 U.S. 410 (1847) (Congress' power to punish the counterfeiting of U.S. currency, U.S. Const. art. I, § 8, cl. 6, does not prevent a State from punishing the passing of counterfeit money). Section 3 is also supported by the line of recent cases recognizing the validity of "parallel" enforcement of federal requirements by States. *See Medtronic*, 518 U.S. at 495; *Bates*, 544 U.S. at 447; *Riegel*, 552 U.S. at 330.[34]

These cases illustrate the rule that, unless Congress has occupied the field, the States are not prevented "from prosecuting where the same act constitutes both a federal offense and a state offense under the police power." *Pennsylvania v. Nelson*, 350 U.S. 497, 500 (1956). Thus, "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the

[34] The lone exception to this rule, inapplicable here, occurs in the field of labor relations, where congressionally provided remedies are exclusive. *See Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

treatment of an alien subclass, the States may, of course, follow the federal direction." *Plyler*, 457 U.S. at 219 n.19. Section 3 diligently follows this recommendation, overlapping precisely with federal direction in both its substantive elements and its penalty.

In our system of cooperative federalism, the States may assist the federal government in tackling national problems. In *Gilbert v. Minnesota*, 254 U.S. 325 (1920), this Court upheld a Minnesota statute that made it a crime "to interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the State of Minnesota." *Id.* at 326. Rejecting the argument that the statute trenched upon areas of exclusive federal power, this Court recognized that the Constitution creates a system of cooperative federalism (*id.* at 329):

> Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any co-operation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one, and that the constituted and constituting sovereigns must have power of co-operation against the enemies of all.

In *Whiting* this Court upheld against a preemption challenge another Arizona statute that sought to add Arizona's enforcement tools to the cause of enforcing federal immigration law. *Whiting* held that Arizona's licensing law was not preempted by IRCA. The *Whiting* Court explained that IRCA imposed "a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban." 131 S. Ct. at

1985. The Court also noted that "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects." *Id.* at 1981. So too here. Section 3 simply seeks to enforce the federal registration requirements and tracks federal law in all material respects.

The Ninth Circuit's reliance (App. 29a-30a) on *Hines v. Davidowitz* was misplaced. In *Hines*, this Court held that the federal Alien Registration Act of 1940 preempted Pennsylvania's Alien Registration Act. This Court stated that where the federal government has "provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. 52, 66-67 (1941). But Section 3 does not violate that rule. Section 3 simply adopts as Arizona law the federal prohibitions and penalties on aliens in regard to registration. *See* App. 28a ("Section 3 essentially makes it a state crime for unauthorized immigrants to violate federal registration laws.").

Unlike Section 3, which adopts federal law without modification as Arizona law, and simply adds a parallel enforcement track, the Pennsylvania law in *Hines* "created conflicts with various federal laws." *DeCanas*, 424 U.S. at 363 (distinguishing *Hines* on that basis). Unlike the federal Act, which required only a "single registration," the Pennsylvania Act required an alien to register "once each year." Furthermore, the Pennsylvania Act required aliens to "show the card whenever it may be demanded by any police officer" and punished the failure to register, without more. In contrast, the federal Act

had "[n]o requirement that aliens carry a registration card to be exhibited to police," and "only the wilful failure to register [was] made a criminal offense." *Hines*, 312 U.S. at 59-61.

The court below also cited (App. 30a-31a) *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), which held that a state common-law claim of "fraud on the FDA" was preempted. But as this Court explained in *Whiting*, the claim in *Buckman* was preempted because it "directly interfered with the operation of the federal program" by causing "applicants before a federal agency 'to submit a deluge of information that the [agency] neither wants nor needs, resulting in additional burdens on the [agency's] evaluation of an application,' and harmful delays in the agency process." *Whiting*, 131 S. Ct. at 1983 (quoting *Buckman*, *supra*, at 351) (brackets in *Whiting*). Section 3 raises no such concerns and conflicts in no way with federal law.

IV. SECTION 5(C) IS CONSTITUTIONAL.

Section 5(C) makes it a misdemeanor for any "unlawfully present" and "unauthorized" alien "to knowingly apply for work, solicit work in a public place or perform work" in Arizona. Ariz. Rev. Stat. § 13-2928(C). Section 5(C) is a presumptively valid exercise of the traditional state authority to regulate the employment relationship. In combating the problem of work by unauthorized aliens, IRCA addresses the demand side by forbidding employers from hiring unauthorized workers. Section 5(C) "mirrors federal objectives and furthers a legitimate state goal," *Plyler*, 457 U.S. at 225, by addressing the problem from the supply side. Because IRCA is silent with respect to penalties on unauthorized

workers, nothing overcomes the presumption against preemption that applies to Section 5(C). IRCA's express and limited preemption provision, 8 U.S.C. § 1324a(h)(2), preempts only state laws imposing "sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens," and thus does not reach Section 5(C).

Section 5(C) is an appropriate subject of state legislation. Each State retains the authority to protect its "fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." *DeCanas*, 424 U.S. at 357. As this Court recently reaffirmed, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," and such regulations are "certainly within the mainstream of [the State's] police power." *Whiting*, 131 S. Ct. at 1974 (quoting *DeCanas*, 424 U.S. at 356) (brackets in *Whiting*). Accordingly, this Court in *DeCanas* explained that "we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship … in a manner consistent with pertinent federal laws." 424 U.S. at 357.

IRCA made it unlawful for employers to hire unauthorized aliens, 8 U.S.C. § 1324a(a), and expressly preempted state laws (other than licensing laws) imposing other sanctions on those who employ unauthorized aliens, *id.* § 1324a(h)(2), but IRCA conspicuously did not impose federal penalties, or preempt any state penalties, on aliens who work without authorization. The Ninth Circuit, however,

assumed that "Congress' inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work." App. 39a.

That conclusion attributes to Congress a remarkably counterintuitive intent—namely, not only to focus its resources on employers who make illegal hires, but to leave those who unlawfully seek employment entirely immune. It is also inconsistent with this Court's preemption precedents. To begin with, nothing in federal law overcomes the strong presumption of validity that attaches to Section 5(C). The Ninth Circuit agreed that the presumption against preemption applies to Section 5(C), App. 33a, but failed to give effect to the presumption.

Furthermore, this Court has rejected as "quite wrong" the view that a federal "decision not to adopt a regulation" is "the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002).

This is as true in the immigration context as anywhere else. As this Court stated in *Hines*:

> where the Constitution does not of itself prohibit state action … and where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.

312 U.S. at 68 n.22. Although that principle did not control in *Hines* because there Pennsylvania had

enacted an alien registration scheme that overlapped and conflicted with the federal one, it fits this case perfectly. Here, in an area of admitted traditional state authority, Congress "purposely left untouched" supply-side employment regulations of transactions that have a marked impact on local labor markets, leaving the state "free to legislate concerning such local matters." *Id.* In *Whiting* the Court noted that if a state statute "operates 'only with respect to individuals whom the Federal Government has already declared cannot work in this country' "—as does Section 5(C)—this supports a "finding [of] no preemption." 131 S. Ct. at 1981 (quoting *DeCanas*, 424 U.S. at 363).

The Ninth Circuit viewed itself as "bound" (App. 33a) by its prior decision in *NCIR,* 913 F.2d 1350 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991). In *NCIR*, the Ninth Circuit held that the INS lacked authority to bar aliens from working as a condition of release pending deportation proceedings. Needless to say, the Ninth Circuit's *NCIR* decision has no binding effect on this Court, but how the court below could view itself bound is a mystery since the court "agree[d] that the ultimate legal question before us in [*NCIR*] was distinct from the present dispute," App. 34a, and, more important, this Court *reversed* the Ninth Circuit in that case. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991).

In this Court's *NCIR* decision, which is binding, the Court held that the INS' "no-work bond conditions" were within its statutory authority and "wholly consistent with th[e] established concern of immigration law" to " 'preserve jobs for American workers.' " *Id.* at 194 (quoting *Sure-Tan*, 467 U.S. at

893). Section 5(C), too, is wholly consistent with that objective. Indeed, even the Ninth Circuit recognized that "Section 5(C) clearly furthers the strong federal policy of prohibiting illegal aliens from seeking employment in the United States." App. 39a.

The court below relied upon IRCA's legislative history as canvassed by the Ninth Circuit in its (reversed) *NCIR* decision. App. 34a. But, like IRCA's text, IRCA's legislative history shows only that Congress decided not to impose sanctions on unauthorized alien workers. IRCA's legislative history—and, more important, its text—do not show that Congress decided that *the States* should not have the power to impose such sanctions. On the contrary, as this Court has recognized, "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *NCIR,* 502 U.S. at 194 & n.8). IRCA certainly cannot be read to reflect a congressional policy that no consequences should follow from unauthorized work by aliens. Indeed, Congress has declared that work in violation of an alien's nonimmigrant status is a ground for removal under the INA. *See* 8 U.S.C. § 1227(a)(1)(C)(i); *Shivani v. Gonzales*, 167 F. App'x 362, 362-363 (4th Cir. 2006).

V. FOREIGN CRITICISM OF S.B. 1070 HAS NO PREEMPTIVE EFFECT.

The panel majority pointed to foreign criticism of S.B. 1070 as support for its preemption finding. That reliance on foreign criticism was just one more way in which the Ninth Circuit strayed from this

Court's precedents. As Judge Bea succinctly put it: "We do not grant other nations' foreign ministries a 'heckler's veto.' " App. 95a.

The criticism that the Ninth Circuit marshaled to buttress its conclusion was far from overwhelming. The panel majority pointed to such facts as (1) various "foreign leaders and bodies have publicly criticized Arizona's law," including "six human rights experts at the United Nations," App. 23a, (2) "at least five of the six Mexican governors invited to travel to Phoenix to participate in the September 8-10, 2010 U.S.-Mexico Border Governors' Conference declined the invitation," App. 24a; (3) "[t]he Mexican Senate has postponed review of a U.S.-Mexico agreement on emergency management cooperation to deal with natural disasters," App. 24a, (4) the Deputy Secretary of State had stated that S.B. 1070 "threatens" harm to U.S. foreign relations, App. 24a; and (5) a DHS official stated that S.B. 1070 "is affecting DHS's ongoing efforts to secure international cooperation in carrying out its mission." App. 24a.

None of this should have influenced the preemption analysis. The Arizona immigration law upheld in *Whiting* was not popular in these quarters either, but that did not deter this Court from rejecting the federal government's arguments based on the traditional tools of preemption analysis—statutory text and legislative intent—as opposed to weighing the views of human rights experts or deferring to the executive's preferred enforcement posture. What is more, this Court in *Whiting* distinguished the very cases which the Ninth Circuit invoked, *Crosby v. National Foreign Trade Council*,

530 U.S. 363 (2000), and *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), on a ground equally applicable here—namely, that state law fully embraces, rather than conflicts with, the federal substantive immigration rules.

As Judge Bea noted in dissent, foreign nations—and even subnational foreign officials—cannot invalidate a State's law simply by criticizing it. *See* App. 95a. In *Barclays*, as here, a number of foreign governments and officials had "deplor[ed] [a California statute] in diplomatic notes, *amicus* briefs, and even retaliatory legislation," 512 U.S. at 320, and the Secretary of State had noted the volume of complaints, *id.* at 324 n.22. This Court nonetheless rejected the relevance of these protests to the preemption analysis, holding that in the absence of evidence of preemptive congressional intent, the contention that the statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-328. The further problem with relying on foreign criticism to skew the preemption analysis is that not all congressional legislation dealing with immigration is popular with those who have criticized S.B. 1070. Indeed, to the extent criticism of S.B. 1070 focuses on state cooperation with federal authorities in enforcing the federal immigration laws, the critics' real complaint is with federal statutory provisions like §§ 1373(a), (c), (g)(10) and 1644, which expressly facilitate such cooperation. It is those congressional determinations, and not the criticism of foreign governments or the executive branch, that inform the preemption analysis.

VI. S.B. 1070 POSES NO DISUNIFORMITY CONCERNS.

Finally, the panel majority erroneously found that "the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption." App. 26a. Ironically, it is the *dis*uniformity of federal immigration enforcement efforts that has funneled unlawful entrants to Arizona and exacerbated the crisis that led to S.B. 1070's enactment. *See supra* at 2-3. Moreover, there is no dispute that Arizona is in any way regulating immigration "which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. While this Court has found the need for national uniformity to be a factor in the implied preemption analysis where state laws create a patchwork of different substantive standards, there is no such risk here.

This is clearest with respect to Section 2(B), which merely takes advantage of enforcement assistance expressly authorized by—indeed, compelled by—Congress in an area where States already possess inherent authority. "Arizona's procedures simply implement the [measures] that Congress expressly allowed Arizona to pursue…. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Whiting,* 131 S. Ct. at 1981. And with respect to S.B. 1070 as a whole, there is certainly no more disuniformity than in *Whiting*.

When States adopt the federal substantive standard as their own and either authorize state cooperation in enforcement or add state penalties, the potential for a serious conflict is eliminated. Preemption is not a conclusion to be lightly reached. It amounts to a determination that a duly-enacted state law affirmatively conflicts with a particular federal law in violation of the Supremacy Clause. It is thus not enough for the federal executive to show that, all things being equal, it would be easier for federal law enforcement if the state law did not exist. Something in federal statutory law has to do the preempting. In cases like this, where the State goes "the extra mile in ensuring that its law closely tracks [federal law] in all material respects," *id.* at 1981, there is simply no threat of disuniformity or any basis in federal law to invalidate the State's efforts under the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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Statutory Appendix

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S.B. 1070, § 2, Ariz. Rev. Stat. § 11-1051

§ 11-1051. Cooperation and assistance in enforcement of immigration laws; indemnification

A. No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

B. For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully

present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.

2. A valid Arizona nonoperating identification license.

3. A valid tribal enrollment card or other form of tribal identification.

4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

C. If an alien who is unlawfully present in the United States is convicted of a violation of state or local law, on discharge from imprisonment or on the assessment of any monetary obligation that is imposed, the United States immigration and customs enforcement or the United States customs and border protection shall be immediately notified.

D. Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present in the United States and who is in the agency's custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this state.

E. In the implementation of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code § 1373(c).

F. Except as provided in federal law, officials or agencies of this state and counties, cities, towns and other political subdivisions of this state may not be prohibited or in any way be restricted from sending, receiving or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state or local governmental entity for the following official purposes:

1. Determining eligibility for any public benefit, service or license provided by any federal, state, local or other political subdivision of this state.

2. Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding in this state.

3. If the person is an alien, determining whether the person is in compliance with the federal registration laws prescribed by title II, chapter 7 of the federal immigration and nationality act.

4. Pursuant to 8 United States Code § 1373 and 8 United States Code § 1644.

G. This section does not implement, authorize or establish and shall not be construed to implement, authorize or establish the REAL ID act of 2005 (P.L. 109-13, division B; 119 Stat. 302), including the use of a radio frequency identification chip.

H. A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Code §§ 1373 and 1644, to less than the full extent permitted by federal law. If there is a judicial finding that an entity has violated this section, the court shall order that the entity pay a civil penalty of not less than five hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection.

I. A court shall collect the civil penalty prescribed in subsection H of this section and remit the civil penalty to the state treasurer for deposit in the gang and immigration intelligence team enforcement mission fund established by § 41-1724.

J. The court may award court costs and reasonable attorney fees to any person or any official or agency of this state or a county, city, town or other political subdivision of this state that prevails by an adjudication on the merits in a proceeding brought pursuant to this section.

K. Except in relation to matters in which the officer is adjudged to have acted in bad faith, a law enforcement officer is indemnified by the law

enforcement officer's agency against reasonable costs and expenses, including attorney fees, incurred by the officer in connection with any action, suit or proceeding brought pursuant to this section in which the officer may be a defendant by reason of the officer being or having been a member of the law enforcement agency.

L. This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

S.B. 1070, § 3, Ariz. Rev. Stat. § 13-1509

§ 13-1509. Willful failure to complete or carry an alien registration document; exception; authenticated records; classification

A. In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).

B. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

C. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

D. A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or the person is eligible for release pursuant to § 41-1604.07.

E. In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs.

F. This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

G. Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.

H. A violation of this section is a class 1 misdemeanor, except that the maximum fine is one hundred dollars and for a first violation of this section the court shall not sentence the person to more than twenty days in jail and for a second or subsequent violation the court shall not sentence the person to more than thirty days in jail.

S.B. 1070, § 5, Ariz. Rev. Stat. § 13-2928

§ 13-2928. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

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

D. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

E. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code § 1373(c).

F. A violation of this section is a class 1 misdemeanor.

G. For the purposes of this section:

1. "Solicit" means verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.

2. "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3).

S.B. 1070, § 6, Ariz. Rev. Stat. § 13-3883

§ 13-3883. Arrest by officer without warrant

A. A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in the officer's presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under § 13-3903.

5. The person to be arrested has committed any public offense that makes the person removable from the United States.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of

the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.

8 U.S.C. § 1252c

§ 1252c. Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens

(a) In general

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

(1) is an alien illegally present in the United States; and
(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

8 U.S.C. § 1302

§ 1302 Registration of Aliens

(a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

(b) It shall be the duty of every parent or legal guardian of any alien now or hereafter in the United States, who (1) is less than fourteen years of age, (2) has not been registered under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for the registration of such alien before the expiration of such thirty days. Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.

(c) The Attorney General may, in his discretion and on the basis of reciprocity pursuant to such regulations as he may prescribe, waive the requirement of fingerprinting specified in subsections (a) and (b) of this section in the case of any nonimmigrant.

8 U.S.C. § 1304

§ 1304. Forms for registration and fingerprinting

(a) Preparation; contents

The Attorney General and the Secretary of State jointly are authorized and directed to prepare forms for the registration of aliens under section 1301 of this title, and the Attorney General is authorized and directed to prepare forms for the registration and fingerprinting of aliens under section 1302 of this title. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed.

(b) Confidential nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only (1) pursuant to section 1357(f)(2) of this title, and (2) to such persons or agencies as may be designated by the Attorney General.

(c) Information under oath

Every person required to apply for the registration of himself or another under this subchapter shall submit under oath the information required for such registration. Any person authorized under regulations issued by the Attorney General to register aliens under this subchapter

shall be authorized to administer oaths for such purpose.

(d) Certificate of alien registration or alien receipt card

Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

(e) Personal possession of registration or receipt card; penalties

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

(f) Alien's social security account number

Notwithstanding any other provision of law, the Attorney General is authorized to require any alien to provide the alien's social security account number for purposes of inclusion in any record of the alien maintained by the Attorney General or the Service.

8 U.S.C. § 1306

§ 1306. Penalties

(a) Willful failure to register

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

(b) Failure to notify change of address

Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and removed in the manner provided by part IV of this subchapter, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(c) Fraudulent statements

Any alien or any parent or legal guardian of any alien, who files an application for registration

containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter.

(d) Counterfeiting

Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both.

8 U.S.C. § 1324a

§ 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity--

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation

certifies that the agency has complied with the procedures specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if--

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual,

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the

individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining--

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this

paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's--

(i) United States passport;

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document--

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's--

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does

not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's--

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably

establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending--

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual--

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if--

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) of this section provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) of this section is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) of this section as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the

changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether--

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of Title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least--

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D), before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the

establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would--

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter,

or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C.A. § 301 et seq.], including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C.A. § 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C.A. § 301 et seq.].

(4) Demonstration projects

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b) of this section. No

such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures--

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of this section,

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) of this section as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) of this section under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection--

(A) Immigration officers and administrative law judges shall have reasonable access to examine

evidence of any person or entity being investigated,

(B) Administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) Immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection-

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than $250 and not more than $2,000 for each unauthorized alien with

respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity--

(i) to comply with the requirements of subsection (b) of this section (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall

require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1) of this section, the order under this subsection may provide for the remedy described in subsection (g)(2) of this section.

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any

entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e) of this section, to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order

requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. § 1357

§ 1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not

dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests—

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any

order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and 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 this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement

under penalty of perjury as permitted under section 1746 of title 28) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of title 28) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of title 18.

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and

designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a) of this section, an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 1229a of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written

agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, 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, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) 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.

(h) Protecting abused juveniles

An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.

8 U.S.C. § 1373

§ 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or

local government agency, 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, by providing the requested verification or status information.

8 U.S.C. § 1644

§ 1644. Communication between State and local government agencies and Immigration and Naturalization Service

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, 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.