

NO: 11-182

In The
Supreme Court of the United States

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ARIZONA ET AL,
Petitioners,

V.

UNITED STATES,
Respondents.

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

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**BRIEF OF LIBERTY LEGAL FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONERS**

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QUESTION PRESENTED

This brief will address the following question:

Arizona enacted the Support Our Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

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STATEMENT OF INTEREST¹

Liberty Legal Foundation is a nonpartisan, non-profit organization dedicated to restoring Constitutional government by strategically challenging flawed precedent. Liberty Legal Foundation currently has over 32,000 members from all 50 states.

This brief was prepared and filed in a genuine effort to restore and protect the Constitutional structure of our government.

¹ Pursuant to This Court's Rule 37.6 all parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Existing Federal law explicitly prohibits the executive branch from enforcing any policy restricting state law enforcement agencies from requesting immigration status information from the Immigration and Naturalization Service (“INS”). Yet the lower courts in the instant action ruled that the same Federal law actually preempts states from requiring law enforcement agencies to request immigration status information from the INS.

The action of the executive branch represents a complete disregard for existing Federal law. Such a blatant disregard for legislation passed by Congress and signed by a previous President threatens the separation of powers upon which our Constitutional Republic is founded.

ARGUMENT

I. Respondent’s Preemption Argument Violates the Federal Law that it Claims Preempts the Arizona Law

The District Court cited 8 U.S.C. §1373(c) and concluded that because subsection (c) requires the INS to respond to *all* requests for certain information, requiring Arizona law enforcement agencies to make such requests would “divert resources from the federal government’s other responsibilities and priorities.” *Id.* While the District Court cites subsection (c), it apparently didn’t read subsections (a) & (b) of 8 U.S.C. §1373. Those

subsections explicitly prohibit the federal government from making the assertion upon which the District Court based its ruling:

“Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual...no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) ...requesting or receiving such information from, the Immigration and Naturalization Service” 8 U.S.C. §1373(a) & (b).

In other words, no one at any level of government may change the priority *established by Congress* regarding availability of immigration status information. Yet the District Court founded its order restricting Arizona from requesting exactly this information upon the next subsection of the same law, which simply prohibits the INS from refusing to respond to such requests.

So, the law upon which the executive branch founded its preemption argument specifically prohibits the federal government from doing exactly

what it was asking the lower Court to allow it to do. And the lower Court agreed.²

Neither INS nor ICE nor DHS nor DOJ nor any other administrative agency of the federal government, nor the President himself, has the authority to determine that “other responsibilities” have higher priority once Congress makes the determination that responding to law enforcement information requests is a statutory priority. *See* U.S. Const. art. I, § 1. The lower Courts essentially set aside a law passed by Congress and signed by a past President in favor of the policy decisions of the current administration.

II. The Lower Court’s Ruling Destroys the Separation of Powers

Taken in the abstract it would make no sense that a federal agency is trying to ignore a law passed by Congress, or that a President is trying to preempt a law signed by the President. All of the preceding must be understood in light of the conflicting motivations between the branches of government and between prior Presidential administrations and the current administration. What is actually happening in *United States v. Arizona* is that the current Presidential administration doesn’t like the

² Irony is defined as the use of words to express the opposite of the literal meaning. *See Webster’s Ninth New Collegiate Dictionary* 639 (Merriam–Webster 1986). Since irony is also the heart of humor (see *id.*) the lower Court’s ruling would be hilarious if it was intended to be a parody. Instead it destroys the foundations of our Federalist system of government.

immigration laws as passed by earlier sessions of Congress and signed by prior Presidents. So, the administrative departments within the Executive branch are attempting to negate those sections of the law that they don't want to follow.

While a large degree of autonomy is granted to administrative agencies simply by virtue of their daily operational decisions, they do not have the authority to completely ignore Congressional mandates. They certainly don't have the authority to negate such mandates by arguing that if they're forced to follow Congress' mandates it would "redirect federal agencies away from the priorities *they* have established," as concluded by the District Court.

The Legislative branch creates law. *See* U.S. Const. art. I, § 1. The Executive branch enforces law. *See Id.* at art. II, § 1. While the President has broad discretion in how the law is enforced, this discretion ends where Congress has explicitly stated that certain specific activities *shall* be performed. But, in *United States v. Arizona* we have an Executive branch explicitly refusing to follow a Congressional mandate, and a court that has bootstrapped that refusal into an order prohibiting a state from stepping into the void left by executive abuse of authority.

The District Court's ruling has created precedent under which a sitting President, through his administrative departments, may negate acts of Congress and may negate laws signed by prior Presidents, simply by claiming that to follow such

laws would prevent the agencies from setting their *own* priorities. If this ruling is not reversed the current administration will be given license to completely ignore the law.

CONCLUSION

For the reasons discussed above this Court should reverse the lower Court's ruling.

Respectfully submitted,

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