[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16645

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.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF INTERVENOR-APPELLANT ARIZONA STATE SENATOR RUSSELL PEARCE

Paul J. Orfanedes
James F. Peterson (Application pending)
Michael Bekesha (Application pending)
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
Tel: (202) 646-5172

Counsel for Intervenor-Appellant Arizona State Senator Russell Pearce

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INTRODUCTION

Against a blank factual background, the United States argues that the Arizona Legislature has enacted a series of law enforcement provisions that are preempted by federal law. Prior to any Arizona law enforcement officer applying a specific provision to a particular individual in a unique factual context, the United States contends that the new provisions conflict with federal law. Yet, on their face, the series of law enforcement provisions enacted by the Arizona Legislature do not determine who should or should not be admitted into the country. Nor do they create additional conditions under which a lawfully present alien may remain in the country.

The district court found that the United States is likely to succeed in demonstrating that several of the law enforcement provisions are preempted by federal law. In doing so, the district court was required to find that under no set of circumstances could these provisions be applied constitutionally. However, the district court failed to make such a finding. Instead, the district court constructed several speculative, hypothetical applications of the provisions and found that these applications mandated that it enjoin the provisions from taking effect. Even though the Arizona Legislature has done nothing more than enact a series of law enforcement provisions under its well-recognized police powers to protect its

citizens from serious public safety concerns, the district court has denied Arizona law enforcement officers the opportunity to reasonably interpret and apply the provisions in a constitutionally valid manner.

JURISDICTIONAL STATEMENT

Jurisdiction was proper in the district court pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1335 because the United States' claims arise under the Constitution of the United States, Article VI, Clause 2 and Article I, Section 8, and the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq*.

On July 28, 2010, the district court granted in part the United States' motion for a preliminary injunction.

On July 29, 2010, the State of Arizona and Governor Janice K. Brewer filed a timely notice of appeal. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1292(a)(1), which permits an immediate appeal of a district court's grant of an injunction.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court properly enjoined provisions of SB 1070, as amended by HB 2162, from taking effect on July 29, 2010.

STATEMENT OF THE CASE

On April 23, 2010, Governor Janice K. Brewer signed Senate Bill 1070 ("SB 1070") into law. Complaint at ¶ 33. On April 30, 2010, Governor Brewer signed House Bill 2162 ("HB 2162"), which amended various provisions of SB 1070. *Id.* at ¶ 35. SB 1070 was scheduled to take effect on July 29, 2010.

The United States filed a Complaint on July 6, 2010, asserting that Sections 1-6 of SB 1070 violate the Supremacy Clause of the United States Constitution, are preempted by federal law, and violate the Commerce Clause of the United States Constitution. *Id.* at ¶¶ 61-68.

Also on July 6, 2010, the United States filed a Motion for Preliminary Injunction requesting that the district court preliminarily enjoin Sections 1-6 of SB 1070 from taking effect on July 29, 2010. Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof ("Plf's Motion").

On July 28, 2010, the district court denied in part and granted in part the United States' motion for a preliminary injunction. Order at 35. Specifically, the district court enjoined the following provisions of SB 1070 ("the enjoined provisions"): Section 2(B) creating A.R.S. § 11-1051(B); Section 3 creating A.R.S. § 13-1509; Section 5 creating A.R.S. § 13-2928(C); and Section 6 creating A.R.S. § 13-3883(A)(5). *Id.* at 36. This appeal timely followed.

STATEMENT OF FACTS

The United States brought a facial challenge to Sections 1-6 of SB 1070 prior to the date they were scheduled to take effect. Therefore, there are no facts that might illuminate how the enjoined provisions might be applied by Arizona law enforcement officials. The only facts are those outlined above in the Statement of the Case.

SUMMARY OF ARGUMENT

The United States cannot establish that it is likely to succeed in demonstrating that under no set of circumstances can the enjoined provisions be constitutionally valid.

Section 2(B) imposes no "new" burden on lawfully present aliens because Arizona law enforcement officials have the discretion to inquire about a person's immigration status regardless of Section 2(B). Section 2(B) also does not place any undue burden on federal resources because Congress has mandated that the federal government respond to requests from state and local law enforcement officers about persons' immigration status.

Section 3 does not regulate the conditions under which a lawfully present alien may remain in the country. Instead, Section 3 utilizes ordinary state police

powers to create criminal penalties for the failure to comply with a federal registration scheme.

Invoking Arizona's broad authority to regulate employment under its police powers, Section 5 seeks to strengthen Arizona's economy by protecting the state's fiscal interests and lawfully resident labor force from the harmful effects resulting from the employment of unlawfully present aliens.

Section 6 does not grant Arizona law enforcement officers the authority to determine whether an individual has committed a public offense that makes him removable. Section 6 only authorizes Arizona law enforcement officers to make a warrantless arrest of an individual who has already been determined to have committed a public offense that makes him removable.

ARGUMENT

I. The standard of review is *de novo*.

The issue before this Court is whether the district court properly granted a preliminary injunction with respect to several provisions of SB 1070. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374

(2008). Since the United States was required to establish each of these elements in order to prevail on its motion for a preliminary injunction, this brief focuses solely on whether the district court properly found that the United States had established that it is likely to succeed on the merits.

Although generally the grant of a preliminary injunction is reviewed for an abuse of discretion, a district court's "interpretation of the underlying legal principles is subject to de novo review." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Because preemption is a legal question, a district court's decision to grant a preliminary injunction on preemption grounds is reviewed *de novo*. *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

II. The enjoined provisions are not preempted by federal law.

The district court enjoined several provisions of SB 1070 because it found that the United States had established that it is likely to succeed on its claim that each enjoined provision is preempted by federal law. In doing so, the district court found that each enjoined provision, on its face, conflicts with or creates an obstacle to the enforcement and implementation of federal law.

A. Facial challenges are the most difficult challenges to successfully mount.

The United States brought a facial challenge before the district court. Order at 11. As the district court properly noted, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id*. (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). As this Court has succinctly explained, "[A] speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009).

A facial challenge is the most difficult challenge for a plaintiff to mount successfully for two reasons. First, such challenges generally are disfavored by the courts because they rest on speculation, run contrary to the fundamental principal of judicial restraint, and threaten to "short circuit" the democratic process. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). When a legislative enactment is attacked facially, a court is at a disadvantage because it does not know how the law will be applied or construed by an enforcing authority. As the U.S. Supreme Court has declared, "It is neither our obligation nor within our traditional institutional role to resolve

questions of constitutionality with respect to each potential situation that might develop." *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007). Instead of speculating about hypotheticals, courts typically prefer to wait until the law is construed "in the context of actual disputes." *Washington State Grange*, 552 U.S. at 450. A court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Salerno*, 481 U.S. at 745.

Second, courts impose a "heavy burden" on plaintiffs that bring a facial challenge. *Id.* ("[T]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."). A court cannot find a statute to be facially unconstitutional unless *every* reasonable interpretation of the statute would be unconstitutional. *Id.; see also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984). Conversely, to defeat a facial challenge under the Supremacy Clause, a party need "merely to identify a possible [application of the state law] not in conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987). In other words, unlike an "as applied" challenge, in which the plaintiff applies specific facts to the challenged statute, a facial challenge must show that *"no set of circumstances exists* under which the [statute] would be valid." *Washington State Grange*, 552 U.S. at 449 (emphasis added).

By seeking a preliminary injunction prior to SB 1070's effective date, the United States asked the district court to do precisely what the Supreme Court has warned against – to prematurely interpret and unnecessarily speculate on the constitutionality of SB 1070 in a factual vacuum. The United States did not and cannot establish that it is likely to succeed on its claim that all applications of the enjoined provisions are preempted by federal law. For this reason alone, preliminarily enjoining Sections 2(B), 3, 5, and 6 from taking effect is not warranted at this time.[1]

B. Section 2(B) is not preempted by federal law.

i. Section 2(B) does not place any additional conditions under which a lawfully present alien may remain in the country.

Pursuant to Section 2(B), Arizona law enforcement officers must make a reasonable attempt to determine a person's immigration status, if, during the course of a lawful stop, detention, or arrest, an officer develops reasonable suspicion that the person is an alien and is not lawfully present in the United

[1] As this Court recently explained, a facial challenge "is brought against a blank factual background of enforcement and outside the context of any particular case. If and when [the enjoined provisions are] enforced, and the factual background is developed, other challenges to the [provisions] as applied in any particular instance or manner will not be controlled by [any] decision." *Chicanos Por La Causa,* 558 F.3d at 861.

States. A.R.S. § 11-1051(B). An officer need not make an inquiry if doing so is not practicable or may otherwise hinder or obstruct an investigation. *Id.*

It cannot be disputed that state and local law enforcement officers have authority to enforce the criminal provisions of federal immigration laws. *Gonzalez v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983). Implicit in this authority is the authority to investigate possible violations of the criminal provisions of federal immigration laws, including the authority to inquire about a person's immigration status. Both the United States and the district court acknowledged the "existing discretion" of state and local law enforcement officers to verify a person's immigration status during the course of a lawful stop, detention, or arrest. Plf's Motion at 25 and 26; Order at 20 n.12; *see also Muehler v. Mena*, 544 U.S. 93, 100 (2005); *Martinez-Medina v. Holder*, 2010 U.S. App. LEXIS 16703 (9th Cir. Aug. 12, 2010). Thus, there is no question that Arizona law enforcement officers have authority to inquire about a person's immigration status regardless of the enactment of Section 2(B).[2] The new provision does not give officers any "new" authority.

[2] The fact that some local jurisdictions may have tried to limit this authority is not relevant to a preemption analysis.

The district court nonetheless found that Section 2(B) was preempted on its face. It reached this conclusion because it found that "the federal government has long rejected a system by which aliens' papers are routinely demanded and checked" and that Section 2(B) therefore imposes "an unacceptable burden on lawfully-present aliens."[3] Order at 20.

In so ruling, the district court largely relied on *Hines v. Davidowitz*, 312 U.S. 52 (1941). That reliance is misplaced. *Hines* considered the legality of an alien registration scheme adopted by the Commonwealth of Pennsylvania on the eve of World War II. Under the Pennsylvania law, all aliens over the age of 18 were required to register with the state every year, provide specified information, pay an annual registration fee, receive and carry a registration card, and produce the registration card to state law enforcement officers upon demand. *Hines*, 312 U.S. at 400. The Supreme Court found that the Pennsylvania registration scheme was preempted by a subsequently enacted, federal registration scheme. *Id.* at 74.

Section 2(B) is nothing like the Pennsylvania registration scheme at issue in *Hines*. Section 2(B) contains no requirement that aliens register with the State of

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[3] Presumably, the district court was referring to case law holding that only the federal government has the authority to establish "the conditions under which a legal entrant may remain" in the United States. *See*, *e.g.*, *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

Arizona, that they obtain and carry a state-issued registration card, or that they produce such a card on demand. By contrast, it is federal law that requires aliens to register and be fingerprinted. 8 U.S.C. § 1302. Federal law also requires aliens to carry evidence of their registration at all times: "Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him." 8 U.S.C. § 1304(e).[4] If an otherwise lawfully present alien fails to carry his registration document, then he is "guilty of a misdemeanor." 8 U.S.C. § 1304(e). Far from creating a *Hines*-like state registration scheme that overlaps or exceeds the federal registration scheme, Section 2(B) recognizes and incorporates the preexisting authorization of state and local law enforcement officers to inquire about a person's immigration status. Not only is the district court's "your papers please" interpretation of Section 2(B) an unreasonable interpretation, it is very reasonable to interpret Section 2(B) as nothing more than applying an Arizona law enforcement officer's preexisting authority in a particular context.

While both the United States and the district court characterized Section 2(B) as mandatory (*see* Plf's Motion at 25; Order at 20 n.12), this characterization

[4] Federal law prescribes multiple types of registration documents. *See*, *e.g.*, 8 C.F.R. § 264.1.

ignores the fact that, on its face, Section 2(B) leaves Arizona law enforcement officers considerable discretion about when and how to inquire about a person's immigration status. Section 2(B) clearly does not authorize Arizona law enforcement officers to stop persons solely to inquire about their immigration status, nor are they free to ask all persons whom they stop, detain, or arrest about their immigration status. For Section 2(B) to apply, there must be a lawful stop, detention, or arrest *and* there must be reasonable suspicion that a person is an alien and is not lawfully present in the United States.

When a lawful stop, detention, or arrest has been effected *and* an Arizona law enforcement officer has reasonable suspicion that a person is an alien and is not lawfully present in the United States, the law enforcement officer still has considerable discretion about when and how to inquire about the person's immigration status. The law enforcement officer only needs to inquire about the person's immigration status if the officer believes it is "practicable" to do so and that it will not otherwise hinder or obstruct the investigation. Moreover, the Arizona law enforcement officer need only make a "reasonable attempt" to determine the person's immigration status. Nothing in Section 2(B) requires a law enforcement officer to "demand" a person's "papers." A reasonable attempt to determine a person's immigration status may consist of nothing more than a

simple question and a verbal response. Again, it is certainly reasonable to interpret Section 2(B) in this way.

In addition, Section 2(B) contains a presumption of legal presence if the suspected unlawfully present alien presents a valid Arizona driver licence, or other similar, government-issued identification. If an Arizona law enforcement officer determines that further inquiry is necessary, the officer may find it appropriate to contact the federal government's Law Enforcement Support Center ("LESC") to inquire about the immigration status of a suspected unlawfully present alien. What is practicable and reasonable is left up to the law enforcement officer's discretion and obviously will depend on the unique circumstances of each particular stop, detention, or arrest. Finding Section 2(B) comparable to a "system by which aliens' papers are routinely demanded and checked" is incorrect. It is a complete mischaracterization, if not an unfortunate caricature, of the provision.

Having misconceived the provision, the district court's finding that Section 2(B) "imposes an unacceptable burden on lawfully present aliens" is entirely misplaced. Section 2(B) imposes no "new" burden on lawfully present aliens because state and local law enforcement officers acting under the authority given to them by state law have the discretion to inquire about anyone's immigration status regardless of Section 2(B). *Mena* and *Martinez-Medina* are illustrative.

In *Mena*, the Supreme Court considered the questioning of a woman who had been detained by local, California law enforcement officers during the execution of a search warrant. *Mena*, 544 U.S. at 96. The officers asked the woman her "name, date of birth, place of birth, and immigration status." *Id.* The woman, who was a lawful permanent resident alien, later claimed in a section 1983 lawsuit that the officers violated her Fourth Amendment rights by questioning her about her immigration status without independent reasonable suspicion. *Id.* at 100-101. This Court agreed, but the Supreme Court reversed: "This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena about her immigration status . . . but the premise is faulty." *Mena*, 544 U.S. at 100-01. Under Section 2(B), Arizona law enforcement officers would not have been required to ask Mena about her immigration status -- but clearly would have had the discretion to do so -- because there was no reasonable suspicion to make such an inquiry.

In *Martinez-Medina*, a sheriff's deputy asked a father and son whom the deputy happened to encounter at a gas station in Oregon about their travel plans, identities, and immigration status. *Martinez-Medina*, 2010 U.S. App. LEXIS at *2-3. When the father and son told the deputy they did not have green cards, the

deputy told them they could not leave and that he was going to call "Immigration." *Id.* at *3. The father and son were later determined to be unlawfully present in the United States and were found to be removable. In reviewing the orders of removal, this Court, citing *Mena*, found that the initial encounter between the father and son and the deputy was a consensual encounter and therefore did not violate the rights of the father and son under the Fourth Amendment. *Id.* at **9-10. Under Section 2(B), an Arizona sheriff's deputy would not have been required to question the pair about their immigration status -- but again would have had the discretion to do so -- because the exchange was not a lawful stop, but merely a consensual encounter.[5] Given that state and local law enforcement officers already have authority under state law to inquire about a person's immigration status, any claim that Section 2(B) imposes a new, impermissible burden on lawfully present aliens is an illusion.

Moreover, because even under Section 2(B) Arizona law enforcement officers retain complete discretion to determine the scope of any inquiry or even to *decline* to conduct an inquiry if it is not practicable or will hinder or obstruct an investigation, characterizing Section 2(B) as necessarily imposing any type of

[5] Rather than being a burden on lawfully present aliens, Section 2(B) could be viewed as limiting officers' discretion to inquire about a person's immigration status.

burden on lawfully present aliens is particularly inapt. Again, an inquiry under Section 2(B) may be satisfied by a simple question and verbal response. It also may be satisfied by the production of a valid Arizona driver license or other government identification. It is difficult to conceive of how an occurrence as ordinary as producing a driver license at a traffic stop, could, if the driver happened to be a permanent resident alien or an otherwise lawfully present alien, constitute an impermissible burden on lawful aliens so as to render a duly enacted statute unconstitutional.

Nor can it be said that Section 2(B) imposes an improper burden on lawfully present aliens because, during the course of an inquiry under the provision, a lawfully present alien may voluntarily produce his registration document to an Arizona law enforcement officer, or, in the exercise of an officer's discretion, may be asked to produce his registration document.[6] Again, federal law, not Arizona law, requires lawfully present aliens to carry such documentation on their persons.

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[6] Federal immigration laws and regulations provide for at least twelve different types of documents that constitute evidence of registration. 8 C.F.R. § 264.1(b). Some of the most common include the I-551, commonly referred to as a "green card;" the I-185, which is a non-resident alien Canadian border crossing card; the I-186, which is a non-resident alien Mexican border crossing card; and the I-94, which is an Arrival-Departure record. *Id.* Foreign visitors from Visa Waiver Program countries nonetheless are required by law to complete and maintain an I-94 Arrival-Departure record, which constitutes evidence of registration. *Id.*

8 U.S.C. § 1302. It is a misdemeanor not to do so. 8 U.S.C. § 1304(e). At least one obvious purpose of this federal requirement is to ensure that lawfully present aliens can demonstrate their status easily. Because federal law, not Section 2(B), imposes this burden, any claim that Section 2(B) imposes an impermissible burden on lawfully present aliens is illusory.

Finally, it is irrelevant to the United States' facial challenge that, in some limited or unusual circumstances, certain types of lawfully present aliens may not have registration documents readily accessible. Again, Section 2(B) does not require documentation to be presented. It only requires that a "reasonable attempt" be made to determine a suspected unlawfully present alien's immigration status, and that attempt may be satisfied by simple oral inquiry or a telephone call to LESC, neither of which would require the production of registration documents. Regardless, the United States has brought a facial challenge to Section 2(B). It therefore must demonstrate that under no set of circumstances could the provision be constitutional, not that Section 2(B) might present an impermissible burden on lawfully present aliens in a unique set of circumstances. Any such issues must be addressed in an "as-applied" challenge." *Chicanos Por La Causa,* 558 F.3d at 861.

ii. Section 2(B) does not impermissibly burden federal resources.

The district court also found that Section 2(B) "is likely to impermissibly burden federal resources and redirect federal agencies away from the priorities they have established." Order at 17, 20. In reaching this conclusion, the district court cited *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) for the proposition that "state laws have been found to be preempted where they imposed a burden on a federal agency's resources that impeded the agency's function." Order at 16. In *Buckman*, the Supreme Court found that "a state law [was] preempted in part because it would create an incentive for individuals to 'submit a deluge of information that the [federal agency] neither wants nor needs, resulting in additional burdens on the [Food and Drug Administration]'s evaluation of an application.'" Order at 16 (*quoting Buckman*, 531 U.S. at 351). The information at issue in *Buckman* was information that the Food and Drug Administration ("FDA") had determined was unnecessary. *Id*. at 348-351. The state did not create an incentive for individuals to submit information that the FDA wanted or for which the FDA had asked; the state created an incentive for individuals to submit information that the FDA believed to be superfluous.

Section 2(B) does not require Arizona law enforcement officers to submit any information to the federal government, much less to deluge it with superfluous information or requests for information. Also, and unlike in *Buckman*, Section 2(B) does not impose any impermissible burden on the federal government because Congress has statutorily mandated that the federal government respond to questions about a person's immigration status from state and local law enforcement officers. 8 U.S.C. § 1373(c). There was no such federal statutory mandate in *Buckman*.

Moreover, this Court recently addressed whether federal law preempts state legislation that requires action where such action is discretionary or optional under federal law. In *Chicanos Por La Causa*, this Court held that "Arizona's requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." *Chicanos Por La Causa*, 558 F.3d at 866-867. Moreover, this Court noted, "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation." *Id*. at 867. Similarly, Congress could have expressly forbid states from allowing state and local law enforcement officers to contact the federal government to determine a person's immigration

status. It did not. In fact, it did precisely the opposite. Congress forbid states and localities from restricting such communication and mandated that the federal government respond. 8 U.S.C. §§ 1373 and 1644. Without a specific set of facts demonstrating how Section 2(B) places an undue burden on federal resources, the United States cannot establish that it is likely to succeed in demonstrating that Section 2(B) is preempted by federal law.

C. Section 3 is not preempted by federal law.

Section 3 states that a "person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." A.R.S. § 13-1509. The district court found, "Section 3 makes it a state crime to violate federal registration laws and provides for state prosecutions and penalties for violations of the federal registration law." Order at 21. The district court also noted that "[w]hile Section 3 does not create additional registration requirements, the statute does aim to create state penalties and lead to state prosecutions for violation of federal law." *Id.* at 22. The district court nonetheless found that Section 3 was preempted, again relying on *Hines*. *Id.* Again, *Hines* is inapposite.

Unlike the state registration scheme in *Hines*, Section 3 does not provide any additional conditions under which a lawfully present alien may remain in the

United States. Section 3 solely makes it a state crime to violate federal registration laws. To lawfully comply with Section 3, a lawfully present alien simply has to apply for registration with the federal government as required by 8 U.S.C. § 1306(a) and "at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him" as required by 8 U.S.C. § 1304(e). Even that minimal requirement has a caveat. Section 3 also states that it "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509. Therefore, if a lawfully present alien forgets his federal registration documentation at home, is not required to obtain federal registration documentation, or otherwise has authorization from the federal government to remain in the United States, that lawfully present alien would not be in violation of Section 3. As evident from the face of the provision, the United States cannot establish that it is likely to succeed in demonstrating that Section 3 is preempted by federal law in all applications. Section 3 does not create additional conditions upon which a lawfully present alien may remain in the country.

Without much analysis, the district court found that the mere fact that Section 3 created state penalties for violations of federal law was an impermissible attempt to regulate alien registration. Order at 22-23. The district court rashly

reached this conclusion without recognizing that creating state penalties for failing to comply with federal law is common practice in other areas that are unquestionably exclusively federal powers.

Without question, the Commerce Clause represents one of the most fundamental powers delegated to the federal government by the Constitution. *United States v. Lopez*, 514 U.S. 549, 552-553 (1995).[7] Under its well-recognized authority, Congress may regulate the use of the channels of interstate commerce and may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. *Id.* To do just that, Congress created a uniform, federal registration scheme "to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of

[7] "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than [that] prescribed in the Constitution.'" *United States v. Darby*, 312 U.S. 100, 113 (1941) (*quoting Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

the United States." 49 U.S.C. § 13101(a). The uniform, federal registration scheme includes 49 U.S.C. §§ 13901[8] and 13902.[9]

Although the regulation of interstate commerce, like immigration, is "unquestionably exclusively a federal power" (*De Canas*, 424 U.S. at 354-355), states have the authority to regulate activities that touch upon interstate commerce as long as those regulations do not substantially interfere with the uniform, federal registration scheme. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978). And all states, in some way, have constitutionally exercised their authority to protect their citizens from the hazards of transportation. *Id*. at 524 ("The power of the State to regulate the use of its highways is broad and pervasive. We . . . have upheld state statutes . . . despite the fact that they may have an impact on interstate commerce."). Relevant to the instant action, the Arizona legislature enacted legislation that creates state penalties for failing to comply with federal registration requirements of motor carriers.

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[8] Section 13901 requires that an individual register with the U.S. Department of Transportation before the individual may provide transportation or service in interstate commerce, including transportation or service between one state and another state or from one state and another place in the same state by way of another state. 49 U.S.C. §§ 13901 & 13501.

[9] Section 13902 defines the registration requirements as well as establishes penalties for "motor carriers that fail to register their operations as required by this section or that operate beyond the scope of their registrations." 49 U.S.C. § 13902.

In 2002, the Arizona legislature passed A.R.S. § 28-5242, which states, "A motor carrier shall not operate in this state a motor vehicle involved in interstate or foreign commerce . . . unless the motor carrier is registered pursuant to 49 United States Code sections 13901 and 13902." A.R.S. § 28-5242(A). Moreover, the statute requires, "A motor carrier domiciled outside of the United States shall have proof of the registration in the vehicle when operating in this state." *Id.* If a person violates this requirement, the person is "guilty of a class 2 misdemeanor." A.R.S. § 28-5242(C). Similarly, in 2007, the Arizona legislature passed A.R.S. § 28-5244, which subjects a motor carrier to a one thousand dollar civil penalty if it is required to be registered with the United States Secretary of the Department of Transportation pursuant to 49 U.S.C. § 13902 or 49 C.F.R. §§ 390.1-390.37 and it operates in Arizona without the required federal registration. A.R.S. § 28-5244(B) and (C). In other words, the Arizona legislature has enacted legislation which requires compliance with a federal registration scheme. If the individual fails to do so, the individual violates both the federal registration scheme and Arizona criminal and civil laws.

Section 3 is no different from A.R.S. § 28-5242 or A.R.S. § 28-5244. Section 3 solely creates Arizona criminal penalties for failure to comply with a federal registration scheme. It does not regulate immigration. Because the United

States has not shown why Section 3 is preempted in light of other state legislation penalizing the failure to register with the federal government, the United States cannot establish that it is likely to succeed in demonstrating that Section 3 is preempted.

D. Section 5 is not preempted by federal law.

The Arizona legislature seeks to regulate employment related to immigration. Section 5 provides that "it is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." A.R.S. § 13-2928(C). The district court found that Section 5 conflicts with a comprehensive federal scheme of regulating immigration. The district court reasoned that because Congress did not create penalties for individuals seeking or performing work, Congress only intended to sanction employers who sought to hire or hired unlawfully present or unauthorized aliens. The district court therefore concluded that Arizona does not have the authority to enforce Section 5. The district court is wrong.

It is undisputed that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state." *De Canas*, 424 U.S. at 356; *see also Chicanos Por La Causa*, 558 F.3d at

865 ("[T]he power to regulate the employment of unauthorized aliens remains within the states' historic police powers."). In *De Canas*, the state of California "sought to strengthen its economy" by enacting legislation to "protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." *De Canas*, 424 U.S. at 357. California argued, and the Supreme Court agreed, that "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs [and] acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." *Id.* at 356-357. Finally, the Court stated, "These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico." *Id.* at 357. The current situation in Arizona is no different from the conditions in California during the 1970s. Not only is Arizona suffering from high unemployment, it also is dealing with "rampant illegal immigration." Order at 1. Like California in *De Canas*, by enacting Section 5, the Arizona legislature permissibly used its broad authority under its police powers to regulate employment. *De Canas*, 424 U.S. at 356.

Moreover, this Court recently noted that the federal Immigration Reform and Control Act of 1986 ("IRCA") contains an express preemption provision. *Chicanos Por La Causa*, 558 F.3d at 865. The IRCA states, "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Congress did *not* expressly preempt imposing civil or criminal sanctions upon those who gain employment. If Congress had wanted to preempt the states from sanctioning employees, it knew how to and could have easily done so in Section 1324a(h)(2). Because Congress did not expressly preempt employee sanctions, it is the burden of the United States to show that Congress intended to preempt all regulation of employment. Not only has the United States failed to satisfy its burden, but this Court just recently held that the IRCA does not preempt all regulation of employment. *Chicanos Por La Causa*, 558 F.3d at 865 ("[T]he power to regulate the employment of unauthorized aliens remains within the states' historic police powers.")

Arizona has the authority to regulate the employment of unlawfully present aliens. Congress has not expressly preempted Arizona from doing so. Therefore, the United States, without a specific set of facts in which the application of

Section 5 interferes or conflicts with federal law, cannot establish that it is likely to succeed at demonstrating that Section 5 is preempted by federal law.

E. Section 6 is not preempted by federal law.

Section 6 amends an existing Arizona statute to authorize a law enforcement officer to arrest an individual without a warrant if the officer has probable cause to believe that "[t]he person to be arrested has committed any public offense that makes the person removable from the United States." A.R.S. § 13-3883(A)(5). The district court incorrectly concluded that Section 6 requires an Arizona law enforcement officer to "determine whether an alien's public offense makes the alien removable from the United States." Order at 32. Section 6 does not require Arizona law enforcement officers to make any such determination.

As the United States demonstrated in the district court, if an Arizona law enforcement officer runs an individual's name through the National Crime Information Center database, the information that the Arizona law enforcement officer receives from the federal government in response may include whether the individual is an "immigration absconder." Declaration of David C. Palmatier, attached as Exhibit 3 to Plf's Motion, at ¶ 3. Such persons have been found to be removable and have been ordered removed, but have absconded on their removal orders. *Id.* Section 6 makes clear that Arizona law enforcement officers have

authority to arrest such a person without a warrant, but it does not require them to make a determination about what type of offense might make a person removable or otherwise engage in an analysis of removability. A federal immigration court judge already would have made such a determination.[10] Because Section 6 could reasonably be interpreted to authorize warrantless arrests of "immigration absconders," Section 6 is not in conflict with federal law and the United States cannot succeed on its facial challenge.

CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction with respect to Section 2(B) creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 13-1509, Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5) should be reversed and vacated.

[10] Pursuant to federal law, it is a felony for an individual "against whom a final order of removal is outstanding" to "willfully fail[] or refuse[] to depart." 8 U.S.C. § 1253(a). Section 6 clarifies that Arizona law enforcement officers have the authority to arrest such an individual without a warrant.

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Respectfully submitted,

s/ Paul J. Orfanedes
Paul J. Orfanedes

s/ James F. Peterson
James F. Peterson
(Application pending)

s/ Michael Bekesha
Michael Bekesha
(Application pending)
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
Tel: (202) 646-5172

Counsel for Intervenor-Appellant
Arizona State Senator Russell Pearce

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 6709 words (using WordPerfect 11), and has been prepared in a proportional Times New Roman, 14-point font.

s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF INTERVENOR-APPELLANT ARIZONA STATE SENATOR RUSSELL PEARCE** 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 26th day of August 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/ Michael Bekesha