No. 12-17152

United States Court of Appeals for the Ninth Circuit

VALLE DEL SOL, INC., *ET AL.*,
Plaintiffs-Appellees,

vs.

MICHAEL B. WHITING, *ET AL.*,
Defendants,

and

STATE OF ARIZONA AND JANICE K. BREWER,
Intervenors-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CIV. NO. 2:10-CV-01061-SRB, HON. SUSAN R. BOLTON, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF INTERVENORS-APPELLANTS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: November 15, 2012 Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this brief with the consent of all parties.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and consistently has opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF FACTS AND OF THE CASE

In this interlocutory appeal, the State of Arizona and its Governor (collectively, "Arizona") seek to overturn the District Court's belated preliminary injunction of A.R.S. §13-2929, which Arizona enacted in §5 of its Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws ch. 113 ("S.B. 1070"). That section makes it a class 1 misdemeanor for a person in violation of another criminal offense, knowing or in reckless disregard of an alien's

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[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

unlawful presence in the United States, to: (1) transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield an alien from detection in Arizona; or (3) encourage or induce an alien to come to or live in Arizona. A.R.S. §13-2929(A)(1)-(3). Arizona adopted §13-2929 to counteract the negative local impacts of illegal immigration on criminal activity in Arizona.

Amicus Eagle Forum adopts the facts as set forth by Arizona. *See* Arizona Br. at 9-15. As relevant here, the various individual and organizational plaintiffs (collectively, "Plaintiffs") do not even claim to meet the predicate involvement with another criminal offense, but nonetheless claim that §13-2929 injures them. Except for institutional expenditures related only to S.B. 1070 generally, however, Plaintiffs cannot cite any actual instances of their conduct's being affected by §13-2929 in the approximately two years that §13-2929 has been in effect. On the merits, Plaintiffs claim that the federal Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform & Control Act of 1986 ("IRCA"), conflict preempts and field preempts §13-2929.

SUMMARY OF ARGUMENT

Plaintiffs lack standing because §13-2929 does not injure them, as Arizona argues in its brief. Arizona Br. at 17-25. *Amicus* Eagle Forum adds to Arizona's cogent briefing only one additional but critical point on organizational standing to

avoid costs undertaken in response to a challenged government action. Under *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372-73 (1982), and its progeny, courts in other circuits have applied the *Havens Realty* principle that allows institutional plaintiffs to assert injury from expenditures related to counteracting a defendant's actions, without recognizing that the *Havens Realty* statute – the Fair Housing Act – abrogated the judiciary's prudential limits on standing. As such, when a court applies that *Havens-Realty* standing ***outside*** the Fair Housing Act context, the court must apply the prudential limits on standing that did not apply in *Havens Realty*. When it does so here, this Court will conclude that Plaintiffs' expenditures are wholly unrelated to the zone of interests for INA and, more specifically, 8 U.S.C. §1324 (Section I). Of course, if Plaintiffs lack standing, this Court must vacate the preliminary injunction for lack of jurisdiction.

On the preemption merits, federal law preserves state and local authority with respect both to harboring and assisting illegal aliens (Section II.B), which is reinforced by the presumption against preemption (Section II.B.2). Consequently, Plaintiffs cannot establish conflict or field preemption (Sections II.A.3, II.A.4). If Plaintiffs have standing, this Court should reverse the District Court on the merits.

ARGUMENT

I. THE PLAINTIFFS LACK STANDING TO CHALLENGE §13-2929

Although standing "is the threshold question in every federal case,

determining the power of the court to entertain the suit," *Warth v. Seldin,* 422 U.S. 490, 499 (1975), and plaintiffs must have standing for ***each*** form of relief that they request, *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross"), the District Court's order granting the preliminary injunction does not address standing. Both the individual and institutional Plaintiffs lack standing to challenge §13-2929.

Under Article III, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary,* 501 U.S. 312, 316 (1991), and jurisdiction cannot be conferred by consent or waiver. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990). "[I]f the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect," and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (interior quotations omitted). Here, Arizona briefs the issue of standing well, but fails to address prudential standing for organizational plaintiffs under *Havens Realty* and its progeny. Because Arizona cannot waive the issue of standing, however, this Court must address the issue, even if Arizona does not.

By way of background, constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Significantly,

plaintiffs cannot establish standing for self-inflicted injuries because defendants do not ***cause*** those injuries in the manner contemplated by Article III. *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976); *Brotherhood of Locomotive Engineers & Trainmen v. Surface Transportation Bd.,* 457 F.3d 24, 28 (D.C. Cir. 2006); *Ass'n of Community Organizations for Reform Now v. Fowler,* 178 F.3d 350, 358 (5th Cir. 1999). Here, the institutional Plaintiffs' voluntary expenditures to advocate or educate on SB 1070 constitute self-inflicted injuries that Arizona did not cause.

In addition to the limits on standing posed by the Constitution itself, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria. These prudential limits include the requirements that the "plaintiff's complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (interior quotations omitted), and that plaintiffs typically "cannot rest [their] claim to relief on the legal rights or interests of third parties." *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (interior quotations omitted).[2] Although Congress cannot abrogate Article

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[2] In addition to asserting their own injuries, membership groups can establish standing for affirmative relief by ***identifying*** at least one member with standing, provided that the interest protected is germane to the organization and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *Summers v. Earth Island Institute,*

III's constitutional limits on standing, "there is no question that Congress may abrogate" the judiciary's prudential limits on standing. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 558 (1996). Here, Congress has not done so in the INA generally or in 8 U.S.C. §1324 specifically.

Relying on *Havens Realty* and its Circuit progeny,[3] Arizona states that, in order to establish standing, "an organization must demonstrate that it has suffered both a diversion of its resources and a frustration of its mission." Arizona Br. at 18-

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555 U.S. 488, 497-98 (2009). For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). It is not clear whether the District Court found that any Plaintiffs could assert the rights of third parties, but the Supreme Court has foreclosed basing third-party standing on the "***hypothetical*** … relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in original).

[3] Arizona cites *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest,* 624 F.3d 1083, 1088 (9th Cir. 2010), which appears to involve equal-protection claims. *Lake Forest* cites *Fair Housing of Marin v. Combs,* 285 F.3d 899, 905 (9th Cir. 2002) (Fair Housing Act), *Smith v. Pacific Props. & Dev. Corp.,* 358 F.3d 1097, 1105 (9th Cir.2004) (Fair Housing Act), and *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Rev.,* 959 F.2d 742, 748 (9th Cir.1992) (Due Process Clause) as Circuit precedent. *Combs* and *Smith* are inapposite because they involve the same statute at issue in *Havens Realty,* which differs critically from the INA provision at issue here (namely, 8 U.S.C. §1324). *Lake Forest* found that the plaintiffs lacked standing and did not consider the zone-of-interest test. *El Rescate* found the issue of the institutional plaintiffs' standing "moot because the scope of the injunction is no broader than it would have been had the class members been the only plaintiffs," *El Rescate,* 959 F.2d at 748, which makes its discussion of the institutional plaintiff's standing *dicta.*

19 (internal quotations omitted). Arizona's statement is incomplete because it fails to consider the prudential zone-of-interests test.

In *Havens Realty,* the issue was whether the organizational plaintiff had statutory standing to sue under the Fair Housing Act, which creates a right – applicable to individuals ***and associations*** – to truthful, non-discriminatory information about housing:

> Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to ***any person*** because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens Realty, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because Congress extended enforcement of the Fair Housing Act to the full limits of Article III, the inquiry collapsed to the question whether the injuries alleged met the Article III minimum of injury in fact. *Havens Realty,* 455 U.S. at 372. The institutional Plaintiffs here lack three critical elements of *Havens Realty.*

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to the truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing. *Warth,* 422 U.S. at 514 ("Congress may create a statutory right … the

alleged deprivation of which can confer standing"). Here, the institutional Plaintiffs have no claim to any rights whatsoever under INA or 8 U.S.C. §1324.

Second, but related to the first issue, the injury that the institutional Plaintiffs claim must align with the other components of their standing, *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens Realty,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, nothing in INA or 8 U.S.C. §1324 even ***remotely*** relates to Plaintiffs' private spending.

Third, and most critically, the *Havens Realty* statute statutorily eliminated prudential standing. *Havens Realty,* 455 U.S. at 372. Here, the institutional Plaintiffs have no claim whatsoever that INA eliminates prudential standing, and it is fanciful to suggest that INA – or rather 8 U.S.C. §1324 – puts the institutional Plaintiffs and their private spending in the relevant zone of interests or enables these organizations to enforce the rights (if any) of absent third parties.

At bottom, the institutional Plaintiffs' diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. To the extent that Circuit precedent ***suggests*** otherwise, those decisions failed to consider both the zone-of-interests test generally and the INA's relevant zones of interest specifically. As such, those decisions cannot support standing here. *Waters v.*

Churchill, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with"). If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). *Havens Realty* neither abrogated Article III generally nor abrogated prudential limits on standing outside the specific statute at issue in *Havens Realty.*

II. THE INA NEITHER CONFLICT PREEMPTS NOR FIELD PREEMPTS §13-2929

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, field preemption, and implied or conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). In evaluating preemption claims, courts rely on two presumptions. First, preemption analysis begins with federal statutes' plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation, particularly in fields traditionally occupied by the states.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The federal government's abdication of its duties with respect to immigration and the resulting negative impacts of illegal aliens across the Nation have brought several preemption-related issues to the fore as states and localities attempt to protect themselves.

In the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe,* 457 U.S. 202, 225 (1982). Two recent Supreme Court decisions, however, are mixed on states' power to act in that field. In *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011), the Supreme Court rejected preemption challenges to state-law licensing sanctions under 8 U.S.C. §1324a(h)(2) against those who employ illegal aliens and a state-law mandate that employers use the federal E-Verify program, notwithstanding that program's voluntary nature under federal law. In *Arizona v. U.S.,* 132 S.Ct. 2492 (2012), the Supreme Court relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and relied on conflict preemption to invalidate two state-law provisions: (1) a state-law crime for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably believed to be removable from the United States. Although Arizona prevailed sweepingly in

Whiting and only partially in *Arizona,* both decisions support Arizona here.

A. The States Retain a Role in Avoiding the Harms that Illegal Immigration Poses to Public Safety

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power to regulate immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). As long as §13-2929 is not a "regulation of immigration," *see infra,* Plaintiffs cannot rely on the unexercised constitutional ***authority*** of Congress – as distinct from particular congressional enactments like INA – to find preemption. If unexercised authority field preempted §13-2929, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well.

To the contrary, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine,* 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Unless and until Congress enacts a preemptive national solution, nothing in the Constitution itself preempts Arizona from using its police power to solve its local problems.

Far from a "regulation of immigration," §13-2929 merely applies local police power to protect the health and safety of the community. *See DeCanas,* 424 U.S. at 355 ("regulation of 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") (emphasis added). For ***illegal*** aliens,[4] states and localities may address impacts within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the

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[4] Precedents that address state regulation of ***legal*** aliens – while perhaps not always entirely ***irrelevant*** – are not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler,* 457 U.S. at 223.

> United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. While it may discourage illegal aliens from remaining ***in Arizona,*** §13-2929 is indifferent to their relocating ***within the U.S.***

B. The INA Does Not Preempt §13-2929

The fact that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas,* 424 U.S. at 354-55, is both undeniably true and undeniably irrelevant. The question is not whether Congress ***could have*** preempted §13-2929. The question is whether Congress ***did*** preempt §13-2929.

1. Federal Law Recognizes Arizona's Right as a Sovereign to Concurrent Enforcement

As a general rule under the federalist "system of dual sovereignty," "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, 458-59 (1990). In fields like immigration, however, where Congress has "superior authority in this field," Congress can displace the states' dual sovereignty by "enact[ing] a complete scheme of regulation" such that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*

v. Davidowitz, 312 U.S. 52, 66-67 (1941).[5] As indicated below, the INA does not displace state and local police power over harboring and assisting illegal aliens.

The INA includes various roles for state and local enforcement, both with respect to harboring, transporting, and assisting, 8 U.S.C. §1324(a), (c), and with respect to determining immigration status.[6] Moreover, the civil component of the Racketeer Influenced and Corrupt Organizations Act ("RICO") allows ***private*** enforcement with respect to harboring and assisting illegal aliens. 18 U.S.C. §1961(1)(F) (listing harboring, assisting entry into the United States, and importing illegal aliens under INA §§274, 277, and 278 as predicate offenses for RICO). RICO also allows enforcement in ***state*** court. *Tafflin,* 493 U.S. at 458 ("state courts have concurrent jurisdiction over civil RICO claims"). This subsequent enactment is both inconsistent with claims of federal preemption and "entitled to great weight in statutory construction" of the congressional intent in the original enactment. *Red*

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5 The *Arizona* majority recently deemed *Hines* a field-preemption case, *see Arizona,* 132 S.Ct. at 2502, but "the categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

6 *See* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements for state or local government to communicate with, or report to, the federal government regarding illegal aliens and "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens).

Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81 (1969). Private enforcement of RICO makes Plaintiffs' preemption claims implausible.

2. The Presumption against Preemption Applies

In all fields – and especially ones traditionally occupied by state and local government – courts apply a presumption against preemption. *Wyeth,* 555 U.S. at 565; *Santa Fe Elevator,* 331 U.S. at 230; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565.[7] This presumption further shields §13-2929 from preemption.

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[7] Plaintiffs cannot rely on decisions under the National Labor Relations Act ("NLRA") to address the presumption against preemption. Contrary to the presumption ***against*** preemption at issue here, NLRA cases rely on "a presumption ***of federal pre-emption***" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54,* 468 U.S. 491, 502 (1984) (emphasis added). To invoke NLRB cases would "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* While Congress

Moreover, even if Congress had preempted ***some*** state action, the presumption against preemption would apply to determining the ***scope*** of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted).

This dispute concerns areas of traditional local concern under the police power in the form of preventing criminal activity. *DeCanas,* 424 U.S. at 354-55 Indeed, the authority to combat illegality is at the core of traditional police powers: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905). Suppressing crime "has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs would deny

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undoubtedly ***could have*** written immigration or housing law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). NLRA-style preemption cannot apply here.

Arizona the "right to protect itself" against not only the unlawful taking up of residency and all of the resulting economic ills but also the crime associated with illegal aliens. The lawlessness that follows is predictable and, if this Court recognizes a community's "right to protect itself," entirely preventable.

Significantly, "a history of significant federal presence," *U.S. v. Locke,* 529 U.S. 89, 90 (2000), does not defeat the presumption against preemption. To the contrary, the presumption applies in all areas, and federal courts "rely on [it] because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). Thus, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* Accordingly, the presumption applies here.

3. Congress Has Not Conflict Preempted §13-2929

Conflict preemption includes both "conflicts that make it ***impossible*** for private parties to comply with both state and federal law" and "conflicts that ***prevent or frustrate*** the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal immigration law and §13-2929, Plaintiffs necessarily invoke the "prevent-or-frustrate" prong.

Conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Whiting,* 131 S.Ct. at 1985 (interior quotations omitted). Such a freewheeling inquiry would create the real danger – from a separation-of-powers perspective – of the judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137, 153 (1984). *Amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring).

Notwithstanding federal primacy in ***regulating immigration,*** mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). As the Supreme Court held in *Arizona,* however, "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona,* 132 S.Ct. at 2504

(rejecting employee-based criminal sanctions). The question here is whether the *Arizona* difference with respect to employee-based crimes also encompasses the substantive immigration issues presented here. It does not.

Prior to IRCA's amendments, INA would have allowed both employee- and employer-based sanctions under *DeCanas.* According to *Arizona,* however, Congress ***considered and rejected*** employee-based sanctions in IRCA's amendments. *See Arizona,* 132 S.Ct. at 2504-05 (citing legislative history). The Court relied on "the text, structure, and history of IRCA" to conclude "that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* at 2505. Significantly, IRCA did not discuss – much less "clearly and manifestly" reject, *Santa Fe Elevator,* 331 U.S. at 230 – the substantive immigration issues here. Because the presumption of preemption continues to apply, this Court must presume that Congress did not intend to displace state and local authority *sub silentio. Id.* To read *Arizona* to extend beyond employment would unmoor that decision from its authority and reasoning and would reach beyond the substantive issues presented here to any manner of state or local licensing, regulation, and taxing authority.[8]

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[8] Aside from the harboring and assisting issues relevant here, Arizona's use of federal immigration standards follows the federal guidelines for determining immigration status within the INA-authorized mechanisms for inquiries to the federal government. 8 U.S.C. §§1357(g)(10), 1373(a)-(c). Obviously, applying those congressionally authorized inquires cannot frustrate congressional purpose in

This Court should not infer such a sea change from mere silence.

The District Court improperly relied on the Eleventh Circuit's recent decisions, which erred in relying on 8 U.S.C. §1329 to establish exclusive federal jurisdiction over prosecutions for harboring. That section applies by its terms only to "all causes, civil and criminal, ***brought by the United States,***" 8 U.S.C. §1329 (emphasis added), which in no way forecloses – or even applies to – civil and criminal ***not*** brought by the United States. Indeed, contrary to the Eleventh Circuit's view, "section 1324(c) expressly allows for state and local enforcement." *In re Jose C.,* 45 Cal.4th 534, 552, 198 P.3d 1087, 1099 (Cal. 2009); *see also Gonzales v. City of Peoria,* 722 F.2d 468, 475 (9th Cir. 1983) (§1324's text and legislative history establish that "federal law does not preclude local enforcement of the criminal provisions of [INA]"), *overruled on another ground by Hodgers–Durgin v. De La Vina,* 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).[9] In addition, as indicated in Section II.B.1, *supra,* Civil RICO allows state-court and private

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INA because the Supremacy Clause does not require ***identical*** standards. It is enough for state law to "***closely*** track[] [federal law] in all ***material*** respects." *Whiting,* 131 S.Ct. at 1981 (emphasis added).

[9] By way of background, the Senate version of §1324(c) had provided that "all other officers ***of the United States*** whose duty it is to enforce criminal laws" could enforce these INA provisions, but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales,* 722 F.2d at 475 (citing Conf. Rep. No. 1505, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360, 1361) (emphasis added).

enforcement of INA's harboring and assisting provisions. For all of these reasons, *amicus* Eagle Forum respectfully submits that the Eleventh Circuit wrongly decided the harboring issues in the Alabama and Georgia litigation and that those extra-circuit decisions should have no sway here.

4. Congress Has Not Field Preempted §13-2929

Field preemption precludes state and local regulation of conduct in a field that Congress – acting within its proper authority – has carved out for exclusive federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 115 (1992). Similarly, "an authoritative federal determination that the area is best left ***un***regulated … would have as much pre-emptive force as a decision ***to*** regulate." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 66 (2002) (emphasis in original). Neither situation applies here.

Typically, to foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed ***alternative*** protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 552 U.S. 364, 367-68, 373 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated,

to the competitive marketplace" to enable "maximum reliance on competitive market forces"). But courts also can "infer" field preemption "from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 132 S.Ct. at 2501 (internal quotations omitted, alterations in original). In place of an ostensibly door-shutting congressional determination, however, federal law includes door-opening savings clauses for state enforcement and even private enforcement in state court.

Specifically, INA provides for state and local government to coordinate with the federal government on immigration status, *see, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), and preserves enforcement authority with respect to harboring, transporting, and assisting illegal aliens. 8 U.S.C. §1324(a), (c). As indicated, Civil RICO even allows ***private*** enforcement with respect to harboring and assisting illegal aliens. *See* 18 U.S.C. §§1961(1)(F), 1964(c). Provided that §13-2929 does not constitute "alien registration" under Arizona, federal law cannot field preempt state and local involvement.

The field-preempted alien registration regimes in *Hines* and *Arizona* applied to the specific issue of alien registration (*e.g.,* carrying registration documents). *See Hines,* 312 U.S. at 65-66; *Arizona,* 132 S.Ct. at 2501-02. Here, §13-2929 regulates

concurrently – and consistently with federal law – to address the local impacts of violations of federal law. *Tafflin,* 493 U.S. at 458; *Arizona,* 132 S. Ct. at 2502. As such, §13-2929 is not an alien-registration regime under *Arizona.*

In sum, Plaintiffs would be not merely wrong but "***quite wrong*** to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma,* 537 U.S. at 65 (emphasis added). If INA does not conflict preempt §13-2929, INA plainly does not field preempt it, either.

CONCLUSION

For the foregoing reasons and those argued Arizona, this Court should vacate the preliminary injunction and reverse the District Court.

Dated: November 15, 2012

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I hereby certify that on November 15, 2012, I electronically submitted the foregoing *amicus curiae* brief to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users. In addition, I served a paper copy of the foregoing *amicus curiae* brief by U.S. Mail, postage prepaid, on the following counsel who are not CM/ECF users:

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