

No. 11-182

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In The  
**Supreme Court of the United States**

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STATE OF ARIZONA and JANICE K. BREWER,  
Governor of the State of Arizona, in her official capacity,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**AMICUS CURIAE BRIEF OF  
MOUNTAIN STATES LEGAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt portions of Arizona S.B. 1070 on their face because they constitute an obstacle to the accomplishment and execution of the full purposes and objectives of Congress's federal immigration laws.

2. Whether that part of conflict preemption providing that a state law is preempted if it constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress should be abandoned because it violates federalism and separation of powers.

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**INTEREST AND IDENTITY OF AMICUS CURIAE<sup>1</sup>**

Mountain States Legal Foundation (“MSLF”) is a non-profit, public interest legal foundation incorporated under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF’s members include individuals who live and work in every State of the Nation. MSLF and its members believe strongly in the freedoms and liberties of individuals that are preserved by the constitutional structure of federalism and separation of powers.

If a court determines that State law is preempted by federal law because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (“obstacle preemption”), that decision implicates principles of federalism and separation of powers, and thereby, individual liberty. Court-made “obstacle preemption” encourages courts to preempt State statutes that Congress did not intend to preempt, thereby violating principles of

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<sup>1</sup> Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief and have filed “blanket consent” to amicus curiae briefs with this Court. Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

federalism by depriving the States of the powers constitutionally reserved to them. It also encourages courts, in the absence of clear congressional intent, to substitute their own views of congressional purposes and objectives for that of Congress and, thereby, engage in judicial legislation, contrary to principles of separation of powers.

The Ninth Circuit altered the delicate balance of power between the States and the Federal Government and engaged in judicial legislation by substituting its own view of the purposes and objectives of Congress to preempt four provisions of S.B. 1070. MSLF respectfully submits that this Court should abandon “obstacle preemption” and reverse the decision of the Ninth Circuit.



### **STATEMENT OF THE CASE**

The people of Arizona passed a statewide initiative entitled “Support Our Law Enforcement and Safe Neighborhood Act” to address the problems created by illegal immigration in the State of Arizona. On April 23, 2010, Arizona Governor, Janice K. Brewer signed that Act into law as Arizona Senate Bill 1070, Ariz. Sess. Laws ch. 113. Arizona House Bill 2162, 2010 Ariz. Sess. Laws Ch. 211, made changes to S.B. 1070 and was signed by Governor Brewer on April 30, 2010, (hereinafter all references to “S.B. 1070” include the amendments made by H.B. 2162).

The United States filed suit against the State of Arizona and Governor Brewer, seeking a declaration that all the provisions of S.B. 1070 were facially invalid because they were impliedly preempted by federal immigration laws under the doctrine of “obstacle preemption” and sought an injunction against their enforcement. *United States v. State of Arizona*, 703 F. Supp. 2d 980, (D. Ariz. 2010). The United States also sought a preliminary injunction against the enforcement of S.B. 1070, which the district court granted with respect to four provisions of S.B. 1070, utilizing “obstacle preemption” to do so. *Id.* at 1008.

The State of Arizona and Governor Brewer appealed the preliminary injunction to the Ninth Circuit. A divided panel, Judge Bea strongly dissenting in part, affirmed the preliminary injunction. In so doing, the majority utilized “obstacle preemption” to hold that § 2(b) of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1357(g); that § 3 of S.B. 1070 conflicted with and was preempted by 8 U.S.C. §§ 1304, 1306; that § 5(C) of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1324a and its corresponding legislative history; and that § 6 of S.B. 1070 conflicted with and was preempted by 8 U.S.C. § 1252c. *United States v. State of Arizona*, 641 F.3d 339, 345, 348-54, 354-57, 357-60 and 360-65 (9th Cir. 2011). The State of Arizona and Governor Brewer subsequently petitioned this Court for a Writ of Certiorari, which was granted on December 12, 2011. *Arizona v. United States*, 132 S. Ct. 845 (2011).



## SUMMARY OF ARGUMENT

Congress's exclusive power to regulate immigration under the Naturalization Clause of the U.S. Constitution, U.S. Const., art. I, § 8, cl. 4, is limited to determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Arizona Senate Bill 1070, Ariz. Sess. Laws ch. 113, the "Support Our Law Enforcement and Safe Neighborhood Act" ("S.B. 1070") is not a regulation of immigration within the exclusive power of Congress because it deals with none of those enumerated powers.

In all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, there is a presumption that the historic police powers of the States were not to be superseded by federal legislation unless Congress made its intent to do so clear and manifest.

S.B. 1070 is rooted in the traditional police powers of the State of Arizona. The concept of the public welfare is broad and inclusive and public safety, public health, morality, peace and quiet, law and order are some of the more conspicuous examples of the traditional application of the police power. The people of Arizona passed S.B. 1070 as a statewide initiative designed to address rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, which is

clearly within the scope of the police power, and so entitled to the presumption that federal law does not preempt it.

Yet the Ninth Circuit did not afford the presumption of non-preemption, nor did it attempt to determine whether Congress had expressed a clear and manifest intent to preempt it. Instead, utilizing “obstacle preemption,” the Ninth Circuit erroneously found S.B. 1070 was not consistent with full purposes and objectives of 8 U.S.C. § 1357(g). In doing so, the Ninth Circuit entered into an imaginative reconstruction of the objectives and purposes of 8 U.S.C. § 1357(g)(1-9) through a freewheeling inquiry that supplied legislative intent that was missing. Indeed, Congress, in 8 U.S.C. §§ 1357(g)(10), 8 U.S.C. 1373(c), and 8 U.S.C. 1644, expressed the intent that laws such as S.B. 1070 were not preempted. Thus, the Ninth Circuit erred and this Court should reverse the Ninth Circuit’s decision.

More importantly, the Ninth Circuit’s decision is a good example of the constitutional difficulties with “obstacle preemption.” Indeed, the Ninth Circuit’s decision violates federalism and separation of powers principles and threatens personal liberty. It amounts to no less than a usurpation of legislative authority by the judiciary, thereby unconstitutionally substituting judicial preemption for legislative preemption.

The nature of “obstacle preemption” tends to avoid the central question of congressional intent to preempt State law. Instead, it tends to focus on the

general purposes and objectives that Congress intended the law to accomplish and whether State law interferes with these purposes in any way. Thus, the concept of “obstacle preemption” must assume that, though silent, Congress would have wanted to displace State law if it creates an obstacle to the accomplishment and execution of the full purposes and objectives behind the statute. Even assuming that all members of Congress could agree on their collective “purposes and objectives,” which is doubtful, there is still no reason to assume that they would want to displace whatever State law that may make achieving those purposes more difficult.

“Obstacle preemption” displaces more State law than its rationale warrants and reads federal statutes to imply preemption clauses that the enacting Congress might well have rejected. Indeed, what is involved is really a process of imaginative reconstruction – a court is trying to reconstruct how the enacting Congress would have resolved questions about the statute’s preemptive effect if it had considered them long enough to come to a collective agreement. Indeed, “obstacle preemption” not only tends to usurp State power and allocate it to the Federal Government, but it invites judges to step into legislative shoes where Congress has not expressed a clear and manifest intent. In other words, “obstacle preemption” requires inquiry into matters beyond the scope of proper judicial review. Thus, “obstacle preemption” clearly upsets the delicate balance between State and federal power and violates separation of powers

principles, as did the decision of the Ninth Circuit here.

Accordingly, this Court should abandon the concept of “obstacle preemption,” hold that the preemptive scope of a federal statute is limited to the clearly expressed preemptive intent of Congress found in the text of the relevant statute, and reverse the decision of the Ninth Circuit.

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## ARGUMENT

### I. STATES MAY LEGISLATE CONCERNING ALIENS UNLAWFULLY PRESENT UNLESS PREEMPTED BY CONGRESS.

The federal power over immigration derives primarily from the Naturalization Clause: “[The Congress shall have the power] . . . [t]o establish an uniform Rule of Naturalization[.]” U.S. Const., art. I, § 8, cl. 4. This Court has held that the “power to regulate immigration [pursuant to that Clause] is . . . exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). Yet, this exclusive power is limited: Congress may only “determin[e] what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.” *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1948); see *DeCanas*, 424 U.S. at 355 (“power to regulate immigration is essentially a determination of who should or should not be

admitted into the country and the conditions under which a legal entrant may remain”).

Importantly, this “Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration [within the exclusive power of Congress], and thus per se preempted by this constitutional power, whether latent or exercised.” *DeCanas*, 424 U.S. at 355. In other words, “that aliens are the subject of state statutes does not render [the statutes] a regulation of immigration” within the exclusive power of Congress. *Id.* There is no contention that S.B. 1070 is a regulation of immigration within the exclusive power of Congress. Therefore, the issue of whether a State may legislate concerning unlawfully present aliens depends on whether Congress preempted the State law pursuant to the Supremacy Clause.

## **II. CONGRESS MUST CLEARLY MANIFEST ITS INTENT TO IMPLIEDLY PREEMPT S.B. 1070.**

### **A. There Exist Two Types Of Implied Conflict Preemption – Physical Impossibility And “Obstacle Preemption.”**

The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. In accordance with the Supremacy Clause, preemption of State law by Congressional action “may either be expressed or implied and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992). This Court has recognized two types of implied preemption – field preemption and conflict preemption. *Id.* Field preemption, which is not involved here, occurs when the federal regulation is so pervasive that it may be inferred that Congress left no room for the States to supplement it. *Id.* There are two types of conflict preemption. *Id.* The first, also not involved here, is when compliance with both federal and state regulations is a physical impossibility. *Id.* The second one is often referred to as “obstacle preemption”:

[Implied] [c]onflict preemption [is] . . . where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Id.* at 98 (internal citations omitted). Only “obstacle preemption” is at issue here.

**B. Under “Obstacle Preemption,” Congress Must Clearly Manifest Its Intent To Preempt State Law.**

- 1. In all cases involving the exercise of the historical police powers of a State, there is a presumption that Congress did not preempt that exercise.**

There are “two cornerstones of . . . pre-emption jurisprudence.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is that “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); see also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (“ways in which federal law may pre-empt state law . . . turn on congressional intent”). The second cornerstone of preemption analysis is that “[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*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)) (emphasis added). Indeed, the “presumption against pre-emption is rooted in the concept of federalism.” *Geier v. American Honda Motor Comp., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

This presumption serves to place preemption in the hands of Congress rather than the Judiciary:

The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance . . . and its requirement that Congress speak clearly when exercising that power.

*Id.* (internal quotations omitted).

## **2. S.B. 1070 involves traditional matters of state concern within the historical police powers of a state.**

There can be little doubt that S.B. 1070 is rooted in the traditional police powers of the State of Arizona. The police power is broad, as described many years ago by Justice Holmes: “[T]he police power extends to all the great public needs [and] may be put forth in aid of what is . . . held by . . . *preponderant opinion to be greatly and immediately necessary* to the public welfare.” *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (emphasis added). Indeed, the “concept of the public welfare is broad and inclusive [and] . . . public safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power, . . . [y]et they merely illustrate the scope of the power and do not delimit it.” *Berman v. Parker*, 384 U.S. 26, 32-33 (1954).

The people of Arizona passed S.B. 1070 as a statewide initiative designed to address “rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns.” *United States v. State of Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010). The “preponderant opinion” of Arizonans, as expressed by their votes, was that S.B. 1070 was “greatly and immediately necessary to the public welfare.” See *Noble*, 219 U.S. at 188. It is undoubtedly within the historic police powers of a State to protect its residents and its economy from the adverse impact of rampant illegal immigration, escalating crime and serious public safety concerns, all areas of traditional concern to the States. Thus, “States are [not] without any power to deter the influx of persons entering the United States against federal law and whose numbers might have a discernible impact on traditional state concerns.” *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982). Therefore, under “obstacle preemption,” Congress must clearly manifest its intent to preempt S.B. 1070.

**C. The Ninth Circuit Erred Because It Failed To Require That Congress Clearly Manifest Its Intent To Preempt S.B. 1070.**

The Ninth Circuit erroneously refused to afford S.B. 1070 the presumption that it was not preempted by federal immigration law because it erroneously determined that S.B. 1070 did not involve the historic police powers of the State. *United States v. Arizona*,

641 F.3d 339, 348, 355, 361.<sup>2</sup> As a result, the Ninth Circuit engaged in imaginative reconstruction of the objectives and purposes of federal immigration law through a freewheeling inquiry that supplied missing legislative intent. This is aptly demonstrated in Petitioners' Opening Brief. Therefore, MSLF limits its analysis to Section 2(B) of S.B. 1070 (Ariz. Rev. Stat. § 11-1051(B)).

Section 2(b) of S.B. 1070 provides:

For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be *verified with the federal government pursuant to [8 U.S.C. § 1373(c)]*. A law enforcement official or agency of this state or a county, city,

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<sup>2</sup> The Ninth Circuit did afford this presumption to Section 5 of S.B. 1070. *Id.* at 357. However, as clearly demonstrated by Petitioners, the Ninth Circuit actually failed to apply that presumption in its analysis. *See* Pet'r Op. Brf. at 52-57.

town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution[.]

(emphasis added). The identified federal statute, 8 U.S.C. § 1373(c) provides:

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

This statute demonstrates that Congress clearly intended cooperation between the States and federal government in immigration matters, such as contemplated by S.B. 1070 § 2(B). The Ninth Circuit ignored this plain intent of Congress and instead focused on 8 U.S.C. § 1357(g)(1-9), which provides for a very formalized deputization procedure, through written agreement, whereby States or localities may become deputized as federal immigration officials, and wrongly concluded that all other methods of enforcing immigration laws were preempted. *United States v. State of Arizona*, 641 F.3d at 248-49.

There is a saving provision contained in 8 U.S.C. § 1357(g), however, § 1357(g)(10), which provides:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State – (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

When read together with 8 U.S.C. § 1373(c) it seems clear that Congress intended state officers to have authority to enforce federal law without agreement, though deputization by agreement is certainly *one* way in which Congress has authorized local officers to cooperate in enforcing federal immigration laws. The Ninth Circuit, though correctly conceding that this saving language “is broad,” engaged in freewheeling extratextual analysis to determine that it means just the opposite. *United States v. State of Arizona*, 641 F.3d at 349-50. Even though there exists no language in the statute to support its conclusion, the Ninth Circuit, in a freewheeling divination of the purpose and objective of Congress in 8 U.S.C. § 1357(g), concluded that the purpose of § (g)(10) was that state officers may only act to enforce federal immigration laws without a written agreement when the Attorney General called upon a particular officer or officers to assist, under his close supervision, “on an incidental

and as-needed basis” but not in a “systematic or routine” way. *Id.* at 349.

That this is Congress’s intent is not only not clear and manifest but it also finds support nowhere in the statutory text. Indeed, Congress’s intent appears to be just the opposite – state officers should cooperate in federal enforcement of federal immigration laws in a systematic and routine fashion, as contemplated by S.B. 1070 § 2(B). Compounding its error, the Ninth Circuit ignored another pertinent federal statute that, when read together with 8 U.S.C. § 1373(c), demonstrates that Congress did not intend to preempt S.B. § 2(B).

In 1996, Congress enacted two comprehensive acts to strengthen immigration enforcement relating to unlawfully present aliens: the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (“IIRIRA”); and the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (“Welfare Reform Act”). Section 642(a) of IIRIRA contained 8 U.S.C. § 1373(c). Section 434 of the Welfare Reform Act, codified as 8 U.S.C. § 1644, provides:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the

immigration status, lawful or unlawful, of an alien in the United States.

Thus, detecting and apprehending unlawfully present aliens is a high enforcement priority for Congress:

“The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.”

*City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (quoting H. Rep. No. 104-725 at 383 (1996)). Indeed, the assistance provided by State and local governments in detecting and apprehending unlawfully present aliens is consistent with Congress’s immigration enforcement policy and of considerable assistance to Congress in accomplishing that policy:

“The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.”

*City of New York*, 179 F.3d at 32-33 (quoting S. Rep. No. 104-249, at 19-20 (1996)).

It is clear that the Ninth Circuit erroneously engaged in imaginative reconstruction of the purposes and objectives of Congress in enacting 8 U.S.C.

§ 1357(g) to find preemption where the opposite appears to be the case. Therefore, this Court should reverse the Ninth Circuit.

### **III. “OBSTACLE PREEMPTION” VIOLATES FEDERALISM AND SEPARATION OF POWERS.**

#### **A. Federalism And Separation Of Powers Are Essential To Preserve Individual Liberties.**

The concept of federalism posits that the Federal Government is one of limited, enumerated powers, whereas the powers retained by the States are numerous and indefinite:

The Constitution creates a Federal Government of enumerated powers. *See* Art. I § 8. As James Madison wrote: “The powers delegated the proposed Constitution of the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed., 1961). This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

*United States v. Lopez*, 514 U.S. 549, 552 (1995). Thus, the “Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457

(1991). Under this federal system, “the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

The Framers adopted this system of dual sovereignty to “reduce the risk of tyranny and abuse from either front” and because “[i]n the tension between federal and state power *lies the promise of liberty*.” *Gregory*, 501 U.S. at 458-59 (emphasis added); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the *protection of our fundamental liberties*”) (internal quotations omitted) (emphasis added). Thus, this federal structure secures the liberties that derive from this diffusion of power:

The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the *liberties that derive from the diffusion of sovereign power*.

*New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotations omitted) (emphasis added).

Additionally, a “federalist structure of joint sovereignty preserves to the people numerous advantages,” such as “a decentralized government that will be more sensitive to the diverse needs of a heterogeneous

society” and “increases[d] opportunity for citizen involvement in democratic processes.” *Gregory*, 501 U.S. at 458. Finally, as the Framers observed, the “compound republic of America” provides “a double security . . . to the rights of the people” because “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.” *The Federalist* No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

The principle of separation of powers is necessary to preserve federalism and individual liberties: “The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed.” *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). That is, the “essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people.” *Id.* (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) (“The Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers.”); see *The Federalist* No. 51, at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961) (the “separate and distinct exercise of the different powers

of government . . . is . . . essential to the preservation of liberty”).

Thus, none of the branches may assume the role of any of the others because “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers,” *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). This is so because “power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it.” *The Federalist* No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961).

Therefore, the Judiciary may not legislate: “From its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature.” *Raines v. Byrd*, 511 U.S. 811, 819 (1997) (internal quotations omitted). Hence, separation of powers operates to “exclude[] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress[.]” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Consequently, “[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be *the legislator*.” *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring) (quoting *The Federalist* No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961)) (emphasis in original).

**B. “Obstacle Preemption” Violates Federalism And Separation Of Powers Because It Substitutes The Judgment Of The Judicial Branch For That Of The Legislative Branch.**

Whether a State law is displaced by “obstacle preemption” under current law depends on whether Congress – notwithstanding its silence on the issue – intended to displace that law because it constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Wyeth*, 555 U.S. at 565. But the nature of “obstacle preemption” tends to avoid the central question of congressional intent to preempt State law. Instead, it tends to focus on the general purposes and objectives that Congress intended the law to accomplish and whether State law interferes with these purposes in any way.

Thus, the concept of “obstacle preemption” must assume that, though silent, Congress would have wanted to displace State law if it creates an obstacle to the accomplishment and execution of the full purposes and objectives behind the statute. But this assumption is flawed. At the outset, a test that requires courts to identify the “full purposes and objectives” behind federal statutes faces significant obstacles:

As commentators across the political spectrum have pointed out, each House of Congress is a collective body, and its individual members each have their own purposes.

Many statutes are the products of compromise; members of Congress who want to pursue one set of purposes agree on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective “purposes and objectives” may be naive, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.

Caleb Nelson, *Preemption*, 86 Va. L. Rev 225, 280-81 (2000).

Even assuming that all members of Congress could agree on their collective “purposes and objectives,” there is still no reason to assume that they would want to displace whatever State law that may make achieving those purposes more difficult. As the Supreme Court has acknowledged outside the context of preemption, “no legislation pursues its purposes at all costs,” and “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1987).

Consequently, the mere fact that Congress enacts a statute to serve certain purposes does not necessarily imply that Congress wants to displace all State law that constitutes some obstacle to those purposes. “It

follows that a general doctrine of ‘obstacle preemption’ will displace more state law than its rationale warrants . . . [and] will read federal statutes to imply preemption clauses that the enacting Congress might well have rejected.” Nelson, *Preemption*, 86 Va. L. Rev. at 281. Indeed, referring to this process as “*imaginative reconstruction*,” Professor Nelson explains that “[t]he Court is trying to reconstruct how the enacting Congress would have resolved questions about the statute’s preemptive effect if it had considered them long enough to come to a collective agreement.” *Id.* at 277. This approach clearly upsets the delicate balance between State and federal power.

“Obstacle preemption” not only tends to usurp State power and allocate it to the Federal Government, but it invites judges “to step in[to] legislative shoes where Congress has not expressed a clear and manifest intent.” Robert S. Peck, *A Separation of Powers Defense of the “Presumption Against Preemption*,” 84 Tul. L. Rev. 1185, 1196 (2010). Accordingly, “because preemption depends so heavily on congressional intent, a freewheeling inquiry that ends up supplying missing legislative intent violates separation of powers.” *Id.* at 1197.

This process of “imaginative reconstruction” is less a matter of determining congressional intent to preempt and more a form of accidental preemption by the Judicial Branch:

Traditionally, courts determine congressional intent on the basis of a statute’s text,

structure, and purpose. *Altria Group, Inc. v. Good*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 538, 543-44 (2008). The Court has said that, because of the presumption against preemption, it “must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive.” *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

Where that is not determinative, judges often rely upon history or a seemingly apt analogy in the face of *legislative inscrutability*. See e.g. *Farouki v. Emirates Bank Int’l, Ltd.*, 14 F.3d 244, 249 n.17 (4th Cir. 1994); *Ga.-Pac. Corp. v. EPA*, 671 F.2d 1235, 1240 (9th Cir. 1982). Where it lacks sufficient legislative direction, the Court tends to rely on the most general assessment of congressional purpose and then extrapolate from there to give “application to *congressional incompleteness*.” *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 240 (1959). The result then is less a reflection of congressional intentions and more a form of *accidental preemption, based solely on the sensibilities of the Justices*.

*Id.* at 1198-99 (emphasis added). Thus, courts should first begin with the text and “[w]hen the statutory language is plain, the sole functions of the courts . . . is to enforce it according to its terms. *Arlington Cent.*

*Sch. Dist. Bd. of Educ. v. Murphy*, 480 U.S. 522, 625-26 (1987).

Accordingly, because “obstacle preemption” implicates both federalism and separation of powers, “a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.” *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). Thus, the “pre-emptive scope of [a federal statute] is . . . *limited to the language of the statute*[.]” *Id.* (emphasis added). That is, “obstacle preemption” “should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress’s primary objectives, as conveyed with clarity in the federal legislation.” *Id.* at 110. This is necessary to prevent judges from usurping the role of Congress:

[T]he presumption [against preemption] serves as a limiting principle that prevents federal judges *from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption* based on frustration of purposes – *i.e.*, that state law is pre-empted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

*Geier*, 529 U.S. at 907-08 (Stevens, J., dissenting) (emphasis added). Indeed, Justice Stevens seemed to endorse rejecting “obstacle preemption”:

Recently, one commentator has argued that our doctrine of frustration-of-purposes . . . pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it.

*Id.* at 908 n.22 (citing Nelson, *Preemption*, 86 Va. L. Rev. at 231-32). Thus, “preemption analysis is, or ought to be, a matter of *precise statutory . . . construction* rather than an exercise in *free-form judicial policymaking*.” *Id.* at 911 (emphasis added).

In other words, “obstacle preemption” “requires inquiry into matters *beyond the scope of proper judicial review*.” *Wyeth*, 555 U.S. at 602. (Thomas, J., concurring in judgment) (emphasis added). “Obstacle preemption” “facilitates *freewheeling, extratextual*, and broad evaluations of the ‘purposes and objectives’ embodied within federal law,” which leads to “decisions giving improperly broad pre-emptive effect to *judicially manufactured policies rather than the statutory text enacted by Congress*[.]” *Id.* at 604 (emphasis added). Therefore:

This Court’s entire body of “purposes and objectives” pre-emption jurisprudence is inherently flawed. The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.

*Id.* at 594. That is, “obstacle preemption” leads to the unconstitutional invalidation of State laws and should be eliminated:

Because such a sweeping approach to preemption leads to the *illegitimate – and thus, unconstitutional – invalidations of state laws*, I can no longer assent to a doctrine that preempts state laws merely because they “stand as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law[.]

*Id.* at 604 (emphasis added).<sup>3</sup>

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<sup>3</sup> In fact, Justice Thomas argued that *Hines v. Davidowitz*, 312 U.S. 52 (1941), the seminal case in which this Court created the concept of “obstacle preemption,” was fatally flawed and an example of the unconstitutional incursion into State power and the judicial assumption of legislative power. *Wyeth*, 555 U.S. at 594 (Thomas, J., concurring in judgment). *Hines* did not confine itself to “considering merely the terms of the relevant federal law[.]” but instead “looked far beyond . . . statutory text and embarked on its own freeranging speculation about what the purposes of the federal law must have been.” *Id.* at 595. For example, Justice Thomas pointed out that, in *Hines*, the Court considered “public sentiment,” “statements of particular Members of Congress,” and the “nature of the power exerted by Congress, the object sought to be attained, and the character of the obligation imposed by law.” *Id.* at 596. Justice Thomas agreed with Justice Stone’s dissent in *Hines* and observed that “obstacle preemption” “is driven by the Court’s own conceptions of a policy which Congress had not expressed and which is not plainly to be inferred from the legislation which it had enacted.” *Id.* (internal quotations omitted).

Thus, “obstacle preemption” requires that courts, in the face of legislative inscrutability, engage in consideration of the purposes and objectives of Congress. Inevitably, the sensibilities, predilections, and predispositions of individual judges are substituted for a clear statement of legislative intent and unconstitutionally replace congressional preemption with judicial preemption, in violation of federalism and separation of powers principles. Only if congressional intent to preempt State laws is clearly expressed in the text of the statute, which Congress is fully capable of doing, may the courts preserve the principles of federalism and separation of powers. “Obstacle preemption,” is antithetical to those principles and should be abandoned.

Nowhere is the need to abandon “obstacle preemption” made more clear than in the freewheeling, extratextual, imaginative reconstruction of the full purposes and objectives of Congress in which the Ninth Circuit engaged. *See* Section II(C) above. What occurred there produced a sharp divide on the panel and demonstrates that the majority engaged in its own predilections and sensibilities rather than look for clearly manifested congressional intent. Indeed, the Ninth Circuit panel’s majority came to a conclusion that was the opposite of what Congress had intended. But substituting a judicial view for Congress’s view is inevitable when applying “obstacle preemption.” This Court should abandon “obstacle

preemption” and reverse the Ninth Circuit, which relied exclusively thereon.

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### CONCLUSION

This Court should reverse the Ninth Circuit because it erroneously applied “obstacle preemption” to misconstrue congressional intent to preempt any of S.B. 1070, as demonstrated by Petitioners’ Opening Brief. However, the entire concept of “obstacle preemption” is ultimately at fault, and MSLF urges this Court to reverse the Ninth Circuit and abandon the concept of “obstacle preemption” on which the Ninth Circuit relied.

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Respectfully submitted,

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