No. 11-182

IN THE
Supreme Court of the United States

STATE OF ARIZONA, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Immigration Justice Center (NIJC) and the American Immigration Lawyers Association (AILA) are two immigration-focused organizations with substantial interest in this Court's resolution of this case, both as advocates for immigrants generally and as representatives of practitioners in the field.

NIJC is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC provides immigration assistance and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and immigrant families and other non-citizens facing removal and family separation. Through partnerships with the nation's leading law firms, NIJC provides such direct legal services to more than 10,000 non-citizens annually. NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through advocacy for policy reform, impact litigation, and public education.

AILA is a national organization comprised of more than 11,000 lawyers in the field of immigration law throughout the United States. AILA's objectives

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

are to advance the administration of law pertaining to immigration, nationality, and naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in representative capacity in immigration, nationality, and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court, often on a *pro bono* basis. In this capacity, many of AILA's constituent lawyer-members represent foreign nationals who will be significantly affected by this case.

Because these organizations have been providing immigration services in the trenches for years, they have collectively gained significant practical experience in the workings of this complex area of law. As a result, they are uniquely positioned to speak, from a practical perspective, to how Arizona's reach into immigration enforcement in fact frustrates Congress' carefully balanced and prioritized immigration procedures and policies.

SUMMARY OF ARGUMENT

The Arizona statute at issue here, 2010 Ariz. S.B. 1070, is premised on a crude oversimplification of federal immigration laws which recognizes neither the competing interests that Congress has balanced in enacting those laws nor the complexity of Congress' scheme. Arizona apparently believes that

alienage is evident to the naked eye; that "unlawful presence" is a fact which can be simply determined; and (premised on these assumptions) that it knows how to enforce the immigration laws better than the federal government which has had that task for two centuries. To the contrary, this statute – so ill-designed that it could only be enforced brutishly and with haphazard suffering – aptly illustrates why the Constitution places immigration in the hands of the national government.

By Constitutional and statutory design, a State may not enforce an immigration statute in a manner that frustrates federal immigration goals; and it may only enforce federal immigration laws in cooperation with the federal government. S.B. 1070 violates both principles by creating a state immigration enforcement regime which will result in the immigration-related arrest and detention of citizens and noncitizens alike who would not be otherwise arrested or detained under federal law and who are legally entitled to remain in the United States. This brief details the practical effects of Sections 2 and 6 of S.B. 1070 which conflict with and pose obstacles to the federal immigration scheme established by Congress.

In particular, S.B. 1070 directs state and local officers to conduct immigration-related arrests and detentions that conflict with federal law; to carry out immigration investigations and detentions premised on legal concepts that would not justify such investigation or detention under federal immigration law; and to commandeer federal resources in pursuit of the State's own immigration enforcement

priorities. S.B. 1070 contravenes the fundamental principle that "the responsibility for the character of [immigration] regulations, and for the manner of their execution, belongs solely to the national government." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. STATE AND LOCAL OFFICIALS' INVOLVEMENT IN IMMIGRATION ENFORCEMENT IS RIGHTLY SUBJECT TO STRICT FEDERAL OVERSIGHT.

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976); *accord Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2010); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); U.S. Const. Art. I, § 8, cl. 4. Indeed, the apprehension, detention and removal of noncitizens who are in violation of federal immigration law lies near the core of the exclusive federal power. *See, e.g.*, *United States ex. rel Turner v. Williams*, 194 U.S. 279, 289-90 (1904) ("Repeated decisions of this Court have determined that Congress has the power . . . to prescribe the terms and conditions on which [aliens] may come in . . . and to commit the enforcement of such conditions and regulations to executive officers."); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("In the United

States, [the power to set the conditions of admission and presence in the United States] is vest in the national government, to which the Constitution has committed the entire control of international relations."); *Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belong to the government of the United States . . . cannot be granted away or restrained on behalf of any one."). And Congress has certainly exercised that power—it has "established a 'comprehensive federal statutory scheme for regulation of immigration naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (quoting *De Canas*, 424 U.S. at 353, 359).

To be sure, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power." *De Canas*, 424 U.S. at 355. But "whatever power a state may have" to enact laws that touch upon immigration, those laws are "subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). These principles leave little room for independent state action, and any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal immigration regime is preempted. *Hines*, 312 U.S. at 67.

II. SECTION 2(B) OF S.B. 1070 IS INCOMPATIBLE WITH FEDERAL LAW.

Section 2(B) of S.B. 1070 provides that upon a police officer's "reasonable suspicion" that a person stopped, detained, or arrested is "an alien and is unlawfully present," the officer must make "a reasonable attempt . . . when practicable, to determine the immigration status of that person." S.B. 1070 § 2(B) (emphasis added). And "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Id.*

As the Ninth Circuit recognized, the plain language of Section 2(B) requires Arizona police officers "to verify – with the federal government – the immigration status of *all* arrestees before they are released," *United States v. Arizona,* 641 F.3d 339, 347 (9th Cir. 2011), regardless of the offense for which they were arrested and regardless of whether there is any reason to suspect that they are noncitizens, entered the country without inspection, or are otherwise out of status.

In other words, even if an arrestee would otherwise be entitled to be released – for example, because the police lacked probable cause for the arrest or because the individual had posted bail – Section 2(B) mandates that the person remain in detention until the "person's immigration status" can be "determined." S.B. 1070, §2(B).

Section 2(B) also establishes a presumption that an individual is not unlawfully present if he possesses a valid Arizona driver license; a valid

Arizona "nonoperating identification license"; a valid form of tribal identification; or "if the entity requires proof of legal presence in the United States, any valid United States federal, state or local government identification." *Id.*

A. Section 2(B) Conflicts With 8 U.S.C. § 1252c Because It Mandates Immigration Enforcement Procedures Precluded By Federal Law.

Congress provided a limited immigration power to non-federal officers to arrest and detain a noncitizen unlawfully in the United States. The power is specified in 8 U.S.C. § 1252c(a), which provides that State and local law enforcement officers may "arrest and detain an alien . . . illegally present in the United States" who has been convicted of a felony and either left the country or been deported "***but only after*** State or local law enforcement officials obtain appropriate confirmation" from the federal immigration authorities of that individual's status. *Id.* (emphasis added).[2] Because Section 1252c's power is premised on specific Congressional goals, and because S.B.

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[2] Section 1252c's sponsor, Representative John Doolittle of California, emphasized that, while it was intended to untie State officials hands, it was intended to cover only those "situations in which the state or local officer encounters criminal aliens within his routine duties" and has received "appropriate confirmation from the INS of the illegal status of the individual." 142 Cong. Reg. 4619 (1996) (Statement of Rep. Doolittle). As a result, "[o]nly confirmed criminal aliens are at risk of being taken into custody." *Id.*

1070's detention provision interferes with these goals, S.B. 1070 is preempted.

S.B. 1070 conflicts with this Congressional scheme in two main ways. First, S.B. 1070 requires State officers to keep persons in detention for the purpose of *obtaining* confirmation of their immigration status. But Section 1252c allows State officers to detain for immigration reasons "***only after***" the noncitizens' immigration status is confirmed. Second, S.B. 1070 allows detention of ***any alien*** believed to be unlawfully present. But Section 1252c limits arrest authority to a ***subset of those aliens*** who are present in the United States after a deportation or departure after a felony conviction. These opposing provisions create a clear conflict between the state statute and the federal immigration law.

That conflict matters. There are good reasons why Congress specifically limited state and local immigration-detention authority to the clearly and relatively easily identifiable subset of noncitizens who are not only detainable or removable, but who have previously been convicted of a felony and are amenable to felony prosecution under 8 U.S.C. § 1326 for illegal reentry.

First, the federal immigration scheme represents a complex balance of interests meant to address a variety of concerns. While one interest is plainly the removal of persons unlawfully present, others include promoting family unity, providing a means by which United States employers may hire necessary foreign labor in a variety of skilled and

unskilled positions, facilitating the immigration of immigrant entrepreneurs and investors, and providing asylum to victims of persecution. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (providing family preference visas for the spouses, parents, and children of U.S. citizens); 8 U.S.C. § 1153(a) (providing family preference visas for children and spouses of lawful permanent residents); 8 U.S.C. § 1153(b) (allocating visas for employment-based immigrants including certain multinational executives); 8 U.S.C. § 1153(b)(5) (establishing visas for immigrants who invest in the U.S. economy); 8 U.S.C. § 1158 (affording opportunity to apply for asylum). Indeed, Congress had this very balance in mind when it specifically defined unlawful presence so as to accommodate these varied interests. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I)-(V) (providing that a noncitizen's period of unlawful presence shall not include any time in which he or she is a minor, has a bona fide asylum application pending, is the beneficiary of family unity protection, is a battered woman or child, or is a victim of a severe form of human trafficking).

Congress determined that the balance of these many interests is best accomplished by placing immigration enforcement in the hands of the Attorney General, while allowing State and local officials to supplement federal efforts in a specific class of cases in which they are certain about a noncitizen's immigration status and criminal liability *before* detention. As a practical matter, that balance ensures, for example, that people can get to work on time without being harassed for documentation

about their immigration or citizenship statuses based on how they look or what language they speak, that trafficking victims are not dissuaded by state detentions from working with federal law enforcement, and that victims of persecution and abuse elsewhere are not subject to the humiliation of unjustified detention in the county which offers them a safe haven.

Second, the complexity of federal immigration regulations makes it unlikely that State law enforcement officers (who are not experts in federal immigration law) will be able quickly to reach reliable conclusions concerning a noncitizen's immigration status. Indeed, that is why Congress decided to require training in federal immigration law before allowing State officers to perform "immigration officer" functions. 8 U.S.C. §1357(g)(1)-(2) (requiring states who seek to have officers function as "an immigration officer" for "investigation, apprehension, or detention of aliens" to certify that the particular state officers or employees carrying out those functions "have received adequate training regarding the enforcement of relevant Federal immigration laws"). Congress reasonably decided to limit State officers' immigration-related detention authority to clear and specific cases in which they follow federal direction, and to reserve broader detention authority for federal officers whose training and supervision equip them to apply the law consistent with Congressional objectives.

Finally, Congress has decided, pursuant to domestic policy and foreign affairs considerations, to

mandate the custody of only a small subset of noncitizens subject to removal proceedings. For instance, those convicted of aggravated felonies or who have been involved in terrorist activities must be taken into custody. 8 U.S.C. § 1226(c)(1). For all other noncitizens, Congress has provided for bond hearings, supervised release, and in some cases, even work authorization,[3] reflecting Congress' desire to limit immigration-related detentions to individuals who pose a serious threat to public safety. *See* 8 U.S.C. § 1226(a). This prioritization also helps prevent the premature or unjustified disruption of family unity and respects due process. *Demore v. Kim*, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring) ("[D]ue process requires individualized procedures to ensure there is . . . sufficient justification to detain [the individual] pending a more formal hearing."). Arizona's mandatory detention under Section (2)(B) of all arrestees while their immigration status is determined conflicts with and undermines this federal prioritization.

B. Section 2(B) Also Conflicts With And Is An Obstacle To 8 U.S.C. § 1357(g).

In addition to the carefully defined State power to arrest and detain articulated in Section 1252c, Congress also provided that State officers could carry out other federal "immigration officer" functions in certain circumstances. In 8 U.S.C. § 1357(a)–(f),

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[3] *See* 8 U.S.C. § 1226(a) (regarding release of detained noncitizens); *Matter of Patel,* 15 I. & N. Dec. 666 (BIA 1976) (noting that once it is determined a noncitizen does not present a danger to the community or any bail risk, then no bond should be required).

Congress defined the powers of federal "immigration officers and employees," including the power to interrogate, arrest without warrant, investigate, arrest, search, and detain. In Subsection (g), Congress detailed the circumstances in which *State* officers and employees might perform those *federal* "immigration officer functions." 8 U.S.C. § 1357(g). Those circumstances, as the Court of Appeals explained, require significant federal supervision and oversight: Congress required a written agreement with the Attorney General, specific authorization for the particular State officer, assurances of adequate training in federal immigration laws, and state officer subjection to the "direction and supervision of the Attorney General," among other prerequisites. 8 U.S.C. § 1357(g).[4] The Court of Appeals correctly concluded that the explicit Congressional mandate "forecloses any argument that state or local officers can enforce federal immigration law as directed by a mandatory state law." 641 F.3d at 349.

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[4] To be sure, Congress has repeatedly noted that it encourages state and local cooperation with the federal enforcement efforts, and it certainly allows and even requires some information-sharing. *See* 8 U.S.C. § 1357(g)(10); 8 U.S.C. § 1373 (INS must respond to state/local inquiries), 8 U.S.C. §1623 (no higher education benefits), 8 U.S.C. § 1624 (no general cash public assistance), 8 U.S.C. § 1644 (no prohibitions on information sharing). But all of these provisions are in the context of furthering the balance of interests relating to immigration issues that Congress has reached, and all of them are in the context of cooperation with federal officials. None of them envisions a 50-state crazy-quilt of state enforcement statutes based on state-chosen subsets of those interests, regardless of Federal priorities.

Section 2(B) conflicts with this provision because it authorizes—indeed, mandates—the performance of a federal immigration officer's functions, such as investigation and detention, by state officers *without* meeting the specific federal requirements set forth in Section 1357(g) and *without* the necessary federal supervision to ensure that federal policy is implemented. The importance of that federal oversight was emphasized by the sponsors of Section 1357, who explained that while the law recognized the valuable cooperative role that state officials could play, it also ensured that federal policy would remain paramount by "requiring ongoing Federal supervision of [state] efforts so that everything will be conducted under the watch of the INS and the Attorney General in conformity with Federal Standards." 142 Cong. Rec. at 5372 (1996) (Statement of Rep. Cox).

C. Section 2(B) Conflicts With Federal Immigration Law Because It Premises Immigration Investigation and Detention on Concepts Which Would Not Justify Investigation and Detention Under Federal Immigration Law.

Section 2(B) requires state officers to investigate and verify the immigration status of anyone they stop, for any reason, where "reasonable suspicion exists that the person is an alien and unlawfully present in the United States." But this statute far exceeds the authority given to federal immigration officers and will necessarily result in detentions that would not be justified under federal law. Such

detentions frustrate the accomplishment of Congress' objectives.

1. A "Reasonable Suspicion" That Someone Is An "Alien" Is Not One State Officers Can Reliably Reach In An Ordinary Police Interaction.

Section 2(B) is premised on the idea that police officers can easily identify whether a person is a U.S. citizen or not in a routine police contact. However, a person's citizenship or alienage status is not a characteristic apparent to the naked eye.

Clearly, race, ethnic appearance, and language are not reliable indicators of alienage. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886, (1975) ("Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens."); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc) (discussing "[t]he likelihood that in an area in which the majority – or even a substantial part – of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien").

Naked-eye appraisal of alienage is illusory. Indeed, even trained federal immigration officials frequently err in assessing citizenship or alienage based on appearance. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1599 & n.185 (2010) (noting that

citizens and lawfully present noncitizens "have been subject to immigration enforcement actions, including prolonged stops, searches, interrogations, arrest, detention, and (in rare cases) even removal"); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606 (2011) (empirical study documenting that in 2010 more than 4,000 U.S. citizens were detained or deported as aliens, with more than 20,000 U.S. citizens detained or deported as aliens since 2003).

Nor is determining a person's citizenship necessarily a straightforward inquiry. As we discuss more fully below, United States citizens are not required to carry proof of their citizenship. *See infra* at pp. 23-24. Moreover, citizenship determinations are often legally complex. "Citizenship law is probably the area of law where statutes remain relevant the longest, because even the most ancient and long-repealed statutes can still apply in a current case." Robert Mautino, *Acquisition of Citizenship*, 6 Bender's Immigr. Bull. 3 (2001). Similarly, U.S. treaties and international covenants – which change over time – are often dispositive as to a person's citizenship status.

Even if birth certificates were always easily or quickly obtainable (and they are not), they would not be dispositive. Not every person born in the United States is a U. S. citizen.[5] Conversely, many people

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[5] *Compare In re Baiz,* 135 U.S. 403, 424 (1890) (children of consuls are citizens) with 8 C.F.R. § 103.1(a) ("A person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is not

born abroad are U.S. citizens, and have been since the country's founding. *Cf.* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 ("[T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens."); *see generally* 8 U.S.C. § 1401.[6]

For these reasons, even an exceptionally diligent law enforcement officer would be hard-pressed to reliably judge whether an assertion of citizenship is true or false, especially in the absence of documents which U.S. citizens are neither required, nor accustomed, to carry on their persons. The more likely scenario is that State officers will form suspicions based on language, race, and ethnicity, which are not reliable indicators of whether a person is a citizen or alien. And the result will be a host of wrongful or erroneous detentions, premised on inappropriate factors.

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subject to the jurisdiction of the United States. That person is not a United States citizen under the Fourteenth Amendment to the Constitution.").

[6] Acquisition of citizenship at birth depends on numerous factors, such as each parent's citizenship (8 U.S.C. § 1401(c)-(e), (g)-(h)); the duration and timing of their residence in the United States (*id.* § 1401(d)-(e), (g)-(h)); their marital status at the time of the individual's birth (*id.* § 1409); the year in which the person was born (*id.* § 1401(h)); the place where the person was born (*id.* § 1401(c)-(e), (g)-(h)); and in some situations, even the date on which a child born out of wedlock was legitimated (*id.* § 1409). None of these can be ascertained or observed by police in any contact or that could give rise, constitutionally, to any suspicion of alienage.

2. "Unlawful Presence" is A Complex Legal Determination Not Susceptible to "Reasonable Suspicion" Developed During A Routine Police Stop.

In addition to alienage, Section 2(B) relies on a State police officer's reasonable suspicion of "unlawful presence" as the premise for immigration-related arrests and detentions. The Arizona statute does not define "unlawful presence." Legal presence may appear to be a straightforward, binary question, which, if not outwardly evident, is at least easily ascertainable as a factual matter. The reality is far more complex, and does not fit neatly onto a bumper sticker.[7]

Notwithstanding Arizona's claim that it seeks only to apply the federal statute, it has premised its local enforcement on a federal immigration concept – "unlawfully present" – that is wrenched from the context in which it appears in the federal scheme. As a technical legal matter, "unlawful presence" is a concept of inadmissibility applied in narrow circumstances peculiar to immigration application processing, in relation to past unlawful presence; it is thus rarely if ever proffered as a charge of removability. *See* 8 U.S.C. §§ 1182(a)(9)(B), (C) (defining "unlawful presence" in relation to applications for admission or adjustment of status). The federal scheme does not use the concept of

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[7] *Cf., e.g.*, Lawrence Downes, *What Part of "Illegal" Don't You Understand?* NY Times, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/opinion/28sun4.html, *last visited* March 24, 2012.

"unlawful presence" to apply either to those who have entered surreptitiously or to those who have overstayed their visas. *Cf.* 8 U.S.C. §§ 1182(a)(6)(A), 1227(a)(1)(C)(i).[8]

Moreover, the federal statute includes a host of provisions governing construction of the concept of "unlawful presence." In particular, the federal statute *excludes* from its scope significant categories of persons, including minors, certain asylum applicants, victims of domestic abuse and human trafficking, and beneficiaries protected under the family unity program established by Section 301 of the Immigration Act of 1990. *See* 8 U.S.C. § 1182(a)(9)(B)(iii).[9] The Arizona provision appears

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[8] Unlawful presence is defined in 8 U.S.C. § 1182(a)(9)(B)(ii), but only "[f]or purposes of [that] paragraph" *Id.*

[9] In addition, some people subject to the unlawful presence inadmissibility periods may qualify for and receive a waiver of inadmissibility or permission to reenter the United States notwithstanding inadmissibility. *See* 8 U.S.C. §§ 1182(a)(9)(B)(v), (a)(9)(C)(ii) and (iii). Moreover, federal law has designated a number of circumstances as constituting a "period of stay authorized by the Attorney General," *see* 8 U.S.C. § 1182(a)(9)(B)(ii), which are excluded from and thus can not constitute "unlawful presence" under § 1182(a)(9). *See* Memorandum from Donald Neufeld, Lori Scialabba, Pearl Chang, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 6, 2009) *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF. There are 13 categories thus designated, including "Aliens with Properly Filed Pending Applications for Adjustment of Status," "Nonimmigrants With Pending Requests for Extension of Status or Change of Status," "Aliens With Pending Applications For Temporary Protected Status," and "Aliens Granted Stay of

to recognize no such exceptions, and employs the term to cover individuals who are not "unlawfully present" under federal law.

To the extent that Arizona's reference to "unlawful presence" is intended as a proxy for identifying the stereotypical "illegal immigrant" who surreptitiously crosses the border (by land or sea), the federal scheme characterizes such persons as "present without admission" under 8 U.S.C. § 1182(a)(6)(A)(i), rather than as "unlawfully present." Federal law provides for significant exceptions to that category as well, such as certain battered women and children. 8 U.S.C. § 1182(a)(6)(A)(ii); Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, tit. III, § 301(c)(2). The Arizona statute fails to exclude such victims from its reach.

Additionally, many noncitizens who lack present lawful status are nonetheless entitled to remain in the United States pending adjudication of an application or petition. For instance, a non-citizen who entered the United States as a tourist, with permission to remain for six months, would fall out of lawful status after that point. *See* 8 U.S.C. § 1101(a)(15)(B), 22 C.F.R. § 41.31, 8 C.F.R. § 214.1(b)(2). But if she were to apply for asylum (perhaps due to a change in conditions in her homeland), and then remain in the United States past the six-month mark, she would be permitted to remain in the United States until her asylum

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Removal." Aliens who fit these categories might be "unlawfully present," but not subject to removal.

application was adjudicated. *See* 8 U.S.C. §§ 1158, 1187(b), 1225, 1231(a)(1)(B). This is so not because she has obtained some lawful status, but because Congress has granted her the right to seek protection in this country. 8 U.S.C. § 1158(a)(1).[10] Congress is entitled to make that, and other, policy judgments.[11]

Further, even those noncitizens who are the subject of removal proceedings have the right to remain in the United States, despite lack of legal status, until an administratively final removal order is entered. 8 U.S.C. § 1252(b)(3)(B). Congress has defined when removal orders become final in the immigration system. 8 U.S.C. § 1101(a)(47)(B). And it has, with some enumerated exceptions, given immigration courts the sole and exclusive jurisdiction for determining removability and inadmissibility, pursuant to extensive procedural due process. 8 U.S.C. § 1229a(a)(3); *Colmenar v.*

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[10] This opportunity is both an expression of the nation's principles and a fulfillment of national treaty obligations. See 8 U.S.C. § 1231(b)(3); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see generally INS v. Stevic*, 467 U.S. 407, 416-17 (1984).

[11] Other policy judgments are also embedded in the statutes and regulations. For instance, Congress prevents federal officials from "mak[ing] an adverse determination of admissibility or deportability… using information furnished solely by a spouse or parent who has battered the alien or subjected the alien to extreme cruelty." 8 U.S.C. § 1367(a)(1)(A). For enforcement actions occurring at domestic violence shelters, rape crisis centers, and domestic violence courts, Congress requires extra procedural protections to ensure that these provisions are enforced. 8 U.S.C. § 1229(e). Arizona's provisions include no similar protections.

INS, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.").

To the extent that the State of Arizona seeks to force an individual's departure from the state before the federal government authorizes their removal from the country, Arizona's enforcement scheme undermines the federal immigration regime and enforcement. Arizona claims for itself the right of "attrition through enforcement," S.B. 1070 § 1, on pain of criminal liability, even before the immigration courts have finished adjudication of an applicant's case. This conflicts with the federal scheme, and, if it worked at all, would do so by shifting the burden of federal laws and treaty obligations onto other states. To the extent that noncitizens felt compelled to move to other states, this would impose additional costs both on the noncitizen and their counsel, and to the immigration system, which would have to track changes of address, 8 U.S.C. § 1305, and consider resulting change of venue requests, *see Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).

That conflict is exacerbated by S.B. 1070 §2(H), which authorizes money damages against those who enforce the federal immigration laws to "less than the full extent permitted by federal law." Section 2(B), unless enjoined, will surely lead to investigations and detentions of persons who would *not* be investigated or detained under federal law, and ought not be investigated or detained at all. In the name of assisting federal officials, Arizona has

enacted a statutory scheme that undercuts the federal regime and that stands as an obstacle to the goals of federal law.

D. The Presumption that Individuals Are Not "Unlawfully Present" if They Have Certain Documents Does Not Resolve the Conflict Created By Section 2(B).

Section 2(B) purports to minimize the risk of erroneous arrests and detentions by creating a presumption that, if an individual can produce certain forms of identification, he is not unlawfully present in the United States. The statute lists as acceptable identification a valid Arizona driver's license; a valid Arizona "nonoperating identification license"; a valid form of tribal identification; and, "if the entity requires proof of legal presence in the United States, any valid United States federal, state or local government identification." S.B. 1070 § 2(B). This presumption does not resolve the law's incompatibility with federal law, however, because it is both overinclusive and underinclusive of those lawfully present under federal law.

Many noncitizens are legally permitted to remain in the United States without possessing any of the documents on the prescribed list. Permanent residents whose green cards have expired, for example, are not deportable under 8 U.S.C. § 1227. See Application Process for Replacing Forms I-551 Without An Expiration Date, 72 Fed. Reg. 46,922, 46,924 (Aug. 22, 2007). Victims of domestic violence would commonly lack a form of documentation specified by the State or Arizona as providing lawful

status, but many such individuals would nonetheless be lawfully present in the United States. 8 U.S.C. § 1182(a)(6)(A)(ii); (a)(9)(B)(iii)(IV).

In addition, as explained above, noncitizens with pending applications for particular immigration statuses may be present in the United States without being required or permitted to obtain any of the specified forms of identification. Asylum applicants cannot be deported until their claims are finally adjudicated. *See* 8 U.S.C. §§ 1158, 1187(b), 1225, 1231. Other noncitizens with pending applications before the immigration courts or the Department of Homeland Security – such as applicants for Cancellation of Removal, 8 U.S.C. § 1229b(b), Adjustment of Status, 8 U.S.C. § 1255(a), or Temporary Protected Status, 8 U.S.C. § 1254a – are permitted to remain in the United States while those applications are considered. But unless and until those applications are granted, the individual may not have any of the prescribed forms of identification – despite being lawfully present. *See* 8 U.S.C. §§ 1229b, 1254a. And even where noncitizens may apply for employment authorization (which may in turn be used to obtain other forms of government-issued identification), they are not required to do so, and the substantial cost (currently $380) may preclude many from doing so until they have saved up the money. *See* 8 C.F.R. § 274a.12(c)(8), (10); Instructions at http://www.uscis.gov/files/form/i-765instr.pdf.

The Arizona presumption also fails to protect United States citizens, who may not have—and are

not required to carry[12]—any of the documents on the prescribed list. For example, Washington and New Mexico do not require proof of "lawful presence" to obtain a driver's license. *See* Acceptable Documents – Non-Commercial Drivers' Licenses and Identification Cards, *available at* http://www.mvd.newmexico.gov/SiteCollectionDocuments/assets/Acceptable%20Documents%20Chart%207Mar12.pdf (New Mexico); http://www.dol.wa.gov/driverslicense/18over.html (Washington). Thus, under S.B. 1070, a U.S. citizen resident of New Mexico who is stopped, detained or arrested while in Arizona to buy gas cannot show his license and go on his way. Instead, he may well be unable to provide the documents Arizona requires him to produce to entitle him to the presumption that he is lawfully present in the United States.

The presumption not only fails to protect those (including U.S. citizens) who should be free of immigration-related arrest and detention, but also extends protection to some whom the law would purportedly aim to catch. Under federal and state law, persons may well possess the listed documents even though they are not permitted to remain in the

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[12] It is a point of honor in this country that U.S. citizens are not legally required to obtain or carry identification of any kind, let alone proof of citizenship. But Arizona essentially creates such a *de facto* system by denying a presumption of citizenship if a citizen dares to travel without identification Arizona requires. It is worth noting that for natural born citizens who are stopped, federal immigration officials will have *no* immigration records and will be unable to verify their citizenship status, leaving citizens in detention until they can prove their citizenship.

United States. For example, a permanent resident is eligible to obtain an Arizona driver's license, *See* Arizona Motor Vehicle Division, Identification Requirements, http://mvd.azdot.gov/mvd/formsandpub/viewPDF.asp?lngProductKey=1410&lngFormInfoKey=1410. If that individual were subsequently deported due to a felony, and illegally reentered the country, he would be precisely the person targeted by 8 U.S.C. § 1252c; yet because the person would possess the government-issued identification that the Arizona statute presumes corresponds to legal status, he would presumptively escape arrest.

Thus, the Arizona presumption that individuals are lawfully present in the United States if they possess specified documents is both underinclusive and overinclusive with respect to those individuals who, under federal law, are permitted to remain in the United States. It therefore exacerbates, rather than resolves the statute's more fundamental conflicts with federal immigration law.

III. SECTION 6 OF S.B. 1070 IS INCOMPATIBLE WITH FEDERAL IMMIGRATION LAW.

Separate and apart from the arrest-and-detention authority set forth in Section 2(B), Section 6 of S.B. 1070 also conflicts with federal law because it authorizes state and local officers to make warrantless arrests that are not permitted under federal law.

Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." S.B. 1070, § 6(A)(5). That provision is inconsistent with and substantially broader in scope than federal law in several respects.

First, Section 6 conflicts with federal law because it purports to give Arizona officers substantially broader arrest powers than federal immigration officials possess. A federal officer may make warrantless arrests only when an immigration law is broken in his presence, or in exigent circumstances in which the alien is likely to escape before a warrant may be obtained. *See* 8 U.S.C. § 1357(a). If Arizona were to comply with the requirements of §1357(g) by entering into a written agreement with the Attorney General, which would entail training in the enforcement of federal immigrations laws, Arizona officers would be entitled to the same powers as federal immigration officers. But here, Arizona not only seeks to bypass those substantial requirements, but also to seize substantially broader immigration-enforcement authority than Congress has granted to the federal officers who are primarily charged with immigration enforcement.

Second, as with Section 2(B), Section 6's standard for an Arizona warrantless arrest stands in sharp conflict with Congress' direction in 8 U.S.C § 1252c that State officers may arrest only criminally-convicted aliens whose immigration status has already been verified by federal authorities.

Third, Arizona permits arrests based, not on a conviction, but on probable cause to believe that a removable offense occurred. Under federal law, Congress generally requires that where criminal activity is the predicate for removal, the noncitizen must have been already *convicted*. Were the rule otherwise, removal proceedings would turn into mini-criminal trials, in which the government, in order to establish removability, would first need to prove criminal conduct. *Cf. United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (L. Hand, J.); *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (BIA 1996) (noting "the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence"). In heartland immigration cases, where Congress requires conviction as a predicate to making an arrest relating to removability, Arizona's "probable cause" standard is in conflict.

Fourth, asking arresting officers to ascertain potential removability under the "probable cause" standard, is absurd in this context.[13] Whether an individual is removable will generally depend on citizenship, immigration status, any past offenses, date of admission, and other facts which are entirely distinct from the nature of the offense he is alleged to have committed. As this Court has recognized, and as *Amici* can attest, "[i]mmigration law can be

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[13] *Beck v. Ohio*, 379 U.S. 89 (1964) (defining probable cause as whether, at moment of warrantless arrest, officer had "information … sufficient to warrant a prudent man in believing that the arrestee had committed or was committing an offense").

complex, and it is a legal specialty of its own." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1438; *see also id.* at 1488 (Alito, J., concurring). Yet the Arizona statute requires state officers, largely unschooled in federal immigration law, to determine on the fly whether there might be probable cause to believe an individual is "removable" under federal law. And while his status is sorted out, the noncitizen will remain detained, subject to the slow churn of the immigration courts' docket. *See http://trac.syr.edu/phptools/immigration/court_backlog/* (showing that in Arizona, removal proceedings in 2011 took an average of more than 400 days to complete).

Fifth, a state or local official untrained in immigration law would have to apply a federal law which does not specify whether any particular state crimes qualify as removable offenses. *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Instead, the federal consequences of state criminal conduct can be determined only by breaking down each crime into its component elements, and then comparing the state offense for which the noncitizen was convicted to the closest federal analogue contained in the INA. *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007). This requires comparing the section 1182(a) and 1227(a) offenses to other *federal* statutes, as many of the crimes enumerated in these sections actually borrow other substantive definitions. *See e.g.*, 8 U.S.C. § 1227(a)(2)(C) (referencing 18 U.S.C. § 921 to define "firearm" and "destructive device"); *id.* § 1227(a)(2)(E) (referencing 18 U.S.C. § 16 to define "crimes of violence"); *id.* §§

1182(a)(2)(A)(i)(II) and 1227(a)(2)(B) (referencing the definition of "controlled substance" set forth in 21 U.S.C. § 802).

Determining if a noncitizen's conviction is a removable offense requires a "legal test" that cannot be made during a routine police stop. The analysis requires application of a categorical test comparing the elements of the convicted offense with the immigration statute. *See Duenas-Alvarez*, 549 at 193. The categorical approach – as a legal test – is not the sort of observable characteristic that a police officer could competently rely on when determining whether to make an arrest. The application of the categorical test may involve comparing, pursuant to a "modified" categorical approach, "the indictment or information and jury instructions in [an] earlier case," "the terms of a plea agreement, the transcript of colloquy between judge and defendant, or some comparable judicial record of information about the factual basis for the plea" with the immigration statute. *Id.* at 187 (quotation marks omitted). That information, of course, will not be available when a non-citizen is merely suspected of having "committed" a removable offense but has not been convicted of anything. Even the modified categorical analysis may still not resolve whether a conviction is a removable offense. *See, e.g., Nijhawan v. Holder*, 557 U.S. 29 (2009) (applying a "circumstance-specific" approach to establish the amount of the loss for purposes of 8 U.S.C. § 1101(a)(43)(M)(i)). And even where it can be established that a certain crime *could* render an individual removable, the removability inquiry often depends upon the

confluence of certain other factors, including the date of the crime, the severity of the sentence imposed, and whether the noncitizen was "admitted" or is considered to be seeking admission. *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)(I) (conviction for crime of moral turpitude only triggers removability if crime committed within 5 years of admission or 10 years after conferral of lawful permanent resident status); *id.* § 1227(a)(2)(B)(i) (controlled substance conviction after admission confers removability).

As this analysis suggests, the "removable offense" determination is difficult for the most experienced of immigration specialists. In far more ideal conditions—*i.e.* with the benefit of time, a complete record, adversarial proceedings, and substantive legal training—immigration specialists sometimes reach inconsistent results regarding the immigration significance of substantially similar offenses. *Compare Matter of Torres-Varela*, 23 I. & N. Dec. 78, 86 (BIA 2001) (multiple convictions for driving under the influence of alcohol ("DUI") do not constitute "crime involving moral turpitude"), *with Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1196 (BIA 1999) (aggravated DUI is a "crime involving moral turpitude"); *compare also Matter of Solon*, 24 I. & N. Dec. 239, 246 (BIA 2007) (under New York law, third degree assault is a crime of moral turpitude), *with Matter of Sejas*, 24 I. & N. Dec. 236, 238 (BIA 2007) (under Virginia law, convictions for domestic assault and battery are not crimes of moral turpitude).

For all these reasons, it is unreasonable to expect a police officer to accurately determine whether there is probable cause to believe that a person has

committed a public offense that makes him removable. That is precisely why Congress did not intend for laws like S.B. 1070 to counteract and frustrate the federal immigration scheme.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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