Barnaby Zall (*admitted pro hac vice*)
Counsel for Amicus American Unity Legal Defense Fund
WEINBERG & JACOBS, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
301-231-6943
301-984-1200 (f)
bzall@aol.com

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, *Plaintiff* v. State of Arizona, *et al.*, *Defendants*	CV-10-1413-PHX-SRB LODGED: PROPOSED BRIEF *AMICUS CURIAE* OF THE AMERICAN UNITY LEGAL DEFENSE FUND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION ATTACHED

Barnaby Zall (*admitted pro hac vice*)
Counsel for Amicus American Unity Legal Defense Fund
WEINBERG & JACOBS, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
301-231-6943
301-984-1200 (f)
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FOR THE DISTRICT OF ARIZONA

United States of America *Plaintiff* v. State of Arizona, *et al.* *Defendants*	CV-10-1413-PHX-SRB MEMORANDUM OF POINTS AND AUTHORITIES OF *AMICUS CURIAE* AMERICAN UNITY LEGAL DEFENSE FUND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Introduction and Summary:

> [I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – **unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate**.

Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008) (Wake, J.) (emphasis added).

The United States ("Plaintiff") says that Arizona's SB 1070 focuses too much on stopping illegal immigration, Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof ("P. Mem."), 13, and that it must "balance the purposes and objectives of federal law." P. Mem., 3. Yet Plaintiff has it backwards: it is Arizona which is pursuing the "purposes and objectives of federal law," and Plaintiff's "balance" which violates it.

Plaintiff, for example, doesn't mention that its "balance" means not enforcing Congress's expressed "primary purpose" of protecting American workers through vigorous immigration enforcement. In particular, Plaintiff doesn't admit immigration law enforcement in the interior of the country collapsed – declining 99% between Fiscal Year 1997 and FY 2005 – and still has not recovered.

The immigration enforcement collapse was not accidental, and it was not ordered or approved by Congress. It doesn't even match official rhetoric. It was the deliberate abandonment of a new "efficient and effective capability to bar unauthorized workers from employment in any given sector." Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 39. "When the capability was realized, it was stopped." *Id*. It was "stopped" by agency internal memo, *id*., at 61-62,

because of "complaints" that it was too effective at stopping the employment of illegal immigrants. *Id*. This is the opposite of the text and avowed purpose of the statute.

Plaintiff is asking this Court to approve not a "balance" of "purposes and objectives of federal law," P. Mem. 3, but a violation of the spirit and letter of both. The consequences of this "'real' federal policy" are the opposite of what Plaintiff's Motion suggests: under the applicable Supreme Court standard of review, the failure of federal illegal immigration law enforcement is not support for preemption, but a major ground for rejecting preemption.

Interior Immigration Law Enforcement Is a "Primary Purpose" of the Immigration Laws: It is the expressed position of the federal government to stop illegal immigration:

> [B]usinesses must be held accountable if they break the law by deliberately hiring and exploiting undocumented workers. We've already begun to step up enforcement against the worst workplace offenders. And we're implementing and improving a system to give employers a reliable way to verify that their employees are here legally. But we need to do more. We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers. And ultimately, if the demand for undocumented workers falls, the incentive for people to come here illegally will decline as well.

President Barack Obama, *Remarks by the President on Comprehensive Immigration Reform*, July 1, 2010, http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

Stopping illegal immigration is also the unchanged statutory position of the federal government. Congress decided in 1986 to "close the back door on illegal immigration so that the front door on legal immigration may remain open." H. Rep. 99-682 (I), at 46. Congress chose a combination of increased border enforcement with

"employer sanctions" – prohibitions on hiring illegal immigrants[1] – as "the only effective way to reduce illegal entry and in the Committee's judgment it is the most practical and cost-effective way to address this complex problem." *Id*., at 49.

> As we have previously noted, [the Immigration Reform and Control Act of 1986] "forcefully" made combating the employment of illegal aliens **central to "[t]he policy of immigration law**." *INS v. National Center for Immigrants' Rights, Inc*., 502 U.S. 183, 194, and n. 8 (1991). It did so by establishing an extensive "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147-48 (2002) (emphasis added). That focus on combating illegal immigration[2] remains "central" to immigration law.

For a time, the Executive Branch seemed to be following this policy. A 1991 INS memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law." CRS, *Immigration Enforcement*, at 37. In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration." *Id*. In Fiscal Year 1996, President Clinton requested, and Congress approved, "significant funding

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[1] In its brief *amicus curiae* in *Friendly House v. Whiting*, No. 2:10-cv-1061-PHX-SRB (Doc. 326), at 4-5, *Amicus* American Unity Legal Defense Fund, Inc. ("AULDF") discussed this legislative history of employer sanctions.

[2] As AULDF showed in its *Friendly House amicus* brief, *supra*, at 8, Congress did not intend the Executive Branch to be the sole enforcer of illegal immigration laws. For example, in 1996, Congress provided a RICO cause of action to States and individuals against employers of illegal immigrants. *Id*.

increases for interior enforcement, including worksite enforcement and employment eligibility verification." *Id.*

By 1996, there appeared to be a breakthrough: INS developed a new and "effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

Federal Agencies Chose to Let Employer Sanctions Fail: By 1998, however, INS abandoned the "effective" strategy, *because* it was effective. **"**When the capability was realized, it was stopped." *Id*.; *see, also, id.*, at 61-62 (describing May 1998 "Immediate Action Directive for Worksite Enforcement Operations" memorandum by INS Executive Associate Commissioner for Field Operations Michael Person ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id*. at 38, 62, not because Congress changed the law.

Interior Immigration Law Enforcement Has Collapsed: As a result, the reality of worksite immigration enforcement is substantially different from Congress's intention and the Executive's rhetoric: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ." U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement Weaknesses*"), August 2005, GAO-05-813, at 30 (emphasis added).

GAO's bland language masks the true extent of the "decline[]" Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3
2005[3]	81	N/A[4]
2006	3,667	N/A
2007	4,077	N/A
2008	5,184	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. 2006-2008 data from ICE, "Fact Sheet: Worksite

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[3] ICE, which uses different criteria than GAO, later reported a higher number (1,116) for FY 2005. Immigration and Customs Enforcement, "Fact Sheet: Worksite Enforcement," April 30, 2009, www.ice.gov/pi/news/factsheets/worksite.htm. This reduces the "decline" to only 93.4%.

[4] ICE no longer makes its enforcement statistics publicly available in the same format.

Enforcement," April 29, 2010, www.ice.gov/pi/news/factsheets/worksite.htm. Since FY 2005, there have been increases in worksite immigration law enforcement, but the level (5,184 in FY2008) is still a "decline" of 70% from the FY1997 peak level.

The Enforcement Collapse Hurts Americans: Given the obvious economic incentives to hire cheaper illegal immigrant workers and the lack of any realistic enforcement threat, employers apparently choose to preferentially hire illegal immigrants. "A startling new study[5] shows that all of the growth in the employed population in the United States over the past few years can be attributed to recently arrived immigrants." Bob Herbert, "Who's Getting the New Jobs," *The New York Times*, July 23, 2004, A23, col. 6, http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482.

This job "capture" has also decreased the wages paid to native-born workers. "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, at 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374. This wage decrease is not equally shared. Professor Borjas noted that "high school

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[5]Sum, Fogg, Khatiwada and Palma, "Foreign Immigration and the Labor Force of the U.S.," Center for Labor Market Studies, Northeastern University, July 2004. The study does not distinguish between legal and illegal immigrants. *See, also,* Steven Camarota, *A Jobless Recovery?* Center for Immigration Studies, October 2004, www.cis.org/articles/2004/back1104.html.

dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24.

To Preempt State Illegal Immigration Laws, Congress Must Act "Unmistakably:" The enforcement collapse has constitutional significance. The Supreme Court has established two standards for review of state immigration laws:[6] one for legal immigrants; a lower one for illegal immigrants. States may only regulate LEGAL immigration when Congress permits them to do so,[7] but States may regulate ILLEGAL immigrants consistently with federal law unless Congress has expressly or "unmistakably"[8] preempted them.

It is not enough to have "strong evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982). To preempt a State law against illegal immigrants, Congress must have made its purpose "clear and manifest":

> But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805(a) in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "the **clear and manifest purpose of Congress**" would justify that conclusion. *Florida Lime & Avocado Growers v. Paul*, [373 U.S. 132] at 146 [1963].

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[6] In its brief *amicus curiae* in *Friendly House v. Whiting*, No. 2:10-cv-1061-PHX-SRB (Doc. 326), *Amicus* American Unity Legal Defense Fund, Inc. ("AULDF") discussed the standard for reviewing SB 1070 in more detail.

[7] "[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982), *quoting, De Canas v. Bica*, 424 U.S. 351, 358 n. 6 (1976); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971).

[8] *De Canas*, 424 U.S. at 356.

De Canas, 424 U.S. at 357 (emphasis added).

States Have the "Right" to "Protect" Their People When the Federal Government Does Not: States have "the right" to regulate illegal immigration when the federal government has not done so:

> And [*Pennsylvania v.*] *Nelson*[, 350 U.S. 497, 500 (1956)] stated that even in the face of the general immigration laws, States would have the **right** 'to enforce their sedition laws at times when the Federal Government has not occupied the field and **is not protecting the entire country** from seditious conduct.

De Canas, 424 U.S. at 362-63 (emphasis added).

State laws affecting illegal immigrants, however, must "mirror federal objectives and further[] a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). "Mirror" does not mean identical; the California statute upheld in *De Canas* added penalties and local enforcement beyond those permitted by federal law. 424 U.S. at 356-65. As to "legitimate state goals," Justice Brennan gave examples:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.

De Canas, 424 U.S. at 356-57.

The effects of the enforcement collapse described *infra* exactly mirror Justice Brennan's explanation of "perceived evils" which States may address. Thus, in light of *De Canas*, the collapse of federal immigration law enforcement shows the opposite

of what Plaintiff argues: The failure to enforce federal law is not a policy "balance" justifying preemption, but one of the major grounds for rejecting preemption.

Plaintiff Turns the Immigration Laws Upside-Down: Aside from one brief mention, P. Mem. at 12,[9] Plaintiff overlooked the Supreme Court's standards for State illegal immigration-related laws, instead repeatedly citing the different standard for reviewing laws relating to legal immigration. *See, e.g.*, P. Mem. 11-12 (citing legal immigration cases such as *Hines v. Davidowitz*, 312, U.S. 52 (1941), and *Toll*, without distinguishing the legal and illegal immigration standards). Nor does Plaintiff ever mention the inherent State "right" to "protect" their interests when federal enforcement efforts collapse.

But Plaintiff's essential failure is the attempt to convince the Court that it can "balance" various "objectives" to the exclusion of immigration enforcement. P. Mem. at 13 ("In pursuing that goal [reducing the number of illegal immigrants], Arizona's policy will disrupt federal enforcement priorities and divert federal resources"). Immigration law enforcement is not one of a number of equal items which can be balanced; it is "central" to "[t]he policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. at 183, 194, and n. 8; *Hoffman Plastic Compounds*, 535 U.S. at 147-48. As Congress said in 1986, the reason for immigration law enforcement is to "close the back door to keep the front door open," exactly what Plaintiff claims to want. Plaintiff not only misleads the Court, but demonstrates no understanding of the very "balance" it purports to enforce.

Arizona's SB 1070 focuses directly on illegal immigration, mirrors federal law, and is narrowly tailored to protect its own interests. Once Congress established

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[9] "Although this federal power does not preclude 'every state enactment which in any way deals with aliens,' *De Canas v. Bica*, 424 U.S. at 355."

"appropriate standards for the treatment of an alien subclass, the States may, **of course**, follow the federal direction." *Plyler v. Doe*, 457 U.S. at 219 n. 19 (emphasis added). It is Arizona which is pursuing the "purposes and objectives of federal law," and Plaintiff's "balance" which threatens to cut off authorized immigration. Plaintiff is asking this Court to approve not a "balance" of "purposes and objectives of federal law," P. Mem. 3, but a violation of the spirit and letter of both.

Conclusion: Plaintiff's failure to mention, much less observe, the standard of review suggests its Motion for Preliminary Injunction is not well-grounded. It cannot prevail on the merits of its claim, and the public interest does not favor the immigration enforcement collapse or the violation of a central policy of immigration law. The Motion should be denied.

RESPECTFULLY SUBMITTED,

/s Barnaby Zall

Barnaby Zall (*admitted pro hac vice*)
Counsel for Amicus American Unity Legal Defense Fund
WEINBERG & JACOBS, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
301-231-6943
301-984-1200 (f)
bzall@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and sent a Notice of Electronic Filing to the ECF registrants on record.

A COPY was also sent with Notice of Electronic Filing, via overnight Express Mail, the 19th day of July, 2010, to:

The Honorable Susan R. Bolton
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 522
401 West Washington Street, SPC 50
Phoenix, AZ 85003-2153

/s/ Barnaby Zall
_____
Signed: Barnaby Zall