

No. 09-115

IN THE
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, ET AL., *Petitioners*,
v.
MICHAEL B. WHITING et al., *Respondents*.

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

**AMICUS CURIAE BRIEF OF THE AMERICAN
CENTER FOR LAW AND JUSTICE IN
SUPPORT OF RESPONDENTS**

JOHN P. TUSKEY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757)226-2489

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. FEDERALISM CONCERNS SHOULD PLAY A SIGNIFICANT ROLE IN EVALUATING PREEMPTION CLAIMS AGAINST STATE LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PERTAINING TO ILLEGAL ALIENS	3
A. The Legal Arizona Workers Act Is A Valid Exercise of Arizona’s Police Powers, and the Assumption Against Preemption Should Apply	5
B. The Federalist Presumption Against Preemption Should Control Where A Few States Shoulder A Disproportionate Share of the Social and Economic Costs of Illegal Immigration, And The Federal Government Either Cannot Or Will Not Address The Problem	8
II. STATE IMMIGRATION LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PROMOTE NATIONAL IMMIGRATION POLICY AND SHOULD NOT BE PREEMPTED	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985)	4
<i>Chicanos Por La Causa, Inc. v. Candelaria</i> , 558 F.3d 856 (9th Cir. 2009)	7
<i>City of New York v. United States</i> , 179 F.3d 29 (2d Cir. 1999)	15
<i>DeCanas v. Bica</i> , 424 U.S. 351 (1976)	4, 5, 15
<i>Egelhoff v. Egelhoff (ex. rel Breiner)</i> , 532 U.S. 141 (2001)	4, 7
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985)	14
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	3, 4
<i>Hisquierdo v. Hisquierdo</i> , 439 U.S. 572 (1979)	17
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	8
<i>Ky. Ass'n of Health Plans, Inc. v. Miller</i> , 538 U.S. 329 (2003)	8
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	7
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	14, 15
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	7
<i>Rush Prudential HMO, Inc. v. Moran</i> , 536 U.S. 355 (2002)	8
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	3
<i>United States v. Contreras-Diaz</i> , 575 F.2d 740 (9th Cir. 1978)	16
<i>United States v. Soriano-Jarquin</i> , 492 F.3d 495 (4th Cir. 2007)	9
<i>United States v. Vasquez-Alvarez</i> , 176 F.3d 1294 (10th Cir. 1999)	16

<i>United States v. Yazell</i> , 382 U.S. 341, 352 (1966) ...	17
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	8

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 1.....	16
U.S. Const. art. VI, cl. 2.....	4

STATUTES

8 U.S.C. § 1103	16
8 U.S.C. § 1324a	2, 5, 7, 14
8 U.S.C. § 1357	9, 15, 16
8 U.S.C. § 1373	15, 16
8 U.S.C. § 1644	15
Ariz. Rev. Stat. § 23-211	6
Ariz. Rev. Stat. § 23-212	6

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Arizona State University, The Morrison Institute for Public Policy, <i>Illegal Immigration: Perceptions and Realities</i> (2010).....	11-12
Ed Barnes, <i>Cost of Illegal Immigration Rising Rapidly in Arizona</i> , FOXNews.com (May 17, 2010), http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidly-new-study-says/	12
Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, for the Attorney Gen., Re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002).....	17
Steven A. Camarota, <i>Center for Immigration Studies on the New Arizona Immigration Law, SB1070</i> ,	

Center for Immigration Studies (Apr. 2010), http://www.cis.org/announcement/AZ-immigration-SB1070	13-14
Steven A. Camarota & Jessica Vaughan, <i>Immigration and Crime: Assessing a Conflicted Issue</i> , Center for Immigration Studies (Nov. 2009), http://www.cis.org/ImmigrantCrime	13
Susan Carroll, <i>Feds Moving to Dismiss Some Deportation Cases</i> , HOUSTON CHRONICLE, (Aug. 24, 2010), http://www.chron.com/dispatch/story.mpl/metropolitan/7169978.html	9
Erwin Chemerinsky, <i>Empowering States When It Matters: A Different Approach to Preemption</i> , 69 Brook. L. Rev. 1313 (2004)	4
Congressional Budget Office, <i>The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments</i> (2007).....	10-11
Federation for American Immigration Reform, <i>The Costs of Illegal Immigration to Arizonans: Executive Summary</i> (2004)	12-13
<i>Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest</i> , FoxNews.com, http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests/	13
S. Candice Hoke, <i>Preemption Pathologies and Civic Republican Values</i> , 71 B.U. L. Rev. 685 (1991) .	4-5
Kris W. Kobach, <i>The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests</i> , 69 Alb. L. Rev. 179 (2005).....	17
Kris W. Kobach, <i>Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal</i>	

<i>Immigration</i> , 22 GEO. IMMIGR. L.J. 459 (2008)...	16
State Laws Related to Immigrants and Immigration in 2008, Immigration Policy Project (Dec. 18, 2008)	6
State Law Related to Immigrants and Immigration in 2009, Immigration Policy Project (Dec. 1, 2009)	6
MGT of America, Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties (2002).....	11
Michael McConnell, <i>Federalism: Evaluating the Founders' Design</i> , 54 U. Chi. L. Rev. 1484 (1987).....	3
20 Op. O.L.C. 26, 29, 37 (1996)	17
Robert Rector & Christine Kim, <i>The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer</i> , The Heritage Foundation (2007), http://s3. amazonaws.com/thf_media/2007/pdf/sr14.pdf	11
Peter H. Schuck, <i>Immigration Law and Policy: Taking Immigration Federalism Seriously</i> , 2007 U. Chi. Legal F. 57 (2007)	4, 10
Randall G. Shelley Jr., <i>If You Want Something Done Right . . . : Chicanos por la Causa v. Napolitano and the Return of Federalism to Immigration Law</i> , 43 Akron L. Rev. 603, 603–04 (2010)	10
Juliet P. Stumpf, <i>States of Confusion: The Rise of State and Local Power Over Immigration</i> , 86 N.C.L. Rev. 1557 (2008).....	15
U.S. Gov't Accountability Office, GAO-05-646R, Information on Certain Illegal Aliens Arrested in the United States (2005)	13
Jessica Vaughan, <i>ICE Chief Morton to Field: See No Illegal Aliens</i> , Center for Immigration Studies,	

(Aug. 19, 2010), http://cis.org/vaughan/see-no-illegal-aliens	9-10
Ernest Young, <i>Federal Preemption and State Autonomy</i> , in Richard Epstein & Michael Greve, <i>Federal Preemption: States' Powers, National Interests</i> (AEI 2007).....	7-8

INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before this Court as counsel for parties or for amici.

The proper resolution of this case is a matter of concern to the ACLJ because of its dedication to constitutional principles of federalism.

SUMMARY OF THE ARGUMENT

Although this preemption case presents narrow statutory interpretation issues—requiring the Court to divine Congress’s intent in the absence of clear statutory terms—it implicates fundamental principles of federalism for two reasons. First, illegal immigration is a serious problem, which uniquely and profoundly affects the states, particularly border states like Arizona. The federal government has proved inadequate to the tasks of enforcing current immigration laws and building consensus toward

* The parties have filed with the Court their written consent to the filing of all briefs amicus curiae in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

needed immigration reform. The issue has been mired in partisan politics, and the states have been left to cope on their own.

Second, for the past quarter century, but especially since September 11, 2001, Congress has welcomed, and in fact highly depends on, state and local assistance in enforcing federal immigration laws. Whatever Congress may have intended by the savings clause of 8 U.S.C. § 1324a(h)(2)—and that is not clear—national immigration policy now favors concurrent federal/state authority to enforce federal immigration laws. State laws, like the Legal Arizona Workers Act, that mirror federal immigration provisions and incorporate federal standards promote national policy and should not be preempted. No national interest is furthered by sustaining preemption claims such as those in this case, where small discrepancies exist between state and federal enforcement provisions. Conversely, needless damage to state sovereignty, and to state and local efforts to combat the ills associated with illegal immigration, will result.

ARGUMENT

I. FEDERALISM CONCERNS SHOULD PLAY A SIGNIFICANT ROLE IN EVALUATING PREEMPTION CLAIMS AGAINST STATE LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PERTAINING TO ILLEGAL ALIENS.

The Constitution is structured so that “States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (*citing* Michael McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987)).

The Founders established the federalist system “to ensure the protection of ‘our fundamental

liberties.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, confers “a decided advantage” to the federal government, the power to preempt state laws is “*an extraordinary power . . . [that the Court] assume[s] Congress does not exercise lightly.*” *Gregory*, 501 U.S. at 460 (emphasis added). To sum up in Justice Breyer’s words, “the true test of federalist principles” comes in preemption cases. *Egelhoff v. Egelhoff (ex. rel Breiner)*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Federalism concerns are at their apex when federal law intrudes in an area of traditional state sovereignty. *Gregory*, 501 U.S. at 457–58. This principle extends to cases in which preemption is asserted against a state’s exercise of its police powers to address severe problems unique to that state. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). In the realm of illegal immigration control, preempting state laws that mirror federal standards but provide slightly different enforcement mechanisms eviscerates the states’ ability to “make choices that are responsive to their residents’ desires, to experiment, and to advance liberty and freedom within their boundaries.” Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1326 (2004) (“a broad vision of inferred preemption invalidates beneficial state laws.”); *see also* Peter H. Schuck, *Immigration Law and Policy: Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007); S. Candice Hoke, *Preemption*

Pathologies and Civic Republican Values, 71 B.U. L. Rev. 685, 697 (1991).

A. The Legal Arizona Workers Act Is A Valid Exercise of Arizona's Police Powers, and the Assumption Against Preemption Should Apply.

The authority to bar employment of illegal aliens “is certainly” within Arizona’s police power. *DeCanas*, 424 U.S. at 356. Thus, when Congress passed the Immigration Reform Control Act provisions making it unlawful for employers “to hire, recruit or refer for a fee . . . an alien knowing the alien is an unauthorized alien” or “to continue to employ . . . an unauthorized alien” 8 U.S.C. § 1324a(a)(1)–(2),¹ it trenched upon an area of traditional state sovereignty. Pursuant to its power under the Supremacy Clause, Congress included an express preemption clause but carved out an area of continuing state authority over the employment of illegal aliens. Section 1324a(h)(2) allows states to sanction “through licensing and similar laws” employers who employ unauthorized aliens.

Accordingly, with the savings clause of §1324a(h)(2) in mind, Arizona in 2007 passed the Legal Arizona Workers Act (“LAWA”). LAWA is one of numerous state laws that attempt to provide state

¹ An unauthorized alien is one who is either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General. 8 U.S.C. § 1324a(h)(3).

enforcement of federal immigration laws that are otherwise ineffectually enforced.²

LAWA authorizes Arizona courts to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz. Rev. Stat. § 23-212 (2010).³ The Act defines business licenses to include “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.” *Id.* § 23-211(9)(a).

LAWA grants the state authority to enforce essentially federal law provisions. The Act incorporates the federal definition of “unauthorized alien,” *see id.* § 23-211(11), and requires Arizona courts to adopt the federal government’s determination of the employee’s lawful status. *Id.* § 23-212(H).

Additionally, LAWA requires Arizona employers to use E-Verify, a federal Internet database that maintains current records on aliens’ work

² In 2008, thirteen states enacted nineteen laws regulating the employment of immigrants. State Laws Related to Immigrants and Immigration in 2008, Immigration Policy Project (Dec. 18, 2008). In 2009, twelve states enacted twenty one laws regulating the employment of immigrants. State Law Related to Immigrants and Immigration in 2009, Immigration Policy Project (Dec. 1, 2009).

³ The Act provides further that any person may submit a complaint to the Arizona Attorney General or a county attorney. Ariz. Rev. Stat. Ann. § 23-212(B). An appropriate county attorney may bring an action against the employer in superior court. *Id.* § 23-212(C), (D).

authorization status. LAWA imposes no sanctions, however, for employers who refuse. The federal government encourages, but does not mandate, use of E-Verify. 8 U.S.C. § 1324a(d).

As is true in most close preemption cases, Congress's intent with respect to the scope of the savings clause in §1324a(h)(2) is murky. Congress did not specifically define the phrase "licensing and similar laws," and the legislative history sheds little light on the issue raised in this case. *See Chicanos Por La Causa, Inc. v. Candelaria*, 558 F.3d 856, 864 (9th Cir. 2009).

It is accordingly imperative that the Court faithfully apply the federalist principle of presumption against preemption in interpreting the savings clause in §1324a(h)(2). "In all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" the Court assumes 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." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Egelhoff v. Egelhoff*, 532 U.S. 141, 157 (2001) (Breyer, J., dissenting) ("the true test of federalist principle[s]" comes in preemption cases in which statutory terms are unclear). *See generally* Ernest Young, *Federal Preemption and State Autonomy*, in Richard Epstein & Michael Greve, *Federal Preemption: States' Powers, National Interests* 262, 262 (AEI 2007) (arguing that where Congressional

intent is unclear, the presumption against preemption should always control.)

That presumption extends to savings clauses within express preemption provisions. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002), *overruled on other grounds, Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003).

B. The Federalist Presumption Against Preemption Should Control Where A Few States Shoulder A Disproportionate Share of the Social and Economic Costs of Illegal Immigration, And The Federal Government Either Cannot Or Will Not Address The Problem.

Congress has plenary power over immigration, and sets federal immigration policy. *INS v. Chadha*, 462 U.S. 919, 940 (1983). The Executive Branch’s enforcement policy does not trump Congressional objectives because where Congress exercises plenary power to prescribe laws, the Executive must follow Congress’s direction. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696–99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6)).

Notwithstanding Congress’s immigration policy objectives, the Executive Branch’s lassitude toward immigration law enforcement is well-documented. For example, the Department of Homeland Security is now “reviewing thousands of pending immigration cases and moving to dismiss those filed against

suspected illegal immigrants who have no serious criminal records” Susan Carroll, *Feds Moving to Dismiss Some Deportation Cases*, Houston Chronicle, Aug. 24, 2010, <http://www.chron.com/dispatch/story.mpl/metropolitan/7169978.html>.

Additionally, although Congress intended state and local officers to have an expanded role in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the “287(g)” program,⁴ the Administration has limited both federal and local officers’ authority to arrest illegal aliens who are discovered during traffic stops. The new ICE policy seeks to curtail an officer’s authority under the 287(g) program: “Immigration officers shall not issue a detainer unless an LEA [law enforcement agency] has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e. roadside or *Terry* stops) but not arrested.” Jessica Vaughan, *ICE Chief Morton to Field: See No Illegal Aliens*, Center for Immigration Studies, (Aug. 19, 2010), <http://cis.org/vaughan/see-no-illegal-aliens> (*quoting*

⁴ See 8 U.S.C. § 1357(g)(1) (2006). Local law enforcement officers have inherent authority to arrest and detain illegal aliens when ICE confirms that the aliens are unlawfully present. See *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007). Additionally, Congress expanded the role that state and local officers can have in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the “287(g)” program. See 8 U.S.C. § 1357(g)(1) (2006).

ICE Draft Policy, *available at* <http://www.cis.org/articles/2010/ice-draft-080110.pdf>). Vaughan summed up the new policy: “all illegal aliens who violate traffic laws will get a free pass from ICE, unless they also happen to have committed other ‘real’ crimes.” *Id.*

Federal enforcement of Section 1324 provisions barring the employment of illegal aliens is similarly anemic. Randall G. Shelley Jr., *If You Want Something Done Right . . . : Chicanos por la Causa v. Napolitano and the Return of Federalism to Immigration Law*, 43 Akron L. Rev. 603, 603–04 (2010).

In addition to lax enforcement of immigration policy, the federal government refuses to secure the border with Mexico, and it is the border states that bear much of the social and economic costs resulting from the federal government’s failure to effectively address illegal immigration.

As one scholar pointed out, most tax revenues generated by illegal immigrants flow to the federal government, while almost all the costs, including those borne by locally funded social services and illegal immigrant crime, accrue to the states. Peter H. Schuck, *Immigration Law and Policy: Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007).

A 2001 report by United States/Mexico Border Counties Coalition showed that law enforcement activity involving illegal immigrants in four states (California, Arizona, New Mexico, and Texas) cost some county governments on the border a combined total of \$108 million in 1999. Congressional Budget

Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* 9 (2007) [hereinafter CBO Report], *available at* <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6>

Immigration.pdf. Furthermore, a report that focused primarily on the “Costs of Uncompensated Care in Southwest Border Counties” and surveying seventeen border counties in California, Arizona, New Mexico, and Texas determined that nearly \$190 million of “uncompensated [medical] costs” was due to “undocumented immigrants.” MGT of America, *Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties* 30, *available at* <http://www.bordercounties.org/vertical/Sites/%7BB4A0F1FF-7823-4C95-8D7A-F5E400063C73%7D/uploads/%7BFAC57FA3-B310-4418-B2E7-B68A89976DC1%7D.PDF>. A 2007 Heritage Foundation study showed that while low-skill immigrant households received over \$30,000 per household in 2004 in immediate government benefits, the same households only paid \$10,573 in taxes. Robert Rector & Christine Kim, *The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer*, The Heritage Foundation (2007), http://s3.amazonaws.com/thf_media/2007/pdf/sr14.pdf. These households, which were used as a surrogate for illegal immigrant households, received nearly three dollars in benefits for each dollar in taxes paid. *Id.*

The Office of Immigration Statistics estimated that in 2009, 460,000 illegal aliens resided in Arizona. Arizona State University, The Morrison Institute for Public Policy, *Illegal Immigration: Perceptions and Realities* 2 (2010), *available at*

<http://morrisoninstitute.asu.edu/publications-reports/2010-illegal-immigration-perceptions-and-realities1>. In a 2004 study, the Federation for American Immigration Reform estimated that Arizona's illegal immigrant population was costing the state's taxpayers approximately \$1.3 billion per year in education, medical care, and incarceration alone, Federation for American Immigration Reform, *The Costs of Illegal Immigration to Arizonans: Executive Summary 1* (2004) [hereinafter Federation for American Immigration Reform], *available at* <http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101>, or approximately \$700 annually per Arizona taxpaying household. *Id.* More recent figures by FAIR in 2009 suggest that the annual cost of illegal immigration in Arizona has risen to at least \$2.7 billion annually. Ed Barnes, *Cost of Illegal Immigration Rising Rapidly in Arizona*, FOXNews.com (May 17, 2010), <http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidlty-new-study-says/>. This cost includes \$1.6 billion for educating children of illegal aliens, \$694.8 million in health care services for illegal aliens, and \$339.7 million in law enforcement and court costs. *Id.*

In addition to these quantifiable costs, Arizona also incurs a number of non-quantifiable costs, including: preventing and enforcing crimes committed by illegal aliens; providing an array of services in Spanish interpretation and translation, especially in the health care, law enforcement, and judicial systems; tuition subsidies to illegal immigrants who enroll in Arizona's higher education institutions; increased insurance rates associated

with illegal immigration-related crimes; and lost earnings by U.S. citizens or legal residents. Federation for American Immigration Reform, at 4.

A study released by the Center for Immigration Studies, relying upon federal law enforcement data, showed that in 2004, 11.1% of Arizona's state prison population was undocumented or "illegal," compared to 7% of the overall state population that is illegal. Steven A. Camarota & Jessica Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, Center for Immigration Studies (Nov. 2009), <http://www.cis.org/ImmigrantCrime>. In 2005, a Government Accountability Office study showed that most arrests of illegal aliens occurred in Arizona, California, and Texas, the three largest border states. *Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest*, FoxNews.com, <http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests/> (last visited Oct. 20, 2010). Sampling a prison population of more than 55,000 illegal immigrants, the study found that 80% of the arrests occurred in those three states. *Id.* see also U.S. Gov't Accountability Office, GAO-05-646R, Information on Certain Illegal Aliens Arrested in the United States (2005), available at <http://www.gao.gov/htext/d05646r.html> (stating that Arizona was responsible for 8% of these arrests).

In Arizona's Maricopa County, the Attorney's Office has found that illegal aliens committed 22% of all felonies in the county, though illegal aliens comprise only 10% of Maricopa County's adult population. Steven A. Camarota, *Center for*

Immigration Studies on the New Arizona Immigration Law, SB1070, Center for Immigration Studies (Apr. 2010), <http://www.cis.org/announcement/AZ-immigration-SB1070>

This Court recognized in *Plyler v. Doe*, 457 U.S. 202 (1982), that “unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service.” *Id.* at 228 n.23. Also, the Court could not “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.* State sovereignty is most undermined when the states are left to “the mercy of the Federal Government,” and deprived of “their opportunities to experiment and serve as ‘laboratories.’” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 n.13 (1985) (Powell, J., dissenting). The border states are being left to the mercy of the federal government in the realm of illegal immigration. The federalist presumption against preemption is clearly warranted.

II. STATE IMMIGRATION LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PROMOTE NATIONAL IMMIGRATION POLICY AND SHOULD NOT BE PREEMPTED.

LAWA promotes federal policy against employers hiring unauthorized aliens. It does so within the scope of the savings clause of §1324a(h)(2). Where state laws regulating illegal aliens mirror federal

objectives and reinforce federal policy, preemption claims must fail. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *De Canas v. Bica*, 424 U.S. 351, 361 (1976).

Petitioner's cramped and unsubstantiated interpretation of the phrase "licensing and similar laws" does not further federal immigration policy. Rather, holding LAWA preempted would serve only to perpetuate a policy of ineffective enforcement, even though Congress has made clear that the federal government needs the states' assistance in enforcing the nation's immigration's laws. Federal immigration law has shifted its focus from "foreign affairs and national identity to a seemingly domestic issue, touching on central areas of state concern." Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C.L. Rev. 1557, 1595 (2008).

Congress has passed numerous acts illustrating the clear and manifest intent to welcome state involvement in immigration control. Congress has expressed its intent not to preempt state cooperation by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10) (2006)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§ 1373(a)-(b), 1644 (2006)),⁵ (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) simplifying the process for making such inquiries (Law Enforcement Support Center ("LESC")), (5)

⁵ See also *City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of law banning sanctuary policies).

deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1) (2006)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11) (2006)).

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

In 1996, Congress also enacted 8 U.S.C. § 1357(g)(1), which allowed state and local officers to be deputized as immigration agents. This congressionally-delegated authority is distinct from an officer’s inherent authority to inquire into immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 478 (2008). *See also United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *United States v. Contreras-Diaz*, 575 F.2d 740, 743-45 (9th Cir. 1978).

Congress has also used its spending power, U.S. Const. art. I, §8, cl. 1, to support cooperative immigration enforcement by appropriating federal funds for state and local governments that assist in enforcing immigration laws. 8 U.S.C. § 1103(a)(11).

Finally, the Executive Branch itself has encouraged concurrent immigration enforcement. In 1996, the Justice Department’s Office of Legal

Counsel (“OLC”) supported state and local enforcement of criminal INA provisions and also concluded that state and local officers could detain aliens for registration law violations. 20 Op. O.L.C. 26, 29, 37 (1996).

Since 2001, the Justice Department has entered warrants (“detainers”) for civil immigration violations into the National Crime Information Center database (“NCIC”), available nationally to state and local officers. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 191 (2005). In 2002, a revised OLC memo dropped the “criminal law enforcement only” limitation and analyzed the statutes and cases expressing and recognizing Congress’s intent to allow broad concurrent enforcement. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, for the Attorney Gen., Re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 5–8 (Apr. 3, 2002).

Where Congress legislates in fields of traditional state regulation, courts will not find federal preemption unless that was Congress’s clear and manifest purpose, or the state statute does “‘*major damage*’ to ‘*clear and substantial*’ federal interests” *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966) (emphasis added)).

LAWA does no damage to federal immigration policy. It is consistent with the federal government’s

policy of concurrent enforcement of federal immigration laws. Provided state enforcement laws track federal standards, minor discrepancies in enforcement mechanisms should not defeat the presumption against preemption warranted when states exercise their police power to address a problem of profound state concern.

CONCLUSION

Amicus respectfully requests this Court to affirm the judgment of Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN P. TUSKEY	JAY ALAN SEKULOW
LAURA B. HERNANDEZ	<i>Counsel of Record</i>
AMERICAN CENTER FOR	STUART J. ROTH
LAW & JUSTICE	COLBY M. MAY
1000 Regent University Dr.	AMERICAN CENTER FOR
Virginia Beach, VA 23464	LAW & JUSTICE
(757)226-2489	201 Maryland Ave. NE
	Washington, DC 20002
	(202) 546-8890
	sekulow@aclj.org

Attorneys for Amicus Curiae

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