NO. 10-16645
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The United States of America, Plaintiff-Appellee, v. State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants-Appellants.	Appeal from the United States District Court for the District of Arizona No.: 2:10-cv-01413-SRB

BRIEF OF *AMICI CURIAE* STATE LEGISLATORS FOR LEGAL IMMIGRATION, DARYL METCALFE, SCOTT BEASON, PAUL SANFORD, FRANK GLIDEWELL, JON WOODS, ANDY BIGGS, FRANK ANTENORI, JACK W. HARPER, TED HARVEY, JAMES KERR, KENT D. LAMBERT, KEVIN LUNDBERG, B.J. NIKKEL, MARK SCHEFFEL, DAVID SCHULTHEIS, SPENCER SWALM, ANDREW RENZULLO, JORDAN ULERY, FRAN WENDELBOE, PHIL HART, STEVEN THAYN, MIKE DELPH, ERIC A. KOCH, CINDY NOE, DOUGLAS A. THOMAS, DON H. DWYER, JR., PAT MCDONOUGH, KIM MELTZER, DAVE AGEMA, STEVEN M. PALAZZO, EDWARD B. BUTCHER, TONY FULTON, CHARLIE JANSSEN, ALISON LITTELL MCHOSE, JAMES M. GULLEY, COURTNEY E. COMBS, MIKE CHRISTIAN, RANDY TERRILL, KIM THATCHER, JIM COX, THOMAS C. CREIGHTON, MARK MUSTIO, SCOTT PERRY, MICHAEL PITTS, LEO BERMAN, BETTY BROWN, DAN FLYNN, STEPHEN SANDSTROM, MATTHEW T. SHEA, WALTER E. DUKE, AND JOHN OVERINGTON IN SUPPORT OF APPELLANTS AND REVERSAL

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STATEMENT OF *AMICI CURIAE*

State Legislators for Legal Immigration is a nationwide coalition of state legislators who are committed to seeking full cooperation among the federal, state and local governments in eliminating all economic attractions and incentives (including, but not limited to, public benefits, welfare, education and employment opportunities) for unlawfully present aliens to enter and remain in the United States. Founded by Pennsylvania State Representative Daryl D. Metcalfe, the coalition is comprised of lawmakers from across the nation who are committed to federalism and state sovereignty.[1]

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[1] The following 51 Legislators from 24 States join in this *amici* brief:

Rep. Daryl Metcalfe (Pennsylvania House of Representatives, District 12); Sen. Scott Beason (Alabama State Senate, 17th District); Sen. Paul Sanford (Alabama State Senate, 7th District); Rep. Frank Glidewell (Arkansas House of Representatives, District 63); Rep. Jon Woods (Arkansas House of Representatives, District 93); Rep. Andy Biggs (Arizona House of Representatives, District 22); Sen. Frank Antenori (Arizona Senate, District 30); Sen. Jack W. Harper (Arizona Senate, District 4); Sen. Ted Harvey (Colorado State Senate, District 30); Rep. James Kerr (Colorado House of Representatives, House District 28); Rep. Kent D. Lambert (Colorado House of Representatives, District 14); Sen. Kevin Lundberg (Colorado State Senate, District 15); Rep. B.J. Nikkel (Colorado House of Representatives, District 49); Sen. Mark Scheffel (Colorado State Senate, District 4); Sen. David Schultheis (Colorado State Senate, District 9); Rep. Spencer Swalm (Colorado House of Representatives, District 37); Rep. Andrew Renzullo (New Hampshire House of Representatives, District 27); Jordan Ulery (New Hampshire House of Representatives, District 27); Rep. Fran Wendelboe (New Hampshire House of Representatives, District 1); Rep. Phil Hart (Idaho House of Representatives, House District 3); Rep. Steven Thayn (Idaho House of Representatives, House District 11A); Sen. Mike Delph (Indiana State Senate,

In addition to bringing a unique perspective to the case, *Amici* view SB 1070 as an essential tool to address lawbreaking within their States. In addition, *Amici* are concerned by the Federal Government's attack on Arizona and SB 1070 at the same time that many States, including those represented by *Amici*, are grappling with the severe costs imposed by the presence of unlawfully present aliens.

District 29); Rep. Eric A. Koch (Indiana House of Representatives, House District 65); Rep. Cindy Noe (Indiana House of Representatives, House District 87); Rep. Douglas A. Thomas (Maine House of Representatives, District 24); Del. Don H. Dwyer, Jr. (Maryland House of Delegates, District 31); Del. Pat McDonough (Maryland House of Delegates, District 7); Rep. Kim Meltzer (Michigan House of Representatives, 33rd District); Rep. Dave Agema (Michigan House of Representatives, 74th District); Rep. Steven M. Palazzo (Mississippi House of Representatives, District 116); Rep. Edward B. Butcher (Montana House of Representatives, House District 29); Sen. Tony Fulton (Nebraska State Legislature, District 29); Sen. Charlie Janssen (Nebraska State Legislature, District 15); Assemblywoman Alison Littell McHose (New Jersey Assembly, District 24); Rep. James M. Gulley (North Carolina House of Representatives, District 103); Rep. Courtney E. Combs (Ohio House of Representatives, 54th House District); Rep. Mike Christian (Oklahoma House of Representatives, House District 93); Rep. Randy Terrill (Oklahoma House of Representatives, House District 53); Rep. Kim Thatcher (Oregon House of Representatives, House District 25); Rep. Jim Cox (Pennsylvania House of Representatives, District 129); Rep. Thomas C. Creighton (Pennsylvania House of Representatives, District 37); Rep. Mark Mustio (Pennsylvania House of Representatives, District 44); Rep. Scott Perry (Pennsylvania House of Representatives, District 92); Rep. Michael Pitts (South Carolina House of Representatives, District 14); Rep. Leo Berman (Texas House of Representatives, House District 6); Rep. Betty Brown (Texas House of Representatives, House District 4); Rep. Dan Flynn (Texas House of Representatives, House District 2); Rep. Stephen Sandstrom (Utah House of Representatives, District 58); Rep. Matthew T. Shea (Washington House of Representatives, 4th District); Del. Walter E. Duke (West Virginia House of Delegates, 54th District); Del. John Overington (West Virginia House of Delegates, 55th District)

This *amici curiae* brief, while supporting the Appellants, is primarily for the purpose of assisting the Court. All parties have consented to the filing of this brief.

ARGUMENT

I. SB 1070 and Our Federalist System.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It is also axiomatic that under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Hence, while the States have surrendered certain powers to the Federal Government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST No. 39 (J. Madison)). The Supreme Court has described this constitutional scheme of dual sovereigns as follows:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . Without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the

> National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory, 501 U.S. at 457 (citing *Texas v. White*, 74 U.S. 700 (1869), quoting *Lane County v. Oregon*, 74 U.S. 71 (1869)). This residual state sovereignty is demonstrated by the Constitution's conferral upon Congress of not all government powers, but only discrete, enumerated powers. *Printz*, 521 U.S. at 919 (citing Art. I, § 8 and Amend. X). As James Madison described:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The 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 (C. Rossiter ed. 1961).

The principal purpose of this federalist system is to act as a check on abuse of government power. This "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The Supreme Court has explained that these "twin powers will act as mutual restraints only if both are credible." *Gregory*, 501 U.S. at 459. Significantly, it is only through the Supremacy Clause that the Federal

Government may impose its will on the States in areas traditionally regulated by the States – an "extraordinary power in a federalist system." *Id*. at 460. The Court presumes, however, that the Federal Government does not exercise such a power "lightly." *Id*.

It is within this carefully constructed federal system that SB 1070 must be viewed. Although the federal government has the power to regulate immigration, the mere fact that "aliens are the subject of a state statute does not render it a regulation of immigration" and exclusively within the Federal Government's purview. *De Canas v. Bica*, 424 U.S. 351, 352-353 (1976). The regulation of immigration is nothing more than "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id*. at 355; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("The authority to 'control immigration' is the power to 'admit or exclude aliens.'").

SB 1070 plainly does not impose new restrictions on the manner in which an alien enters the country. Nor does it impose any conditions under which a lawfully present alien may remain in the country. SB 1070 simply codifies already existing authority allowing states to enforce certain provisions of federal law.

SB 1070 falls within the well-recognized authority of a State in our federalist system. For instance, this Court has plainly held that nothing in federal

law precludes a State or locality from enforcing the criminal provisions of immigration law. *Gonzalez v. Peoria*, 722 F.2d 468, 476 (1983). Similarly, the Supreme Court has plainly held that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (*citing De Canas v. Bica*, 424 U.S. 351 (1975)).

In addition, SB 1070 is not an obstacle to the enforcement of federal immigration law. SB 1070 does not conflict with or stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *U.S. v. Locke*, 529 U.S. 89, 109 (2000). SB 1070, in fact, "mandates compliance with the federal immigration laws" and therefore cannot "stand[] as an obstacle to [the] accomplishment and execution of congressional objectives." *In re Jose C.*, 198 P.3d 1087, 1100 (Calif. 2009). SB 1070 mirrors Congress' objectives and furthers the legitimate goals set forth by Congress.

For these reasons, SB 1070 does not violate the Supremacy Clause and is not preempted by federal law, as it is entirely consistent with the "dual system" of sovereignty between the States and the Federal Government. SB 1070 falls within the well-recognized authority of the States, does not regulate immigration, and is in no way an obstacle to the enforcement of federal immigration law.

II. Federal Law Provides For and Relies on the Cooperation of States and Localities in Immigration Enforcement.

Congress has made plain its view of the dual role that states and localities play in assisting federal officials with immigration enforcement efforts. In fact, rather than excluding the States from immigration enforcement, federal law specifically provides that States and the Federal Government will cooperate in this effort. While the district court generally ignores this important cooperation, Congress has made clear that it views the assistance of states and localities as essential to successful enforcement of the nation's immigration laws.

The most obvious examples of this cooperative relationship are set forth in two federal statutes, 8 U.S.C. §§ 1373 and 1644, both of which constitute unmistakable federal mandates requiring cooperation through the free flow of information regarding a person's immigration status. Section 1373(a) expressly states that state and local government entities "may not prohibit or in any way restrict" a government official from "sending to or receiving from [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a).

The legislative history of the statutes reflects a clear congressional view as to the importance of cooperation through the exchange of information between states and localities and federal immigration officials regarding a person's

immigration status. Congress enacted 8 U.S.C. § 1644 in August 1996 as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. One month later, Congress enacted a companion statute, 8 U.S.C. § 1373, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The Senate Report accompanying the bill that became IIRIRA explains that the provision:

> Prohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. **Effective immigration enforcement requires a cooperative effort between all levels of government.** The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, 19-20 (1996) (emphasis added).

It is difficult to conceive of how Congress could have expressed its goal of cooperation between federal immigration officials and state and local law enforcement authorities any more clearly than when it enacted these statutes. As one commentator has observed:

> The assistance of state and local law enforcement agencies can also mean the difference between success and failure in enforcing the nation's laws generally. The nearly 800,000 police officers nationwide represent a

> massive force multiplier. This assistance need only be occasional, passive, voluntary, and pursued during the course of normal law enforcement activity. The net that is cast daily by local law enforcement during routine encounters with members of the public is so immense that it is inevitable illegal aliens will be identified.

Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 181 (February 2006). State and local law enforcement officers are "the eyes and ears of law enforcement across the United States." *Id.* at 183. Federal immigration officers simply cannot cover the same ground (*Id.*), and Congress obviously recognized the substantial benefits to the enforcement of federal immigration that could result from the free flow of information between local, state, and federal law enforcement officials. Congress sought to promote this voluntary sharing by enacting Sections 1373 and 1644.

Congress' mandate of a cooperative role between federal and state and local law enforcement is further demonstrated in other federal statutes. Section 1324(c) provides that:

> No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and **all other officers whose duty it is to enforce criminal laws**.

8 U.S.C. §1324(c) (emphasis added). As noted above, this Court has unequivocally held that the "all other officers" provision allows for state law enforcement to specifically enforce the criminal provisions of federal immigration law. *See Gonzalez*, 722 F.2d at 476. Other courts have similarly observed how federal law "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *U.S. v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) (*citing U.S. v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999)).

Notably, Title 8, section 1357g (1)-(9) (commonly referred to as the "287(g) program") provides that state and local officers, under agreements between federal and state and local authorities, may be trained to perform certain immigration-related enforcement functions. Importantly, section 10 of the same statute provides that:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise **to cooperate** with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10) (emphasis added). This provision again demonstrates the cooperative relationship in immigration enforcement that Congress has mandated. This relationship, as recently described by the California Supreme Court, is "a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the achievement of federal criminal immigration policy." *In re Jose C.*, 45 Cal. 4th 534, 554, 198 P.3d 1087, 1100 (2009). *See also* 8 U.S.C. § 1252c(b) (mandating that the Attorney General "shall" cooperate with the states to assure that information that would assist state law enforcement officials in arresting and detaining "an alien illegally present in the United States" under certain conditions is made available to such officials).

In view of this clear cooperative relationship, the U.S. Department of Justice's Office of Legal Counsel has previously confirmed the important role of states and localities in immigration enforcement. *See* U.S. Department of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations* (dated April 3, 2002). This memorandum recognizes that states have "inherent power" to make arrests for violations of federal law and that 8 U.S.C. § 1252c does not preempt State authority to make arrests for certain federal violations.

CONCLUSION

For the foregoing reasons, *Amici* respectfully asks that the Court reverse and vacate the district court's issuance of a preliminary injunction.

September 2, 2010

Respectfully Submitted,

/s/_____

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CERTIFICATE OF COMPLIANCE PURSUANT TO F.R.APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of *Amici Curiae* State Legislators for Legal Immigration, et al. is proportionally spaced, has a typeface of 14 points or more and contains ____ words.

_____ _____

Date Geoffrey S. Kercsmar

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF AMICI CURIAE STATE LEGISLATORS FOR LEGAL IMMIGRATION, et al.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 2nd day of September 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/_____