DAVID T. HARDY (#4288)
8987 Tanque Verde, PMB 265
Tucson, AZ 85749
Telephone: (520) 749-0241
Facsimile: (520) 749-0088
dthardy@mindspring.com

Attorney for Washington Legal Foundation, *et al.*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The United States of America, Plaintiff, v. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants.	CV-10-01413-PHX-SRB **LODGED: PROPOSED BRIEF OF WASHINGTON LEGAL FOUNDATION, STATE REP. JOHN KAVANAGH, U.S. REPS. LYNN JENKINS, TOM McCLINTOCK, GARY MILLER, and LAMAR SMITH, ALLIED EDUCATIONAL FOUNDATION, and NATIONAL BORDER PATROL COUNCIL AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Of Counsel:
Daniel J. Popeo
Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: July 20, 2010

DAVID T. HARDY (#4288)
8987 Tanque Verde, PMB 265
Tucson, AZ 85749
Telephone: (520) 749-0241
Facsimile: (520) 749-0088
dthardy@mindspring.com

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INTERESTS OF AMICI CURIAE

A list of the *amici curiae* and their specific interests is set forth in the motion for leave to file this brief. While *amici* agree with Defendants that the United States has not shown a likelihood of success on the merits, this brief focuses on the United States's claim that SB 1070's employment provision – the first portion of § 5 of SB 1070, which enacts A.R.S. § 13-2928(C) – conflicts with, and thus is impliedly preempted by, federal immigration policy. Contrary to the United States's claim, § 5 of SB 1070 is designed to assist with implementation of the immigration policies established by Congress, and nothing in the provision stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is the policy of the United States that those not authorized to be present in the United States should not seek or undertake employment in this country. Section 5 of SB 1070, by criminalizing the solicitation and/or performance of employment by such individuals, directly advances that policy.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case is a facial challenge to Arizona Senate Bill 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010), as amended by Arizona House Bill 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010) ("SB 1070"). The legislation is a multi-faceted effort to assist federal authorities in implementing several well-established federal policies: removing illegal aliens from the U.S. and eliminating incentives that cause many such aliens to seek to remain here. The United States has moved to enjoin enforcement of SB 1070 even before it is scheduled to take effect on July 29, 2010. As explained below, the U.S. has

not demonstrated that it is likely to prevail in its challenge to § 5 of SB 1070 and thus is not entitled to a preliminary injunction against enforcement of that provision. Moreover, the motion is deficient in that it fails to bring to the Court's attention binding precedent that directly contradicts the position it asserts. Indeed, the U.S.'s position regarding preemption of state law is contrary to the position it has espoused in other settings.

ARGUMENT

I. PLAINTIFF HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS PREEMPTION CLAIM AGAINST SB 1070'S EMPLOYEE SANCTION PROVISION

The United States is not entitled to a preliminary injunction in the absence of a showing that it is likely to succeed on the merits of its claims. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). It has failed to demonstrate such a likelihood with respect to its challenge to A.R.S. § 13-2928(C) (hereinafter "§ 5 of SB 1070"). That provision states:

> It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this State.

Section 5 goes on to provide that a violation of A.R.S. § 13-2928(C) is a Class 1 misdemeanor and to provide definitions for the terms "solicit" and "unauthorized alien." *See* A.R.S. §§ 13-2928(D) & (E). Most importantly, Section 5 makes clear that Arizona officials are not to decide for themselves who is an "unauthorized alien," but rather are to defer to the determinations of federal officials applying federal immigration law. *Id.*

A. Section 5 of SB 1070 Is Fully Consistent with Federal Immigration Policy

The United States does not contend that any federal statute expressly preempts § 5 of SB 1070. Rather, the U.S. contends that § 5 is impliedly preempted because, by imposing sanctions on illegal aliens who solicit employment in this country, it conflicts with federal immigration policy. U.S. Br. 42-44.

The U.S.'s conflict-preemption argument is without merit; § 5 is fully consistent with federal immigration policy. Recognizing that illegal immigration is spurred to a significant degree by the availability of employment in the United States, Congress adopted the Immigration Reform and Control Act of 1986 ("IRCA") for the purpose of preventing the employment of illegal aliens and thereby reducing the incentive for illegal entry into the country. As the Supreme Court has repeatedly recognized, "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 & n.8 (1991)).

The United States asserts that IRCA sought a "balanced" approach toward employment of illegal aliens, an approach that sought to balance a desire to discourage employment of illegal aliens against a desire to treat such individuals compassionately. U.S. Br. 44. That assertion finds no support in the statutory language. That policy may be the approach of the Obama Administration, but it is not the approach adopted by Congress. *See* U.S. Const., Art. I, § 8, cl. 4 (assigning to Congress primary responsibility for

establishing immigration policy). As the Supreme Court has explained, IRCA adopted a combination of restrictions upon employers (a requirement that they verify the work eligibility of all job applicants) and employees (criminal prohibitions against the submission of fraudulent work-eligibility papers) designed to ensure that *no* illegal aliens would be employed in this country:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Hoffman Plastic, 535 U.S. at 148.

There is no conflict between the policy established by IRCA (preventing *all* employment of illegal aliens) and § 5 of SB 1070. Although § 5 imposes sanctions on illegal aliens above and beyond those imposed by IRCA, those sanctions create no conflict because they serve simply to further the existing congressional policy. Because Congress sought "forcefully" to combat *all* employment of illegal aliens, a state law that makes it that much more difficult for illegal aliens to find employment cannot reasonably be understood as being in conflict with federal policy.

B. Binding Ninth Circuit Precedent Establishes a Strong Presumption That Congress Did Not Intend to Preempt § 5

The United States's motion errs in asserting that a "presumption against preemption" is inapplicable here because the case touches upon immigration issues. U.S.

Br. 12. That error is particularly glaring with respect to § 5, which touches upon a field (the regulation of employment) that has traditionally been the subject of the States' police powers. The Supreme Court has held unequivocally:

> [I]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 129 S.Ct. 1187, 1194-95 (2009).

The Supreme Court has held explicitly that the presumption against preemption applies even when the state law at issue touches upon immigration matters. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). The Ninth Circuit recently applied the presumption against preemption in a challenge to a different Arizona statute that regulates the employment of illegal aliens, finding that the presumption was particularly appropriate because the field being regulated (employment) is one that has traditionally been subject to state regulation. *Chicanos Por La Causa, Inc. v. Napolitano* ["*CPLC*"], 588 F.3d 856, 865 (9th Cir. 2009) (concluding that *De Canas* was superseded by subsequent federal legislation and stating, "We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here."), *cert. granted sub nom., Chamber of Commerce of the United State v. Candelaria*, 2010 U.S. LEXIS 5321 (U.S. June 28, 2010).

CPLC represents controlling authority that is directly contrary to the position

espoused by the United States in this case with respect to the presumption against preemption. Yet, the United States's motion for a preliminary injunction failed to bring the Ninth Circuit's *CPLC* decision to the attention of the Court. In failing to cite *CPLC*, the U.S. has fallen short of fulfilling its obligations to the Court.[1] Particularly in light of the presumption that Congress did not intend to preempt state laws regulating the employment of illegal aliens, the United States has not come close to meeting its heavy burden of demonstrating that § 5 of SB 1070 conflicts with – and thus is impliedly preempted by – federal immigration law.

C. State Regulation of the Employment of Illegal Aliens Was Permissible Prior to IRCA, and That Statute Cannot Reasonably Be Understood To Have *Decreased* State Authority to Prevent Illegal Aliens from Seeking or Performing Employment

Prior to adoption of IRCA in 1986, Congress had not adopted any restrictions – on either employers or employees – regarding the employment of illegal aliens. The Supreme

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[1] Indeed, the U.S. does not simply deny the presumption against preemption; it asserts that it is *the U.S.* whose position is entitled to deference. U.S. Br. 25 (asserting that Court should defer to Executive Branch conclusions that permitting SB 1070 to go into effect is likely to have adverse effects on U.S. foreign policy). That assertion has no basis in law, particularly when (as here) the position of the Executive Branch was developed solely in connection with litigation. *See, e.g., Wyeth v. Levine*, 129 S. Ct. at 1201-03. Cases cited by the United States, U.S. Br. 25 (citing, *e.g., Holder v. Humanitarian Law Proj.*, 2010 U.S. LEXIS 5252, at *58 (U.S. 2010)), support judicial deference to foreign policy assessments undertaken by *Congress* in adopting legislation, not deference to litigation-driven assessments by the Executive Branch. The Supreme Court has explicitly rejected efforts by the President to unilaterally preempt a State's actions on the basis of the President's assessment of the likely foreign-policy impact of the State's actions, in the absence of evidence that Congress has authorized the President to act. *Medellin v. Texas*, 552 U.S. 491, 524-25, 532 (2008).

Court determined in 1976 in *De Canas* that Congress had not intended thereby to preclude States from adopting restrictions of their own. *De Canas,* 424 U.S. at 356-63. The Court rejected a preemption challenge to a California criminal statute providing that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States." California Lab. Code § 2805(a) (West 1976). *Id.* The Court concluded that nothing in federal immigration law indicated "that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *Id.* at 358.[2]

Although § 5 of SB 1070 would have been constitutionally unassailable if adopted in 1985, the United States argues that Congress – when it adopted IRCA in 1986 – intended to deprive States of the authority they possessed pre-1986 to regulate efforts by illegal aliens to solicit and perform employment. Nothing in IRCA's statutory language supports that conclusion. It is simply inconceivable that a statute adopted for the purpose of making "combating the employment of illegal aliens central to the policy of immigration law," *Hoffman Plastic,* 535 U.S. at 147, was also intended to deprive States of existing authority to engage in that same combat. *See also INS v. Nat'l Ctr. for Immigration Rights*, 502 U.S. 183, 194 (1991) ("A primary purpose in restricting immigration is to preserve jobs for American workers.").

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[2] The quoted language made plain that States were free to regulate employment of illegal aliens by imposing requirements on *either* employers *or* employees.

At the same time that it imposed restrictions on employers regarding their hiring of illegal aliens, IRCA adopted an express preemption provision that limited the authority of States to impose additional restrictions on employers. *See* 8 U.S.C. § 1324a(h)(2). But IRCA does not include a provision that expressly preempts States from imposing restrictions on illegal aliens regarding their solicitation or performance of employment. The absence of such an express preemption provision speaks volumes. The Ninth Circuit held in *CPLC* that Congress's adoption of § 1324a(h)(2) without adopting a similar restriction on State requirements regarding employer participation in the E-Verify system was strong evidence that Congress did not intend preemption in the latter situation. The appeals court explained, "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly" preempt state laws of the sort set forth in § 1324a(h)(2). *CPLC*, 558 F.3d at 867. By similar logic, Congress's failure to expressly preempt States from imposing restrictions on illegal aliens indicates that it did not intend to preempt such restrictions.

The only decision that the U.S. points to in support of its preemption claim is *Nat'l Ctr. for Immigrants' Rights v. INS* ["*NCIR*"], 913 F.2d 1350 (9th Cir. 1990). But as the U.S. concedes, that decision no longer serves as precedent – it was reversed by the Supreme Court. 502 U.S. 183 (1991). Moreover, *NCIR* is not even a preemption case. The appeals court ruled 2-1 that in light of Congress's decision not to impose federal

sanctions on illegal aliens who seek employment, the INS exceeded its statutory authority in adopting regulations that threatened such sanctions. But nothing in *NCIR* (even if it were still good law) indicated that IRCA imposed similar restrictions on States.

Congress subsequently adopted legislation requiring States to adopt practices designed to reduce the incentives for illegal aliens to remain in the country. *See, e.g.,* 8 U.S.C. §§ 1611, 1621 (prohibiting States – with very few exceptions – from paying public benefits to illegal aliens, regardless whether funding for the benefits derives from federal or state sources). It defies logic to suggest that Congress demands that States ferret out illegal aliens to ensure that they are not receiving welfare benefits, yet simultaneously prohibits them from taking steps to prevent illegal aliens from seeking employment.

II. THE ADMINISTRATION'S PRO-PREEMPTION POSITION IN THIS CASE IS INCONSISTENT WITH ITS ANTI-PREEMPTION POSITION IN ANALOGOUS CASES OUTSIDE THE CONTEXT OF IMMIGRATION

The Obama Administration's motion for a preliminary injunction makes a sweeping argument in support of preemption of state laws touching on immigration issues, even laws that operate in fields (such as regulation of employment) traditionally occupied by the States. The Court ought to be made aware, however, that the Administration has adopted anti-preemption positions in other areas of the law – particularly with respect to preemption of state common-law tort actions – that are extremely difficult to reconcile with the position it has taken in this case.

Most prominently, the Administration has taken an anti-preemption position in

Williamson v. Mazda Motor of America, No. 08-1314, a pending Supreme Court case that will determine whether federal policy regarding the installation of lap/shoulder seat belts in rear car seats preempts tort suits alleging that cars lacking such belts are defectively designed. The Administration in April filed a brief urging the Court to grant review and arguing that the lower courts erred in finding preemption. It asserted that the mere fact that a car meets safety requirements established by a Federal Motor Vehicle Safety Standard does not suggest a federal intent to preempt tort suits seeking to establish more stringent requirements. U.S. Br. at 9. It is difficult to reconcile that assertion with the argument here that IRCA's inclusion of only limited sanctions against employees impliedly preempts State efforts to impose more stringent sanctions. *See also* Executive Order 13132 – Federalism, 64 Fed. Reg. 43255-59 (Aug. 10, 2009) (directing all branches of the federal government to be "deferential" to the States and to limit the circumstances under which they deem State regulatory actions to be preempted by federal law).

CONCLUSION

Amici respectfully request that the motion for a preliminary injunction be denied.

/s/ David T.Hardy
David T. Hardy (#4288)
8987 Tanque Verde, PMB 265
Tucson, AZ 85749
(520) 749-0241 (telephone)
(520) 749-0088 (facsimile)
dthardy@mindspring.com

Dated: July 20, 2010

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2010, I electronically filed the brief of *amici curiae* Washington Legal Foundation, et al., with the Clerk of the Court for the U.S. District Court for the District of Arizona, by using the CM/ECF system. I certify that all participants in the case are represented by counsel of record who are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David T. Hardy
David T. Hardy

UNITED STATES DISTRICT COURT
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The United States of America, Plaintiff, v. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants.	CV-10-01413-PHX-SRB **ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, *ET AL.*** **ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, *ET AL.***

The Court, having reviewed the Motion for Leave to File Brief of *Amici Curiae* Washington Legal Foundation, *et al.*, and good cause appearing,

IT IS ORDERED that the Motion for Leave to File Brief of *Amici Curiae* Washington Legal Foundation *et al.* is GRANTED and that the Brief, which was concurrently lodged with the Motion, shall be filed forthwith.