No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA, *et al.*, *Petitioners*,
v.
UNITED STATES, *Respondent*.

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

Brief *Amicus Curiae* of U.S. Border Control, U.S. Border Control Foundation, Policy Analysis Center, English First Foundation, English First, Conservative Legal Defense and Education Fund, Virginia Delegate Bob Marshall, Pennsylvania Representative Daryl Metcalfe, Oklahoma Representative Charles Key, Maryland Delegate Don Dwyer, Wyoming Senator Kit Jennings, Utah Representative Curtis Oda, Washington Representative Matt Shea, and Iowa Representative Kent Sorenson in Support of Petitioners

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September 12, 2011

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INTEREST OF *AMICI CURIAE*[1]

The organizational *amici curiae* are nonprofit organizations having mutual interests in proper construction of the Constitution and laws of the United States, and in securing the nation's borders. They believe that this brief will be of assistance to the Court, bringing to its attention relevant matter not fully addressed by the parties. They are as follows:

- **U.S. Border Control** (www.usbc.org) was incorporated in Virginia and is exempt from federal income tax under IRC section 501(c)(4) of the Internal Revenue Code ("IRC").

- **U.S. Border Control Foundation** (www.usbcf.org) was incorporated in Virginia and is exempt under IRC section 501(c)(3).

- **Policy Analysis Center** was incorporated in Virginia and is exempt under IRC section 501(c)(3).

- **English First Foundation** (www.englishfirstfoundation.org) was incorporated in Virginia and is exempt under IRC section 501(c)(3).

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- **English First** (www.englishfirst.org) was incorporated in Virginia and is exempt under IRC section 501(c)(4).

- **Conservative Legal Defense and Education Fund** (www.cldef.org) was incorporated in the District of Columbia and is exempt under IRC section 501(c)(3).

The individual *amici curiae* are currently-serving state legislators who stand with Arizona's defense of the rights of sovereign states, seek to preserve the powers of the states from federal encroachment, and have concern about the burden that illegal immigration poses throughout the country to the political communities and economies of their various states:

- Virginia Delegate **Bob Marshall**,
- Pennsylvania Representative **Daryl Metcalfe**,
- Oklahoma Representative **Charles Key**,
- Maryland Delegate **Don Dwyer**,
- Wyoming Senator **Kit Jennings**,
- Utah Representative **Curtis Oda**,
- Washington Representative **Matt Shea**, and
- Iowa Representative **Kent Sorenson**.

Representative Metcalfe is Founder and Chairman of State Legislators for Legal Immigration (http://www.statelegislatorsforlegalimmigration.com/), and he, Delegate Dwyer, and Representative Shea

previously joined in an *amicus* brief in the case below in the Ninth Circuit (No. 10-16645).[2]

SUMMARY OF ARGUMENT

It is the preeminent duty of this Court to preserve the balance between the federal and state governments struck by the United States Constitution. While Article VI of the Constitution provides that constitutional federal law is the supreme law of the land, it is incumbent upon the courts to remember that the powers of Congress are few and definite, while the powers of the State are many and indefinite. Indeed, it is even more critical to recall that the governments of the original 13 states preceded the government of the United States both in time and in right. If this truth is forgotten, the Supremacy Clause will be misused, subordinating the several states to the national government when the Constitution is replete with provisions designed to preserve the States as sovereign political communities with reserved powers to protect and to preserve themselves as free and independent states.

Purporting to apply this Court's preemption doctrine, the U.S. Court of Appeals for the Ninth Circuit disregarded this fixed federalist principle. Instead of applying the ordinary presumption against preemption, the court presumed that an Arizona law designed "to discourage and to deter the unlawful entry and presence of aliens" was a regulation of

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[2] http://www.ca9.uscourts.gov/datastore/general/2010/10/25/amicus.brief8.pdf

immigration and naturalization, and was therefore, within the exclusive province of the federal government.

Had the court below correctly applied the presumption against preemption, it would have recognized that the States have traditionally inquired into the status of their residents' United States citizenship to determine whether they met the constitutional standard of state citizenship as defined by the Fourteenth Amendment. Because one's U.S. citizenship determines whether a resident of a state is a state citizen, states have a legitimate interest in the enforcement of the nation's immigration and naturalization laws, lest they be overrun politically and economically by persons illegally residing in the state.

In the case of Arizona, the state's interest is even more acute and pronounced. Faced with a veritable horde of foreign invaders from the south, the Arizona state legislature adopted a policy of "attrition" as a means of self-defense. Not only did the court below disregard this purpose, it ignored that, under Article IV, Section 4, the federal government was obliged to stop this invasion, and that Article I, Section 10 expressly reserved to the states the power to defend themselves against invaders.

The express reservation of power in the states to repel an invasion need not await an actual invasion, nor a declaration of war. It is enough that the state is in imminent danger for it to draw on its reserved power of self-preservation. According to the Ninth

Circuit, however, Arizona must rely on the federal government's discretion in the enforcement of its immigration and naturalization laws. But the federal government has contributed to — not alleviated — the danger by a decade of bi-partisan neglect of Arizona's plight that threatens public solvency, especially in the provision of educational services to millions of illegal aliens and their families.

ARGUMENT

Petitioners argue that "Arizona's Authority to Enact S.B. 1070 is a Matter of Pressing Importance," which merits this Court's attention because the issues raised "strike at the heart of our federal balance," and because the Ninth Circuit's resolution of those issues "is irreconcilable with the basic tenets of our Federalism." Arizona Petition for a Writ of Certiorari (hereinafter "Cert. Pet."), pp. 19-24. These *amici* concur. The Ninth Circuit utterly failed to perform its duty "[t]o preserve the even balance" of this "Republic['s] dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different." South Carolina v. United States, 199 U.S. 437, 448 (1905). While this judicial duty is both "peculiar" and "delicate," it is "preeminently" the duty of this Court to preserve "the even balance between these two governments." *Id.* For the reasons stated in the Petition, and for the additional reasons stated below, these *amici* urge this Court to review the decision below.

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE PRINCIPLES OF FEDERALISM WOVEN INTO THE VERY FABRIC OF THE NATION'S CHARTER AND CONSTITUTION.

On July 4, 1776, the American people, acting in concert through their elected representatives, established the United States of America. They did so, not in the capacity of representatives of a hastily formed centralized national polity, but as the representatives of the people of 13 "united Colonies," each with a rich history of self-government. Thus, they proclaimed "that these united Colonies are, and of Right, ought to be Free and Independent States ... and that, as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Declaration of Independence.

On November 15, 1777, delegates representing the original 13 states signed the Articles of Confederation, Article II of which proclaimed that "[e]ach State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled." Under the Articles, "the states assume[d] the primary responsibility for the protection of the liberties of their citizens." *See* Sources of Our Liberties 400 (R. Perry & J. Cooper, eds. American Bar Foundation, Rev. ed. 1978). "Only a few powers were given to the central government." *Id.* On September 17, 1787, representatives of the original 13 States approved the

Constitution of the United States, each provision of which was voted on and approved State by State, with each state having one vote. Thus, the document's subscription clause read "done in Convention by the Unanimous Consent of the States" and signed — as the Declaration of Independence and the Articles of Confederation had been — by the people's representatives grouped and expressly identified State by State. *See* Sources, 321-22, 416-17.

While designed "to form a more perfect Union," Article VII of the Constitution dictated a ratification process whereby the Constitution would have no effect unless the representatives of the people of nine States — meeting separately and independently in a constitutional convention called by the legislature of each State — approved it. And even then the Constitution would not bind any State that did not ratify it, "the ratification of the Conventions of the nine States [being] sufficient for the Establishment of the Constitution **between the States so ratifying** the Same." (Emphasis added.) Although the Constitution granted to the new national government more powers than had been delegated under the Articles of Confederation, the Constitution — like the Articles — preserved the independent and sovereign states.

In short, the State governments came first, constituted by the people of each State, with the plenary powers inherent in civil government, followed by the federal government, constituted by the People of the United States, acting State by State, and

granting to that government only those powers expressly delegated to it by the Constitution.

Thus, in 1793, in Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1793), Justice Iredell observed that:

> Each State in the Union is sovereign as to all powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrenderred [sic] must remain as it did before. [*Id.* at 435.]

In 1991, this Court confirmed this historic legacy of "dual sovereigns":

> "[T]he people of each State compose a **State**, having its own government, and endowed with **all the functions essential to separate and independent existence**,' ... '[w]ithout the States in union there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent **autonomy** to the States, through their union under the Constitution, but it may be not unreasonably said that **the preservation of the States**, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of **indestructible States**. [Gregory v.

Ashcroft, 501 U.S. 452, 457 (1991) (emphasis added) (citations omitted).]

At the heart of this case is whether one of these "indestructible states," Arizona, retains the power of self-preservation, a function essential to its separate and independent existence, or whether Arizona and her people are deprived of such "reserved" powers, as secured by the Tenth Amendment, rendering them wholly dependent upon a non-responsive, often antagonistic, national government to protect them from an actual invasion of illegal immigrants. According to the court below, this Court's preemption doctrine severely restricts Arizona's effort "'to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States,'" (641 F.3d at 367, Noonan, J. concurring), on the ground of a judicially-contrived implication that Congress intended that Arizona subordinate the vital interests of its citizens to a failed national immigration and naturalization policy that threatens to sap Arizona of its economic and political vitality.

At risk in this case is whether the nation's federalist system — in which independent and sovereign States have played a vital part from the very beginning of America's settlement and colonial history — is to be degraded in favor of an exalted centralized civil power, the tentacles of which are increasingly threatening to strangle American self-government and liberty. *See, e.g.,* M. Beitler, "Federal Government is Too Big: Federalists and Anti-Federalists Agree" (May 23,

2011).[3] As this Court stated just this past October term, "Federalism ... allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely on the political processes that control a **remote central power.**" Bond v. United States, 564 U.S. __, 131 S.Ct. 2355, 2364 (2011) (emphasis added).

II. THE NINTH CIRCUIT RULING UNDERMINES THE RETAINED SOVEREIGNTY OF THE STATE OF ARIZONA.

In Bond, this Court unanimously affirmed that the constitutional "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States" and that "[t]he federal balance ... ensure[s] that States function as political entities in their own right." Bond v. United States, 131 S.Ct. at 2364. According to the Ninth Circuit, however, the grant of power to the United States Congress "to establish an uniform rule of Naturalization" implicitly denies to the States any powers respecting the legal status of persons within its geographical jurisdiction, except as expressly granted by Congress. *See* United States v. Arizona, 641 F.3d 339, 344-46 (9th Cir. 2011).

The Ninth Circuit found that Section 2B of S.B. 1070 — authorizing an Arizona law enforcement official to

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[3] http://lincolntribune.com/?p=12063.

ascertain a person's immigration status **incidental to a stop or arrest** for a violation of a **state** law or **county** or **city** ordinance — was preempted by a federal statute governing direct and purposeful enforcement of **federal** immigration laws by state and local law enforcement officials. *Id.*, 641 F.3d at 346-52. To reach this conclusion, the court dismissed Arizona's claim that the ordinary presumption against preemption applied, ruling that "states have not traditionally occupied the field of identifying immigration violations." *Id.*, 641 F.3d at 348.

Section 2B, however, neither authorizes nor permits state and local officials to identify immigration violations; rather it authorizes only efforts to identify "immigration status," and even then, to do so in cooperation with the federal government, not independently from it. *Id.,* 641 F.3d at 346. But the Ninth Circuit misconstrued Section 2B in such a way as to equate the two, because the public policy of Section 2B, like all of S.B. 1070, was "to make attrition through enforcement." *Id.*, 641 F.3d at 366 (Noonan, J. concurring). Upon this erroneous premise, the court below concluded that Arizona law **functions** to serve no other purpose than to displace federal immigration policy by its own "policy on immigration." 641 F.3d at 367 (Noonan, J., concurring). Only by characterizing Arizona's bill as an immigration and naturalization measure could the Ninth Circuit find that S.B. 1070 impeded Congress's authority to establish a "uniform rule on naturalization."

Completely overlooked by the Ninth Circuit is that Arizona's policy of "attrition" of illegal immigrants is

not a state policy on immigration or naturalization. Rather, S.B. 1070 states that Arizona has a "**compelling interest** in the **cooperative enforcement** of federal immigration laws ... to **discourage and deter the unlawful entry** and presence of aliens and economic activity by persons unlawfully present in the United States." (Emphasis added.) Thus, Arizona's policy is to enforce cooperatively a national policy of immigration and naturalization **as a means of** protecting her "integrity, dignity, and residual sovereignty," one of the central features of America's federal system. *See* Bond, 131 S.Ct. at 2364. It is an inherent power of the State, secured by the Tenth Amendment, to protect and preserve her sovereign status as a separate and independent political community.

Missing from the Ninth Circuit's analysis of the traditional role of State governments is their authority to define and enforce laws governing state citizenship. According to the Fourteenth Amendment, persons residing in Arizona are citizens of Arizona, only **if** they are, first of all, citizens of the United States. That amendment defines a United States citizen as a "person born or naturalized in the United States, and subject to the jurisdiction thereof." In order for Arizona to determine whether a particular state resident is also a state citizen, it retains the authority to inquire into and ascertain whether that person is a United States citizen either by birth or by naturalization, an inquiry that would include ascertaining a person's immigration status. Thus, state inquiries into such status are within the ambit of those powers reserved to the States by the Tenth

Amendment. For example, this Court has ruled that a State may condition employment as a public school teacher or as a police officer on a person's American immigrant status. *See* Ambach v. Norwick, 441 U.S. 68 (1979) (public school teacher) and Foley v. Connelie, 435 U.S. 291 (1978) (state police officer). As this Court has explained:

> The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government ... begins by defining the scope of the community of the governed.... Aliens are by definition those outside of this community. [Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982).]

Accordingly, this Court has affirmed "'a State's **historical** power to exclude aliens from participation in its democratic political institutions' ... as part of the **sovereign's** obligation 'to preserve the basic conception of a **political community**.'" Foley, 435 U.S. at 295-96 (emphasis added).

To be sure, neither Section 2B, nor any other contested provision of S.B. 1070, directly concerns public employment, or other privileges of citizenship, such as the right to vote, to run for elective office or to serve on a jury. *See id.* at 296. All four sections, however, are tailored to ameliorate the enormous hydraulic pressures that a "broken" federal immigration system has placed upon Arizona's ability

"to function as a political entity in its own right."[4] *See* Cert. Pet., p. 19. Indeed, Arizona has expressed in S.B. 1070, itself, that there "is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona." As pointed out in the Petition for Certiorari, that "compelling interest" arises from the inadequate federal enforcement of the nation's immigration laws. Arizona's border with Mexico "is so porous" and that "large areas of southern Arizona" have become so dangerous that they resemble a war zone, patrolled by National Park Rangers with M-16 carbines. *Id.,* pp. 19-20. Arizona taxpayers are tremendously burdened, paying inordinate sums for "incarcerating criminal aliens," and for providing illegal aliens and their families with other services, such as education and health care.[5]

To combat these several threats to her political sovereignty and public solvency, Arizona passed S.B. 1070, the intent of which was "to make attrition through enforcement the public policy of all state and local government agencies in Arizona." In adopting a policy of attrition, the Arizona legislature hoped to ameliorate the political and economic threats caused by illegal immigration through both voluntary and involuntary reduction of its illegal alien population.[6]

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[4] *See* Bond, 131 S.Ct. at 2364.

[5] *See* Cert. Pet., pp. 20-21.

[6] *See* J. Antle, "Mission Attrition," (*The American Spectator*: July/Aug. 2010). http://spectator.org/archives/2010/07/07/mission-attrition/print

Apparently, the enactment of S.B. 1070, and the controversy sparked by its passage, succeeded in doing just that, occasioning a sizeable return of Mexican citizens to Mexico,[7] and others moving to other states.[8]

Such attrition of the illegal alien population necessarily reduces the number of non-citizens who either attempt to register to vote, or, if already registered, who actually vote in state and local elections. Such a reduction in numbers by attrition may prove to be the most effective means of cleaning the voter rolls of illegal aliens, because current voter registration policies and practices operate largely on the honor system.[9]

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[7] M. Stevenson, "Study: 100,000 Hispanics leave Arizona after immigration law debated" (Nov. 11, 2010) http://www.msnbc.msn.com/id/40141843/ns/us_news-immigration_a_nation_divided?

[8] J. Tyler, "Hispanics leave AZ over immigrant law," American Public Media, May 18, 2010. http://marketplace.publicradio.org/display/web/2010/06/14/pm-hispanics-leave-arizona-over-immigrant-law/

[9] *See* L. Bentley, "In Arizona, illegal aliens, felons, and multi-state residents vote unabated," Sonoran News.com, Oct. 20, 2010. http://www.sonorannews.com/archives/2010/101020/frontpage-illegal.html. In 2004, by popular initiative, the people enacted into law Proposition 200 which would require specific proof of American citizenship as a condition for registering to vote. That law has yet to be put into effect. The question of whether it has been preempted by the National Voter Registration Act, in that Proposition 200 requires such proof of citizenship to vote in either a state or national election, is currently before an *en banc* court in the Ninth Circuit. *See* Gonzalez v. Arizona, No. 08-17115 (U.S. Court of Appeals for the Ninth Circuit).

III. THE CONSTITUTION REQUIRES THE FEDERAL GOVERNMENT TO DEFEND EACH STATE AGAINST INVASION, AND EXPRESSLY SECURES STATE AUTHORITY TO RESPOND AGGRESSIVELY TO SUCH INVASION.

Notably absent from the Ninth Circuit opinions is any discussion of the scope of the Constitution's grant of power to Congress in Article I, Section 8, cl. x, "[t]o establish an uniform Rule of Naturalization ... throughout the United States," pursuant to which the federal nationalization statutes on which the Court focused were enacted. Without any analysis whatsoever, the panel assumed *sub silentio* that S.B. 1070 was a state naturalization law, that the Constitution vested exclusive control in this area to the federal government, and that Arizona had no business meddling in this area without express authorization from Congress.[10] Having so pigeonholed S.B. 1070, the Ninth Circuit ignored the real interest that the State of Arizona had in passing this law — self defense.

In its myopic focus on Congressional intent, the Ninth Circuit overlooked two provisions in the Constitution which anticipate the very real possibility that the territory of a state might be invaded by

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[10] Justice Noonan's assumption in his concurring opinion that enforcement of immigration laws was central to the formation of the nation's foreign policy was likewise based on no constitutional analysis, and scant authority. *See* U.S. v. Arizona, 641 F.3d at 366-369.

foreign governments and foreign nationals. First, Article IV, Section 4 imposes an affirmative duty upon the federal government to protect Arizona from invasion:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and **shall protect** each of them against **Invasion**...." [Art. IV, Sec. 4 (emphasis added)]

While it is true that most of the Mexican nationals and citizens of several other countries who have illegally breached the nation's Arizona border do not wear military uniforms and carry the traditional weapons of war, it is clear that Arizona's borders have been breached by hundreds of thousands of invaders, in flagrant disregard of the sovereignty, and the laws, of both the United States and Arizona.

Illegal aliens coming over the border surreptitiously are obviously not United States citizens or otherwise lawful entrants. They enter the country illegally,[11] and then remain in the country illegally.[12] When they work in Arizona, they work illegally[13] — illegally fabricating a Social Security Number, and using other illegal forms of identification.[14] Many of them

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[11] *See* 8 U.S.C. §1325.

[12] *See* 8 U.S.C. § 1324d.

[13] *See* 8 U.S.C. § 1324a.

[14] *See* 18 U.S.C. § 1028.

subsequently misrepresent their status and register to receive public benefits and to vote in Arizona elections illegally.[15] Some enter Arizona bringing drugs and committing violence.[16] Some enter as members of international drug and crime syndicates.[17] Some bring deadly contagious diseases that had largely been eradicated in the United States.[18]

The great numbers of illegal immigrants despoil the land near the border, make large portions of Arizona into a dangerous place to travel,[19] force Arizona

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[15] *See* 18 U.S.C. § 1015.

[16] "Mexico's drug-related violence," BBC, Aug. 26, 2011. ("The Mexican government last issued figures in 12 January 2011. Its database said 34,612 people had been killed since December 2006, including suspected drug gang members, members of the security forces and those considered innocent bystanders.") http://www.bbc.co.uk/news/world-latin-america-10681249

[17] *See* W. Booth, "Mexico's crime syndicates increasingly target authorities in drug war's new phase," Washington Post, May 2, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/05/01/AR2010050102869.html

[18] *See, e.g.,* C.P. Davis, M.D., "Chagas Disease," MedicineNet.com http://www.medicinenet.com/chagas_disease/article.htm. *See also* M. Weinberg, National Center for Infectious Diseases, "The U.S.-Mexico Border Infectious Disease Surveillance Project: Establishing Bi-national Border Surveillance," Emerging Infectious Diseases Journal 2003, CDC, Jan. 9, 2003, pp. 97-102. http://www.cdc.gov/ncidod/EID/vol9no1/02-0047.htm

[19] *See* M. Chamot, "Arizona Under Seige; Americans Banned from 5,500 U.S. National Park Acres Overrun by Dangerous Mexican Drug Cartels & Smugglers of Illegal Aliens," June 19, 2010. http://www.zimbio.com/Illegal+immigration/articles/iu4qhQGB

government officials to increase taxes to pay for benefits which they receive,[20] and take jobs from American citizens.[21]

Arizona estimates that 400,000 individuals now living in Arizona, approximately 6 percent of its residents, are illegal invaders.[22] In the aggregate, illegal aliens arrive in numbers which rival the size of the largest invading forces in history.

Some invaders even appear to enter Arizona with the believing that they are reclaiming the Southwest United States — land which they believe had been stolen from them.[23] What is truly remarkable is that some of the Mexican nationals who have forced their

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[20] *See* E. Barnes, "Cost of Illegal Immigration Rising Rapidly in Arizona, Study Finds," Fox News, May 17, 2010. http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidlty-new-study-says/

[21] *See* Associated Press, "Illegal Immigrants Leaving Arizona Over New Law," CBS News, Apr. 29, 2010. http://www.cbsnews.com/stories/2010/04/29/national/main6442729.shtml

[22] *See* Cert. Pet., p. 20.

[23] A Zogby International poll in Mexico in May 2002 revealed that by a margin of "two to one, more Mexican respondents agree (58%) than disagree (28%) that the territory of the United States' Southwest rightfully belongs to Mexico. One in seven (14%) is not sure." Zogby Poll, "American Views of Mexico and Mexican views of the U.S.," Part II (June 6, 2002). http://www.numbersusa.com/text?ID=1149

way across Arizona's borders actually do wear the uniform of a foreign power, constituting the actual military forces of the Mexican Government, and yet the federal government has not protected Arizona and its citizens. In 2006 alone, the Department of Homeland Security confirmed 20 actual incursions onto U.S. soil by the Mexican military — 50 percent of which occurred in Arizona, and nearly every one involved intentional, armed incursions by members of the Mexican military.[24]

Meanwhile, the federal government seeks to minimize these incursions onto U.S. soil. Former Department of Homeland Security Secretary Michael Chertoff blamed those who report on such incursions, stating: "I think to create the image that somehow there is a deliberate effort by the Mexican military to cross the border would be to traffic in scare tactics...."[25] While Mr. Chertoff claimed the incursions were not "deliberate," his own report classified most incursions as "intentional." DHS, Mexican Government Incidents, *supra*, pp. 7-15. And his own agency warned Border Patrol agents to be wary of Mexican troops in the United States who would "escape, evade

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[24] *See* Department of Homeland Security, Customs and Border Protection, Office of Border Patrol, Mexican Government Incidents, 2006 Fiscal Year Report. http://www.judicialwatch.org/archive/2008/FY2006MexicanIncursionReport.pdf

[25] *See* AP, "Chertoff downplays Mexican military incursions," The Salt Lake Tribune, Jan. 19, 2006. http://archive.sltrib.com/article.php?id=3416118&itype=NGPSID&keyword=&qtype=

and counterambush" law enforcement officers.[26] The deception implicit in the statements of Mr. Chertoff is exposed by those who confront this problem at the border: "'Give me a break' said ... a 27-year Border Patrol veteran ... 'intrusions by the Mexican military to protect drug loads happen all the time and represent a significant threat to agents.'"[27] Their presence in the United States amounts to an "invasion" under Article 4, Section 4 of the Constitution.

When confronting an actual invasion, the Constitution also recognizes the inherent right of each state to take extreme measures in its own self-defense:

> No State shall ... engage in War, **unless actually invaded**, or in such imminent Danger as will not admit of delay. [Art. 1, Sec. 10, cl. 3 (emphasis added).]

Joseph Story's commentary on this clause explained that it envisioned a state's right, when confronted by invasion, to take military action "for its own safety."

> The danger may be too imminent for delay; and under such circumstances, a state will have the right to raise troops for its own safety, even without the consent of congress." [J. Story,

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[26] *See* "Mexican military incursions reported," Washington Times, Jan. 17, 2006. http://www.washingtontimes.com/news/2006/jan/17/20060117-121930-3169r/

[27] *See id.*

> Commentaries on the Constitution, 3. § 1399, reprinted in Kurland, Philip B. and Lerner, Ralph, The Founder's Constitution, University of Chicago Press (1987), Volume 3, p. 485.]

Surely, if a state has the constitutional authority to raise troops and conduct military action in its own "self-defense," without the consent of Congress, it has the authority to do what Arizona has done in S.B. 1070 — encourage "attrition" of persons illegally on Arizona soil.

IV. THE FEDERAL GOVERNMENT HAS FAILED TO DEFEND THE ARIZONA BORDER.

For the past decade, presidents of both parties, and leaders in Congress on both sides of the aisle, have given mixed signals respecting defense of the border, and illegal immigrant enforcement policies and practices. Congress has considered a series of bills which would give millions of children of illegal aliens, and then their families, the opportunity to jump ahead of the line of those applying for legal immigration.

The interest in moving toward amnesty for illegal aliens has been distinctly bi-partisan. The first Senate bill called the DREAM Act was introduced August 1, 2001, by Senator Orrin Hatch (R-UT), S. 1291, in the 107th Congress.[28] Subsequent versions of the DREAM Act were supported by then President George W.

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[28] http://www.govtrack.us/congress/billtext.xpd?bill=s107-1291

Bush.[29] The current version of this bill is S. 952, the Development, Relief, and Education for Alien Minors Act of 2011 ("DREAM Act"), introduced May 11, 2011, in the 112th Congress by Democratic Senate Assistant Majority Leader Richard Durbin (D-IL).[30] This bill is supported by now President Barack Obama.[31]

The Ninth Circuit accepted at face value the representations of the Justice Department that "Congress provided the Executive with a fair amount of discretion to determine how *federal* officers enforce immigration law" and that the federal government implements "its priorities and strategies in law enforcement...." U.S. v. Arizona, 641 F.3d at 351. However, the true intentions of the Justice Department have come into question. On April 13, 2011, Democratic Senate Majority Leader Harry Reid and 20 Democratic Senators wrote a letter to the President suggesting that, even though the DREAM Act was rejected by Congress, and President Obama is "obligated to enforce the law," that the President has "prosecutorial discretion in light of law enforcement

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[29] *See* M. Brand,"Student Facing Deportation Fights for DREAM," National Public Radio, Sep. 10, 2007, http://esl-bits.net/advanced-listening/Media/Dream/default.html

[30] http://www.govtrack.us/congress/billtext.xpd?bill=s112-952

[31] UPI, "Obama says he still supports DREAM Act," July 25, 2011. ("In July 2008, when Obama ran for president, he promised the National Conference of La Raza he would make immigration reform a priority during the first year of his presidency.") http://www.upi.com/Top_News/US/2011/07/25/Obama-says-he-still-supports-DREAM-Act/UPI-30971311582600/

priorities and limited resources." The Senators wrote: "we would support a grant of deferred action to all young people who meet the rigorous requirements necessary to be eligible ... under the DREAM Act."[32]

In response, on August 18, 2011, Homeland Security Secretary Janet Napolitano replied on behalf of President Obama, stating that she agrees that "it makes no sense to expend our enforcement resources on low-priority cases" and "[d]oing otherwise hinders our public safety mission — clogging immigration court documents and diverting [Department of Homeland Security ("DHS")] enforcement resources away from individuals who pose a threat to public safety."[33] Secretary Napolitano referred to a June 17, 2011 memorandum on prosecutorial discretion from Immigration and Customs Enforcement ("ICE") Director John Morton, issued after the Reid letter had been received. Under that memorandum,[34] ICE indicated a desire to slow-play immigration enforcement with "a case-by-case review to ensure that new cases placed in removal proceedings similarly meet such priorities."

While the establishment of enforcement priorities is not unusual, especially in response to Congressional

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[32] http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c

[33] http://democrats.senate.gov/uploads/2011/08/11_8949_Reid_Dream_Act_response_08.18.11.pdf

[34] http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf

underfunding enforcement of the nation's immigration laws, the June 17, 2011 memorandum was issued in response to frustrated Congressional supporters of unsuccessful amnesty legislation, urging law enforcement to ignore most violations of immigration law. The response of the President's key immigration official to political pressure suggests, at the very least, a lack of vigor of the President in performing his Article II, Section 3 constitutional duty to "take Care that the Laws be faithfully executed...."

Put into a historical context, the efforts of the current Administration to protect the border are revealed as modest. A few years after Arizona became a state in 1912, Mexican general Pancho Villa began a series of cross-border attacks on American citizens in the United States in retaliation for Woodrow Wilson's recognition of Villa's competitors as the official government of Mexico. Pancho Villa's forces were considered bandits by the American government, and President Wilson sent General John J. Pershing, with over 6,000 troops, into Mexico to capture or kill Villa. To protect the border, President Wilson also called up 110,000 members of the National Guard to counter the increasing number of border raids from Mexico into the United States.[35] By way of contrast, in May 2010,

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[35] *See* M. Yockelson, "The United States Armed Forces and the Mexican Punitive Expedition: Part 1" Fall 1997, Vol. 29, No. 3. http://www.archives.gov/publications/prologue/1997/fall/mexican-punitive-expedition-1.html

President Obama committed 1,200 federal troops to the border.[36]

V. THE FEDERAL GOVERNMENT'S FAILURE TO ENFORCE THE BORDER HAS IMPOSED A HUGE TAX BURDEN ON THE CITIZENS OF ARIZONA, AS WELL AS THE REST OF THE COUNTRY, PARTICULARLY WITH RESPECT TO EDUCATION.

Under the theory of the Ninth Circuit, only the Federal Government has a legitimate interest in immigration status of persons found in a state. Such a view ignores reality. It was recently estimated that Arizona is forced to tax its citizens an additional $2.7 billion per year to pay the costs associated with illegal aliens, including "$1.6 billion from Arizona's education system, $694.8 million from health care services, $339.7 million in law enforcement and court costs, $85.5 million in welfare costs and $155.4 million in other general costs." *See* E. Barnes, "Cost of Illegal Immigration Rising," *supra*. While Arizona's voters spoke loudly against bilingual education and its excessive cost on November 7, 2000 with the adoption of Proposition 203, the educational burden on Arizona remains is immense, and it is a cost which Arizona cannot avoid based on this Court's controversial 5-4 decision in Plyler v. Doe, 457 U.S. 202 (1982). The effect of that case, coupled with the government's

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[36] *See* P. Zengerle, "Obama sending 1,200 troops to Mexico border," May 25, 2010. http://www.reuters.com/article/2010/05/26/us-usa-mexico-border-idUSTRE64O5RE20100526

theory in this case, indicates that the federal government can fail to enforce the borders, allow an invasion of 11 million or more illegal aliens, and then hand the bill for the education of the children of those illegal aliens to the states.

Failure to secure the border imposes additional costs on the federal government as well, but as with other spending issues, the current Administration is tolerant of escalating debt. Federal expenses are made even worse by Congress' delay in enacting English as the official language, and requiring that all governmental official duties be conducted in English, and that all new citizens be able to read and understand the English language text of our founding documents.

As to the other states, it is the porosity of the Arizona border that creates the type of uncontrolled immigration that is draining the educational budgets of schools across America, particularly where bi-lingual education is employed. In this way, the battle of Arizona is truly the battle for, and behalf of, all Americans and it becomes incumbent on other states to show solidarity with the people of Arizona, as these organizations and state legislators seek to do by joining in the filing of this *amicus* brief.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit should be granted.

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