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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Arizona, with its 370-mile border with Mexico, indisputably bears a disproportionate share of the costs of illegal immigration. In response, Arizona enacted S.B. 1070, which dedicates considerable state resources to the effective enforcement of the substance of federal immigration law. By expressly borrowing federal standards, S.B. 1070 avoids any possibility of preemption. To be clear, S.B. 1070 does not authorize any arrest or impose any penalty for conduct that is permissible under federal law. Instead, it consistently adopts the federal substantive law as its own. And Congress, far from preempting the field or prohibiting such complementary state efforts, has affirmatively encouraged such cooperative law enforcement and expressly preempted state laws that would prevent state officers from communicating with federal officers. This is not fertile ground for a preemption argument.

The United States nonetheless insists that S.B. 1070 is impliedly preempted on its face. But its argument depends on inverting fundamental principles of federalism and the separation of powers and ignoring the plain text of multiple immigration provisions. Under our system of government, States have inherent authority to make arrests for violations of federal law, and Congress, not the executive, does the preempting. The United States acknowledges, as it must, that voluntary state efforts to enforce federal law are the norm. The fledging Republic enacted criminal and immigration laws long before it established an extensive network of federal law enforcement agents, and the Framers

reassured skeptics that Congress' ability to enact substantive law would not require a significant cadre of federal law enforcement officials. Nonetheless, the United States contends that while *ad hoc* cooperation from state law enforcement officials is just fine, a systematic state effort to enforce federal law crosses the line from cooperation into confrontation. But there is no support for this novel theory, and no reason to prefer the *ad hoc* over a state statute like S.B. 1070. If Congress decides that systematic state efforts are problematic, it is perfectly capable of preempting them. But Congress has consistently expressed a preference for maximizing state cooperation and prohibiting efforts to limit communication between the States and federal immigration officials.

In the end, because Congress has consistently favored active enforcement of the immigration laws by both state and federal law enforcement, the United States is reduced to arguing that Arizona's more systematic efforts to enforce the law interfere with the executive branch's preferred enforcement posture. But it is the federal law enacted by Congress, not the executive's preferred enforcement posture, that carries preemptive effect. Moreover, the executive's concern about too much cooperation is essentially the same argument that this Court rejected just last Term in *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968 (2011).

The United States' objection to state-law penalties on violations of federal registration obligations or soliciting employment that is verboten under federal law suffers the same defect. State laws imposing penalties for violations of federal standards, so-

called "parallel" cases, are the easy cases for preemption purposes. Absent express or field preemption, there is simply no conflict and no basis for facially invalidating a duly enacted state statute that unquestionably has constitutional applications.

I. STATES HAVE INHERENT AUTHORITY TO ENFORCE FEDERAL LAW, INCLUDING FEDERAL IMMIGRATION LAW.

A. States Have Inherent Authority to Enforce Federal Law.

Although respondent cannot deny that the Constitution permits state efforts to enforce federal law, it nonetheless insists that States derive their authority from federal law and cannot "wrest from federal officials the enforcement of federal laws by imposing a mandatory directive as a matter of state law." Br. 45. That view is both critical to respondent's preemption argument and fundamentally misdescribes our federal system. The States' ability to enforce federal law—whether through state law enforcement officers or through state laws imposing penalties for violations of federal-law standards—is a function of the States' inherent residual sovereignty, not any federal statutory authorization. While Congress can preempt such state efforts, in the absence of such congressional action, state enforcement of federal law standards is the norm, not a deviation that demands express authorization from Congress.

The notion that States may enforce federal law as an incident of their inherent and residual sovereignty is hardly radical. Respondent's own

Office of Legal Counsel (OLC) has opined that "the authority to arrest for violation of federal law inheres in the States subject only to preemption by federal law." OLC, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations* (Apr. 3, 2002) (JA 267). As OLC explained, "the authority of state police to make arrests for violation of federal law is [not] limited to those instances in which they are exercising delegated federal power" because "such arrest authority inheres in the States' status as sovereign entities." JA 270. OLC stated that the "contrary conclusion," *i.e.*, "that States, through their police, may exercise only the arrest power that Congress has affirmatively authorized," is not only "lacking any legal support" but "would dramatically upset settled practices." JA 273.

This Court's cases confirm that state officers may make arrests for violations of federal law even if there is no federal statute authorizing them to do so. *See, e.g.*, *United States v. Di Re*, 332 U.S. 581, 589-590 (1948) (absent an applicable federal statute, state law determines validity of a state officer's warrantless arrest for federal criminal violations); *see also In re Quarles*, 158 U.S. 532, 535 (1895). As Justice Jackson explained in *Di Re*, the principle that state law enforcement officers may make arrests for violations of federal law as long as the arrests are authorized by state law has roots going all the way back to "one of the earliest acts of Congress." 332 U.S. at 589. That provision, part of the Act of September 24, 1789, authorized the arrest and detention of an individual for a federal crime "agreeably to the usual mode of process against

offenders in such state." Ch. 20, § 33, 1 Stat. 73, 91; *Di Re*, 332 U.S. at 589 n.8.

This notion that state officials could voluntarily enforce federal law whenever consistent with state law would have struck the framing generation as obvious. The new Republic enacted criminal penalties and naturalization rules long before it developed a network of federal law enforcement agents sufficient to enforce those laws without state assistance. While there is some debate over the extent to which state cooperation was compelled as opposed to merely welcomed, *compare Printz v. United States*, 521 U.S. 898, 905-912 (1997) *with id.* at 946-953 (Stevens, J., dissenting), there is no doubt that the early Congresses depended on state cooperation. Indeed, the Framers viewed the new federal government's reliance on pre-existing state officials—who drew their authority from the inherent and reserved power of the States, not the new federal government—as a virtue, not a vice. When opponents of the Constitution suggested that the new federal government's ability to tax would necessitate an army of federal tax collectors, Madison responded that the enforcement effort "will generally be made by the officers, and according to the rules, appointed by the several States." The Federalist No. 45 (James Madison).

Nor did the Framers envision a different rule for naturalization. The founding generation concluded that the substantive rule of citizenship needed to be uniform to avoid the prospect that one State could have particularly lax rules which would then extend to the entire nation by virtue of Article IV's Privileges and Immunities Clause. *See* 1 Joseph

Story, *Commentaries on the Constitution of the United States* 384 (3d ed. 1858). But when it came to enforcing those uniform national rules, Congress once again turned to the States, particularly the state court system. *See Printz*, 521 U.S. at 905-906 (discussing laws relying on state courts to "record applications for citizenship" and "to register aliens seeking naturalization").

Nothing that has happened since suggests that state officials' ability to enforce federal immigration laws depends on express federal authorization.[1] Instead, like many other areas of the law, the authority of state law enforcement officers to enforce federal law depends on state law. And, unless Congress acts to override state law, state efforts to enforce federal immigration laws remain valid.

B. Absent Field Preemption or Express Congressional Direction to the Contrary States May Punish Conduct That Independently Violates Federal Law.

At times, respondent comes close to suggesting that federal law occupies the field when it comes to immigration. But it is well-established that States may legislate to protect state interests affected by violations of federal immigration law. *See Whiting*, 131 S. Ct. 1968; *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *DeCanas v. Bica*, 424 U.S. 351, 355-356 (1976).

[1] If employers can report violations of the immigration laws to federal immigration authorities (which they can, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895 (1984)), state law enforcement officers surely can do the same.

Respondent emphasizes (Br. 19-20) that Congress granted the executive branch broad discretion to determine when an unlawfully present alien should be deported. That is true, but nothing in S.B. 1070 interferes with this exclusive removal power. The law enforcement provisions of S.B. 1070, Sections 2 and 6, may result in a brief detention or arrest of an unlawfully-present alien, but the federal executive will determine whether that individual may stay or must go. Sections 3 and 5 of S.B. 1070 penalize federal registration and unauthorized-work requirements, but the penalties do not include removal.[2]

That the executive branch has discretion in enforcing the immigration laws is wholly unremarkable and has no bearing on the preemption analysis. Whenever Congress enacts a criminal law, the federal executive will have considerable prosecutorial discretion. But that does not give the executive any authority to pick and choose which state efforts to enforce federal standards interfere with its enforcement priorities and are therefore preempted. The circumstances in which Congress can delegate its ability to preempt state law to the executive branch remain subject to some doubt. *See, e.g., Watters v. Wachovia Bank*, 550 U.S. 1, 38-44 (2007) (Stevens, J., dissenting). But the executive must point to something much more concrete and

[2] Respondent invokes (Br. 19) *INS v. Chadha*, 462 U.S. 919 (1983), to argue that Congress granted the Executive Branch unfettered discretion with respect to the removal of aliens. But actually Congress went to great and ultimately unconstitutional lengths to retain a veto over the executive's removal decisions.

express than a mere grant of prosecutorial discretion.

Respondents' preemption argument rests principally (Br. 24-25) on three cases: *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986). Two of those cases were raised and distinguished in *Whiting*, and the third is so patently inapposite that it did not even make the cut.

In *Whiting*, this Court explained that both *Buckman* and *Crosby* "concern[ed] state actions that *directly interfered* with the operation of the federal program." *Whiting*, 131 S. Ct. at 1983 (plurality) (emphasis added). The Court distinguished *Buckman* and *Crosby*, finding that "[t]here is no similar interference with the federal program in this case; that program operates unimpeded by the state law." *Id.* *Whiting* involved an Arizona statute that, *inter alia*, authorized county attorneys to verify employment status pursuant to 8 U.S.C. § 1373(c) and made use of the federal E-Verify system mandatory. The Court found no significant interference because the state statute relied on federal standards and mechanisms. The same conclusion follows here.

Even apart from *Whiting*, *Buckman* and *Crosby* distinguish themselves and demonstrate the weakness of the preemption claim here. *Buckman* involves the federal government's unique interest in prohibiting fraud in its own proceedings, which is akin to the longstanding rule that only federal authorities can prosecute perjury in the federal

courts. *See Thomas v. Loney*, 134 U.S. 372, 375 (1890) (recognizing this rule as an exception to the general rule that two sovereigns can make the same conduct illegal); *see also Gilbert v. Minnesota*, 254 U.S. 325 (1920) (applying the general rule to uphold state law prohibiting interference with enlistment in federal military). And *Crosby*'s zero-tolerance for inconsistent state sanctions clearly does not extend outside the distinct context of international sanctions. *Whiting* and *DeCanas* make clear that a similar rule does not apply in the immigration context.

Whiting did not discuss *Gould*, because neither the United States nor the *Whiting* petitioners saw fit to cite it. And no wonder: Not only is *Gould* irrelevant to state regulation of illegal aliens, but this Court has already rejected an effort to transplant the unique rules of preemption under the National Labor Relations Act, 29 U.S.C. §§ 151-169, and "the *Garmon* rule" into the immigration context. *See DeCanas*, 424 U.S. at 358-361 & n.7 (rejecting reliance on *Garmon* as "misplaced" because "nothing remotely resembling the NLRA scheme is to be found in the INA").[3]

The United States seeks to distinguish cases such as *Fox v. Ohio*, 46 U.S. 410 (1847), and *Gilbert v. Minnesota*, which underscore the general presumption that States can independently punish

[3] The Court's citation of *Gould* in *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008), but not in *Chamber of Commerce v. Whiting*, underscores that *Gould* involved the special labor law rule of *Garmon* preemption and sheds no light on preemption questions in the distinct immigration context.

conduct that violates federal law on the view that "those cases presented questions of legitimate local concern that were not displaced by federal law." Br. 29. But the massive number of illegal aliens in Arizona and the costs and damages directly related thereto are even more obviously matters of local concern than counterfeiting federal coinage or interference with federal military enlistment, *see* Pet. Br. 1-8. As this Court has emphasized: "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." *Plyler*, 457 U.S. at 228 n.23; *see also DeCanas*, 424 U.S. at 356 (describing California's effort as "certainly within the mainstream of such police power regulation"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975) (noting that illegal aliens "create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services").

Although respondent identifies a handful of readily distinguishable cases involving either field preemption or truly unique areas like international sanctions and perjury committed in federal court, its fundamental problem is that it cannot remotely deny or avoid the general default rules: State officers can enforce federal law and States are free to impose their own penalties on conduct independently prohibited by federal law. Any effort to suggest that immigration is governed by the special rule for truly unique federal interests is foreclosed not only by

Whiting and *DeCanas*, but also by over two centuries of history dating back to the first Congress. The Constitution itself recognizes the importance of having a uniform substantive immigration law. But state efforts to enforce the uniform federal substantive law have been commonplace since the founding and raise no special concerns. As in other contexts, when a state law adopts the federal standard as its own, "operates 'only with respect to individuals whom the Federal Government has already declared'" ineligible for work or subject to penalty, and provides a "parallel" state remedy, there is no conflict or preemption. *Whiting*, 131 S. Ct. at 1981 (*quoting DeCanas*, 424 U.S. at 363).

II. THE LAW ENFORCEMENT PROVISIONS OF S.B. 1070 ARE NOT PREEMPTED.

A. Section 2(B)

Section 2(B) of S.B. 1070, Ariz. Rev. Stat. § 11-1051, provides that when Arizona law enforcement officers reasonably suspect that a person they have lawfully stopped, detained, or arrested is an unlawfully present alien, "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" pursuant to the verification procedure established by 8 U.S.C. § 1373(c). That is the same verification provision utilized in the law upheld in *Whiting*. *See* 131 S. Ct. at 1976. Section 2(L) further provides that Section 2(B) shall be implemented consistently with federal immigration law. That provision avoids any possibility of preemption, as Section 2(B) is not only consistent with federal law but expressly permitted

by multiple federal laws. *See* 8 U.S.C. §§ 1357(g)(10), 1373(a)-(c), 1644.[4]

Indeed, Section 2(B) is most readily understood as state law authorization for precisely the kind of cooperative law enforcement and communication federal law welcomes. Congress, far from discouraging state efforts to verify immigration status, has affirmatively mandated that federal immigration authorities respond to such requests. Section 1373(c) directs that federal authorities "shall respond" to any inquiry by a state or locality "seeking to verify or ascertain the citizenship or immigration status of any individual within [its] jurisdiction" by "providing the requested verification or status information." As if that direction were not clear enough, 8 U.S.C. § 1644 declares that "[n]otwithstanding any other provision of Federal ... law, no State or local government entity may be prohibited, or in any way restricted, from sending to

[4] Respondent is wrong to say that Section 2(B) "requir[es] state and local officers to detain every person suspected of being an unlawfully present alien until her status can be verified." Br. 47. Section 2(B) provides only that "a reasonable attempt shall be made, when practicable" to determine a person's immigration status when "reasonable suspicion" exists that the person is an illegal alien; it does not require the verification be completed during the stop or detention if that is not reasonable or practicable. Respondent's claim also overlooks the fact that, under Section 2(B), a person who provides a valid Arizona driver or identification license is presumed not to be an unlawfully present alien. Because respondent brought a facial challenge to S.B. 1070 before it could take effect or be construed by the Arizona courts, Arizona's reasonable construction of its own statute should be accepted. *Cf.* Pet. Br. 39-41.

or receiving from [federal immigration authorities] information regarding the immigration status, lawful or unlawful, of an alien in the United States." Sections 1373(a) and (b) are to the same effect, expressly prohibiting any federal, state or local law from inhibiting communication with INS officials. And to comply with these congressional directions, the federal Law Enforcement Support Center was created "to respond to inquiries around the clock." Br. 8.

In the face of this rather remarkable congressional invitation for cooperative state law enforcement, respondent tries several tacks in seeking to divine preemptive intent in this express congressional embrace of state enforcement. First, respondent suggests that because Arizona candidly expressed dissatisfaction with the extent of federal enforcement efforts, S.B. 1070 and its direction that state officials utilize Section 1373(c) whenever "practicable" "is not cooperation; it is confrontation." Br. 46. But it cannot be that a State that genuinely believes that the federal government should do more to enforce federal law loses its ability to do everything in its reserved power to facilitate such enforcement if it has the temerity to criticize the federal efforts. Beyond that, it is not at all clear how taking the maximum "practicable" advantage of a federal system expressly provided by Congress is confrontational.

Respondent suggests that the federal government must "take the lead in fashioning enforcement priorities and techniques," and that following that lead "is the very definition of cooperation." Br. 46. It is no accident that respondent offers no citation to

a dictionary that actually defines cooperation in this "very" strange way. While this domineering arrangement might reflect an efficient relationship between dance partners, it is an odd notion of cooperation between sovereigns. In any event, Congress has taken the lead in fashioning enforcement "techniques" and has invited States to take advantage of one such technique—the 1373(c) process. Section 2(B) authorizes the precise inquiries that Section 1373(c) envisions and fully comports with Congress' definition of cooperation, which is surely the relevant one.

As for the federal government's enforcement priorities, Section 2(B) poses no obstacle. To the extent a state law enforcement inquiry brings an unlawful alien to the federal government's attention, it in no way forces federal officials to take any particular action. It simply ensures that the federal government has a fuller range of potential candidates on which to bring its enforcement priorities to bear. If the federal government launched an initiative focusing on large scale corporate fraud or major bank robbers, state officials presumably would not be regarded as confrontational or even uncooperative if they sought to hand over small-scale robbers of federal banks or reported those engaged in relatively modest frauds. Federal officials could decide whether the cases fit their enforcement profile or not. Of course, some in Congress or the national electorate might not look kindly on federal prosecutors declining to prosecute clear violations of federal law brought to their attention by state officials. But, a desire to avoid

such accountability to Congress and the citizenry can hardly be a basis for preemption.

Respondent's next effort to evade Congress' obvious intention to facilitate, not preempt, the kind of state enforcement inquiries authorized by Section 2(B) is to suggest that there is something fundamentally different when the requests are the product of a state statute, rather than *ad hoc* decisions by individual state officials. But there is no support in the statute or anything else for the respondent's rather unusual preference for *ad hoc*, as opposed to more systematic, government action. The savings clause in 8 U.S.C. § 1357(g)(10) is another significant indication of Congress' interest in avoiding any impediment to state law enforcement's ability to communicate with federal officials and cooperate "in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." Nothing in that provision remotely suggests it saves *ad hoc* efforts by individual officers but not "state immigration *legislation*." Br. 48 (emphasis in original). To be sure, Section 1357(g)(10) does not specifically mention legislation, but that simply reflects that federal law is appropriately indifferent to whether a State leaves the decision to contact the federal authorities up to individual officers or addresses the issue by statute. There is absolutely no support for the quizzical notion that Section 1357(g)(10) intrudes on such matters of internal state policy.

Finally, respondent contends (Br. 50-51) that 8 U.S.C. § 1373(c) "does not expressly or impliedly authorize" Section 2(B). But with all due respect, that argument gets the constitutional inquiry

exactly backwards. The question is not whether a federal statute *authorizes* Section 2(B), but whether any federal statute *preempts* it. Respondent has the burden of identifying such a preemptive statute, and has failed to do so. A State, unlike a federal agency, does not require a federal statute to authorize its actions. Indeed, Section 1373(c) reflects this basic dichotomy. Not only does it not purport to authorize any state action, it is not directed to States at all. It is directed instead to the relevant federal agency and instructs it in no uncertain terms to respond to requests from state and local officials "by providing the requested verification or status information." There is simply no trick of alchemy that can convert that express direction for federal authorities to facilitate and respond to state requests into a basis for preemption of those same requests.

B. Section 6

The United States has relatively little to say about why Section 6 of S.B. 1070, Ariz. Rev. Stat. § 13-3883, is preempted (Br. 53-55), presumably because it is a straightforward authorization for state officers to enforce federal law. It authorizes a state officer to make a warrantless arrest when there is probable cause to believe that the arrestee has committed an offense that makes him removable pursuant to the federal immigration laws. It is thus a classic, and perfectly valid, expression of the State of Arizona's sovereign authority to assist in enforcing federal law. Moreover, federal law expressly preserves state officers' ability to assist in the "apprehension" and

"detention" of "aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B).[5]

Respondent does not defend the Ninth Circuit's holding that state officers cannot enforce federal removability requirements if those requirements are civil rather than criminal in nature. Nor does it defend the Ninth Circuit's holding that Section 6 is preempted by 8 U.S.C. § 1252c.[6] OLC correctly rejected those views a decade ago. JA 267 (opining that the INA does not "preclude [state officers] from arresting aliens on the basis of civil deportability" and that § 1252c "does not preempt state arrest authority in any respect").

Instead, respondent revives the argument that Section 6 interferes with its enforcement priorities as to removals, which are "within the Secretary's plenary discretion." Br. 54. But Section 6, like the other provisions at issue here, does nothing to interfere with federal removal decisions or priorities. Section 6 authorizes, but does not require, state officers to *arrest* an individual who has committed a removable offense. State officers do not decide whether the individual will be removed, but such arrests will ensure that federal authorities can act

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[5] Respondent misstates petitioners' position when it claims (Br. 53) that "[petitioners] ultimately recognize" that Section 1357(g)(10) limits the States' inherent arrest authority. A savings clause is not the place to look for limits on state authority. The whole point of Section 1357(g)(10) is that nothing in Section 1357(g) should be construed to limit state authority.

[6] Nor does respondent defend the Ninth Circuit's misguided reliance on foreign criticism to buttress its preemption ruling. *See* Pet. Br. 57-59.

on their own priorities. The ultimate removal decision remains squarely with federal authorities.

Respondent argues (Br. 54) that Section 6 risks the arrest of some removable aliens who the executive has already decided not to remove, and of some aliens who are not in fact removable. But as petitioners emphasized in their opening brief (at 38, 41, 49), this is a facial challenge, and respondent does not contend that Section 6 would raise such issues "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, 745 (1987)). Tellingly, respondent cites neither *Washington State Grange* nor *Salerno* anywhere in its brief. Section 6 should not be facially invalidated when it undisputedly would have numerous constitutional applications.[7]

III. SECTION 3 PARALLELS FEDERAL ALIEN REGISTRATION REQUIREMENTS.

Section 3 of S.B. 1070, Ariz. Rev. Stat. § 13-1509, sets forth state law penalties for violations of the federal laws requiring aliens to register and carry registration documents. *See* 8 U.S.C. §§ 1304(e) and 1306(a). The maximum penalties for a second or subsequent violation of Section 3 are the same as the maximum penalties in Section 1304(e), which in turn are less than the maximum penalties in Section 1306(a). The States' inherent power to enforce federal law includes the power to authorize parallel

[7] The fact that this is a facial challenge also disposes of respondent's argument (Br. 54-55) that it may be difficult for some state officers to determine whether some aliens have committed removable offenses.

enforcement of federal requirements. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

Hines v. Davidowitz, 312 U.S. 52 (1941), does not help respondent's argument that federal law occupies the field of immigration registration. The *Hines* Court struck down Pennsylvania's Alien Registration Act, not because federal law occupied the field, but because "under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. Indeed, when this Court enumerates the three principal forms of federal preemption—express, field, and obstacle—it frequently cites *Hines* as the exemplar of obstacle preemption. *See, e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699 (1984). Moreover, in light of the *Hines* Court's ambivalence about different formulations of the preemption inquiry, 312 U.S. at 67, and its effort to ground its decision in the circumstances of the particular case, *id.*, it is a mistake to extrapolate from *Hines* to this very different statute that consciously parallels federal requirements.[8]

The State of Arizona obviously was aware of *Hines* when it enacted Section 3 and purposefully crafted it to avoid any conflict with federal law. The

[8] Respondent also invokes a footnote in *Pennsylvania v. Nelson* to the effect that "Congress manifestly did not desire concurrent state action," 350 U.S. 497, 504 n.21 (1956). *See* Br. 27, 29 n.16. But the Court was referring to concurrent state regulation of sedition. *Nelson*, unlike *Hines*, was a field-preemption case, but the relevant field was sedition, not alien registration. 350 U.S. at 504 ("Congress has intended to occupy the field of sedition.").

Pennsylvania law in *Hines*, by contrast, pre-dated the federal Alien Registration Act, 332 U.S. at 60, and thus not surprisingly conflicted with it, *see* Pet. Br. 52-53 (detailing differences between Pennsylvania and federal law). Section 3, by contrast, clearly parallels federal law. An alien violates Section 3 only by violating the federal registration and carry laws. And the maximum penalty for a violation of Section 3 is no greater than the maximum penalty for a federal-law violation. Section 3 is not preempted by federal law because it merely "follow[s] the federal direction." *Plyler*, 457 U.S. at 219 n.19.

Respondent claims (Br. 32 n.20) that Section 3 is "harsher" than federal law because Section 3 violators are ineligible for probation. But surely preemption does not turn on probation-eligibility. In all events, the lack of a probation option reflects the relatively minor penalties imposed by state law. The maximum penalties under Section 3 are a $100 fine and (for a second or subsequent offense) 30 days in jail. The federal failure-to-register penalties are much stiffer. *See* 8 U.S.C. § 1306(a) ($1,000 fine and six months imprisonment).

IV. SECTION 5(C) REGULATES WORK BY ILLEGAL ALIENS, WHICH FEDERAL LAW DOES NOT REGULATE.

Section 5(C) of S.B. 1070, Ariz. Rev. Stat. § 13-2928, prohibits aliens who are "unlawfully present" and "unauthorized" from knowingly working or applying for work in Arizona. Section 5(C) regulates in an area of traditional state authority. *See DeCanas*, 424 U.S. at 356 ("States possess broad authority under their police powers to regulate the

employment relationship to protect workers within the State."); *see also Whiting*, 131 S. Ct. at 1974. Therefore, the presumption against preemption "applies with particular force" to Section 5(C). *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

In the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a *et seq.* (IRCA), Congress made it unlawful for employers to hire unauthorized alien workers. *See* 8 U.S.C. § 1324a(a). IRCA expressly preempts state laws "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens." *Id.* § 1324a(h)(2). But IRCA did not address the employee or supply-side of the equation in either its general prohibitions or its noticeably limited preemption clause. Thus, despite an express preemption provision, respondent's argument remains an implied preemption argument in an area of traditional state concern.

Respondent asserts (Br. 36) that "IRCA leaves no room for the imposition of state criminal liability on individual aliens." But that assertion is neither supported nor sustainable. IRCA did not preempt the field, as both the limited reach of its express preemption provision and the holdings of this Court in *Whiting* on both implied and express preemption make crystal clear. By failing to address the employee side of the equation, Congress left the law in the same state as to employees as it was for both employees and employers pre-IRCA.

Respondent quibbles that Congress did not leave the employee side of the relationship completely unregulated, but criminalized document fraud by aliens seeking work, *see* Br. 36 (citing 18 U.S.C.

§ 1546(b)). But respondent does not argue that Congress' prohibition on document fraud preempts or immunizes efforts to solicit unlawful employment that do not rely on document fraud. Moreover, the fact that Congress did address one particular form of employee misconduct only makes the fact that IRCA expressly preempts only state laws addressed to employers all the more telling.

Nor is there any tension between Section 5(C) and the grace periods provided for an employer's "good-faith compliance with verification requirements." *See* Br. 40. Those grace periods ensure that employers that inadvertently employ illegal workers during the time necessary to ascertain their status are not punished. But the employer in that context has done nothing wrong. The worker, by contrast, has already done something wrong by applying for or engaging in unlawful employment during the grace period (and presumably disguising his work status from an employer that diligently verified it).

Lacking any textual basis for a preemption argument, respondent resorts to legislative history, but that effort (Br. 37 & n.23) is strained. If anything can be gleaned from the few cited snippets from the early 1970's—thirteen years before IRCA's enactment—it is that Congress simply decided that it would not be worthwhile for the federal government to impose federal criminal sanctions on employees.[9] The legislative history does not show

[9] *Illegal Aliens*: *Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. Pt. 1, 46 (1971) (statement of Charles Gordon, General Counsel, INS); *id.* 89-90 (statement of Joseph Sureck, Regional Counsel, INS) (witness was "not so concerned to add a further penalty upon the employee[s]"

that Congress believed unauthorized workers should be immune from any such sanctions. Nor could legislative history provide such immunity in any event.

Respondent argues that, "[a]lthough Congress may have considered aliens' employment a largely local matter at the time of *DeCanas*," IRCA "reverses" the presumption against preemption. Br. 39. Not so. The employment relationship remains an area of traditional state authority, as this Court held in *DeCanas*, 424 U.S. at 356. To the extent IRCA addressed employers and not employees, it left the law as to employees precisely where it was at the time of *DeCanas* when Justice Brennan had little difficulty concluding for a unanimous Court that regulation of the employment relationship was a core state concern and "within the mainstream of such police power regulation." *Id.* The bottom line is that Section 5(C) does not come within IRCA's express preemption provision, and, like the statutes in *DeCanas* and *Whiting*, is not impliedly preempted when it "operates 'only with respect to individuals whom the Federal Government has already declared

because they were "already subject to prosecution" or deportation for illegal entry); *id.* Pt. 2, 491 (statement of Howard L. Adams, Dist. Dir., INS) (witness "trying to be realistic about this," noting that "[o]ur court dockets are crowded, we impose other penalties, and ... I just doubt the ability of the court to handle the cases of this type of criminal process"); *id.* 548-549 (statement of James Boyd, U.S. Magistrate, El Paso, TX) (noting as "a matter of pragmatism" that "you are going to have trouble getting [criminal sanctions] enforced"); 118 Cong. Rec. H30155 (daily ed. Sept. 12, 1972) (Rep. Rodino) (expressing reluctance to add additional criminal penalties where existing ones were "ineffective deterrent").

cannot work in this country.'" *Whiting*, 131 S. Ct. at 1981 (quoting *DeCanas*, 424 U.S. at 363). As with the other provisions of S.B. 1070, Arizona's effort to go "the extra mile in ensuring that its law closely tracks [federal law] in all material respects" defeats respondent's extraordinary effort to have it condemned as impliedly preempted on its face. *Id.*

CONCLUSION

For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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