Timothy J. Casey (#013492)
SCHMITT, SCHNECK, SMYTH & HERROD, P.C.
1221 East Osborn Road, Suite 105
Phoenix, AZ 85014-5540
Telephone: (602) 277-7000
Facsimile: (602) 277-8663
timcasey@azbarristers.com
Attorney No. 013492
Special Assistant Attorney General for Michigan
For *Amici Curiae* Michigan, Florida, Alabama, Nebraska, Northern Mariana Islands, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia

Michael A. Cox
Attorney General of the State of Michigan

B. Eric Restuccia (MI Bar No. 49550)
Solicitor General

Mark Sands (MI Bar No. 67801)
Assistant Attorney General

P.O. Box 30212, Lansing, MI 48909
Telephone: (517) 373-1124
RestucciaE@michigan.gov
SandsM1@michigan.gov

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The United States of America,

Plaintiff,

v.

The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity,

Defendants.

No. CV-10-1413-PHX-SRB

PROPOSED BRIEF OF *AMICI CURIAE* MICHIGAN, FLORIDA, ALABAMA, NEBRASKA, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND VIRGINIA

LIST OF *AMICI CURIAE*

Bill McCollum
Florida Attorney General
The Capitol, PL-01
Tallahassee, FL 32399

Troy King
Alabama Attorney General
500 Dexter Ave.
Montgomery, AL 36130

Jon Bruning
Nebraska Attorney General
P.O. Box 98920
Lincoln, NE 68509-8920

Edward T. Buckingham
Northern Mariana Islands Attorney General
Administration Building
P.O. Box 10007
Saipan MP 96950-8907

Thomas W. Corbett, Jr.
Pennsylvania Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Henry D. McMaster
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Marty J. Jackley
South Dakota Attorney General
1302 East Highway 14
Suite 1
Pierre, SD 57501-8501

Greg Abbott
Texas Attorney General
PO Box 12548
Austin, TX 78711-2548

Kenneth T. Cuccinelli, II
Virginia Attorney General
900 East Main Street
Richmond, VA 23219

TABLE OF CONTENTS

Page

Index of Authorities iv

Interest and Statement of Position of *Amici Curiae* 1

Argument 2

1. Senate Bill 1070 does not constitute a regulation of immigration. 4

2. The incidental burdens of Arizona's new reporting scheme on the executive branch do not "stand as an obstacle" to the accomplishment of the full purposes and objectives of Congress. 7

Conclusion and Relief Sought 10

Certificate of Service ..... a

INDEX OF AUTHORITIES

Page

Cases

Altria Group v. Good,
__ U.S. __; 129 S. Ct. 538 (2008) 2

Associated Builders and Contractors v. Perry,
115 F.3d 386 (6th Cir. 1997) 1

Chicanos Por La Causa v. Napolitano,
558 F.3d 856 (9th Cir. 2009) 9

Crosby v. National Foreign Trade Counsel,
530 U.S. 363 (2000) 8

Davida v. United States,
422 F.2d 528 (10th Cir. 1970) 5

De Canas v. Bica,
424 U.S. 351 (1976) 2, 3, 4

Gonzalez v. Peoria,
722 F.2d 468 (9th Cir. 1983) 5, 7

Graham v. Richardson,
403 U.S. 365 (1971) 2

Hines v. Davidowitz,
312 U.S. 52 (1941) 7

Muehler v. Mena,
544 U.S. 93 (2005) 6, 7

Plyler v. Doe,
457 U.S. 202 (1982) 2

Terry v. Ohio,
392 U.S. 1 (1968) 6

Toll v. Moreno,
458 U.S. 1 (1982) 2

United States v. Janik,
723 F.2d 537 (7th Cir. 1983) 5

United States v. Raines,
362 U.S. 17 (1960) 7

United States v. Salinas-Calderon,
728 F.2d 1298 (10th Cir. 1984) 5, 6, 7

United States v. Swarovski,
557 F.2d 40 (2d Cir. 1977) 5

United States v. Vasquez-Alverez,
176 F.3d 1294 (10th Cir. 1999) 5

Statutes

42 U.S.C. § 1983 7

8 U.S.C. § 1252c(b) 9

8 U.S.C. § 1373(a) 8

8 U.S.C. § 1373(b) 8

8 U.S.C. § 1373(c) 1, 3, 4, 8

Mich. Comp. Laws § 14.28 1

INTEREST AND STATEMENT OF POSITION OF *AMICI CURIAE*

Michael A. Cox is the Attorney General for the State of Michigan, which shares constitutional and common law roots with Arizona. Attorney General Cox is authorized by statute to intervene on behalf of the People of the State of Michigan in any court or tribunal when, in his judgment, the interests of the People are implicated. Mich. Comp. Laws § 14.28. *See also Associated Builders and Contractors v. Perry*, 115 F.3d 386, 390-392 (6th Cir. 1997).

Like Arizona, the State of Michigan and the *amici* States have the power to concurrently enforce Federal immigration law, provided that the States do not create new categories of aliens or attempt to independently determine the immigration status of an alien. This is the regulatory scheme envisioned by Congress – which is one of concurrent enforcement – where the Federal government must respond to *any* inquiry by a State or local government agency seeking to verify the immigration status of any person within its jurisdiction. 8 U.S.C. § 1373(c). Such a duty is predicated on the principle that the States have the authority to make those inquiries regarding whether aliens are residing illegally within their borders. Indeed, that is precisely what A.R.S. 11-1051 and A.R.S. 13-3883(A)(5) seek to do – identify unlawful aliens within the jurisdiction of Arizona and to bring those persons to the attention of Federal immigration authorities.[1]

By lawsuit, rather than by legislation, the Federal government seeks to negate this pre-existing power of the States to verify a person's immigration status and similarly seeks to reject the assistance that the States can lawfully provide to the Federal government. That result contravenes Congress's intent of cooperative enforcement and replaces it with a regulatory scheme whereby the Federal government may continue to selectively enforce – or as its brief suggests, selectively not enforce – the laws enacted by Congress.

---

[1] Due to the page limitations set forth by this Court in its order in the companion case *Friendly House et al v. Whiting et al*, No. CV 10-1061-PHX-SRB (Dkt. # 282), the brief of the amici States will address only the issue of whether Sections 2 and 6 of S.B. 1070 are preempted.

ARGUMENT

This Court should begin its analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group v. Good*, __ U.S. __; 129 S. Ct. 538, 543 (2008). Where the statute in question is susceptible to more than one plausible reading, courts must generally "accept the reading that disfavors pre-emption." *Altria Group*, 129 S. Ct. at 543.

The U.S. Supreme Court has made clear that "[t]he States enjoy no power with respect to the classification of aliens." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). In the realm of the regulation of *legal* immigration, State regulation of legal aliens is preempted unless Congress specifically provides such power to the States. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 378 (1971). Thus, "state regulation not congressionally sanctioned that discriminates against aliens *lawfully* admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982)(emphasis added).

But the same standard does not apply to aliens who are *unlawfully* in the country. As the U.S. Supreme Court explained in *De Canas v. Bica*, 424 U.S. 351, 354 (1976), it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power[.]" Rather, States have authority to act with respect to illegal aliens, if that action is consistent with the Federal objectives set by Congress. *De Canas*, 424 U.S. at 357. Congress *intended* to allow States to regulate concurrently with the Federal government with regard to the employment of illegal aliens and, therefore, such regulation is not preempted. *Toll*, 458 U.S. at 13 n. 18.

This Court must presume that S.B. 1070 is not preempted, unless (1) the statute constitutes a "regulation of immigration;" or (2) the statute conflicts with Federal laws, such that it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

De Canas, 424 U.S. at 356-357, 363. Senate Bill 1070 does not constitute a "regulation of immigration" because it does not define who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. According to the brief for the United States, the declared purpose of the statute in section 1 to pursue "attrition through enforcement" constitutes the creation of a state-centric immigration policy. But this claim lacks merit. Senate Bill 1070 does not create a class of aliens different from that set forth under Federal law, nor does it impose restrictions on lawful aliens outside of those in Federal Law. Rather, the statute – and in particular sections 2 and 6 addressing the authority of Arizona to investigate or arrest unlawful aliens – simply exercises Arizona's inherent authority to act with respect to illegal aliens.

Moreover, the incidental burdens of Arizona's new reporting scheme on the executive branch do not "stand as an obstacle" to the accomplishment of the full purposes and objectives of Congress. The United States argues that S.B. 1070 is inconsistent with the policy objectives of the executive branch. But the objectives set forth by Congress – not the executive – are the relevant objectives for purposes of a preemption analysis. Here, Congress has directed that Federal immigration officials "shall respond" to any State inquiry seeking to verify the citizenship status of any individual within its jurisdiction. 8 U.S.C. § 1373(c). By its very terms, this law presumes that State law enforcement officers have inherent authority to inquire into the immigration status of persons within their borders. And that is precisely what A.R.S. 11-1051 and A.R.S. 13-3883(A)(5) allow Arizona to do – investigate or arrest aliens who are classified by the Federal government as unlawful and verify their immigration status with the Federal government.

Finally, S.B. 1070 cannot be said to be an "obstacle" to Federal enforcement of immigration law, because the Federal government at all times maintains its authority to

determine how to proceed once an unlawful alien is brought to its attention by Arizona. The statute simply requires a police officer who has reasonable suspicion to believe that an individual who has already been lawfully detained is in the United States illegally to ascertain that person's immigration status and report unlawful aliens to Federal authorities. But it is ultimately those Federal authorities who must identify the individual as being in the country illegally and who must determine whether the individual must be deported or if that person will be allowed to stay in the United States for humanitarian or other reasons. Accordingly, the United States' preemption argument must fail.

1. Senate Bill 1070 does not constitute a regulation of immigration.

A statute is a "regulation of immigration" if it defines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 354-355. For instance, a State cannot impose additional requirements for aliens to enter the State that go beyond those set by Congress to allow entry into the United States. Moreover, a State cannot create state-level criteria to determine which aliens were allowed to remain in the State. In this case, the United States claims that the statement that Arizona would seek "attrition through enforcement" constitutes the unlawful creation of a state-level immigration policy inconsistent with Federal policy. But the statute as a whole makes clear how Arizona's "policy" will be enacted – by exercising its authority under Federal law to investigate or arrest unlawful aliens and to seek the assistance of the Federal government in identifying whether a specific individual is in the United States unlawfully. *See* 8 U.S.C. § 1373(c). Moreover, Arizona's statement of policy does not change any policy or law regarding who is or is not an unlawful alien under Federal law. It does, however, highlight the obvious – enforcement of immigration laws will reduce violations of those laws. Any time a State chooses to assist in enforcing Federal law, it does so with the goal of reducing violations of that law – the

goal of attrition through enforcement. A State's enforcement of Congressionally-approved immigration standards does not establish new immigrations standards. Rather, it reduces violations of the Federal standards, which is unquestionably the policy goal Congress set when it enacted those standards in the first place.

Federal courts have long held that State law enforcement officers have inherent authority to arrest for violations of Federal law, as long as the arrest is authorized by State law. *See Davida v. United States*, 422 F.2d 528, 530 (10th Cir. 1970). *See also United States v. Swarovski*, 557 F.2d 40, 43-49 (2d Cir. 1977); and *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (holding that as a matter of state law, Illinois officers "have implicit authority to make Federal arrests"). Congress augmented the State's inherent authority by providing that States could arrest persons who are illegally present in the United States under Federal authority where other conditions were met. 8 U.S.C. § 1252c. As explained by the U.S. Court of Appeals for the Tenth Circuit, Congress intended that § 1252c *enhance* State power and that it did not " limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of Federal law, including immigration laws. Instead, 1252c merely creates an additional vehicle for the enforcement of Federal immigration law." *United States v. Vasquez-Alverez*, 176 F.3d 1294, 1298, 1299 (10th Cir. 1999).

The reasoning of *Vasquez-Alverez* is consistent with the conclusions reached by the circuits in the specific realm of immigration law. In *Gonzalez v. Peoria*, 722 F.2d 468, 477 (9th Cir. 1983), the Ninth Circuit held that a State may arrest a person for violating Federal immigration law, so long as the police "have probable cause to believe either that illegal entry has occurred or that another offense has been committed." Likewise, the Tenth Circuit applied the same reasoning in *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984), where a local law enforcement officer had "reasonable suspicion" that a person had violated Federal

immigration law. In *Salinas-Calderon*, a Kansas State Trooper pulled over a driver of Mexican descent based on his suspicion the driver was intoxicated. During the stop, the Trooper discovered not only that the driver could not speak English, but also six adult males in the bed of his pickup truck were unable to speak English. The Tenth Circuit held that the Trooper had "general investigatory authority to inquire into possible immigration violations" and that his questions to the driver's wife about the defendant's green card were reasonable under *Terry v. Ohio*. *Salinas-Calderon*, 728 F.2d 1301 n 3 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). When the Trooper ascertained that the defendant was from Mexico and did not have identification papers or a green card, he had probable cause to make a warrantless arrest for violation of the immigration laws. *Salinas-Calderon*, 728 F.2d at 1301.

In fact, a 2002 memorandum by the Department of Justice's Office of Legal Counsel concludes that States have "inherent power" to make arrests for violations of Federal law and that 8 U.S.C. § 1252c does not preempt State authority to arrest for Federal violations. *See* Dep't of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (April 3, 2002) available at http://www.aclu.org/FilesPDFs/ACF27DA.pdf (accessed on July 12, 2010). This statement of the official position of the Department of Justice is consistent with decisions of the U.S. Courts of Appeals for the Ninth and Tenth Circuits holding that State law enforcement can specifically arrest a person suspected of violating Federal immigration law.

The requirement in A.R.S. 11-1051 that an officer have "reasonable suspicion" that a person in lawful custody is an unlawful alien before investigating that person's immigration status is also consistent with U.S. Supreme Court precedent. In *Muehler v. Mena*, 544 U.S. 93, 100-101 (2005), the U.S. Supreme Court held that a police officer could question a person who is lawfully in custody about that person's immigration status without triggering an additional

seizure under the meaning of the Fourth Amendment. Specifically, the Court held that once a person is lawfully in custody, "the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status." *Mena*, 544 U.S. at 101.

Thus, S.B. 1070 does not "regulate" immigration because its requirements are consistent with the power of State law enforcement to inquire into a person's immigration status. *Mena*, 544 U.S. at 101. The Tenth Circuit's decision in *Salinas-Calderon* – which sustained the argument made by the United States – is consistent with the DOJ's 2002 memorandum and with the provision of S.B. 1070 that requires an officer engaged in a lawful stop, detention, or arrest of a suspect to verify that person's immigration status where there is "reasonable suspicion" that the individual is an unlawful alien.[2] Likewise, *Salinas-Calderon*, *Gonzalez*, and the official memorandum of the Department of Justice, support section 6 of the statute which permits an officer to arrest a person where there is probable cause that the individual has committed an offense that could result in deportation. Accordingly, because S.B. 1070 does not "regulate" immigration, it is not preempted by Federal law.

2. The incidental burdens of Arizona's new reporting scheme on the executive branch do not "stand as an obstacle" to the accomplishment of the full purposes and objectives of Congress.

The preemption doctrine, which rests on the Supremacy Clause, is intended to ensure that state action does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). But here, the United States argues that S.B. 1070 is preempted because it interferes with the executive branch's discretionary allocation of resources.

[2] The United States argues that enforcement of sections 2 and 6 could hypothetically lead to "harassment" of legal aliens and, therefore, those sections are preempted. This argument lacks merit, as a mere hypothetical or imaginary harm is not sufficient to find a statute facially unconstitutional. *See United States v. Raines*, 362 U.S. 17, 22 (1960). Rather, the proper remedy for a person allegedly harassed by Arizona law enforcement under section 2 or 6 would be a 42 U.S.C. § 1983 action, not a claim of preemption.

To support this claim, the United States cites *Crosby v. National Foreign Trade Counsel*, 530 U.S. 363 (2000), in which the United States Supreme Court held that a Massachusetts statute imposing sanctions on Burma was preempted by a Congressional statute imposing sanctions on that country. The Federal statute gave the President the authority to control economic sanctions against Burma and directed the President to proceed diplomatically in developing a strategy towards Burma. The Massachusetts statute, on the other hand, broadly barred its citizens from engaging in commerce with Burma. But the mandatory scheme imposed by Massachusetts interfered with the delegation of power by Congress to the President to modify or end the sanctions at his discretion or to use the promise to do so diplomatically to encourage the Burmese regime in a more democratic direction. *Crosby*, 530 U.S. at 376-377. Because the Massachusetts statute interfered with Congress's intent to give the President maximum flexibility in crafting sanctions against Burma, the Supreme Court held that it was preempted.

No such conflict exists here as between Federal immigration law and S.B. 1070. First, Congress has provided that the executive branch has no discretion regarding whether to answer an inquiry from a State regarding the immigration status of a person in custody. Under 8 U.S.C. § 1373(c), Federal immigration authorities "shall respond" to an inquiry from a State agency seeking to verify the citizenship or immigration status of any individual within that State's jurisdiction. In fact, the U.S. "may not" prohibit or restrict a State from seeking information regarding the citizenship or immigration status of any individual. 8 U.S.C. § 1373(a). Likewise, Federal, State, and local entities are barred from preventing their officials from exchanging information with Federal immigration office. 8 U.S.C. § 1373(b). Again, Congress's use of the word "shall" in § 1373(c) demonstrates that the executive branch lacks any discretion whether to answer these inquiries. Nor does the statute limit in any way the number of inquiries a State might make. Therefore, the executive branch's discretionary allocation of resources cannot

justify its preemption argument. Indeed, this very argument was rejected by the Ninth Circuit in *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866-867 (9th Cir. 2009) (holding that Arizona's requirement to participate in 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").

Second, Congress has stated that the Attorney General "shall" cooperate with the States to assure that information that would assist State law enforcement in arresting and detaining "an alien illegally present in the United States" under certain conditions is made available to such officials. 8 U.S.C. § 1252c(b). Congress's use of the word "shall" indicates a mandatory, rather than discretionary, duty on part of the executive branch to assist State law enforcement in carrying out the State's prerogative under 8 U.S.C. § 1252c(a). Because the Congress has not given the executive branch any discretion in determining whether to assist Arizona, its complaints about draining Federal resources cannot form the basis of a claim of preemption.

Finally, any claim that S.B. 1070 interferes with the Federal government's allocation of resources must fail because Arizona does not, and cannot, place any obligation on the Federal government after an unlawful alien is reported. Under A.R.S. 11-1051(C), a law enforcement agency "shall" notify Federal immigration officials. Once that notification has been completed, it is ultimately up to the Federal government how to proceed. The Federal government could, for example, exercise its discretion by allowing the unlawful alien to remain in the United States in the interest of providing humanitarian relief. Or the Federal government could simply refuse to process any unlawful alien referred to them by Arizona officials, as suggested in May 2010 by

the head of the Immigration and Customs Enforcement agency.[3] There is simply no provision in S.B. 1070 that would, or could, permit Arizona to overrule such an exercise of discretion.

Accordingly, the claim of the United States that S.B. 1070 is preempted because it "interferes" with the enforcement priorities of the executive branch must fail.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, the *amici* respectfully urge this Honorable Court to DENY the Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

SCHMITT, SCHNECK, SMYTH & HERROD, P.C.
s/Timothy J. Casey
Timothy J. Casey #013492
1221 East Osborn Road, Suite 105
Phoenix, AZ 85014-5540
Telephone: (602) 277-7000
Facsimile: (602) 277-8663
timcasey@azbarristers.com
Special Assistant Attorney General for Michigan
For *Amici Curiae* Michigan, Florida, Alabama, Nebraska, Northern Mariana Islands, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia

Michael A. Cox
Attorney General of the State of Michigan

B. Eric Restuccia (MI Bar No. 49550)
Solicitor General

Mark Sands (MI Bar No. 67801)
Assistant Attorney General

P.O. Box 30212, Lansing, MI 48909
Telephone: (517) 373-1124
RestucciaE@michigan.gov
SandsM1@michigan.gov

Dated: July 14, 2010

[3] *See* Avila, "ICE chief criticizes Arizona immigration law," *Chicago Tribune*, May 19, 2010. Available at http://www.azcentral.com/news/articles/2010/05/19/20100519arizona-immigration-law-ICE-chief-opposes.html (accessed on July 11, 2010).

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2010, I electronically transmitted the attached document (proposed amici brief) to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Plaintiff United States of America
represented by Joshua Wilkenfeld Email: joshua.i.wilkenfeld@usdoj.gov

Varu Chilakamarri Email: varudhini.chilakamarri@usdoj.gov

Defendant State of Arizona and Janice K Brewer Governor of the State of Arizona
represented by John J Bouma Email: jbouma@swlaw.com

Joseph G Adams Email: jgadams@swlaw.com

Joseph Andrew Kanefield Email: jkanefield@az.gov

Robert Arthur Henry Email: bhenry@swlaw.com

Amicus Center on the Administration of Criminal Law
represented by Anne Milgram Email: anne.milgram@nyu.edu

Anthony S Barkow, Email: anthony.barkow@nyu.edu

Ellen London, Email: elondon@fklaw.com

Jessica Alexandra Murzyn, Email: jmurzyn@fklaw.com

Ricardo Solano, Jr, Email: rsolano@fklaw.com

By: SCHMITT, SCHNECK, SMYTH & HERROD, P.C.
s/Timothy J. Casey
Timothy J. Casey #013492
timcasey@azbarristers.com
Special Assistant Attorney General for Michigan
For *Amici Curiae* Michigan, Florida, Alabama,
Nebraska, Northern Mariana Islands, Pennsylvania, South Carolina, South Dakota,
Texas, and Virginia

In addition a COURTESY COPY was mailed to:
HONORABLE SUSAN R. BOLTON
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 522
401 West Washington Street, SPC 50, Phoenix, AZ 85003-2153