No. 11-182

IN THE
Supreme Court of the United States

ARIZONA, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF FORMER COMMISSIONERS OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether federal immigration law likely preempts Arizona's state immigration law which conflicts with federal priorities and Congressional intent to entrust the Executive Branch with discretion over administration and enforcement of federal immigration laws and policies.

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INTERESTS OF *AMICI CURIAE*[1]

Amici are former Commissioners of the United States Immigration and Naturalization Service ("INS"), the predecessor agency to the federal offices now responsible for immigration enforcement under the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ"). Doris Meissner served as Commissioner of the INS under the administration of President William Clinton from 1993 to 2000. She also served under the administration of President Ronald Reagan as Acting Commissioner of the INS in 1981 and then Executive Associate Commissioner, the third-ranking post in the agency, until 1986. James Ziglar was appointed Commissioner of the INS by President George W. Bush in 2001 and served until the agency was dissolved and its missions transferred to DHS.

Amici have no personal stake in the outcome of this case. As former heads of the nation's primary immigration administrative and enforcement agency, they can attest to the importance of a consistent and uniform national system for enforcing and administering the nation's immigration laws. Based on their service in three administrations, *amici* understand the requirement for the Executive Branch to balance competing national interests, including bor-

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[1] The parties have filed blanket consent statements for the filing of briefs *amici curiae*. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

der security, state-federal coordination, humanitarian obligations, and caseload management, in executing federal immigration policy. They have a unique understanding of the importance of setting administrative and enforcement goals and priorities—both in principle and practice—in order to effectively administer and enforce the nation's immigration laws. They also can attest to the disruption to fair and effective administration and enforcement of those laws caused by the efforts of individual states and local governments that attempt to enforce the federal immigration laws in a manner inconsistent and in conflict with the priorities, goals and objectives established by federal immigration agencies and officials.

Ms. Meissner and Mr. Ziglar are Senior Fellows at the Migration Policy Institute, a non-profit, nonpartisan policy research organization dedicated to the study of the movement of people worldwide. The views expressed in this brief are their own.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") vests the Executive Branch with exclusive responsibility for enforcing the nation's immigration laws. The Congress and this Court long have recognized that federal supremacy in matters relating to the terms of admission, the criteria for granting status or requiring removal, the policies relating to the enforcement of the immigration laws, and the specific administration and enforcement of the immigration laws are necessary for the just and equitable admin-

istration of the law. Federal supremacy in immigration matters permits the nation to control its borders in a flexible and consistent manner. The ability to respond to constantly changing and competing factors and circumstances that include national security and public safety requirements, foreign policy considerations, criminal justice, and humanitarian challenges is a uniquely federal obligation and responsibility.

The Executive Branch also must tailor enforcement policy to practical realities, including in particular, resource limitations. Because it is not possible to achieve 100 percent enforcement of the immigration laws, and because indiscriminate and inconsistent enforcement are counterproductive, the Congress has delegated discretionary authority to the relevant federal agencies to determine where the nation's limited resources are deployed most productively. An effective enforcement regime depends on consistent and focused execution of enforcement priorities.

Arizona's immigration statute, S.B. 1070, rejects the federal government's primacy in the development and execution of national immigration enforcement policy and the exclusive authority of the Executive Branch to establish and execute federal immigration enforcement policy priorities, a power specifically delegated by the Congress. In so doing, Arizona's law rejects a long-standing Congressional preference for the judgment of expert federal agencies over that of a particular state or local government. Arizona's law also rejects a long history of federal enforcement discretion and strategic resource

management. Heretofore, federal agencies set immigration enforcement goals and priorities in response to Congressional directives and understanding of the national interests. Arizona's law undermines that established policy and practice by substituting its own judgment for which suspected immigration violations ought to be investigated and prosecuted.

And it does so unnecessarily. Democratic and Republican administrations have welcomed meaningful cooperation from state and local law enforcement agencies under the direction and supervision of federal authorities. A pattern of cooperation between federal and state law enforcement authorities has been established over many years in which state and federal immigration enforcement entities have worked together under the blanket of federal supervision. S.B. 1070 has disrupted that allocation of appropriate roles and responsibilities in Arizona. Instead of encouraging cooperative assistance with federal officials toward shared goals and priorities for the nation, Arizona's law calls upon state and local authorities to exercise independent judgment regarding federal goals, priorities, and resources that are the responsibility of federal agencies and agency heads.

But even if Arizona's efforts were intended to be cooperative, S.B. 1070 undermines national goals because it can overwhelm federal resources with requests that are not consistent with federal priorities. The enforcement regime established by S.B. 1070 requires Arizona law enforcement officers to investigate and detain aliens where the federal government

would not. In so doing, it elevates the state's decision-making authority above that of the federal agencies and Congress.

ARGUMENT

I. EVERY ADMINISTRATION SETS IMMIGRATION ENFORCEMENT GOALS AND PRIORITIES AND RELIES ON MEANINGFUL COOPERATION FROM STATES TO ACHIEVE THOSE GOALS.

A. Congress Authorized Federal Agencies To Set Enforcement Priorities In Response To Changing Circumstances And Limited Resources.

Arizona's law attempts to substitute a state legislature's judgment for that of Congress and the Executive Branch. And it does so in an area where, as Arizona concedes, the federal government generally enjoys exclusive authority. Arizona Br. 30. Arizona does not deny that Congress vests the Executive Branch with statutory authority to enforce the INA. *See* U.S. Br. 19-21. Instead, the state urges this Court to ignore the exercise of that authority when deciding whether S.B. 1070 is preempted. *See* Arizona Br. 28, 58. Establishing federal priorities and taking into account foreign policy goals are central to effective immigration policymaking. Any disruption to the functioning of federal authority in this arena is detrimental to the national interests.

Every administration is required to formulate policy to respond to changing circumstances. Immi-

gration enforcement, like national defense, depends on the "flexibility and … adaptation … to infinitely variable conditions," *Lichter v. United States*, 334 U.S. 742, 785 (1948). Such policy formulation and execution is complex and dynamic. To constrain the flexibility of the federal government to deal with changing circumstances that impact the national interests or security would result in the diminution of the ability of the Congress and Executive Branch to protect the national interest. The national interest is served most effectively when federal authorities exercise the exclusive discretion to enforce the law granted by Congress. For decades, Congress and the executive agencies have responded together to meet the challenges posed by immigration. If previous administrations had not been able to fully control available federal resources, they would not have been able to respond effectively to changing demands in a manner consistent with national objectives. That flexible responsiveness has served the national interests well from administration to administration.

There are many examples of how policy has changed and has been adapted to new circumstances. For instance, in 1986 Congress enacted the Immigration Reform and Control Act ("IRCA"), prohibiting employers from hiring workers who lacked appropriate federal work authorization. 8 U.S.C. § 1324a(h)(3). In response, the federal government redirected some of its investigative resources toward employer education before initiating enforcement operations against employers. Responding to record levels of illegal immigration, enforcement priorities in the 1990s called for the government to concentrate resources on the highest

volume border crossing corridors. Border security became an even greater priority after the terrorist attacks of September 11, 2001. The Bush Administration redirected resources to the investigation and prosecution of immigration and terrorism-related offenses over, for instance, white collar crimes. *See* Dan Eggen & John Solomon, *Justice Department's Focus Has Shifted*, Wash. Post, Oct. 17, 2007, at A1. None of these measures would have been as effective if the Executive Branch had to compete with states' independent judgments as to where federal resources are deployed most effectively.

Current enforcement efforts reflect more recent Congressional mandates and similarly depend on the Executive Branch's control over available resources. For instance, Congress has encouraged the Department of Homeland Security to address immigration concerns by first targeting aliens convicted of serious crimes for removal from the United States. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (2009) (more than 25% of the entire budget of the office of Immigration and Customs Enforcement ("ICE") to target criminal aliens). Indeed, Congress specifically directed the Department to "prioritize the identification and removal of aliens convicted of a crime *by the severity of that crime*," *id.* (emphasis added), and the Secretary has complied. That Congressionally-driven strategy falls flat where a state can impose its own priorities and thereby tax immigration resources without regard to the over-arching limitation imposed by the doctrine of federal supremacy.

B. Enforcement And Prosecutorial Discretion Are Essential To Achieving Defined Objectives.

This Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (prosecutorial discretion applies to immigration enforcement activities). In a system without discretion, only one policy choice exists: investigate every violation; enforce every regulation; fine or arrest, detain, and deport anyone and everyone. That kind of policy leaves no room for immigration agents, for example, to distinguish between a nonviolent elderly U.S. combat veteran and a suspected terrorist with a history of gang violence. Without discretionary oversight, both cases would merit the same investigative and prosecutorial resources.

In light of the limited resources available to enforce our nation's immigration laws, federal legislators have demanded a strategic approach from agency leaders. *See, e.g.*, H.R. Rep. No. 111-157, at 8 (2009) (directing DHS to ensure that its enforcement resources are used for maximum gain in "actually making our country safer" rather than merely "rounding up as many illegal immigrants as possible"). Resources provided in the federal budget presently make it possible to remove less than four percent of removable aliens, J.A. 109. *Which* four

percent are removed is a matter of consequence for national security and public safety.

Congress entrusts federal agencies to target the most dangerous removable aliens. *See Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent."). For decades, federal immigration officials have instructed their agents to decline to prosecute legally sufficient immigration cases where it would serve no substantial federal interest.[2] Reflecting the

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[2] *See, e.g.*, Bo Cooper, INS General Counsel, *INS Exercise of Prosecutorial Discretion* (July 11, 2000), available at http://www.legalactioncenter.org/sites/de-fault/files/docs/lac/Bo-Cooper-memo.pdf; Doris Meissner, Office of Comm'r, U.S. Dep't of Justice, No. HQOPP 50/4, *Exercising Prosecutorial Discretion* (Nov. 17, 2000), available at http://www.legalactioncenter.org/sites/de-fault/files/docs/lac/Meissner-2000-memo.pdf; William J. Howard, Office of Principal Legal Advisor, U.S. Dep't of Homeland Security, *U.S. Immigration and Customs Enforcement, Prosecutorial Discretion* (Oct. 24, 2005), available at http://www.legalactioncenter.org/sites/de-fault/files/docs/lac/Howard-10-24-2005-memo.pdf; Julie L. Myers, Office of Assistant Sec., U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion* (Nov. 7, 2007) ("Myers Memo"), available at http://www.legalaction-center.org/sites/default/files/docs/lac/Myers-2007-memo.pdf; John Morton, Office of Dir., U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement, Policy Number 10072.1, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), available at http://www.ice.gov/doclib/news/releases/2011/110302washingto ndc.pdf; John Morton, Office of Dir., U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement, Policy

enforcement priorities of the time, federal agents historically have exercised discretion over whom to stop, question, or arrest for an administrative violation; whom to detain or release on bond; and whether to dismiss a proceeding, grant parole, stay a final order of detention, or pursue an appeal. *See, e.g.*, Memorandum from John Morton, Director, ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, (June 17, 2011) ("Morton Memo").[3] Before investing time and effort into investigation and enforcement activities, experienced federal agents first consider, among other things, a person's prior lawful status in the United States, the circumstances of arrival (both age and method), service in the U.S. military, and criminal history. Morton Memo at 4-5.

Number 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at http://www.ice.gov/doc-lib/secure-communities/pdf/domestic-violence.pdf; U.S. Dep't of Homeland Security, *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Amendment on Immigration Enforcement Priorities*, (Nov. 17, 2011), available at http://www.ice.gov/doclib/about/off-ices/ero/pdf/pros-discretion-next-steps.pdf.

[3] Available at www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (citing, inter alia, Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976); Bo Cooper, INS General Counsel, *Motions to Reopen for Considerations of Adjustment of Status* (May 17, 2001)).

But even if resources were limitless, prosecution would not always be warranted or wise. Administrations must be free to exercise their discretionary judgment *not* to act where, for instance, witnesses or informants critical to high-priority criminal targets are involved. Authorities (federal, state, or local) must be able to assess the potential benefits of intelligence gained from potentially removable aliens before deciding whether to investigate their status. This may present a distasteful calculus for some—particularly those states with significant immigration problems—but it is one that every administration must be able to make as a matter of policy.

Administrations also must be free to take into account broad enforcement efforts that involve other governments, targeting transnational gangs, drug and human smuggling operations, and other violent criminals and criminal enterprises. Federal authorities may choose to collaborate with certain removable aliens if the bargain ultimately leads to a more substantial payoff—the prosecution of much "bigger fish."

Other issues may influence an agency's decision not to proceed in a particular case. For example, the INA permits aliens who fear persecution in their home country to apply for asylum protection, 8 U.S.C. § 1158, and federal agents regularly exercise discretion when investigating individuals with pending asylum applications. The federal government may choose not to investigate an individual who qualifies for deferred action, which the government grants for general humanitarian reasons—to permit a person to care for a sick child, to receive urgent

medical care, or to visit an ailing relative. Morton Memo at 4. *See, also*, 8 U.S.C. § 1254a (empowering federal officials to exercise discretion not to enforce immigration law against aliens during ongoing armed conflict in their home country); *id.* § 1182(d)(5)(A) (permitting parole for "urgent humanitarian reasons or significant public benefit"); *id.* § 1227(a)(1)(E)(iii) (permitting waiver of a ground of deportability for purposes of family unity). The George W. Bush Administration, for example, instructed its agents and officers to exercise prosecutorial discretion when making administrative arrests and custody determinations for nursing mothers unless there were specific statutory detention requirements or concerns about national security. Myers Memo at 1.

The government also withholds prosecution against petitioners under the Violence Against Women Act (VAWA), which enables aliens who have been battered or otherwise abused by a husband, parent, or child to petition for immigration benefits. 8 U.S.C. § 1101(a)(51). This policy has another salutary effect: the victims protected by the Act are able to cooperate with law enforcement against their abusers (often U.S. citizens or lawful permanent residents). The same discretionary policy applies to victims of sex trafficking and other crimes, and for the same reasons. *Id.* § 1101(a)(15)(T). Federal agents often rely on aliens unlawfully in the United States to build criminal cases, including cases against other aliens the government deems more dangerous to public safety and national security. ICE relies on alien informants and witnesses in illegal employment cases and investigations of violent gangs. *See*

id. § 1101(a)(15)(U). It benefits neither the state nor the federal government to investigate or detain these potentially removable aliens when the agency, in its discretion, will not remove them.

C. Meaningful State Cooperation Under Federal Control Is In The National Interest.

State and local law enforcement resources can be beneficial to the effective enforcement of federal immigration laws. Congress acknowledged the primacy of federal responsibility in these collaborative enforcement efforts when it enacted the 287(g) Program. 8 U.S.C. § 1357(g). Under that program, state and local authorities can assist federal immigration law enforcement subject to three conditions: (1) there must be a Memorandum of Agreement; (2) the local cooperating authorities must receive appropriate training; and (3) local authorities must operate under the supervision of federal immigration officers. *Id.*

The 287(g) Program was designed to provide a force multiplier for the execution of federal enforcement priorities by engaging local law enforcement agencies voluntarily in assisting federal agencies. U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, http://www.ice.gov/news/library/factsheets/287g.htm. The federal government provides participating law enforcement agencies with training and program supervision. Currently, several state and local law en-

forcement entities in Arizona participate in the program, including the state's Departments of Corrections and Public Safety and several city and county police and sheriff's departments. *Id.* Each is permitted to contribute to federal enforcement efforts, "subject to the direction and supervision of the [Secretary of DHS]." 8 U.S.C. § 1357(g)(3).

Other federal programs, like the Criminal Alien Program's Joint Criminal Alien Removal Taskforce, also provide for cooperation with local agencies—again, under federal supervision. Under this program, local officers join special operations teams coordinated by federal Homeland Security authorities, U.S. Marshals, U.S. Customs and Border Protection agents, U.S. Immigration and Customs Enforcement agents, and the Bureau of Prisons, to target aliens involved in human trafficking, smuggling and transnational organized crime.

Certain of these federal efforts are specifically focused on Arizona and encourage cooperation between the federal authorities and the state. The Alliance to Combat Transnational Threats ("ACTT") leverages the capabilities of more than 60 federal, state, local, and tribal agencies in Arizona and Mexico to combat individuals and criminal organizations that pose a threat to communities on both sides of the border. During the past two years, the Department of Homeland Security has engaged in unprecedented, targeted efforts to secure the Southwest border in full collaboration with Arizona officials. U.S. Customs and Border Protection, Fact Sheet: Alliance to Combat Transnational Threats—

Arizona/Sonora Corridor (Feb. 8, 2011), http://www.cbp.gov/xp/cgov/newsroom/fact_-sheets/border/arizona_factsheet.xml.

In each of these programs, the federal government retains its ultimate authority over immigration policy and oversees state officials in furthering priorities that serve national interests. Each program is conducted under federal supervision and requires formal training for state and local law enforcement officers.

II. STATE EFFORTS TO PURSUE INDEPENDENT ENFORCEMENT GOALS WITHOUT FEDERAL GUIDANCE, OVERSIGHT, OR CONTROL THREATEN NATIONAL INTERESTS.

This Court has recognized that immigration enforcement is a "fundamental sovereign attribute," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citations omitted), that requires federal control. There are at least three reasons for that rule. First, state laws do not necessarily serve federal interests and can actually threaten Congressional goals and do harm to foreign relations. Second, even where state law purports to supplement federal law, independent enforcement efforts are often unsuccessful and inefficient. Third, independent state efforts unnecessarily may tax critical federal resources without a corresponding federal benefit.

A. A Uniform National Approach To Immigration Enforcement Is Necessary.

Under any administration, regardless of its particular policy perspective, immigration enforcement depends on a unified and coordinated system with clear lines of authority and accountability. As *amici* recognize from their own experience, responsibility for federal immigration policy and enforcement has changed during recent administrations and especially after the creation of the Department of Homeland Security. However, some basic themes have remained constant: specific Executive Branch agency heads are accountable for the administration of the nation's immigration laws and policies, and enforcement of those laws is a uniquely federal responsibility.

Any state law that competes with federal priorities—or that ignores them—necessarily frustrates those priorities. Even well-intentioned efforts to refine or improve upon federal immigration enforcement policy conflict with "overriding national policies in an area constitutionally entrusted to the Federal Government." *Graham v. Richardson*, 403 U.S. 365, 378 (1971).

As *amici* know from their experience, a state's decision to further its own immigration enforcement goals would have undermined the efforts of any prior administration to enforce federal immigration policies. Similarly, future leaders will struggle to administer the national immigration laws if they are undermined or countermanded by local decisions based upon local concerns.

This is not just a theoretical possibility. Arizona's solution to the current immigration problem is

to investigate and prosecute whenever possible. Even if that solution might be demanded by some Arizona citizens, it is not the solution chosen by the federal government. And Congress has acknowledged the impracticality and undesirability of casting an indiscriminate enforcement net like the one Arizona proposes. *See, e.g.*, H.R. Rep. No. 111-157, at 8 ("[R]ather than simply rounding up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population, DHS must ensure that the government's huge investments in immigration and enforcement are producing the maximum return in actually making our country safer.").

That is why Congress empowered the Executive Branch—and not the states—to forgo sanctions or even to grant benefits to those who might be in the country illegally. Federal agencies—and not state legislatures—may decide when the costs of removal outweigh the benefits. *See* 8 U.S.C. § 1103. For example, the government may value critical testimony against high-priority offenders over the removal of those who would testify. *See* U.S. Br. 21. Even the stepped-up verification efforts Arizona's law requires might disrupt a prosecutor's strategy. This Court heretofore has observed that state laws requiring "repeated interception and interrogation by public officials" may undermine other strategies, and indeed "generat[e] the very disloyalty which [Congress] has intended guarding against." *Hines v. Davidowitz*, 312 U.S. 52 at 65-67, 74 (1941). The problem is compounded as additional state legisla-

tures add their own determinations about how to enforce federal law.

Finally, every administration must be free to manage foreign affairs and communicate its policies to foreign governments with one voice. Immigration necessarily affects foreign relations, over which the federal government always has enjoyed exclusive constitutional authority. *Hines*, 312 U.S. at 62-66; *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001). As part of the formulation and execution of federal immigration policy by the Executive Branch, federal agencies and departments consult on a regular, ongoing, formal, and informal basis. The Department of State, in particular, promotes United States policies internationally and manages objections raised by foreign governments to the treatment of their nationals within the United States. The delicate assessment of "sensitive and weighty interests of national security and foreign affairs" are "entitled to deference" from this Court. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010); *see Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). States do not enjoy any such deference. Nor do they have the information necessary to make decisions about how their local enforcement efforts might affect or thwart foreign policy aims.

Enforcement efforts by individual states open the floodgates to a sea of conflicting and ever-changing local immigration policies, each reflecting independent interests that may conflict with the national interest or the interests of other states. Local authorities are not equipped to enforce federal immigration law on their own. Immigration regula-

tions are extremely complicated and require substantial training and expertise. *See Mathews v. Diaz*, 426 U.S. 67, 84 (1976) (Immigration enforcement requires federal decision-making, "rather than that of either the States or the Federal Judiciary.") If laws like S.B. 1070 are permitted to stand, current and future administrations will find themselves in the impossible situation of having to answer for potentially hundreds or thousands of enforcement decisions over which they have no control, many of which they would never countenance as a matter of federal immigration policy. Without federal guidance, state authorities will make mistakes, some of which will have significant consequences, not only for the individuals affected but also for our nation's relations with foreign governments.

B. Even Where State Laws Do Not Explicitly Conflict With Federal Guidance, They Negatively Impact National Enforcement Efforts.

Arizona acknowledges that Congress expressly intended immigration law to be applied uniformly. Arizona Br. 2, 60-61. It contends, however, that its independent efforts do not necessarily disrupt the uniformity Congress desired. Arizona Br. 24. As the government's brief explains, Arizona's law is not in fact consistent with federal policy. U.S. Br. 22-25. But even if it were, S.B. 1070 requires state enforcement where "Congress manifestly did not desire concurrent state action." *Pennsylvania v. Nelson*, 350 U.S. 497, 504 n.21 (1956). "Conflict is imminent" when "two separate remedies are brought to bear on the same activity." *Crosby v. Nat'l Foreign*

Trade Council, 530 U.S. 363, 380 (2000) (citation omitted); *see also Amalgamated Ass'n of Street, Elec. Rwy. & Motor Coach Empls. v. Lockridge*, 403 U.S. 274, 287 (1971) (a conflict in mere technique "can be as fully disruptive to the system Congress erected as conflict in overt policy"). Even "auxiliary regulations" overstep a state's authority, *Hines,*, 312 U.S. at 66-67, and threaten to disrupt the system of national enforcement.

Even where state and federal laws are clear and consistent, and local authorities generally understand the relevant federal policy considerations, enforcement decisions are highly contextual and fact-specific. These decisions require the Executive Branch to balance shifting, complex, and often competing interests "peculiarly within its expertise," *Heckler,* 470 U.S. at 821, such as national security, public safety, foreign relations, and humanitarian obligations. Events affecting any of these interests may occur without state law enforcement authorities taking notice. Likewise, there may be circumstances so sensitive that state and local law enforcement authorities will not be privy to the relevant information.

Increased communication between states and the applicable federal authorities is not a remedy for this inherent conflict. Because the enforcement of federal immigration law directly implicates foreign relations, *see supra* 18-19, the State Department is involved regularly in the management of federal immigration decisions. There is no practical mechanism for the State Department to communicate with every local authority that wishes to promulgate its

own independent immigration policy, nor would such after-the-fact communication affect those states that have already passed their own immigration statutes. S.B. 1070's reliance on federal authorities to determine whether an individual is unauthorized fails to prevent the undue detention of foreign nationals for the same reason: State Department officials have neither the time nor the resources to respond directly to state and local authorities' independent decisions to detain every potentially removable alien.

C. State And Local Authorities' Independent Immigration Laws Unfairly Tax Critical Federal Resources Otherwise Available To Respond To National Interests.

This Court recognizes that state laws burdening federal resources can undermine federal operations. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349-51 (2001) (preempting state law cause of action in part because it would disrupt agency work with a flood of unnecessary information). State laws like Arizona's will flood already-overtaxed federal investigative and detention resources with low-priority cases that federal authorities otherwise would not choose to prosecute. As a result, federal agencies will be less equipped to enforce high priority goals like national security and public safety. Arizona's law, in particular, weakens federal enforcement activities for several reasons.

First, Arizona's law wastes valuable resources. Local law enforcement officers cannot possibly be expert in the numerous ways a person may be law-

fully or unlawfully present in the United States. They must rely on federal authorities to make status determinations in each case that presents itself. But if every case were submitted for federal verification—as Arizona's law demands—the resulting volume would overwhelm any agency's resources. Federal enforcement officers already struggle to handle the volume of calls they receive from local law enforcement. No agency—not currently nor under prior administrations—could respond to the volume of inquiries that Arizona's law, and others like it, will generate.

Second, because Arizona's law (and others like it) does not distinguish among categories of aliens or suspected violations, it forces federal agents to respond to reports of civil immigration status violations *over all other priorities*. This clearly undermines the carefully calibrated federal strategy to focus on certain persons and certain violations. Every minute spent by a federal agent pursuing low-priority nonviolent individuals is time not spent on dangerous aliens who pose a real threat to Arizona and every U.S. citizen and resident.

Third, local enforcement efforts would suffer. When local authorities are forced to submit *every* suspicion to federal agents for action, they can no longer rely on the valuable federal support they would otherwise receive to aid criminal investigations and prosecutions of serious federal immigration violations. Local resources already are seriously taxed. Under Arizona's law, state and local officers must arrest rather than cite and release. They must

book and detain every suspect until federal authorities can verify immigration status.

CONCLUSION

For the reasons set forth above, this Court should affirm the lower court's decision.

Respectfully submitted,

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