No. 11-182

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Arizona's state immigration-enforcement scheme, S.B. 1070, expressly makes "attrition through enforcement the public policy of all state and local government agencies in Arizona." The questions presented are:

1. Whether the district court abused its discretion by preliminarily enjoining Section 3, which creates a state-law crime of being unlawfully present in the United States and failing to register with the federal government, as likely preempted by federal law, which comprehensively regulates alien registration.

2. Whether the district court abused its discretion by preliminarily enjoining Section 5, which creates a state-law crime of seeking work or working while not authorized to do so, as likely preempted by federal law, which imposes civil and criminal penalties on employers who knowingly employ unauthorized aliens but only civil sanctions on aliens who work without authorization.

3. Whether the district court abused its direction by preliminarily enjoining a portion of Section 2 that requires state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained without regard to federal enforcement priorities, as likely preempted by federal law, which requires systematic state enforcement efforts to be cooperative with federal officials and consistent with federal priorities.

4. Whether the district court abused its discretion by preliminarily enjoining Section 6, which authorizes warrantless arrests of aliens believed to be removable, as likely preempted by federal law, which requires systematic state enforcement efforts to be cooperative with federal officials and consistent with federal priorities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-115a) is reported at 641 F.3d 339. The opinion of the district court (Pet. App. 116a-169a) is reported at 703 F. Supp. 2d 980.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2011. On June 30, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 10, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "established a 'comprehensive fed-

eral statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas* v. *Bica*, 424 U.S. 351, 353, 359 (1976)). The Attorney General and the Secretary of Homeland Security principally administer that scheme.

a. The INA sets out a comprehensive registration scheme that, subject to certain exceptions, generally requires aliens to register upon entering the United States. 8 U.S.C. 1201(b), 1301-1306; 8 C.F.R. Pt. 264. Willful failure to register as required, or (for adults) failure to carry a registration document once one receives it, is a misdemeanor. 8 U.S.C. 1304(e), 1306(a).

Unlawful entry into the United States and reentry after removal are federal criminal offenses. 8 U.S.C. 1325, 1326. Federal law, however, does not make mere unlawful presence in the United States a criminal offense. Aliens unlawfully present in the country are subject to civil detention and removal under the INA. See 8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1)(A)-(B); Pet. App. 123a-124a.

With limited exceptions, removal proceedings in federal immigration court—a specialized tribunal in the Justice Department's Executive Office for Immigration Review—are the "sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." 8 U.S.C. 1229a(a)(3); see 8 U.S.C. 1229-1229a.[1] The INA establishes the grounds

[1] In specific circumstances, other federal processes may determine whether an alien is removable from the United States. See, *e.g.*, 8 U.S.C. 1225(b)(1)(A) (expedited removal for aliens arriving at a port

on which an alien may be ordered removed. See 8 U.S.C. 1182(a), 1227(a) (2006 & Supp. III 2009).

b. To discourage illegal immigration into the United States, the INA prohibits employers from knowingly hiring or continuing to employ aliens who are not authorized to work in the United States. 8 U.S.C. 1324a(a)(1)(A), (2) and (4). Employers who violate that prohibition face a range of civil and criminal penalties. 8 U.S.C. 1324a(e)(4) and (f); 8 C.F.R. 274a.10. Federal law does not, however, impose criminal penalties on aliens who merely seek or obtain unauthorized employment in the United States.

c. Congress has directed the Secretary to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2010 (DHS Appropriations Act), Pub. L. No. 111-83, Tit. II, 123 Stat. 2149 (2009);[2] Department of Homeland Security Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 (2008) (same). Accordingly, U.S. Immigration and Customs Enforcement (ICE) has made "aliens who pose a danger to national security or a risk to public safety" its highest priority, including aliens engaged in or suspected of terrorism and aliens convicted of criminal activity. C.A. Supp. E.R. 111. ICE also has focused on dismantling large organizations that smuggle aliens and contraband, which "tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and

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of entry and certain other aliens), 1228(b) (administrative removal of certain aliens convicted of aggravated felonies).

[2] See also Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, Div. B, § 1101(a)(3), 125 Stat. 102 (continuing the same "authority and conditions" for fiscal year 2011).

weapons." *Id.* at 109. In contrast, "[a]liens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority." *Id.* at 111.[3]

Federal officials also must take into account humanitarian interests in appropriate instances, reflecting the federal government's "desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances." C.A. Supp. E.R. 111. These humanitarian concerns "may, in appropriate cases, support a conclusion that an [otherwise removable] alien should not be removed or detained at all." *Ibid.* Federal law thus empowers federal officials in a number of ways to exercise discretion to refrain from removing an alien who may have unlawfully entered or remained in the United States. *E.g.*, 8 U.S.C. 1158 (asylum for refugees), 1182(d)(5)(A) (humanitarian parole), 1227(a)(1)(E)(iii) (waiver of a ground of deportability for purposes of family unity), 1229b (cancellation of removal, including to prevent extraordinary hardship to close relatives), 1254a (protection from removal based on unsafe conditions in home country).

Approximately one-quarter of all ICE special agents are stationed in the five Southwest Border offices, including more than 350 agents in Arizona. C.A. Supp. E.R. 107. During an average day, ICE officers remove from the United States approximately 900 aliens. C.A. *Id.* at 105. Approximately half of those aliens are per-

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[3] See generally Memorandum from Assistant Secretary John Morton to All ICE Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (June 30, 2010), http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

sons who had committed crimes. *Ibid.* In addition, since the beginning of fiscal year 2005, in Arizona alone, more than 90,000 persons who sought admission to the United States were either found to be inadmissible by U.S. Customs and Border Protection (also a DHS component) or withdrew their applications for admission. *Id.* at 160-161.

d. The federal immigration laws encourage States to cooperate with the federal government in its enforcement of immigration laws in several ways. The INA provides state officials with express authority to take certain actions to assist federal immigration officials. For example, state officers may make arrests for violations of the INA's prohibition against smuggling, transporting or harboring aliens. See 8 U.S.C. 1324(c). Similarly, state officers may arrest and detain an alien who is illegally present in the United States and has previously been convicted of a felony in the United States and deported or left the United States after such conviction, so long as the arrest is permitted by state law, the state officer has received confirmation from federal immigration officials of the status of the individual, and the detention is only for the period of time necessary for federal officers to take the alien into custody for purposes of deporting him. See 8 U.S.C. 1252c. And, if the Secretary determines that an actual or imminent mass influx of aliens presents urgent circumstances requiring an immediate federal response, she may authorize any state or local officer, with the consent of the department in which that officer is serving, to exercise the powers, privileges or duties of federal immigration officers under the INA. See 8 U.S.C. 1103(a)(10).

Congress has also authorized DHS to enter into agreements with States to allow appropriately trained

and supervised state and local officers to perform enumerated functions of federal immigration enforcement. 8 U.S.C. 1357(g)(1)-(9). Activities performed under these agreements—known as "287(g) agreements"—"shall be subject to the direction and supervision of the [Secretary]." 8 U.S.C. 1357(g)(3).

The INA further provides, however, that a formal agreement is not required for state and local officers to "cooperate with the [Secretary]" in certain respects. 8 U.S.C. 1357(g)(10). Even without an agreement, state and local officials may "communicate with the [Secretary] regarding the immigration status of any individual," or "otherwise * * * cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Ibid.* To further such "cooperat[ive]" efforts to "communicate," Congress has enacted measures to ensure a useful flow of information between DHS and state and local agencies. 8 U.S.C. 1373.

Consistent with Section 1357(g)(10), DHS has invited and accepted the assistance of state and local law enforcement personnel without a 287(g) agreement in a variety of different contexts. See generally DHS, *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (Sept. 21, 2011) (*DHS Guidance)*, http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf. Arizona participates in several such cooperative law enforcement programs, including the Alliance to Combat Transnational Threats, which seeks "to disrupt and dismantle violent cross-border criminal organizations that have a negative impact on the lives of the people on both sides of the border." C.A. Supp. E.R. 108.

2. On April 23, 2010, the Governor of Arizona signed into law S.B. 1070, 2010 Ariz. Sess. Laws, Ch. 113.[4] The law was enacted to make "attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note. The statute requires Arizona state and local officials to enforce all federal immigration laws to the maximum extent, regardless of the multifaceted objectives and priorities the federal government considers in enforcing those laws. Ariz. Rev. Stat. Ann. § 11-1051(A). Any state or local official or agency whose policy "limits or restricts the enforcement of federal immigration laws * * * to less than the full extent permitted by federal law" may be sued by any Arizonan for civil penalties, of up to $5,000 per day. *Id.* § 11-1051(H).

S.B. 1070's provisions are expressly designed to "work together" to deter the unauthorized entry, presence, and economic activity of aliens in the United States. S.B. 1070, § 1. Four of those provisions have been preliminarily enjoined. Two of those measures—Sections 3 and 5—create new state crimes, and the others—Sections 2 and 6—impose requirements on Arizona law enforcement officers to verify immigration status and provide arrest authority.

a. *Criminal provisions*: Section 3, Ariz. Rev. Stat. Ann. § 13-1509, makes it a state crime to violate the federal statutes requiring certain aliens to obtain and carry federal registration papers, 8 U.S.C. 1304(e), 1306(a). See p. 2, *supra*. The state crime "does not apply to a person who maintains authorization from the federal

[4] S.B. 1070 was amended one week later by H.B. 2162, 2010 Ariz. Sess. Laws, Ch. 211. All references to provisions of S.B. 1070 are to the text as amended, as it appears in West's *Arizona Revised Statutes Annotated* 2010 supplement.

government to remain in the United States," Ariz. Rev. Stat. Ann. § 13-1509(F), and therefore applies only to unlawfully present persons.

The relevant provision of Section 5, Ariz. Rev. Stat. Ann. § 13-2928(C), makes it a state crime for any "unauthorized alien" to apply for or perform work as an employee or independent contractor. As noted above, federal law does not impose criminal penalties on aliens merely for working or seeking work in the United States without authorization. Federal law also does not require employers to verify the work authorization of independent contractors. See 8 C.F.R. 274a.1(f), 274a.2(b).

b. *Stop and arrest provisions*: The relevant provision of Section 2, Ariz. Rev. Stat. Ann. § 11-1051(B), imposes two nondiscretionary duties on Arizona law-enforcement officers. First, officers must determine, whenever practicable, the immigration status of any individual who is stopped or detained if there is reasonable suspicion that the person is an alien and "unlawfully present in the United States," unless doing so would hinder or obstruct an investigation. Second, if a person is arrested, law-enforcement officers must verify the person's immigration status before they may release him.

Section 6, Ariz. Rev. Stat. Ann. § 13-3883, authorizes Arizona officers to arrest without a warrant any person whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Arizona law defines "public offense" to mean conduct subject to imprisonment or a fine under Arizona law and also, if committed

outside Arizona, under the law of the State in which it occurred. Ariz. Rev. Stat. Ann. § 13-105(26).[5]

3. The United States alleges in this action that various provisions of S.B. 1070 are preempted by federal law. Pet. App. 170a-204a. Upon filing the complaint, the United States sought a preliminary injunction against the enforcement of specified parts of S.B. 1070 while this litigation proceeds. The district court preliminarily enjoined Sections 2, 3, 5, and 6. *Id.* at 116a-169a.

The court held that the United States is likely to succeed in showing that the state crimes created by Sections 3 and 5 are preempted. Section 3's crime of failure to register while unlawfully present, the court held, impermissibly creates an Arizona-specific "supplement" to "the uniform," "complete," and "comprehensive federal alien registration scheme." Pet. App. 149a. And the court found Section 5's crime of working or seeking work without authorization to be contrary to a decision by Congress not to adopt such penalties. *Id.* at 151a-156a.[6]

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[5] Other provisions of S.B. 1070 have been challenged in the underlying lawsuit; although not preliminarily enjoined, those provisions illustrate the scope of Arizona's immigration-enforcement scheme. S.B. 1070 creates a new state crime for a person who is already "in violation of a criminal offense" to transport an alien into Arizona; to conceal, harbor, or shield the alien in Arizona; or to encourage or induce the alien to come into Arizona, with knowledge or in reckless disregard of the alien's illegal presence in the United States. S.B. 1070, § 5 (Ariz. Rev. Stat. Ann. § 13-2929). Another provision amends a statute that makes it a state crime to transport or procure transportation for a person with knowledge or reason to know that the person is not lawfully in the United States. S.B. 1070, § 4 (amending Ariz. Rev. Stat. Ann. § 13-2319).

[6] Only the employment-related aspect of Section 5 (Ariz. Rev. Stat. Ann. § 13-2928(C)) is at issue in this Court. The United States also

The court also held that the United States is likely to show that the stop-and-arrest-related provisions of Sections 2 and 6 are preempted. Mandatory verification of federal immigration status under Section 2 would burden lawfully present aliens and divert federal resources from implementation of federal priorities, the court concluded. Pet. App. 146a. And the court further held that Section 6, by authorizing the arrest of anyone believed to have committed an offense that makes him removable, "impose[s] a 'distinct, unusual and extraordinary' burden on legal resident aliens that only the federal government has the authority to impose." *Id.* at 165a (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 65-66 (1941)). Because of the complexity of federal removal decisions, the court continued, "there is a substantial likelihood that officers will wrongfully arrest legal resident aliens" under the provision, *ibid*.

The court found that allowing these four provisions to take effect would likely cause the United States irreparable harm because "the federal government's ability to enforce its policies and achieve its objectives" regarding the national immigration laws would "be undermined by the state's enforcement of statutes that interfere with federal law." Pet. App. 167a. The court also found that the injunction was important to prevent state law from placing a burden on legal aliens that federal immigration law has sought to avoid. *Id.* at 168a. In contrast, no public interest would be impaired by preventing Arizona from instituting its own immigration scheme outside the

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sought a preliminary injunction against Ariz. Rev. Stat. Ann. § 13-2929, also enacted by Section 5, but the district court denied that request (Pet. App. 156a-160a) and the government did not cross-appeal.

control of the federal government. *Ibid.* The court therefore granted the requested injunction.[7]

4. The court of appeals affirmed, concluding that the district court did not abuse its discretion in enjoining these four provisions of S.B. 1070. Pet. App. 1a-115a.

a. The court unanimously concluded that the criminal provisions of Sections 3 and 5 are preempted. The court first held that Section 3, which "essentially makes it a state crime for unauthorized immigrants to violate federal registration laws," Pet. App. 28a, is incompatible with *Hines*, *supra*, in which this Court made clear that "'where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.'" *Id.* at 29a-30a (quoting *Hines*, 312 U.S. at 66-67). The court also stressed that, unlike in preemption cases involving traditional areas of state concern, Arizona has no independent interest in whether aliens register with the federal government. *Id.* at 28a-29a, 31a-32a.

The court also unanimously concluded that Section 5, which "criminalizes unauthorized work and attempts to secure such work," Pet. App. 33a, is preempted by federal law. The court explained that, in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress "establishe[d] a complex scheme to discourage the employment of unauthorized immigrants—primarily by penalizing employers

[7] The court denied the government's request to preliminarily enjoin other portions of S.B. 1070 that are not at issue here. See Pet. App. 121a, 156a-160a & n.20; note 6, *supra*.

who knowingly or negligently hire them." Pet. App. 35a. Congress declined to impose similar penalties on potential employees who work or seek work, instead exposing them only to immigration consequences and a limited set of federal sanctions if they commit fraud in connection with their employment applications. *Id.* at 36a. Congress also provided certain "affirmative protections to unauthorized workers, demonstrating that Congress did not intend to permit the criminalization of work." *Ibid.*

The court reasoned that Congress's refusal to criminalize work by unauthorized aliens, when viewed in the context of IRCA's comprehensive scheme for regulating the employment of unauthorized aliens, "justifies a preemptive inference that Congress intended to prohibit states from criminalizing work." Pet. App. 39a (citing *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). Because Section 5 directly criminalizes such unauthorized work, it "constitutes a substantial departure from the approach Congress has chosen to battle this particular problem." *Id.* at 40a. It is not sufficient that Arizona seeks to further the same ends as Congress, the panel held: "[s]haring a goal with the United States does not permit Arizona to "'pull[] levers of influence that the federal Act does not reach.'" *Ibid.* (quoting *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000)).

b. The court also held by a divided vote that the stop-and-arrest-related provisions of Sections 2 and 6 are also preempted.

The court held that Section 2 is preempted because it imposes a mandatory duty on Arizona law-enforcement officers to determine the immigration status of individuals stopped, detained, and arrested. The court explained that 8 U.S.C. 1357(g)(10), which authorizes

state officials to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present" even in the absence of a written agreement, "does not permit states to * * * systematically enforce the INA in a manner dictated by state law, rather than by the Attorney General." Pet. App. 15a. The court concluded that although under Section 1357(g)(10)(A) "state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties," *id.* at 16a, States may not "adopt laws dictating how and when state and local officers *must* communicate with the Attorney General" on these matters. *Ibid.* Thus, the court concluded, Section 2's mandatory directive "attempt[s] to hijack a discretionary role that Congress delegated to the Executive" in enforcing the INA. *Id.* at 22a. The court noted that the conflict between Arizona's law and federal law illustrates the potential "threat of 50 states layering their own immigration enforcement rules on top of the INA." *Id.* at 26a.

"In addition to" conflicting with the INA, the court added, the enactment of Section 2 "has had a deleterious effect on the United States' foreign relations," Pet. App. 22a, thereby "thwart[ing] the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." *Id.* at 26a.

Finally, the court concluded that Section 6 also is preempted by federal law, reasoning that it exceeds the "circumstances in which Congress has allowed state and local officers to arrest immigrants." Pet. App. 44a-45a. The court noted that the arrest authority conferred by Section 6 is greater even than the warrantless arrest authority provided to federal immigration officers.

Id. at. 44a. The court held that States lack inherent authority to enforce the immigration laws and that Section 6 both exceeds the scope of congressionally authorized cooperation and interferes with federal prerogatives. *Id.* at 45a-53a.

c. Accordingly, the court of appeals held, the district court did not abuse its discretion in concluding that there is "likely no set of circumstances" under which Sections 2, 3, 5, or 6 would be valid. Pet. App. 27a, 32a, 41a, 53a. On the other factors of the preliminary-injunction standard, the court held that the State has no interest in enforcing a law that is invalid under the Supremacy Clause, that the United States had shown that it faced irreparable harm, "and that granting the preliminary injunction properly balanced the equities and was in the public interest." *Id.* at 54a. Consequently, it held that the district court did not abuse its discretion in granting the preliminary injunction.

d. Judge Noonan joined the court's opinion and also filed a separate concurring opinion to "emphasize the intent of the statute and its incompatibility with federal foreign policy." Pet. App. 55a. He explained that the provisions of S.B. 1070 were intended to work together to effectuate Arizona's goal of "attrition through enforcement," and that it would be "difficult to set out more explicitly the policy of a state in regard to aliens unlawfully present not only in the state but in the United States." *Id.* at 56a.

e. Judge Bea concurred in part and dissented in part. He agreed with the majority's conclusions and preliminary injunction against Sections 3 and 5 but dissented from "the portion of the majority's reasoning" that, in his view, "allows complaining foreign countries to preempt a state law." Pet. App. 66a-67a. Judge Bea

would have reversed the preliminary injunction with respect to Sections 2 and 6. *Id.* at 66a-114a.

ARGUMENT

As the court of appeals correctly held, the district court did not abuse its discretion by preliminarily enjoining four provisions of S.B. 1070. Those provisions do not represent an effort to cooperate with the federal government in enforcing federal immigration law; instead, they are designed to establish Arizona's own immigration policy, "attrition through enforcement," to supplant what the Governor called in her signing statement the federal government's "misguided policy." S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note ("Intent"); Remarks by Gov. Jan Brewer, Apr. 23, 2010, at 2.[8] The court of appeals correctly held that the INA precludes the State's effort to challenge federal policy rather than cooperate with federal officials in furthering it.

The court's decision does not conflict with any other appellate decision. Indeed, petitioners do not even claim that a conflict exists except with respect to Section 6, and that contention is erroneous; the decisions petitioners cite do not establish that any other circuit would uphold a state statutory scheme premised on *disagreement* with current federal enforcement priorities as the type of "cooperat[iv]e" state and local efforts authorized by the INA.

Instead, petitioners' argument for certiorari rests on the notion that their petition presents issues of compelling, nationwide importance. Although no one doubts that how best to address illegal immigration is an important issue, petitioners are incorrect in stating (Pet. 21)

[8] http://azgovernor.gov/dms/upload/SP_042310_SupportOurLawEnforcementAndSafeNeighborhoodsAct.pdf.

that this Court should review the preliminary injunction to decide whether the States have "any realistic legal tools for addressing" the issue, writ large. The INA permits, and DHS welcomes, the States' *cooperative* involvement in enforcement efforts, and DHS has recently issued guidance to state and local officials further explaining the opportunities for such cooperation.

Several pending cases challenge new immigration-related state laws, and this case was the first to be decided by any court of appeals. But these state laws are not carbon copies; they take various different approaches to the subjects S.B. 1070 addresses, and they address numerous other subjects that this preliminary injunction does not, such as housing, contracting, education, and transportation. There is no reason to think that reviewing *this* preliminary injunction would resolve *those* cases—much less resolve any conflict in the courts of appeals on the relevant issues, because none exists, not even at the petition's broad level of generality.

That several States have recently adopted new laws in this important area is not a sufficient reason for this Court to grant review of the first appellate decision affirming a preliminary injunction against part of one of those state laws. That decision turns on the four specific provisions of S.B. 1070 at issue, and it is correct. Under this Court's established criteria, further review is not warranted.

A. The Court Of Appeals Correctly Held That The Challenged Provisions Are Not Permissible Cooperative Enforcement Measures

"[W]hatever power a state may have" to act in the areas regarding immigration and alien registration is "subordinate to supreme national law.'" *Hines* v.

Davidowitz, 312 U.S. 52, 68 (1941); see also *Toll* v. *Moreno*, 458 U.S. 1, 11 (1982); *De Canas* v. *Bica*, 424 U.S. 351, 354 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 84 (1976); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705-706 (1893); *Chae Chan Ping* v. *United States*, 130 U.S. 581, 603-604 (1889). The national government, not the States, controls both "the character of [immigration] regulations" and "the manner of their execution." *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875). The Secretary and the Attorney General are charged with executing the INA and, as a result, with exercising their discretion in a manner that, in their judgment, most appropriately balances the purposes of the controlling federal law. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832, 837-838 (1985).

This Court has also repeatedly recognized that the regulation of immigration is intertwined with the national government's exclusive conduct of foreign policy, because "real or imagined wrongs to another's subjects inflicted, or permitted, by a government" may result in "international controversies of the gravest moment." *Hines*, 312 U.S. at 64. Mistreatment of aliens within the United States risks "reciprocal and retaliatory treatment of U.S. citizens abroad," thereby implicating "the ability of U.S. citizens to travel, conduct business, and live abroad." C.A. Supp. E.R. 69.

The exclusive federal authority to regulate immigration does not preclude "every state enactment which in any way deals with aliens," *De Canas*, 424 U.S. at 355, or bona fide cooperation with the federal officials responsible for enforcing the federal immigration statutes. The INA incorporates that principle. First, federal law expressly provides for state and local officials to cooperate with federal officials in the enforcement of federal immi-

gration laws in specified circumstances. See p. 5, *supra*; 8 U.S.C. 1103(a)(10), 1252c, 1324(c). Second, Congress provided that a state or locality may enter into a written 287(g) agreement to allow its officers to carry out immigration-enforcement functions, "subject to the direction and supervision of the [Secretary of Homeland Security]." 8 U.S.C. 1357(g)(3); see 8 U.S.C. 1357(g)(1)-(9); pp. 5-6, *supra*. And third, Section 1357(g) also provides that state and local law enforcement may "cooperate with the [Secretary]" in certain respects without a formal 287(g) agreement. 8 U.S.C. 1357(g)(10); see p. 6, *supra*. Thus, while the INA leaves the States able to assist the federal government in carrying out the federal government's functions, it also makes clear that such assistance must be "cooperat[ive]" and must not interfere with the Secretary's ultimate authority and discretion with respect to immigration enforcement. 8 U.S.C. 1357(g)(3) and (10).

The court of appeals correctly recognized and applied these principles. Indeed, despite petitioners' assertion at one point (Pet. 17) that the court of appeals' decision would allow "only the national government" to "address th[e] problem" of immigration enforcement, petitioners recognize elsewhere (Pet. 4, 5, 30, 32) that the INA permits numerous state law-enforcement efforts that are "cooperative" with federal policy. The court of appeals correctly concluded that none of the challenged aspects of S.B. 1070 can be sustained on that basis, and that they therefore are preempted.

1. *Criminal Provisions.*—Petitioners do not attempt to argue that Sections 3 and 5—which impose *state* criminal liability for being unlawfully present in the United States and for seeking work without authorization under *federal* law—are permissible efforts to

"cooperate with" federal officers "in the identification, apprehension, detention, or removal" of illegal aliens. 8 U.S.C. 1357(g)(10)(B); see Pet. 34. Petitioners' repeated references to Section 1357(g)(10)(B) (which petitioners call a "savings clause"), Pet. 5, 17, 26, 34, 35, 37-38, therefore bear no relation to Sections 3 and 5. Nor can petitioners find support in the implied-preemption analysis of *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011), which turned on the existence of a specific savings clause, 8 U.S.C. 1324a(h)(2), that concerned employment and "expressly allowed Arizona to pursue" a particular end. 131 S. Ct. at 1981 (plurality opinion). Sections 3 and 5 are not within any savings clause.

The panel unanimously concluded that both Sections 3 and 5 are preempted. Pet. App. 27a-41a, 66a, 94a-95a. Accord *United States* v. *Alabama*, No. 11-14532, 2011 WL 4863957, at *1, *6 (11th Cir. Oct. 14, 2011) (per curiam) (enjoining, pending appeal, Alabama law penalizing aliens' failure to register); *United States* v. *Alabama*, No. 2:11-CV-2746, 2011 WL 4469941, at *19-*27 (N.D. Ala. Sept. 28, 2011) (preliminarily enjoining Alabama statute imposing criminal penalties on unauthorized aliens who solicit or perform work). Petitioners assert, in a single sentence (Pet. 31-32), that the court of appeals "failed to consider constitutional applications of Sections 3 and 5(C)," but never state what those applications might be. The court of appeals correctly concluded that the INA simply does not permit States to regulate immigration by imposing criminal liability in these two areas. Those provisions therefore have no valid applications.

a. Section 3 effectively makes unregistered presence in the United States in violation of federal law a state crime. State Senator Russell Pearce, its sponsor, ex-

plained that Section 3 "says that if you're in Arizona * * * in violation of federal law, that you can be arrested under a state law." Recording of Meeting of Ariz. House Comm. on Military Affairs & Pub. Safety, Mar. 31, 2010, 18:15–18:39.[9]

The registration of aliens and the requirement that they carry identification while in this country is an area committed to national rather than local regulation, *Hines*, 312 U.S. at 62-63, 65-67, and Congress has comprehensively addressed that subject in the INA. Arizona therefore has no authority to regulate alien registration. Even if Arizona's penalties for failure to register purported to "complement" the federal registration scheme, contra *Hines*, 312 U.S. at 66-67 (invalidating a state law that supposedly complemented the federal alien-registration scheme), Arizona could not provide its "own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [federal] Act." *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286 (1986). In *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), the Court held that the relationship between a federal agency and persons it regulates (*e.g.*, through the filing of documents) is not an area of traditional state regulation but rather a matter for the federal government itself to address. The Court therefore held that a State could not provide its own tort remedy for unlawful fraud against the U.S. Food and Drug Administration.[10] Similarly

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[9] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7286.

[10] *Buckman* distinguished *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *Medtronic* v. *Lohr*, 518 U.S. 470 (1996), on which petitioners seek to rely (Pet. 38). In those cases, the Court in *Buckman* explained, litigants relied on "traditional state tort law which had pre-

here, the State may not impose its own criminal sanctions for failure to comply with federal registration requirements, especially ones enacted pursuant to the national government's exclusive power over immigration.

And in fact, Section 3 is not merely complementary of the federal framework, because it targets only unlawfully present aliens. While federal officials regularly prosecute aliens for illegal entry and reentry after removal, Congress has afforded those officials the flexibility to address mere unlawful presence through noncriminal means, such as civil removal proceedings in federal immigration court. The federal government has chosen to adopt that more flexible approach. See pp. 2, 3-4, *supra*.[11]

The foreign-relations implications of Arizona's decision to criminalize unlawful presence, see note 11, *supra*, only underscore the conflict between that decision and governing federal law, although the conflict would exist irrespective of those implications.[12]

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dated the federal enactments in question," whereas in *Buckman* "the existence of these federal enactments is a critical element in their case." *Buckman*, 531 U.S. at 353; see Pet. App. 31a. Here too, decisions concerning general state tort laws or generally applicable unfair-practices laws provide no basis for concluding that a state has authority to criminalize unlawful presence by aliens in the United States.

[11] As then-Deputy Secretary of State Steinberg explained in his declaration, the United States' "uniform" policy "has been that the unlawful presence of a foreign national, without more, ordinarily will not lead to that foreign national's criminal arrest or incarceration, but instead to civil removal proceedings." C.A. Supp. E.R. 84. "This is a policy that is understood internationally and one which is both important to and supported by foreign governments." *Ibid*.

[12] Thus, Judge Bea concluded that Section 3 is preempted without reliance on any foreign-relations considerations, confirming that the panel's reference to those considerations (Pet. App. 32a, 41a) did not

Petitioners also state (Pet. 34-37) that the court of appeals should have started from the assumption that Section 3 is not preempted (as the court of appeals assumed Section 5 was not, Pet. App. 33a), but that quibble is irrelevant: as to both Section 3 and Section 5, the court of appeals correctly held that Congress precluded the States from second-guessing the judgments it wrote into the INA (to criminally penalize unlawful entry and reentry, but civilly remedy unlawful presence; to penalize hiring unauthorized aliens, but not criminalize the performance of work itself). Because Congress's preemptive intent is manifest, whether or not the court *starts* with an assumption against preemption "demonstrably makes no difference to resolution of the [preemption] question" with respect to Section 3. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004). Petitioners are incorrect in any event: Section 3 is not a generic "law enforcement matter[]" but an alien-registration measure, and as this Court has held, alien registration is not an area in which States have "traditional authority" (Pet. 36). *Hines*, 312

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affect the outcome and does not merit further review on its own. And in any event, petitioners' brief criticism of that reasoning (Pet. 39-40) lacks merit. The sole case petitioners cite, *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298 (1994), dealt not with preemption by a federal statute but with the Commerce Clause's limitations on state power to tax foreign commerce. *Barclays* does not affect the preemption analysis here. Indeed, as this Court's decisions since *Barclays* show, national foreign-policy considerations may not be frustrated by a single State, even if the national government's policy has "domestic consequences" (Pet. 40). See *American Ins. Ass'n* v. *Garamendi* , 539 U.S. 396, 417-420 (2003); see also *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (conflict is not avoided because state and federal laws "share the same goals"). That other countries agree with that policy, and reciprocate, does not *lessen* the supreme force of federal law. See *Garamendi*, 539 U.S. at 415.

U.S. at 68. *A fortiori*, compliance with the federal government's own alien-registration requirements is not a traditional area of state regulation. See *Buckman*, 531 U.S. at 347-348; pp. 20-21, *supra*.[13]

b. Section 5 likewise would impose criminal punishment on conduct that federal law regulates but does not criminalize: for aliens to work or seek work without authorization. Federal law recognizes that targeting unauthorized employment is one means of discouraging illegal immigration, but the INA strikes a careful balance to avoid discouraging lawful employment by citizens and aliens authorized to work—a category that may, at times, include aliens who are unlawfully present.[14] Thus, the INA penalizes *employers* of unauthorized aliens. See p. 3, *supra*. Aliens who work without authorization are subject to criminal and civil penalties if they use fraud or deceit to obtain work, see 18 U.S.C. 1546(b); 8 U.S.C. 1324c, but only to civil sanctions (such as removal) for work itself. See 8 U.S.C. 1227(a)(1)(C)(i) (removal for failure to maintain nonimmigrant status); 8 C.F.R. 214.1(e) (classifying unauthorized employment as failure to maintain status); see Pet. App. 35a-36a.

Indeed, the INA provides "affirmative protections to unauthorized workers." Pet. App. 36a. For example, the information that an employee submits to verify work

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[13] For these purposes, a State does not enter a traditional zone of state regulation simply by attaching a state criminal penalty to a federal law and calling it "law enforcement," or "tort law." Cf. *Buckman*, 531 U.S. at 347-348. It is odd in any event to suggest (Pet. 36) that the "cooperative enforcement of federal law" is an area where States are presumed to have independent, freestanding authority for purposes of preemption doctrine: by definition, any cooperative enforcement depends upon the federal law.

[14] See, *e.g.*, 8 U.S.C. 1158(d)(2); 8 C.F.R. 274a.12(c)(8) (some asylum applicants may be authorized to work while the application is pending).

authorization may not be disclosed for any purpose other than for enforcement of federal law. 8 U.S.C. 1324a(b)(5); see also 8 U.S.C. 1324a(d)(2)(C) and (F). And the INA's civil-rights protections confirm that Congress wanted employers to follow the law, but did *not* want them (either on their own initiative or compelled by state law) to take every conceivable step to discourage unauthorized employment. See, *e.g.*, 8 U.S.C. 1324b(a)(6) (prohibiting employers from making discriminatory requests for documentation beyond what the Form I-9 procedure requires).

In accordance with that balanced approach, Congress broadly preempted state-law civil and criminal penalties against employers of unauthorized aliens, but carved out a limited role for States to regulate employers through "licensing and similar laws." 8 U.S.C. 1324a(h)(2). Congress provided no concomitant authority for States to regulate employees (nor does Section 5, a criminal prohibition, purport to be a "licensing [or] similar law").

Thus, the court of appeals started from the assumption that state law regulating employment is not preempted, Pet. App. 33a, but rightly held that the particular state criminal sanctions imposed on employees are preempted. The INA's comprehensive framework regulating unauthorized employment, which reflects a careful compromise reached over many years and is now incorporated into the INA's comprehensive regulation of immigration generally, amply demonstrates that Congress affirmatively precluded States from adding their own penalties to the mixture, except in the limited area of "licensing and similar laws." See *id.* at 38a-39a.

2. *Stop and Arrest Provisions.*—Having criminalized failure to register and unlawful presence in Section 3, Arizona adopted Section 2 to compel law-enforcement

officers to seek out evidence of such unlawful presence, and Section 6 to permit warrantless arrests.

a. Under Section 2, state and local law enforcement officers in Arizona *must* verify the immigration status of anyone stopped or detained for any reason whenever there is "reasonable suspicion" that the person is an alien unlawfully present in the United States. Ariz. Rev. Stat. Ann. § 11-1051(B). That provision was designed "to work together" with sections 3, 5, and 6 "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States," S.B. 1070, § 1, Ariz. Rev. Stat. Ann. § 11-1051 note, and Arizona has instructed its officers to use these mandatory immigration status checks as a way to uncover evidence of violations of its new state immigration crimes. See, *e.g.*, Arizona Peace Officers Standards & Training Bd., *Implementation of the 2010 Arizona Immigration Laws, Statutory Provisions for Peace Officers* 4 (June 2010) (directing Arizona officers to use information gathered pursuant to Section 2 "in an investigation for a violation of A.R.S. § 13-1509," created by Section 3).[15] And if any agency were inclined to carry out Section 2 in any way other than to maximize enforcement, Section 2 allows any citizen of Arizona to sue that agency for civil penalties of up to $5000 per day, starting the day the suit is filed. See p. 7, *supra*.

Federal law and policy do not adopt such a one-size-fits-all approach to enforcement. The officials who enforce the Nation's immigration laws require significant discretion in order to balance numerous goals and purposes relevant under the INA, including law enforcement priorities, foreign-relations considerations, and

[15] http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf.

humanitarian concerns. Congress has expressly directed the Secretary to prioritize "the identification and removal of aliens convicted of a crime by the severity of that crime." DHS Appropriations Act, Tit. II, 123 Stat. 2149. Among criminal aliens, DHS's highest enforcement priorities are aliens who threaten public safety or national security and members of criminal gangs that smuggle aliens and contraband. DHS also gives priority to removing repeat border crossers, recent entrants, aliens who have previously been removed, and aliens who have disregarded an immigration court's final order of removal. C.A. Supp. E.R. 109-111. Federal officials exercise countervailing discretion in some instances; in some individual cases, humanitarian considerations may call for deferring removal of an otherwise removable alien. *Id.* at 112; see p. 4, *supra*.

Arizona's mandatory policy of discretion-free maximum state enforcement cannot be reconciled with the provisions of the INA that vest the Secretary and the Attorney General with responsibility and discretion for administering the Act. Petitioners nevertheless assert (Pet. 3, 8, 31) that Section 2 is merely an attempt to provide cooperative assistance to the federal government. Petitioners invoke Section 1357(g)(10)(B), which they characterize as a "savings clause" authorizing measures like Section 2. But Section 1357(g)(10)(B) speaks only to efforts by state officers to "cooperate" with federal officers on immigration-enforcement matters. See p. 6, *supra*. As the court of appeals correctly concluded, Section 2 is not such a cooperative measure because it reflects an attempt to second-guess and affirmatively frustrate federal policy. "Arizona does not seek intergovernmental cooperation—it seeks to pursue its own policy of 'attrition through enforcement.'" Pet. App. 18a n.10.

When state officials seek to enforce the immigration laws pursuant to mandatory state policies and priorities, they deprive officers in the field of the ability to be responsive to the direction and guidance of the federal officials who are responsible for immigration enforcement. DHS has accordingly issued guidance to state and local law enforcement, welcoming their cooperative assistance and explaining that under Section 1357(g)(10)(B), "cooperat[ion]" requires that state and local officers remain open and responsive to federal priorities. *DHS Guidance* 7-10.

Because Section 2's mandatory directive robs state and local officers of the ability to exercise discretion and carry out federal policy, Section 2 is facially invalid. The fact that some of the verifications and arrests that Arizona officers undertake would turn out to be consistent with federal priorities does not mean that the statute is partially valid, as petitioners suggest (Pet. 31); the facial invalidity comes from the fact that the statute in every instance precludes Arizona officers from considering federal priorities and discretion at all. Indeed, where Arizona officers can conduct verification consistent with federal priorities, they do not need Section 2 to authorize them to do so. See 8 U.S.C. 1373.

b. Section 6 likewise implements the policy of maximum "attrition through enforcement" that Arizona seeks to substitute for federal enforcement policy. That provision gives state officers authority to enforce immigration laws, independently of any direction by the federal government, by making warrantless arrests whenever a law enforcement officer has probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable

from the United States." Ariz. Rev. Stat. Ann. § 13-3883(A)(5).

That provision can only be seen as an attempt to allow Arizona officers to identify and arrest any individual—even lawfully present aliens—whom the officers believe may be removable, rather than those whom the federal government seeks to detain and remove. Arizona officers already had authority to arrest without warrant persons who committed "a felony, misdemeanor, petty offense, or one of certain criminal violations in connection with a traffic accident." Pet. App. 161a; see Ariz. Rev. Stat. Ann. § 13-3883(A)(1)-(4) (2010). Section 6, therefore, does not serve any state-specific crime-prevention goal; it instead works in tandem with Section 2 to allow second-guessing of federal enforcement priorities. For the same reasons as Section 2, that effort is preempted: while cooperative law-enforcement efforts are both permissible and welcome, arrests based on state officials' view of who should be removed are not "cooperat[ion]."

B. Affirming The Preliminary Injunction Against Section 6 Did Not Create Any Circuit Conflict

Petitioners note (Pet. 21-29) that in one respect—its analysis of Section 6—the panel majority below suggested that its reasoning differs from that of the Tenth Circuit in *United States* v. *Vasquez-Alvarez*, 176 F.3d 1294, cert. denied, 528 U.S. 913 (1999). Pet. App. 48a. The difference identified by the court of appeals does not, however, indicate that the Tenth Circuit would rule differently with respect to the preliminary injunction against Section 6 or any of the other Arizona-law provisions at issue.

In *Vasquez-Alvarez*, a federal immigration officer "observed an apparent drug transaction between an His-

panic male and another individual" and called a state police officer "to investigate the suspicious transaction." 176 F.3d at 1295. The federal officer also "expressed suspicion that the Hispanic male was an illegal alien" and asked the state officer "to arrest the Hispanic male" if he turned out to be, "in fact, in the country illegally." *Ibid*. The court, and the government, acknowledged that the arrest was not specifically authorized by 8 U.S.C. 1252c, a provision that expressly authorizes state officers to assist in immigration enforcement. 176 F.3d at 1296. But citing Section 1357(g)(10)(B), the Tenth Circuit held that this unexceptionable example of cooperation between federal immigration officials and state law enforcement was permissible. *Id.* at 1300. The court therefore held that the INA did not *forbid* the arrest. *Id.* at 1299-1300.[16]

The Tenth Circuit did not consider a situation like this one, in which the State claims authority to arrest suspected immigration violators (Pet. 34, 37-38) but seeks to wield that authority without cooperating with the federal government. The question in *Vasquez-Alvarez* was whether state officials are disabled by federal law from *cooperating* in immigration arrests; the Tenth Circuit held that they are not, given the invitation to cooperate in Section 1357(g)(10). The question here, by contrast, is whether state officials have inherent authority to take action to detain and seek to remove aliens

[16] The other decisions that petitioners cite similarly contain no hint that the assistance provided by local officials in the particular circumstances at issue was not part of formal or informal cooperation with federal officers. See, *e.g.*, *Muehler* v. *Mena*, 544 U.S. 93, 96, 100-101 (2005) (discussing federal immigration official's involvement in investigation); *United States* v. *Soto-Cervantes*, 138 F.3d 1319, 1321 (10th Cir.) (same), cert. denied, 525 U.S. 853 (1998); *United States* v. *Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984) (same).

without cooperation, *i.e.*, to disregard the limitations in Section 1357(g)(10). The Tenth Circuit certainly did not recognize any inherent state authority to direct officers to "enforce" federal immigration law in a manner responsive not to federal immigration officers or to federal immigration-enforcement priorities and discretion, but rather to a competing and contrary state mandate.

If there were any concern that States might read the opinion in this case as discouraging their *cooperation*, DHS has put that concern to rest. In its recent guidance, DHS explained that it welcomes cooperative assistance from state and local partners in each of the respects listed in Section 1357(g)(10)(B), including the apprehension of removable aliens. Petitioners therefore miss the mark with their assertion (Pet. 28-29) that this Court should take this case to clarify the legal status of "hundreds or thousands of incidents every day" in which state and local officers encounter people they suspect may be unlawfully present: the legal status of those incidents is not in serious question *except* where a State adopts a systematic enforcement policy that fundamentally disagrees with federal policy and priorities, as Arizona has. Under Section 1357(g)(10), "cooperat[ion]" between DHS and the State is the touchstone. Section 6 is preempted because it seeks to circumvent that principle.

C. Taking Up These Issues Before Any Other Court Of Appeals Addresses Them Would Be Premature

Petitioners also suggest (Pet. 21-24) that even in the absence of a circuit conflict, this Court should step in now because its guidance will be needed to harmonize the outcomes of pending challenges to other States' laws. Petitioners seek to lump together various challenges to immigration-related state statutes. In fact, the

States have taken diverse approaches: each of the pending cases involves one or more provisions completely unrelated to anything presented here. None of the cases has proceeded beyond the preliminary-injunction stage, and the provisions that have been enjoined cover a wide range of areas that sweep well beyond this case, from identification cards to public-school enrollment. See *United States* v. *Alabama*, 2011 WL 4863957, at *1 (enjoining, pending appeal, Alabama provisions relating to alien registration and public education); *United States* v. *Alabama*, 2011 WL 4469941, at *19-*27, *38-*45, *46-*52 (preliminarily enjoining Alabama provisions relating to harboring, unauthorized work, and sanctions on employers); *Hispanic Interest Coal.* v. *Bentley*, No. 5:11-CV-2484, slip op. at 36-44, 56-70 (N.D. Ala. Sept. 28, 2011) (preliminarily enjoining Alabama provisions relating to postsecondary education and soliciting work from a motor vehicle), appeal pending, No. 11-14535 (11th Cir. filed Sept. 29, 2011); *Georgia Latino Alliance for Human Rights* v. *Deal*, No. 1:11-CV-1804, 2011 WL 2520752, at *9-*15 (N.D. Ga. June 27, 2011) (preliminarily enjoining Georgia provisions relating to harboring and discretionary verification of arrestees), appeal pending, No. 11-13044 (11th Cir. filed July 8, 2011); *Buquer* v. *City of Indianapolis*, No. 1:11-CV-708, 2011 WL 2532935, at *11-*16 (S.D. Ind. June 24, 2011) (preliminarily enjoining Indiana provisions relating to identification cards and arrest authority); *Utah Coal. of La Raza* v. *Herbert*, No. 2:11-CV-401, slip op. at 1-2 (D. Utah May 11, 2011) (temporary restraining order). See also Mot. for Preliminary Inj., *United States* v. *South Carolina*, No. 2:11-CV-2958 (D.S.C. Nov. 7, 2011) (seeking to enjoin provisions relating to alien registration, transportation of aliens, and mandatory verification). Other provi-

sions have been challenged as well but are not yet on appeal.

There is no reason to for this Court to cut off the ordinary process of appellate review and step in now, for the sake of resolving issues presented in some of these cases. As noted, unlike this case, those cases have not progressed beyond the preliminary-injunction stage and the preliminary injunctions themselves have not yet been examined on appeal. Even if the Court reviewed all four Arizona provisions at issue here, numerous issues would remain to be resolved in the pending cases. Allowing the courts of appeals to consider these preemption issues in the first instance will likely lead to consensus on many of them, if not all, and even if a significant conflict were to arise on particular legal points in the future, the relevant legal issues will have been refined by thorough consideration in pending appeals.

Indeed, this case itself arises in an interlocutory posture and may not yet present all the issues raised by Arizona's law alone. Petitioners seek review of a preliminary injunction, not a final judgment. Although the court of appeals addressed the merits of the provisions that were the subject of the preliminary injunction, there are challenges to other provisions of S.B. 1070 pending in the district court that must be resolved before this case can reach final judgment. See, *e.g.*, Pet. App. 119a-121a; notes 5-7, *supra*. Arizona will be free to seek this Court's review on appeal from a final judgment, raising at that time the questions it seeks to present here, as well as others that may arise in further proceedings.

* * * * *

The court of appeals correctly applied longstanding preemption principles and the text and structure of the INA in affirming the preliminary injunction in this case. Arizona—like all States—is welcome to cooperate with DHS in addressing the problem of illegal immigration within the INA's framework. But Arizona cannot claim to be "cooperat[ing]" with the federal government yet simultaneously follow its *own* strategy of rejecting federal policies and priorities. The INA gives Arizona ample opportunity to join the cooperative effort; if Arizona insists on declining that opportunity and pursuing its own policy, the straightforward result is preemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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