No. 11-182

In the Supreme Court of the United States

STATE OF 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 STATE AND LOCAL LAW ENFORCEMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Major Cities Chiefs Police Association

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INTEREST OF THE *AMICI CURIAE*

Amici are associations of state and local law enforcement officials and individual current and former law enforcement officials. They have deep expertise in local law enforcement and, in addition, on cooperative federal-state law enforcement activities. *Amici* submit this brief to inform the Court regarding the effect of statutes such as the Arizona law at issue in this case on local law enforcement, on federal-state cooperation in enforcing the federal immigration laws, and on the availability of the federal resources that are essential for that cooperation.[1]

Amici are:

- Major Cities Chiefs Police Association, which is a professional association of chiefs and sheriffs representing the largest cities in the United States, serving more than 68 million people;
- Police Executive Research Forum, which is a national membership organization of progressive police executives from the largest city, county and state law enforcement agencies dedicated to improving policing and advancing professionalism through research and involvement in public policy debate;

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

- National Latino Peace Officers Association, which is the largest Latino law enforcement organization in the United States, with membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers, all of whom are employed at the local, state, and federal levels;
- Sheriff Clarence W. Dupnik, Pima County, Arizona, Sheriff's Department;
- Chief Jack Harris, Phoenix, Arizona, Police Department (Retired);
- Chief Roberto Villaseñor, Tucson, Arizona, Police Department;
- Chief Art Acevedo, Austin, Texas, Police Department;
- Sheriff Leroy D. Baca, Los Angeles, California, Sheriff's Department;
- Chief Charlie Beck, Los Angeles, California, Police Department;
- Chief Chris Burbank, Salt Lake City, Utah, Police Department;
- Chief Ronald Davis, East Palo Alto, California, Police Department;
- Chief Sergio Diaz, Riverside, California, Police Department;
- Chief Timothy Dolan, Minneapolis, Minnesota, Police Department;
- District Attorney George Gascón, San Francisco, California, District Attorney's

Office, San Francisco, California, and former Chief of Police, Mesa, Arizona;

- Eduardo Gonzalez, Director of the U.S. Marshall Service (Retired), and former Chief of Police, Tampa, Florida;
- Chief Jeff Hadley, Kalamazoo, Michigan, Department of Public Safety;
- Chief Jeffrey W. Halstead, Fort Worth, Texas, Police Department;
- Chief Rick Jones, Los Rios, California, Police Department;
- Chief Arturo Venegas, Jr.; Former Chief of Police, Sacramento, California, Police Department;
- Sheriff Richard Wiles, El Paso, Texas, Sheriff's Department;
- Chief Noble Wray, Madison, Wisconsin, Police Department.[2]

SUMMARY OF ARGUMENT

The Arizona law at issue in this case creates serious obstacles and grave complications for federal and state law enforcement. The law categorically requires that all State and local law enforcement officers verify with federal authorities the immigration status of almost anyone they stop or arrest in the course of their day-to-day policing activities. If permitted to go into effect, this mandate would jeopardize the integrity of federal and state law enforcement in at least three ways.

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[2] For individuals, affiliations are provided for identification purposes only.

First, Arizona's categorical verification mandate ignores that its police are in no position to enforce responsibly the immensely complex body of federal immigration law. The vast majority of Arizona's law enforcement officials have no training in immigration law or enforcement. They would be unable legitimately to determine if there is reasonable suspicion to believe that an individual they have stopped is unlawfully present in the United States. Indeed, nearly 50 million individuals are lawfully admitted into the United States each year. Even if Arizona police learn that an individual who they stop is not a U.S. citizen, a non-citizen might have lawful status under any number of visa, parole or asylum programs of which Arizona police are unaware. To make matters worse, the Arizona law threatens fines of up to $5,000 per day for failure to comply with its verification mandate. As a result, Arizona police officers would be inevitably impelled to presume that virtually all those they stop or arrest are unlawfully present in the United States.

This unilateral, blunderbuss approach stands in sharp contrast to Congress's carefully tailored scheme for federal/state cooperation in immigration enforcement. The federal Section 287(g) program encourages States and local law enforcement entities to engage in immigration law enforcement jointly, but only after intensive training and under close and cooperative federal supervision.

Second, Arizona's categorical verification mandate would overburden federal resources and prevent the federal government from focusing on the urgent federal enforcement priority of identifying and removing the most dangerous criminal aliens. Arizona's law and similar laws of other States would

very likely overwhelm the national Law Enforcement Support Center that already fields hundreds of thousands of verification requests nationwide. More troubling still, this flood of requests would doubtlessly be cluttered with tens of thousands of queries about individuals who are in fact U.S. citizens or who have no background blemish other than their unlawful presence in the United States. Arizona's categorical mandate would impede federal authorities' compelling enforcement priorities and their response to far more urgent requests from other States involving dangerous and convicted alien criminals.

Third, Arizona's categorical verification mandate would seriously destabilize federal and local community policing priorities. The reality is that our police cannot protect their communities without fostering cooperation and trust from all classes of people in each community. But the Arizona law would poison any culture of cooperation in communities most afflicted with crime. Those who believe their immigration status to be subject to question would have little reason to assist the police to solve very serious crimes—against themselves or against lawful immigrants and U.S. citizens—once they know that their involvement will invariably trigger police scrutiny of their immigration background.

In short, Arizona's categorical verification mandate hopelessly conflicts with vital federal immigration enforcement priorities while severely undermining vital law enforcement interests in preventing and solving society's most serious crimes. The judgment of the court of appeals should be affirmed.

ARGUMENT

S.B. 1070 WILL PRODUCE ERRONEOUS APPLICATIONS OF FEDERAL IMMIGRATION LAWS, UNDERMINE IMPORTANT FEDERAL ENFORCEMENT POLICIES, AND REDUCE THE EFFECTIVENESS OF LOCAL LAW ENFORCEMENT.

Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070") will impede both federal and local law enforcement efforts. S.B. 1070 imposes on local law enforcement officials a stringent, mandatory obligation to enforce federal immigration law, even though local police officers lack the expertise to navigate complex federal immigration standards. Also, by requiring across-the-board enforcement of immigration laws in the State of Arizona, S.B 1070 prevents the federal government's from using its limited resources in accordance with federally-established enforcement priorities. Finally, S.B. 1070 interferes with federal and local community policing initiatives—not only within Arizona but, more significantly, in other States and localities throughout the nation. By creating friction in the relationship between federal and local law enforcement officials, S.B. 1070 thus will impede—and not promote—enforcement of the federal immigration laws.

A. Local Law Enforcement Officers Will As A Practical Matter Find It Virtually Impossible To Comply With Both S.B. 1070 And Federal Immigration Law.

S.B. 1070 requires local law enforcement officials to verify the immigration status of all detained per-

sons who reasonably could be suspected of being present in the United States unlawfully.

But federal immigration laws are extremely complex, and it will be virtually impossible for local police officers, who already have numerous other responsibilities, to become sufficiently familiar with the various categories of immigration status under federal immigration law. The inevitable result will be the erroneous application of federal immigration laws to detain for removal individuals who in fact are not subject to removal.

1. S.B. 1070 Imposes On Local Law Enforcement Officials The Impossible Task Of Navigating Complex Federal Immigration Laws.

Section 2(B) of the Arizona statute states that a law enforcement officer who has lawfully stopped any person for any reason must make a "reasonable attempt" to verify the immigration status of that person whenever there is "reasonable suspicion" that the individual is unlawfully present in the United States, as long as such verification is "practicable" and would not otherwise "hinder or obstruct an investigation." Ariz. Rev. Stat. Ann. § 11-1051(B). The circumstances in which the verification obligation arises are therefore extremely broad—extending to virtually any nonconsensual encounter between an individual and a law enforcement officer.[3]

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[3] During the legislative debate, State Representative Kyrsten Sinema expressed her concern that the requirement to verify immigration status could be triggered during a law enforcement stop to address "civil ordinances including overgrown yards, parking on streets, cars raised on cinder blocks in people's yards, and inoperable vehicles in driveways." H.B. 2162, AZ

To carry out S.B. 1070's mandate properly, every local law enforcement officer in Arizona would have to become familiar with the multitude of different immigration categories that are created by federal immigration law. While some categories of lawful status are relatively straightforward (*i.e.*, U.S. citizen, lawful permanent resident), local police officers will have to understand the full array of nonimmigrant visas and special authorization programs to ensure that they do not detain someone who has received permission from a federal agency to remain in the country.

Nearly 50 million individuals are lawfully admitted into the United States each year.[4] They fall into a wide range of different nonimmigrant visa categories, including the following:

- foreign government officials (A visas),
- business travelers (B-1 visas),
- tourists (B-2 visas),
- students (F-1 visas),
- guest workers and seasonal workers (various kinds of H visas),

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Minority Rep., 49th Leg., 2d Sess. (Apr. 29, 2010). Even an initially voluntary encounter could easily be recharacterized as a "stop" on the basis of the information provided by the individual during the encounter, thereby triggering the verification requirement.

[4] More than 46 million individuals were admitted as nonimmigrants in 2010. See Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 70, Table 25 (Aug. 2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

- North American Free Trade Agreement (NAFTA) professional workers (TN visas), and
- workers in religious occupations (R-1 visas).

See 8 U.S.C. § 1101(a)(15).

Moreover, the federal government provides immigration authorization to victims of certain crimes who have cooperated with law enforcement officials. For example, the "T visa" program, available to 5000 individuals annually, see 8 U.S.C. § 1184(o)(2), provides legal status, work authorization, and eligibility for public benefits for victims of human trafficking if the victims have "complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution" of trafficking crimes. 8 U.S.C. § 1101(a)(15)(T)(i)(aa).

An individual's T status may last up to four years, with further extensions based on law enforcement need for the individual's help in an ongoing investigation or prosecution. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Immigration Relief for Vulnerable Populations: Human Trafficking, Crime Victims, Domestic Violence and Child Abuse (2011), *available at* http://www.uscis.gov/USCIS/Humanitarian/TUVA-WA-relief.pdf.

Another category, the "U visa," is designed to provide immigration and employment authorization to individuals who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying criminal activity, such as domestic violence, torture, sexual exploitation, or kidnapping. 8 U.S.C. § 1101(a)(15)(U). The purpose of the U visa

program is twofold: first, "to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons," and second, "[to offer] protection to alien crime victims in keeping with the humanitarian interests of the United States." 72 Fed. Reg. 53,014-01 (Sept. 17, 2007), *corrected*, 72 Fed. Reg. 54,813 (Sept. 27, 2007).

The federal government also has recognized additional categories of lawful status based on humanitarian need. For example, the Temporary Protected Status ("TPS") program allows the Secretary of Homeland Security to designate a foreign country based on conditions that temporarily prevent the country's nationals from returning safely, such as an ongoing armed conflict or environmental disaster. 8 U.S.C. § 1254a. During the designated period, individuals who are TPS beneficiaries cannot be detained on the basis of their immigration status, and may not be removed from the United States. 8 U.S.C. § 1254a(a)(1)(A).

To ensure that a TPS beneficiary is not inadvertently detained, local law enforcement officials will have to familiarize themselves with the details of the program and the countries currently designated for TPS status. See, *e.g.*, 77 Fed. Reg. 1710-1711 (Jan. 11, 2012) (designating El Salvador for TPS); 76 Fed. Reg. 68,488-68,489 (Nov. 4, 2011) (Honduras); 76 Fed. Reg. 68493 (Nov. 4, 2011) (Nicaragua); 76 Fed. Reg. 63,635 (Oct. 13, 2011) (Sudan); 76 Fed. Reg. 63,629 (Oct. 13, 2011) (South Sudan); 76 Fed. Reg.

29,000 (May 19, 2011) (Haiti); 75 Fed. Reg. 67,383 (Nov. 2, 2010) (Somalia).[5]

The Attorney General may also "parole" otherwise inadmissible aliens into the United States based on "urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).[6] Local law enforcement officials would have to be able to identify individuals present in the United States with the permission of the Attorney General, but who have not technically been admitted into the United States for immigration purposes.

Finally, some individuals may have pending applications for lawful status—such as requests for asylum—that would render detention and removal unjustified. J.A. 43-45 (Aytes Decl.). Hundreds of thousands of aliens have sought asylum protection in the United States in the past five years, and more than half of all applications in fiscal year 2011 were granted. Department of Justice, Exec. Office for Immigr. Review, *FY 2011: Statistical Year Book* I1, K1,

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[5] TPS designation is not permanent—for example, Bosnia-Hercegovina was first designated for TPS in 1992, 57 Fed. Reg. 35,604 (Aug. 10, 1992), but that designation expired in 2000. 65 Fed. Reg. 52,789-52,791 (Aug. 30, 2000). A police officer therefore would be obliged to keep informed not only of TPS designations, but also of TPS expirations.

[6] The humanitarian parole power has provided the executive branch with the flexibility to respond to refugee crises when ordinary statutory provisions were inadequate. See Thomas Alexander Aleinikoff *et al.*, Immigration and Citizenship: Process and Policy 664-665 (6th ed. 2008) (describing large-scale uses of the parole power, such as President Eisenhower's decision to authorize the admission of 30,000 Hungarian refugees into the United States after the Soviet Union sent tanks into Hungary to quash the 1956 revolution).

K2 (2012), *available at* www.justice.gov/eoir-/statspub/ fy11syb.pdf.

Importantly, different types of documentation—and sometimes no documentation—are provided to an individual legally within the United States, depending on his or her particular status. Officers therefore would be obliged to learn a tremendous amount in order to verify the various different status categories set forth above.

But police officers will not be able to rely upon an individual's failure to produce immigration documents in order to make this determination. The federal immigration authorities have made clear that many individuals *not* subject to deportation will not possess the documents relevant to their status. J.A. 41 (Aytes Decl.). In fact, the group of individuals lawfully present in the country but without any documentation are likely to include especially vulnerable individuals, such as domestic violence victims. J.A. 40-41 (Aytes Decl.).

There simply can be no doubt, therefore, that "[i]mmigration law and immigration status is a very complex area, and local law enforcement cannot possibly be experts in all the different ways a person can be lawfully or unlawfully present." J.A. 58 (Harris Decl.).

Making correct determinations regarding the legitimacy of an individual's immigration status would for these reasons be extremely difficult even if a law enforcement officer were able to take his or her time and exercise flexibility during encounters with potentially deportable individuals. But the provisions of the Arizona statute subject police officers to signif-

icant constraints that make a large number of erroneous determinations inevitable.

To begin with, law enforcement officials or agencies who fail to comply with the immigration status verification obligation are subject to civil penalties of up to $5000 per day—and any Arizona citizen may file a lawsuit to enforce this penalty provision. Ariz. Rev. Stat. Ann. § 11-1051(H). Individual law enforcement officers may be joined in these actions, and may be obliged to pay their own attorneys' fees if they are shown to have acted in "bad faith," a term that is not defined in the statute. See *id*. § 11-1051(K).

Law enforcement officials and individual officers therefore will be extremely reluctant to decline to apply the statute's requirement in every case, for fear that any refusal could subsequently be deemed a violation of the statute and lead to substantial monetary liability. This Court has recognized repeatedly in the context of actions under 42 U.S.C. § 1983 "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). Here, the Arizona statute's threat of liability for *inaction* will have the opposite effect, impelling officers to apply the verification requirement notwithstanding concerns about their inability to make accurate determinations.

At the same time, because the verification obligation applies even to investigatory stops, which are limited in duration (see *Florida* v. *Royer*, 460 U.S. 491 (1983) (holding a fifteen-minute detention too long)), officers will be under considerable time pressure to make their determinations quickly. Other-

wise, they might face liability for violating the Fourth Amendment.

It simply will not be possible for officers to make correct determinations given the complexity of the issue. The inevitable result will be erroneous determinations that individuals are present in the country unlawfully.

2. Arizona's Approach To Training Confirms That Police Officers Will Not Be Able To Carry Out Their S.B. 1070 Responsibilities Properly.

The threshold determination under Section 2(B) is whether "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. § 11-1051(B). Arizona's failure to provide its police officers with any useful guidance regarding this determination—or regarding the determination whether the individual is lawfully in the United States—eliminates any doubt that the statute will not be enforced properly and will necessarily lead to the detention of persons lawfully in the United States.

Determining reasonable suspicion of an immigration violation requires a working knowledge of the legal and policy factors that would make an individual more or less likely to be subject to deportation. See *Public Safety & Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*: Joint Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 77-78 (2009) (statement of David A. Harris, Professor of Law, Univ. of Pitts-

burgh School of Law) [hereinafter Harris Statement].[7]

The relevant Arizona Peace Officer Standards and Training Board instructional video directs officers to look to "indications from dress or appearance of the person that he is an illegal alien"; whether the individual "speak[s] English poorly"; the presence of overcrowded vehicles; and whether "[t]he appearance of the individual is unusual or out of place in a particular locale." See *S.B. 1070 Public Information Center*, AZ POST, http://www.azpost.state.az.us/SB1070infocenter.htm (last edited July 6, 2010) [hereinafter *AZ POST Training Video*].[8]

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[7] This is of course an entirely different inquiry than the one, familiar to law enforcement officers, of ascertaining the existence of a reasonable suspicion of criminal activity. Declaration of A.C. Roper, *Hispanic Coalition of Ala.* v. *Bentley*, No. 2:11-cv-02746-SLB ¶ 11 (N.D. Ala. Aug. 1, 2011) [hereinafter Roper Decl.]; Declaration of Mike Hale, *Hispanic Coalition of Ala.* v. *Bentley*, No. 2:11-cv-02746-SLB ¶ 10 (N.D. Ala. July 21, 2011) [hereinafter Hale Decl.] ("My deputies are comfortable establishing the existence of reasonable suspicion as to criminal conduct generally, but * * * not * * * with reasonable suspicion as to immigration status."); J.A. 63 (Villasenor Decl.) (same).

[8] Other factors include the following (as listed in bullet points in the State's video): lack of lawful identification; possession of foreign identification; flight or preparation for flight from law enforcement; engaging in evasive maneuvers; voluntary statements by the person regarding his or her citizenship or unlawful presence; foreign vehicle registration; counter-surveillance or lookout activity; being in the company of other unlawfully present aliens; location, including for example, a place where unlawfully present aliens are known to congregate looking for work; travelling in tandem; being in an overcrowded vehicle or one that "rides heavily"; being in a vehicle where passengers attempt to hide or avoid detection; prior information about the person; inability to provide his or her residential

What dress an illegal immigrant would favor that a U.S. citizen would not is totally unclear, as are these other factors. Without extensive knowledge of and involvement in the immigration process, local law enforcement officials will be forced to rely on inappropriate "substitute clues," such as the ethnicity and language abilities of individuals, their family members, or the community in which they live. Harris Statement, at 78. But these attributes cast a broad net that will include, for example, U.S. citizens lawfully visiting family members; minors; and other individuals who may lack proper identification. J.A. 82-83 (Estrada Decl.). The statutory standard of "reasonable suspicion" of unlawful presence in the United States will thus as a practical matter produce a focus on minorities, and specifically Latinos. Harris Statement, at 78.

Similarly of little utility is the statutory specification that "any valid United States federal, state or local government issued identification" is sufficient to establish lawful presence in the United States "[i]f the entity requires proof of legal presence in the United States before issuance." Ariz. Rev. Stat. Ann. § 11-1051(B)(4). How could an Arizona police officer possibly know which of the numerous identification-issuing entities in the United States require such proof?

Moreover, querying the federal government's database will not solve the problem. The flood of inquiries from Arizona and the other States with similar

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address; claim of not knowing others in same vehicle; providing inconsistent or illogical information; dress; and demeanor: for example, unusual or unexplained nervousness, erratic behavior, refusal to make eye contact, significant difficulty communicating in English. *AZ POST Training Video*.

statutes will lead to response times much longer than the Fourth Amendment allows an investigatory stop to last.

And in any event the federal database is not likely to provide the answer in many cases. The database, of course, *does not contain the names of any U.S. citizens* and also omits the names of some aliens lawfully present in the United States. J.A. 94, 98 (Palmatier Decl.). A negative response to an inquiry therefore will not enable a police officer to make a decision regarding an individual's immigration status.

The negligible guidance provided by Arizona stands in sharp contrast to the process applicable to local law enforcement efforts undertaken pursuant to statutory provisions authorizing federal-state cooperation in immigration law enforcement.

In 1996, Congress authorized the so-called "Section 287(g) program" to provide a framework for the Attorney General of the United States to enter into agreements with state and local governments for their assistance in the enforcement of federal immigration law. 8 U.S.C. § 1357(g) (codifying Section 287(g) of the Immigration and Nationality Act); see also *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, http://www.ice.gov/news/library/fact-sheets-/#287(g) (last visited Mar. 25, 2012) [hereinafter *Fact Sheet*]. Significantly, federal/state agreements governed by the Section 287(g) program must provide for "*adequate training* [of state and local officers] regarding the enforcement of relevant Federal immigration enforcement laws," and specify that any such state and local officers "*shall be subject to the direction and su-*

pervision of the Attorney General." 8 U.S.C. § 1357(g)(2)-(3) (emphasis added).

Under the Section 287(g) program, U.S. Immigration and Customs Enforcement ("ICE") enters into "Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) Service," that successfully enable cooperation with law enforcement agencies to address illegal immigration. *Fact Sheet*, *supra*.

The Immigration Authority Delegation Program (IADP), is a training program developed by U.S. Immigration and Customs Enforcement ("ICE") for local law enforcement participating in 287(g) agreements. See, *e.g.*, Memorandum of Agreement, Mesa Cty. Sheriff's Dept., 4 (Nov. 2, 2009), *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmesapolicedept111-92009.pdf [hereinafter Mesa MOA]. IADP training includes training in civil rights and liberties, ICE's Use of Force policy, public outreach and complaint procedures, detention of foreign nationals procedures, the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," and instructions on cross-cultural issues. *Id*. at 18. This training can be updated after one year and supplemented with local training by ICE supervisors. *Ibid.*

Officers assigned to participate in these agreements undergo an intensive four-week training course. Declaration of Bobby Timmons, *Hispanic Coalition of Ala.* v. *Bentley*, No. 2:11-cv-02746-SLB ¶ 6 (N.D. Ala. Aug. 1, 2011) [hereinafter Timmons Decl.]; *Fact Sheet*, *supra*.

The sharp contrast between the absence of meaningful immigration enforcement standards under S.B. 1070 and the requirements of training and supervision for participants in the Section 287(g) program highlights the near certainty that S.B. 1070 will inevitably produce erroneous and improper enforcement of the federal immigration laws.

B. S.B. 1070's 100% Enforcement Mandate Conflicts With The Federal Government's Immigration Enforcement Priorities And Will Severely Overburden Federal Resources.

The federal government establishes its immigration enforcement priorities on the basis of law enforcement, humanitarian, and foreign policy objectives, as well as available financial resources. S.B. 1070, by contrast, requires 100% enforcement of federal immigration laws. See Ariz. Rev. Stat. Ann. § 11-1051(A)-(B).

While the United States and Arizona may both share a common objective of enforcing federal immigration laws, "a common end hardly neutralizes the conflicting means." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). S.B. 1070 eliminates the federal government's ability to set enforcement priorities by forcing the federal government to divert its law enforcement resources to handle inquiries and referrals for low-priority undocumented migrants caught up in Arizona's immigration dragnet.

Moreover, existing mechanisms such as the Section 287(g) program provide a more effective means for States and localities to participate in federal immigration enforcement in a manner that furthers,

rather than undermines, federal enforcement priorities.

1. S.B. 1070 Is Wholly Inconsistent With Federal Enforcement Priorities.

The 100% mandatory enforcement directive embodied in S.B. 1070 conflicts directly with the priorities set by U.S. Immigrations and Customs Enforcement pursuant to its statutory authority.

ICE bases its enforcement priorities on a number of factors, such as the difference between the number of people currently present in the United States illegally (approximately 10.8 million) and the very limited number of individuals who ICE has the financial resources to remove each year (approximately 400,000). J.A. 109 (Ragsdale Decl.).

The federal immigration enforcement priorities are designed to concentrate resources on removing those undocumented immigrants who pose the greatest threat to national security. The Director of ICE established the federal government's enforcement priorities in a June 2010 memorandum. Memorandum from John Morton, Assistant Sec'y of U.S. Immigration and Customs Enforcement, to All ICE Employees (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

Under these federal guidelines, which "apply across all ICE programs" and "inform enforcement activity, detention decisions, budget requests and execution, and strategic planning," ICE places the highest priority on identifying and removing aliens engaging in terrorism or espionage and aliens convicted of felonies, particularly violent crimes and repeat offenders. *Id.* at 1-2. Under S.B. 1070, however,

local law enforcement officials will be required to conduct an inquiry into immigration status whenever they develop a reasonable suspicion that an individual is not lawfully present in the United States, even if the officer has no reason to believe that the individual poses a danger to others. That will harm both local and federal officials' ability to address more serious crimes associated with federal immigration violations. See J.A. 57-58 (Harris Decl.) ("[S.B. 1070] authorizes officers to divert from focusing on [serious crimes like kidnapping and human smuggling] and instead focus on federal civil violations, such as unlawful aliens who may have expired student or work Visa's [sic] or those who present no danger to the public.").

S.B. 1070 also fails to incorporate federal immigration officials' directive to refrain from pursuing enforcement action against certain crime victims. ICE Director John Morton issued a memorandum in June 2011 specifying that in ordinary circumstances, "it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime." Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel 1 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf-/domestic-violence.pdf. The Director noted that discretion was particularly necessary in these circumstances to avoid deterring individuals from reporting crimes or from pursuing vindication of their civil rights. *Id.* at 2.

By prohibiting the exercise of federal immigration enforcement authority in specified circums-

tances, the federal government was seeking to further both humanitarian and law enforcement aims. Local detention of members of these populations could frustrate or interfere with achieving those goals. For example, if local law enforcement officials detain an undocumented immigrant who happens to be a crucial witness to an ongoing federal investigation or prosecution, the federal law enforcement activity could be compromised.

2. S.B. 1070 Imposes A Heavy Burden On Federal Resources, Which Will Adversely Affect The Federal Government And Other States.

S.B. 1070 imposes a new, and extremely heavy, burden on federal resources by forcing ICE to divert its own limited resources to handle the increasing number of referrals coming from Arizona, as well as other States that adopt laws similar to S.B. 1070. The influx of referrals of low-priority undocumented immigrants will decrease ICE's ability to detain and remove individuals who threaten national security and public safety. It will also adversely affect the availability of ICE resources to other States.

As we have discussed, S.B. 1070 requires local law enforcement officers to verify the immigration status of all suspected aliens. See pages 7-8, *supra*. Each inquiry must be channeled through the Law Enforcement Support Center ("LESC"), the national enforcement operations facility of ICE. See *Law Enforcement Support Center*, Immigration and Customs Enforcement, United States Department of Homeland Security, http://www.ice.gov/lesc (last visited Mar. 25, 2012). That is because LESC is the single national point of contact for state and local law en-

forcement submitting Immigration Alien Queries ("IAQ"). *Ibid.*

The greatly increased number of local immigration queries from Arizona will strain the Center's resources and prevent it from fulfilling its purpose of providing accurate and timely alien status determinations. J.A. 92-93 (Palmatier Decl.). Although Arizona asserts that requesting and receiving information from the LESC is quick and can be done during an investigatory stop, J.A. 171-173, that is not likely to be true once the inquiries from Arizona and other States pour into the Center. J.A. 97 (Palmatier Decl.).

At present, the LESC has 153 Specialists and has the capacity to handle approximately 1.5 million IAQs per year. J.A. 95 (Palmatier Decl.). S.B. 1070's mandatory status verification requirements will lead to thousands of additional IAQs annually. J.A. 96-97 (Palmatier Decl.). The increased inquiries will delay response times to time-sensitive inquiries from law enforcement, "meaning that very serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the illegal alien they have encountered." J.A. 97 (Palmatier Decl.).

The increased demand on the LESC undermines the Center's ability to respond to higher priority requests for criminal alien status from other States and localities. As federal officials have explained:

> This increase in queries from Arizona will delay response times for all IAQs and risks exceeding the capacity of the LESC to respond to higher priority requests for criminal alien status determinations from law enforcement

> partners nationwide. Furthermore, the potential increase in queries by Arizona along with the possibility of other states adopting similar legislation could overwhelm the system.

J.A. 97 (Palmatier Decl.).

Moreover, federal authorities will have to process for removal all of the low-priority individuals identified through the S.B. 1070 procedures. That will divert federal resources and subvert the federal policy. J.A. 122-123 (Ragsdale Decl.) ("Diverting resources to cover the influx of referrals from Arizona (and other states, to the extent similar laws are adopted) could, therefore, mean decreasing ICE's ability to focus on priorities such as protecting national security or public safety in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public.").

3. Section 287(g) Agreements—In Contrast To Arizona's Unilateral Enactment—Provide An Effective Mechanism For Cooperation Between Local And Federal Law Enforcement Officials.

Local law enforcement officials who believe it would be beneficial to obtain authority to enforce federal immigration laws have the option of entering into 287(g) agreements with the federal government. 8 U.S.C. § 1357(g).[9] These memoranda of agreement

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[9] Some local police departments prefer not to enter into such agreements for policy reasons, including the costs associated with immigration enforcement. There have been various reports analyzing the costs of entering into a 287(g) agreement among various jurisdictions. See, *e.g.*, The Latino Migration Project,

between ICE and the local authorities clearly define the scope of the local department's immigration law enforcement authority. See Department of Homeland Security, Office of Inspector General, Performance of 287(g) Agreements 2 (Mar. 2010), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf [hereinafter OIG Report].

Local law enforcement agencies have the flexibility to decide which of the two 287(g) program models they would prefer: the jail enforcement model, under which "287(g) officers working in state and local detention facilities identify and process removable aliens"; the task force model, under which "287(g) officers identify and process removable aliens in com-

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The Institute for the Study of the Americas & The Center for Global Initiatives, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities* 33 (Feb. 2010), *available at* http://cgi.unc.edu/uploads/media_items/287g-report-final.original.pdf (reporting that "[t]he estimated cost for the first full year of operation for Alamance County is $4.8 million," and "the estimated total cost for the first year of operating the 287(g) Program in Mecklenburg County is $5.3 million."); Metropolitan Policy Program at Brookings, *Immigrants, Politics, and Local Responses in Suburban Washington* 18 (Feb. 2009), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf (reporting that Prince William County, VA, spent $6.4 million to enforce its immigration enforcement policy in the first year after entering into a 287(g) agreement); Morris County Sheriff's Office, *An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Program Upon the County of Morris* 7 (Oct. 2007), *available at* http://www.justicestrategies.org/sites/default/files/MorrisSheriff-287g_impact_review.pdf (estimating the cost of entering into a 287(g) agreement at $1.3 million).

munity settings"; or a combination of the two. *Id.* at 3.

The 287(g) MOAs identify personnel eligibility standards and training requirements and mandate certain reporting procedures. *Id.* at 2-3. Most importantly, the MOAs provide that local enforcement agencies are permitted to perform immigration enforcement activities only under ICE supervision, and that ICE officials can suspend or revoke participating officers' authority at any time. *Id.* at 3.[10] The structure of the 287(g) program thus ensures that ICE maintains the authority to set enforcement priorities for the participating local agencies. J.A. 111-112 (noting that ICE has refocused the 287(g) program "so that state and local jurisdictions with which ICE has entered into agreements to exercise federal immigration authority do so in a manner consistent with ICE's priorities").

Indeed, it is significant that the federal government has in recent years modified 287(g) agreements to reflect new federal policies concerning immigration, and to promote "consistency in immigration en-

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[10] The ability to revoke participating agencies' 287(g) agreements is critical in situations in which the local law enforcement agency abuses its authority under the program. For example, the Maricopa County Sheriff's Office had a 287(g) agreement with ICE, but the program was terminated after the Department of Justice found evidence of civil rights violations. See Letter from John Morton, Director, Immigration and Customs Enforcement, to Bill Montgomery, Cnty. Attorney, Maricopa Cnty. (Dec. 15, 2011), *available at* http://media.phoenixnewtimes.com/7508198.0.pdf; Letter from Thomas E. Perez, Assistant Attorney Gen., to Bill Montgomery, Cnty. Attorney, Maricopa Cnty. (Dec. 15, 2011) *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf).

forcement across the country by prioritizing the arrest and detention of criminal aliens." *Fact Sheet: Updated Facts on ICE's 287(g) Program*, ICE, www.ice.gov/news/library/factsheets/287g-reform.htm (last visited Mar. 25, 2012). The revised policy also prioritizes "dangerous criminal aliens" (those convicted or arrested for major drug offenses or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping) for deportation over those whose, for example, only crime lies in their illegal immigrant status. Press Release, Dep't Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm; see Mesa MOA, App. D.

The federal government's 287(g) MOA policy further confirms the federal determination that enforcement should be focused on improving public safety by deporting dangerous illegal immigrants. J.A. 92, 103, 107-111. And it makes clear that this policy determination applies to state resources participating in immigration under federal supervision. Mesa MOA, App. D ("To ensure resources are managed effectively, ICE requires the [Police Department] to also manage its resources dedicated to 287(g) authority under the MOA.").[11]

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[11] It is noteworthy that, prior to the recent 287(g) policy revisions, the federal government had difficulty in maintaining its priorities even under the 287(g) agreements. See Government Accountability Office, GAO-09-109, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Jan. 2009), *available at* http://www.gao.gov/new.items/d09109.pdf [herei-

S.B. 1070 is squarely inconsistent with these federal policy determinations. By mandating 100% enforcement, the statute undermines the federal policy determinations reflected in both federal enforcement priorities and in the federal government's approach to the 287(g) program—both of which rest on the exercise of power conferred on the federal government by Congress.

The very same determination is reflected in ICE's Secure Communities program, which has been implemented in more than 1700 jurisdictions, including all jurisdictions along the Southwest border. *Secure Communities*, Immigration and Customs Enforcement, Department of Homeland Security, http://www.ice.gov/secure_communities (last visited Mar. 25, 2012) (select "The Basics" tab).[12] The program provides a process by which local jurisdictions can share the fingerprints of inmates with the FBI and ICE, who will check the prints against the federal government's immigration databases. *Ibid.*

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nafter GAO Report]; OIG Report. The GAO report found that 20% of the persons apprehended by local law enforcement were not initially detained by ICE and 15% of those who were detained were subsequently released and that "if all the participating agencies sought assistance to remove aliens for such minor offenses, ICE would not have detention space to detain all of the aliens referred to them." GAO Report, at 4. The OIG report concluded that only 9% of the aliens apprehended by local agencies were in the top priority classifications. OIG Report, at 7.

[12] Secure Communities is expected to expand to all law enforcement jurisdictions nationwide by 2013. *Secure Communities*, Immigration and Customs Enforcement, Department of Homeland Security, http://www.ice.gov/secure_communities (last visited Mar. 25, 2012).

ICE then decides whether to take enforcement action, "prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors." *Ibid.* Importantly, the program specifies that "the federal government, not the state or local law enforcement agency, determines what immigration enforcement action, if any, is appropriate." *Ibid.*

Moreover, ICE has specifically and carefully designed the Secure Communities program to "focus[] its limited resources" on the federal government's "highest priority" in enforcing federal immigration laws: "the removal of criminal aliens, those who pose a threat to public safety, and repeat immigration violators." *Ibid.*

The Secure Communities program, like the 287(g) MOAs, ensures that the federal government's enforcement priorities will be reflected in the actions of local law enforcement officials. Enforcement decisions are made "only [by] federal DHS officers" and "only after an individual is arrested for a criminal violation of state law, separate and apart from any violations of immigration law." *Ibid.*

S.B. 1070, by contrast, usurps this exclusive authority, undermines existing immigration enforcement programs, and interferes with important policy choices made by the federal government.

C. S.B. 1070 Undermines Federal And Local Community Policing Policies.

Law enforcement cannot successfully protect citizens without those citizens' cooperation. At both the federal and state level, community policing—the cooperative approach under which law enforcement

and community members work together to combat crime—has resulted in better and more efficient policing.

S.B. 1070, however, upsets that balance. When every individual with whom the police interact must be subjected to immigration scrutiny, it is inevitable that law-abiding witnesses and victims of crimes will avoid police interaction, allowing perpetrators to escape and creating an atmosphere of fear that will spill over to the rest of the community. And this impact will not be restricted to the states that adopt laws resembling S.B. 1070. It will spill across borders, and adversely affect law enforcement in states that do not adopt such policies.

1. Modern law enforcement techniques focus on cultivating relationships with—and the cooperation of—minority communities in order to promote effective policing in those communities. See, *e.g.*, Roper Decl. ¶ 14; Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, at 24 (Mary Malina ed., 2009), *available at* http://www.policefoundation.org/pdf/strikingabalance/Role%20of%20Local%20Police.pdf (explaining the increased popularity of such approaches in the policing profession over the past twenty years).

Law enforcement "rel[ies] heavily" on information from both U.S. citizens who live in immigrant communities and from individuals who are present illegally but have committed no other crime. J.A. 51 ("Deterring, investigating and solving serious and violent crimes are the department's top priorities, and it would be impossible for us to do our job without the collaboration and support of community members, including those who may be in the country

unlawfully."); J.A. 61 (same); J.A. 117-119 (describing ICE reliance on unlawful immigrants in serious criminal cases and the use of federal discretion to enable aliens to remain in the U.S. to assist in investigations and prosecutions); J.A. 84-85.

2. S.B. 1070 threatens these critical and deliberately forged relationships, eliminating important public safety benefits. Police would be compelled to interrogate and perhaps incarcerate many of their potential allies. J.A. 51 (noting that, in the past, an undocumented immigrant physically detained a suspected child molester to aid police). Moreover, even if an exception existed in a certain case, most people will be reluctant to risk deportation by making their names—and what they witnessed or experienced—known. J.A. 84-85.

Law enforcement officers' role as immigration enforcers will become highly salient in the eyes of the community they seek to protect—and that will render community members, both U.S. citizens and noncitizens, uncooperative, destroying the fundamental basis for community policing. J.A. 84-85; J.A. 67 ("We cannot bear the destruction of our relationships with our local community that we so vitally need in order to be successful in our mission to protect the public and make our City a better place to live with an excellent quality of life.").

This will deter illegal immigrants from reporting on their own abuse. See, *e.g.,* Southern Poverty Law Ctr., *Under Siege: Life for Low-Income Latinos in the South,* at 6 (Apr. 2009), *available at* http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf (noting that 41% of migrant workers surveyed reported wage theft). It will also deter U.S. citizens in mixed-status households, or who fear

that their family members will be deported as a result of their interaction with police. J.A. 85.

That is not a small or isolated effect. Studies indicate that 2.3 million U.S. citizens live in mixed-status households. Harris Statement, *supra*, at 77.[13] The mandatory 100% enforcement of the immigration laws required by S.B. 1070 therefore threatens the safety interests of entire communities. See Jack Dunphy, *Arresting a Crime Wave*, National Review Online, Jan. 30, 2008, http://www.nationalreview.com/articles/216650/arresting-crime-wave/jack-dunphy (quoting Los Angeles Assistant Chief George Gascón, who noted that a man who assaults an undocumented woman who fails to report the assault will likely repeat the crime against someone else).

As *amicus* Major Cities Chiefs Association, a group of police chiefs from the 70 largest police departments in the United States and Canada, stated:

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[13] The Police Foundation estimates that 85% of immigrants live in mixed-status families. Khashu, *supra*, at 24. Furthermore, many U.S. citizens live in neighborhoods with or engage in occupations shared by illegal immigrants. Both give rise to reasonable suspicion for a police investigation. And if these citizens, like 11% percent of all voting-age Americans, fail to have a recognized form of government identification, they can be detained until ICE can confirm their status. See The Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, at 3 (2006), *available at* www.brennancenter.org/page/-/d/download_file_39242.pdf (identifying the number of Americans without citizenship identification).

> Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.

Major Cities Chiefs Immigration Committee Recommendations: For Enforcement of Immigration Laws By Local Police Agencies 6 (June 2006), *available at* https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf.

Significantly, this effect will not be limited to states like Arizona that adopt statutes such as S.B. 1070. Once it becomes known that law enforcement authorities in some states have adopted this approach to enforcing federal immigration laws, U.S. citizens and other individuals in immigrant communities in other states will reasonably attribute the same approach to *all* law enforcement officers. States that decline to adopt a policy like Arizona's will nonetheless be burdened by the reduction in law enforcement effectiveness that flows from the elimination of trust between communities and the law enforcement officers who protect them.

By adopting an immigration law enforcement approach that is directly inconsistent with federal policy, Arizona will therefore injure not only its own law enforcement efforts, but also the local law enforcement of its sister states across the nation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Major Cities Chiefs Police Association

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