No. 11-182

In the
# Supreme Court of the United States

ARIZONA, et al.,

*Petitioners*,

v.

UNITED STATES

*Respondent.*

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

## BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, INDIVIDUAL RIGHTS FOUNDATION, COMMITTEE FOR JUSTICE, CONGRESSMEN ED ROYCE, TED POE, AND TOM MCCLINTOCK, AND INDIANA SENATOR MIKE DELPH, IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

MANUEL S. KLAUSNER
Individual Rights Foundation
One Bunker Hill Building
601 West Fifth St., Suite 800
Los Angeles, CA 90071

JOHN C. EASTMAN
ANTHONY T. CASO
*Counsel of Record*
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

*Counsel for Amici Curiae*

## QUESTION PRESENTED

1. Does the President have the unilateral power to preempt State laws that are inconsistent with the President's immigration enforcement objectives but that are designed to assist with the enforcement of federal immigration laws adopted by Congress?

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## IDENTITY AND INTEREST OF AMICI CURIAE

The Center for Constitutional Jurisprudence[1] ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the nature of our federal system of government and the balance of powers between the national and state governments are at issue. The CCJ has previously appeared as *amicus curiae* before this Court in such cases involving questions of federalism, naturalization, and the respective powers of the national and state governments as *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and nonpartisan organization. The IRF is dedicated to supporting

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed with the clerk consents to the filing of amicus briefs in this matter.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

litigation involving civil rights, protection of speech and associational rights, and the core principles of free societies, and it participates in educating the public about the importance of personal liberty, limited government, and constitutional rights. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving significant constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, or speech or associational rights, or to improperly expand federal intrusion on the exercise of state authority to validly exercise their core power under the Constitution to protect the safety of their citizens -- all of which are fundamental components of individual rights in a free and diverse society.

The Committee for Justice is a nonprofit, nonpartisan organization dedicated to advancing the rule of law, promoting constitutionalist nominees to the federal judiciary, and educating government officials, the media and the American people about the proper role of judges and the dangers of judicial activism. Central to the rule of law is the system of federalism established by the United States Constitution, including the twin principles of enumerated federal powers and protection of state sovereignty. Both of these principles will be weakened if the decision below is allowed to stand.

Congressmen Ed Royce (CA-40), Ted Poe (TX-2), and Tom McClintock (CA-4) are members of Congress from Border States severely impacted by the under-enforcement by the Executive of immigration law that has been adopted by Congress. As former Chairman of the International Terrorism and Non-

proliferation Subcommittee, Representative Royce held field hearings on the Texas and California borders on 9/11 Commission concerns that border security had become an issue of national security. Representative Poe, a member of the House Judiciary Committee, is a former prosecutor and judge who has dealt with the impact of illegal immigration on his state and the nation. Representative McClintock, who serves on the Education and Labor Committee, has studied the impact of illegal immigration on employment. They join this brief to call the Court's attention to the way in which the claims by the Department of Justice below undermine the plenary power Congress has over immigration policy.

Indiana State Senator, Mike Delph, represents Indiana senate district 29. During the 2011 Indiana General Assembly Senator Delph authored SB 590 - Illegal Immigration Matters - a bill that addresses the illegal immigration issue in Indiana. SB 590 was signed into law on May 10, 2011.

## SUMMARY OF ARGUMENT

The United States has presented the startling and unsupported argument that the President has unilateral authority to preempt state enactments that may cause conflict with the President's enforcement priorities. In order to preserve the functions of our federalist system identified by this Court in *Bond v. United States*, 131 S.Ct. 2355 (2011), this claim of Presidential power to override sovereign police powers of state governments must be rejected. The States must be able to maintain the authority to enact laws designed to protect the public health, safety, and welfare of their citizens.

*Amici* advance three points in support of the State of Arizona. First, Congress, not the President, has plenary power over immigration policy. Congress alone is vested with the power to establish a uniform rule of naturalization.

Second, states have a broad right to protect the public health, safety and welfare of their citizens. The operative presumption of the Court is that the police powers of states should not be superseded by federal acts, unless *clearly* intended by Congress. There is a presumption against preemption when analyzing preemption challenges in an area of law that is traditionally occupied by the States.

Third, States have been forced to enact legislation to deal with the President's inaction in enforcing federal immigration policies.

## ARGUMENT

### I. Congress, Not the Executive, Has Plenary Power Over Immigration Policy

#### A. Congress alone is vested with the power to "establish [a] uniform Rule of Naturalization."

Congress alone is vested with the power to "establish [a] uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. This Court has consistently held that the Constitution assigns plenary power over immigration policy to Congress, not the President. Over a century ago, this Court declared, "over no conceivable subject is the legislative power *of Congress* more complete" than immigration. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (emphasis added). In *Kleindienst v. Man-*

*del*, 408 U.S. 753, 766 (1972), this Court specifically referred to the immigration powers of Congress as "plenary."

The power of exclusion of foreigners is an incident of sovereignty delegated by the Constitution to "the government of the United States, *through the action of the legislative department*." *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (emphasis added). "[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvin v. Press*, 347 U.S. 522, 531 (1954) (emphasis added).

In fact, this Court has made it clear that over "'no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.*, 214 U.S. at 339).

### B. Federal statutes will not supersede state Laws Unless Congress has made such intention clear.

The "fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nationall Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing Art. VI, cl. 2; *Gibbons* v. *Ogden,* 22 U.S. 1, 9 (1824)). Absent clearly expressed intent by Congress, however, "state law is not preempted." *Rice v. Santa Fe Elevator* Corp., 331 U.S. 218, 230 (1947). In areas of traditional state regulation, the assumption must be that a federal statute will not supersede state law, unless Congress

has made such intention clear. *See, id.* at 230; *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 449 (2005) (stating that the Supreme Court has a duty to accept a reading that disfavors preemption).

This Court has maintained a presumption against preemption when analyzing preemption challenges pertaining to an area of law traditionally occupied by the states. *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605, 611 (1925); *Allen-Bradley v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

This Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), is instructive on this point. That case involved a group of migrant farm workers who alleged that certain labor contractors were hiring undocumented workers in violation of a California statute. Respondents challenged the statute on the grounds that it amounted to regulation of immigration and was therefore preempted by federal law.

In a unanimous decision, this Court held that the federal Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, did not preempt the California statute because it was in harmony with federal regulation. *Id.* at 357-58. The Court further concluded that respondents failed to identify anything in the plain language of the INA, 8 U.S.C. § 1101 *et seq.*, or its legislative history, that warranted the conclusion that the INA was intended to preempt "harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *De Canas*, 424 U.S. at 357-58.

The Arizona statute at issue here is to the same effect. Arizona does not purport to make any policy

over who should be admitted or allowed to stay in this Country. Instead, the Arizona law expressly follows congressional policy—and indeed *mirrors* the provisions of the federal law. *See Plyler v. Doe*, 457 U.S. 202, 225 (1982). Arizona's law incorporates provisions from federal law and promotes compliance with those provisions. *See*, *e.g.*, ARIZ. REV. STAT. §§ 41-1724(B)-(C) (stating that "[t]he terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law;" and "this act shall be implemented in a manner consistent with federal laws regulating immigration").

Arizona's SB 1070 is therefore not a direct regulation of immigration, nor does it conflict with Congressional policy.

### C. It is Congress' intent that must be applied, not the intent of the Executive Branch.

Congress acknowledged important roles for State and local officials to play in the enforcement of federal immigration law. The Attorney General is to communicate with state officials regarding the immigration status of individuals, even if there is no agreement with the federal government for a formal cooperative enforcement program. 8 U.S.C. § 1357 (g)(10)(A). Additionally, Congress imposed a duty on immigration officials to "respond to an inquiry by a Federal, State or local government agency, seeking to verify or ascertain the citizenship or immigration status of an individual." 8 U.S.C. § 1373(c).

If Congress wanted to give federal immigration officers discretion as to whether to answer State and

local citizenship inquiries, it could have used the word "may" instead of "shall" in § 1357 (g)(1), pertaining to the discretion of federal agents to enter into written agreements regarding enforcement of immigration laws.

Congress' requirement that the federal government respond to state and local inquiries into immigration status, 8 U.S.C. § 1373(c), leaves states free to "cooperate with the Attorney General in identification, apprehension, detention, or removal of [illegal] aliens." 8 U.S.C. § 1357(g)(10)(B). It is clear from the text of § 1373(c) that Congress wanted states to help enforce its immigration policy.

The President has the same discretion in enforcing the provisions of the Immigration and Nationality Act as he does with enforcing other federal statutes, of course. But that discretion does not permit the President to override state laws that are consistent with a policy set down by Congress.

A claim of extensive Executive power or "global" enforcement discretion in the immigration arena that is contrary to the expressed policy of Congress is unsupported in this Court's precedents. Any discretion that has been afforded to the Executive itself derives from acts of Congress. *See*, *e.g.*, *Knauff v. Shaughnessy*, 338 U.S. 537, 540 (1950) (upholding a determination by the Attorney General acting pursuant to authority conferred by statute to bar entry on national security grounds to an individual immigrant); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (upholding determination by Board of Immigration Appeals acting pursuant to authority conferred by statute not to withhold deportation of an individual alien who faced possible political persecu-

tion when that alien had been involved with non-political crimes).

Thus, there is no basis for the claim that the President has the power to pursue a comprehensive and sweeping immigration scheme that runs counter to the statutory provisions already created by Congress. Although Congress has indeed vested the Executive branch with a considerable degree of discretion for purposes of enforcing the INA, this discretion has historically been limited to individual remedies in particular cases. *See*, *e.g.*, *Knauff*, 338 U.S. at 540; *Aguirre-Aguirre*, 526 U.S. at 431; *INS v. Chadha*, 462 U.S. 919, 923 (1983). Executive discretion simply is not sufficient for the President to override state laws that are consistent with the expressed policy of Congress.

### D. Even if the President has foreign policy powers sufficient to permit non-enforcement of Federal immigration law, such decisions must be made in a more formal manner than the President has done in this case.

The United States contends that the President's policy of non-enforcement is permitted by the President's powers in the realm of foreign affairs. Additionally, the United States asserts that an attempt by any state to assist in the enforcement of immigration statutes adopted by Congress would interfere with those powers and necessitate preemption.

Although United States' premise is correct—the President is the Nation's chief organ in the field of foreign affairs, *see*, *e.g.*, *United States v. Curtis-Wright Export Corp*., 299 U.S. 304, 319 (1936)—the

superstructure it attempts to erect on that premise pushes the authority well beyond the breaking point.

The President can negotiate a treaty that touches on a policy such as immigration, and once ratified by the Senate, that treaty has the force of law. U.S. Const. art. VI, cl. 2. However, until this happens, an un-ratified treaty does not preempt state law. Necessarily, then, informal diplomatic discussions cannot do so. Moreover, even a ratified treaty gives way to a subsequent act of Congress in an area within the legislative authority of Congress, particularly Congress' plenary power over immigration. *Chae Chan Ping*, 130 U.S. at 600.

*Medellin v. Texas*, 552 U.S. 491 (2008), is on point. There, the President sought to transform international obligations under a non-self-executing treaty into binding federal law that was operative against the states, without an act of Congress. Although this Court recognized that the President has an array of political and diplomatic means available to enforce international obligations, it held the ability to unilaterally convert a non-self-executing treaty into a self-executing one is not among them. The responsibility for "transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Medellin*, 552 U.S. at 525-26.

This Court emphasized that the President's authorization to represent the United States in an international context speaks only to his international responsibilities—it does not grant him the unilateral authority to create domestic law. *Id.* at 529.

What the Court held in *Medellin* is even more true here, because the United States is not relying on any treaty, but merely on a theory of the President's amorphous authority over foreign affairs and diplomacy. As *Medellin* makes clear, more than simply the President's say so would be required if such an interest could ever be sufficient to negate a state's attempt to assist with the enforcement of immigration laws that have been duly enacted by Congress.

Without the more formal process for creating domestic law that *Medellin* requires, state judges and officials must enforce federal law as it is written, and not as the President would like it to be. U.S. Const. art. VI, cl. 2 ("[T]he judges in every State shall be bound" by the Constitution, laws, and treaties of the United States); U.S. Const. art. VI, cl. 3 ("[A]ll executive officers…of the several States, shall be bound by Oath or Affirmation to support the Constitution"). Arizona has simply authorized its own officials to assist in that effort.

## II. States Have a Broad Right to Protect the Public Health, Safety and Welfare of Their Citizens

It is a mainstay of our federal system of government that, as James Madison himself observed, "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist, No. 45, pp. 292-93 (Madison) (Rossiter ed. 1961). While this Court has held that the States cannot add to or detract from Congress' immigration policy, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941), it has also held,

quite explicitly and forcefully, that the *Hines* rule does not apply to all state laws that happen to touch on immigration, *De Canas v. Bica,* 424 U.S. 351, 355 (1976). States retain their broad authority to exercise their police powers, and "the fact that aliens are the subject of a state statute does not alone render it a regulation of immigration." *Id.*

The 2010 Census estimates that there are over 10 million people residing unlawfully in the United States.[2] The large number of people entering the country illegally has forced Arizona and other States to enact their own legislation to protect the rights and safety of all their residents. In this case, Arizona enacted SB 1070 specifically to protect the residents of Arizona from violent attacks and other harms caused by unlawfully present aliens, and it did so by authorizing its own law enforcement officials to assist with the enforcement of federal immigration law.

Moreover, the Executive's under-enforcement of federal immigration laws puts unlawful immigrants themselves at serious risk as well. Nicolas Kanellos, HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: ANTHROPOLOGY 222 (1994). Without enforcement by the federal government, employers face no consequences for hiring illegal immigrants. These immigrants are often subjected to serious employment abuses and are kept in virtual slavery, but their illegal status keeps them from reporting these abuses. *Id*. *See also* Patrick Ettinger, IMAGINARY

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[2] *Illegal Immigrants Factor into 2010 Census Results, Congressional Makeup*, FoxNews.com, *available* at http://www.foxnews.com/politics/2010/12/21/illegal-immigrants-factor-census-results-congressional-makeup/

LINES: BORDER ENFORCEMENT AND THE ORIGINS OF UNDOCUMENTED IMMIGRATION 173-74 (2009) (describing the exploitation of illegal immigrants). Underenforcement thus creates an underclass by allowing unscrupulous employers to use an alien's immigration status as leverage to avoid federal and state health and safety laws. "Workplace injuries are particularly common among undocumented immigrant workers, whose status often makes them feel compelled to accept unsafe working conditions that others reject." Kanellos, *supra*, at 222.

The courts below correctly upheld a number of the provisions of SB 1070 that clearly fit within this police-power authority of the states, including portions of Section 2, ARIZ. REV. STAT. §§11-1051(A), (C)-(F), (G)-(L) (prohibiting local officials from interfering with enforcement of federal immigration law, requiring cooperation, and allowing citizen suits against violators); part of Section 5, ARIZ. REV. STAT. § 13-2928(A)-(B) (creating state-law crime of stopping to pick up day laborers, if doing so impedes traffic); Sections 7, 8 and 9, ARIZ. REV. STAT. §§ 23-212, 23-212.1, and 23-214 (prohibiting the knowing employment of illegal immigrants, and establishing requirements for checking eligibility); another portion of Sections 5 and Section 10, ARIZ. REV. STAT. §§ 13-2929, 28-3511 (creating state law crime for transporting or harboring illegal immigrations, and providing for the impounding of vehicles used in such transporting). But the provisions of SB 1070 enjoined by the courts below—a portion of Section 2, ARIZ. REV. STAT. § 11-1051(B) (requiring local law enforcement to verify immigration status upon reasonable suspicion); Section 3, ARIZ. REV. STAT. § 13-1509 (creating state law crime for failure to carry immigration papers as re-

quired by federal law); part of Section 5, ARIZ. REV. STAT. § 13-2928(C) (making it illegal for an illegal immigrant to solicit, apply for, or perform work); and Section 6, ARIZ. REV. STAT. § 13-3883(A)(5) (authorizing warrantless arrest where there is probable cause to believe the alien has committed a removable offense)—also involve a proper exercise of the state's police powers to deal with the collateral health, safety and welfare impacts of illegal immigration in the state. They are not direct regulations of immigration, and even if they were, because they do not deviate from the regulatory regime adopted by Congress, there is no conflict with Congressional policy and hence no pre-emption under *Hines*.

The *De Canas* Court upheld a state regulation over illegal alien employment as a necessary exercise of police powers to protect legal residents from depressed wages and job displacement even though it created harsher penalties than existed under federal law. It necessarily follows, therefore, that a state law such as the provisions of SB 1070 at issue here, which are congruent with federal law, are also a valid exercise of state police powers to protect lawful residents from violence and other collateral impacts of illegal immigration.

## III. The States Have Found It Necessary to Enact Legislation Supporting Federal Immigration Law in Order to Deal with the Consequences of Illegal Immigration.

The Executive's under-enforcement of the laws excluding those who have entered the U.S. unlawfully has created a significant problem for a number of states. In 2011 alone, state legislators across the nation introduced 1,607 bills and resolutions relating to immigrants and refugees in all 50 states and Puerto Rico.[3] This is a significant increase compared with 2010, when 46 states considered more than 1,400 bills and resolutions pertaining to immigrants. *Id.* Several states have introduced legislation that is substantially similar to Arizona's SB 1070. Alabama House Bill No. 56 (Beason-Hammon Alabama Taxpayer and Citizen Protection Act) (2011); Georgia House Bill No. 87 (Illegal Immigration Reform and Enforcement Act of 2011) (2011); Indiana Senate Bill No. 590 (2011); New Jersey Directive 2007-3 (2007); Michigan House Bill No. 4305 (2011); Minnesota HF 3830 (Support Our Law Enforcement and Safe Neighborhoods Act) (2010); Rhode Island Executive Order 08-01 (Illegal Immigration Control Order) (2011); South Carolina S-20 (2011) and House Bill 4400 (Initiative for a Legal Workforce) (2011); Utah House Bill No. H116 (2011); H466 (2011); H469 (2011); & H497 (Utah Illegal Immigration Enforcement Act (2011)).

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[3] *Immigration Policy Project*, National Conference of State Legislatures, *available* at http://www.ncsl.org/issues-research/immigration/state-laws-related-to-immigration-and-immigrants.aspx.

Out of these efforts have come new laws in several states dealing with the collateral effects of illegal immigration. These state enactments enhance enforcement of federal immigration law in an effort to avoid economic hardship, as well as to ensure safe living and work environments for all residents.

In 2007, New Jersey enacted Directive 2007-3, which provides guidelines establishing the manner in which local, county and state law enforcement agencies interact with federal immigration authorities. Directive No. 2007-3 (2007). The Directive states that "State, county and local law enforcement agencies necessarily and appropriately should inquire about a person's immigration status," specifically when a person has been arrested for a serious violation of State criminal law. *Id.*

Rhode Island enacted Executive Order 08-01(Illegal Immigration Control Order) in 2008. Exec. Order No. 08-01 (R.I. 2008). The Order states:

> Whereas, Congress and the President have been unable to resolve the problem of illegal immigration, leaving the states to deal with the consequences of 11 to 20 million illegal immigrants residing in the United States . . . it is urged that all law enforcement officials, including state and local law enforcement agencies take steps to support the enforcement of federal immigration laws by investigating and determining the immigration status of all non-citizens. . . .

*Id.*

Rhode Island found it necessary to enact this Order because "the presence of significant numbers of

people illegally residing in the State of Rhode Island creates a burden on the resources of state and local human services, law enforcement agencies, educational institutions and other governmental institutions," as well as diminishing opportunities for citizens and legal immigrants of Rhode Island. *Id.*

Additionally, Rhode Island's Order specifically states that nothing in the Order "shall be construed to supersede, contravene or conflict with any federal or state law or regulation . . . ," and that state and local law enforcement agencies are "urged . . . to take steps to support the enforcement of federal immigration laws. . . ." *Id.*

South Carolina's HB 4400 ("Initiative for a Legal Workforce") requires employers doing business in South Carolina to either participate in the federal E-Verify program, or only hire employees that possess or qualify for a South Carolina driver's license (or another state license with similar requirements). H.B. 4400, 117th Gen. Assem., Reg. Sess. (S.C. 2008). This legislation prevents those who are not legal residents of the State from the potential of abuse from employers that may wish to hire them at low wages, or force them to work in unsafe and unhealthy conditions. *Id.*

In Michigan, lack of immigration enforcement led to a drain on the State's economy, causing one of the nation's highest unemployment rates and an exodus of its own residents. This prompted Michigan to introduce the "Support Our Law Enforcement and Safe Neighborhoods Act," which requires government agencies to verify immigration status of people older than 18 who apply for federal, state or local public

benefits." H.B. 4305, 2011 Leg., 96th Sess. (Mich. 2011).

The Act specifically states that "the terms of this [A]ct shall be implemented in a manner consistent with federal laws regulating immigration while protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens. *Id*. Additionally, the Act makes clear that no agency or political subdivision of the state of Michigan is allowed to adopt a policy that limits or restricts the enforcement of federal immigrations laws. *Id*.

In order to deal with the strain on its economy, Alabama introduced HB 56, the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act." H.B. 56, Gen. Assem., Reg. Sess. (Ala. 2011). This legislation requires police to check the status of anyone they suspect may be in the country illegally when they are stopped for another reason. *Id*. It also makes it a criminal offense to provide transportation or housing to anyone not legally in the United States, and will enforce penalties on any business that knowingly employs any person who is in the country unlawfully. *Id*.

Alabama's decision to introduce this legislation was based on the economic hardship due to costs incurred by school districts for public elementary and secondary education of children who are "aliens not lawfully present in the United States." *Id*. The drain on Alabama's educational funding was adversely affecting the availability of public education resources to students who are United States citizens, or who are aliens that are lawfully present in the United States. *Id*.

Alabama determined that there was a "compelling need" for the State Board of Education to accurately measure and assess the population of students that are aliens unlawfully present in the U.S. *Id.* This measure of the population was not instituted as a way to deport those who are unlawfully present, or exclude them from public education. Rather, it allows the State to forecast and plan for any impact that the presence of such a population may have on publicly funded education.

Furthermore, Alabama enacted this legislation in an effort to fully comply with federal law. Alabama found that certain practices previously allowed in its State were actually impeding the enforcement of federal immigration law. Therefore, Alabama adopted the Act to require all agencies within the State to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. *Id.*

Minnesota's HF 3830 ("Support Our Law Enforcement and Safe Neighborhoods Act") was developed due to the State's finding that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout Minnesota. H.F. 3830, 2010 Leg., 86th Sess. (Minn. 2010). The provisions of the Act are intended to work together "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." *Id.*

Utah's HB 497 addresses law enforcement, REAL ID (a program that sets forth the requirements necessary for a state driver's license or ID card to be accepted by the federal government for official purposes, as defined by the Secretary of Homeland Security), and public benefits. H.B. 497, Gen. Sess. (Utah

2011). This legislation requires the verification of immigration status regarding application for public services or benefits provided by a state or local governmental agency or subcontractor, "*except as exempted by federal law*." *Id.* (emphasis added).

Indiana's SB 590, authored by amicus Indiana Senator Mike Delph, establishes state crimes for the possession of false identification, identity fraud, and the transport or harboring of those unlawfully in the State. S.B. 590, 117th Gen. Assem., Reg. Sess. (Ind. 2011). Additionally, state agencies, political subdivisions and contractors with public contracts for services with the state or political subdivision are required to use E-Verify (an Internet-based, free program run by the United States government that compares information from an employee's Employment Eligibility Verification Form I-9 to data from U.S. government records). State agencies and localities must verify eligibility for federal, state and local benefits, and unemployment compensation. *Id.*

Additionally, Georgia's HB 87 (Illegal Immigration and Enforcement Act of 2011) requires employers with more than four workers to verify the immigration status of new hires using the federal E-Verify database. H.B. 87, 151st Gen. Assem., Reg. Sess. (Ga. 2011).

Each state has enacted legislation that is completely consistent with federal law, and has done so based on legitimately serious concerns over the consequences of non-enforcement of federal immigration policies. The enactment of such comprehensive legislation evidences the problems that these States face regarding unlawful entry into the United States, and the steps that they feel are necessary in order to pro-

tect their residents and economies from the toll that unlawful entry into the United States has taken on their States as a whole.

## CONCLUSION

The power to establish a uniform rule of naturalization is vested in Congress alone—not the President. Additionally, states have a broad right to protect the public health, safety and welfare of their citizens. Furthermore, the operative presumption of this Court is that the police powers of states should not be superseded by federal acts, unless *clearly* intended by Congress. Thus, Arizona's SB 1070 must be upheld if state sovereignty is not to be undermined.

Finally, several states have been forced to enact legislation to deal with the collateral consequences of illegal immigration and the under-enforcement of federal immigration laws. The issue of illegal entry into the United States has caused serious social and class problems for Arizona, as well as many other states. As *De Canas* recognizes, the states retain the ability to deal with such consequences in order to protect their own citizens and residents.

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed and the preliminary injunction order vacated.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

MANUEL S. KLAUSNER
Individual Rights Foundation
One Bunker Hill Building
601 West Fifth St., Suite 800
Los Angeles, CA 90071

JOHN C. EASTMAN
ANTHONY T. CASO
*Counsel of Record*
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

*Counsel for Amici Curiae*