

No. 11-182

IN THE Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER,
GOVERNOR OF THE STATE OF ARIZONA,
Petitioners,

v.

UNITED STATES,
Respondent.

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

**BRIEF OF *AMICUS CURIAE*
ARIZONA STATE LEGISLATURE
IN SUPPORT OF PETITIONERS**

Paul J. Orfanedes
Counsel of Record
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W.
Suite 800
Washington, D.C. 20024
(202) 646-5172
porfnedes@judicialwatch.org

Geoffrey S. Kercksmar
KERCKSMAR & FELTUS PLLC
6263 N. Scottsdale Road,
Suite 320
Scottsdale, AZ 85250
(480) 421-1001

Counsel for Amicus Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	2
REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CALLS INTO QUESTION THE WELL-ESTABLISHED POLICE POWERS OF A STATE TO PROTECT ITS CITIZEN.....	3
A. Section 2(B) provides Guidance to Law En- forcement Officers	4
B. Section 3 Utilizes Arizona’s Police Powers to Create Penalties for Violating the Federal Reg- istration Scheme	8
C. Section 5 Regulates Employment Under Arizo- na’s Police Powers	10
D. Section 6 Defines Officers’ Existing Warrantless Arrest Authority	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	PAGE
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976)	4, 10
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	9
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	9
<i>Muehler v. Mena</i> , 544 U.S. 93 (2005)	5, 7
<i>United States v. Arizona</i> , 641 F.3d 339 (9th Cir. 2011)	8, 12
<i>United States v. Arizona</i> , 703 F. Supp. 2d 980 (D. Ariz. 2010).....	5, 12
<i>United States v. Villa-Velasquez</i> , 282 F.3d 553 (8th Cir. 2002)	4

CONSTITUTIONAL PROVISIONS
AND STATUTES

Ariz. Const. art 4, part 1, § 11

A.R.S. § 11-1051(B)5

A.R.S. § 13-15098, 9

A.R.S. § 13-2928(C)10

A.R.S. § 13-3883(A)(5).....11

8 U.S.C. § 1253(a).....12

8 U.S.C. § 1304(e).....8, 9

8 U.S.C. § 1306(a).....8, 9

8 U.S.C. § 1324a10

OTHER AUTHORITIES

Transcript, Chamber of Commerce v. Whiting, No.
09-115, Oral Argument (Dec. 8, 2010)..... 1-2

INTEREST OF THE *AMICUS CURIAE*¹

The Arizona State Legislature (the “Legislature”) is the constitutionally created legislative branch of the State of Arizona. Ariz. Const. art. 4, part 1, § 1.

The Legislature submits this brief in support of the positions taken by the Petitioners and to set forth its unique perspective on the meaning of SB 1070. Because the Ninth Circuit upheld a facial challenge to SB 1070, there are no facts in the record to illuminate how the enjoined provisions might have been applied by Arizona law enforcement officials. Therefore, the Legislature is best positioned to speak as to how the enforcement of SB 1070 was envisioned.

The Legislature enacted SB 1070 to address the adverse effects of illegal immigration within the State. This was necessary because, as Justice Scalia recently noted, “nobody would [have thought] that . . . the Federal Government would not enforce [immigration laws]. Of course, no one would have expected that.” Transcript, *Chamber of Commerce v.*

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amicus curiae* provided counsel for the parties with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

Whiting, No. 09-115, Oral Argument (Dec. 8, 2010) at pp. 7-8. Hence, the Legislature invoked its well-established police powers in crafting SB 1070, for the purpose of protecting the people of Arizona. Rather than welcoming the Legislature's enactment, the United States sued Arizona.²

STATEMENT OF THE CASE

The Legislature adopts the recitation of the case set forth in the petition.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the questions raised by the decision below as to the authority of the States to regulate areas touching on immigration. The provisions of SB 1070 put on hold by the Ninth Circuit would significantly assist Arizona's effort to protect its citizens from the adverse effects of illegal immigration. Specifically, the provisions:

- Provide additional guidance to Arizona law enforcement officers as to how to interact with individuals who may not be lawfully present. Section 2(B).

² Under a statute enacted after commencement of this litigation, the Legislature has been specifically authorized to defend SB 1070, together with Governor Brewer. S.B. 1117. The Legislature has subsequently intervened as a defendant before the district court, and, in the event this Court agrees to review this case, anticipates that it will move to participate as a party before this Court.

- Utilize ordinary state police powers to create state criminal penalties for the failure to comply with federal law. Section 3.
- Invoke Arizona's broad authority to regulate employment under its police powers to protect its economy and lawfully resident labor force from the harmful effects resulting from the employment of unlawfully present aliens. Section 5(C).
- Re-emphasize Arizona law enforcement officers' pre-existing warrantless arrest authority by authorizing a warrantless arrest of an individual who has already been determined to have committed a public offense that makes him removable. Section 6.

The Legislature adopted these provisions under its plenary power to further legitimate state goals. To ensure that Arizona retains the authority to enact such measures, the Petition warrants this Court's review.

**REVIEW IS WARRANTED BECAUSE THE
DECISION BELOW CALLS INTO QUESTION
THE WELL-ESTABLISHED POLICE POWERS
OF A STATE TO PROTECT ITS CITIZENS**

Contrary to the view of the United States, not every state action related to aliens is preempted by federal law. This nation has a system of dual sovereignty and only state laws that regulate immigration are preempted by federal law. Almost 40 years ago, this Court made it clear that the mere fact that

aliens are the subject of a state statute does not render it a regulation of immigration. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Only the determination of who should or should not be admitted into the country, and the conditions under which that person may remain, is the regulation of immigration. *Id.* Accordingly, the Legislature enacted SB 1070 in reliance on the principle that it had authority to utilize well-established police powers in areas touching on immigration as long as it did not “regulate” immigration.

The provisions of SB 1070 at issue do not impose new restrictions on the manner in which an alien enters the country. Nor do they create any new requirements for such individuals to remain in the country. They certainly do not impose new conditions under which a legal entrant may remain in the country. The provisions simply authorize and direct Arizona law enforcement officers to cooperate and communicate with federal officials and impose penalties under state law for non-compliance with federal law. Hence, these provisions mirror federal objectives while furthering legitimate state goals.

A. Section 2(B) Provides Guidance to Law Enforcement Officers.

There is no dispute that state and local law enforcement officers have authority to enforce the criminal provisions of federal immigration laws. *See, e.g., United States v. Villa-Velasquez*, 282 F.3d 553, 555-56 (8th Cir. 2002). 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. Even the United States has conceded 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. *United States v. Arizona*, 703 F. Supp. 2d 980, 998 n.12 (D. Ariz. 2010); *see also Muehler v. Mena*, 544 U.S. 93, 100 (2005). Thus, even prior to the enactment of Section 2(B), Arizona law enforcement officers had authority to inquire about a person's immigration status.

Facing severe adverse effects of illegal immigration (*see* Petition at 19-21), the Legislature sought to provide Arizona law enforcement officers with additional guidance as to how to interact with individuals who may not be lawfully present. Cognizant of the existing authority of the Arizona law enforcement officers, the Legislature undertook to define the available discretion consistent with federal law and create a unitary framework.

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 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.*

As evident from the plain language of the provision, the Legislature carefully crafted Section 2(B) so that it did not authorize Arizona law enforcement officers to stop persons solely to inquire about their immigration status, nor are officers 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 officer need only make a "reasonable attempt" to determine the person's immigration status. A reasonable attempt to determine a person's immigration status may consist of nothing more than a simple question and an oral response.

In addition, Section 2(B) contains a presumption of legal presence if the suspected unlawfully present alien presents a valid Arizona driver license, 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.

To illustrate how the Legislature envisioned Section 2(B)'s enforcement, this Court can look to the factual circumstances of *Muehler v. Mena*, 544 U.S. 93 (2005). In *Mena*, the Court considered the questioning of a woman who had been detained by local, California law enforcement officers during the execution of a search warrant. *Id.* 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. The Ninth Circuit agreed, but this 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 immigra-

tion status -- but clearly would have had the discretion to do so -- because there was no reasonable suspicion to make such an inquiry.

Hence, 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. Again, an inquiry under Section 2(B) may be satisfied by a simple question and oral response. It also may be satisfied by the production of a valid Arizona driver license or other government identification.

Hence, Section 2(B) is well within the police powers of the State, as it simply defines an officer's available discretion consistent with federal law.

B. Section 3 Utilizes Arizona's Police Powers to Create Penalties for Violating the Federal Registration Scheme.

Section 3 provides 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. Section 3 simply codifies federal law as it "essentially makes it a state crime for unauthorized immigrants to violate federal registration laws." *United States v. Arizona*, 641 F.3d 339, 355 (9th Cir. 2011).

Through this provision, the Legislature exercised its well-established police power to penalize individuals who have failed to comply with federal alien

registration laws. The Legislature recognized that it could not enact a state-based registration scheme, such as the one this Court disallowed in *Hines v. Davidowitz*, 312 U.S. 52 (1941). Nor did it want to do so. Thus it created state penalties for failing to comply with federal law, as is common practice in other areas that are exclusively federal powers. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

The Legislature therefore carefully crafted Section 3 so that unlike the state registration scheme in *Hines*, Section 3 did not provide for any additional conditions under which a lawfully present alien may remain in the United States. In fact, the Legislature enacted special safeguards for lawfully present aliens. Under Section 3, a lawfully present alien simply has to apply for registration with the federal government as already 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, he 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. Hence, Section 3 creates no additional

conditions upon which a lawfully present alien may remain in the country and is an entirely proper use of the Legislature's police powers.

C. Section 5 Regulates Employment Under Arizona's Police Powers.

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).

Section 5 simply reinforces federal law. Under federal law, 8 U.S.C. § 1324a, it is unlawful to knowingly hire an illegal alien for employment. To assist employers in complying with this federal law, the Legislature carefully crafted Section 5 to ensure that only those who may lawfully work would apply for jobs.

Moreover, the Legislature recognized the well-established principle that states possess broad authority under their police powers to regulate employment to protect workers within the state. *De Canas v. Bica*, 424 U.S. 315, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state."). Section 5 therefore does no more than protect the jobs of those who may lawfully work from those who cannot lawfully work under federal law.

D. Section 6 Defines Officers' Existing Warrantless Arrest Authority.

Section 6 amends an existing Arizona statute to authorize specifically a law enforcement officer's authority 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). Section 6 also mirrors federal objectives and furthers a legitimate state goal.

As noted above, it is undisputed that state and local law enforcement officers have authority to enforce criminal provisions of federal immigration laws. Therefore, the Legislature carefully crafted Section 6 to do no more than make clear that Arizona law enforcement officers have the specific authority to make a warrantless arrest of individuals who have committed a felony under federal law.

The Legislature also recognized that Arizona law enforcement officers cannot make a determination about what type of offense might make a person removable or otherwise engage in an analysis of removability. Therefore, Section 6 only permits Arizona law enforcement officers the authority to arrest individuals who have willfully failed or refused to depart after having been ordered to be removed by a federal immigration judge.

The Legislature envisioned Section 6 to be used such as when an Arizona law enforcement officer

runs an individual's name through the National Crime Information Center database and the response that the Arizona law enforcement officer receives from the federal government is that the individual is an "immigration absconder." In other words, the federal government would have informed the Arizona law enforcement officer that the individual had previously been found to be removable and had been ordered removed, but had absconded on the removal orders. *Id.* Under federal law, that individual would have committed a felony. 8 U.S.C. § 1253(a) (it is a felony for an individual "against whom a final order of removal is outstanding" to "willfully fail[] or refuse[] to depart."). Therefore, Section 6 simply makes clear that Arizona law enforcement officers have authority to arrest without a warrant individuals who have willfully failed or refused to depart after having been ordered to be removed by a federal immigration judge.

It is important to note that the decision below is premised on an interpretation of Section 6 without any basis in the text. According to the Ninth Circuit, Section 6 "provides for the warrantless arrest of a person where there is probable cause to believe the person *committed a crime in another state* that would be a crime if it had been committed in Arizona and that would subject the person to removal from the United States." 641 F.3d at 361 (quoting *United States v. Arizona*, 703 F. Supp. 2d at 1005) (emphasis in original). The panel majority, like the district court, inserted the words "committed a crime in another state" into the statute. The Legislature did

not write those words. As explained above, Section 6 defines the already existing warrantless authority of officers to arrest persons who have committed felonies under federal law. The panel majority's tortured construction of the statute was not necessary or correct. Section 6 therefore do no more than define the existing warrantless arrest authority of Arizona law enforcement and is not preempted.

CONCLUSION

For the foregoing reasons, the Legislature requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

Paul J. Orfanedes
Counsel of Record
James F. Peterson
JUDICIAL WATCH, INC.
425 Third St., S.W., Ste. 800
Washington, D.C. 20024
(202) 646-5172
porfanedes@judicialwatch.org

Geoffrey S. Kerksmar
KERCSMAR & FELTUS PLLC
6263 N. Scottsdale Road
Scottsdale, AZ 85004
(480) 421-1001

Counsel for Amicus Curiae

September 12, 2011