

No. 11-182

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In The
Supreme Court of the United States

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THE 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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**BRIEF *AMICUS CURIAE* FOR COCHISE
COUNTY SHERIFF LARRY A. DEVER
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

This Court has held that the United States' foreign affairs powers may preempt a state law when that law: (1) conflicts with an "*express*" foreign policy; (2) has more than an incidental or indirect effect on national foreign affairs; or (3) prevents the federal government from speaking with "one voice" on foreign commerce issues. Under these factors, the United States' foreign affairs power does not preempt S.B. 1070. Despite this, by improperly relying on the criticisms of foreign governments and Executive Branch statements, the Ninth Circuit summarily concluded that this Nation's foreign affairs power does preempt S.B. 1070.

This Amicus Brief addresses the following issue: Does the United States' foreign affairs power actually preempt S.B. 1070?

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INTEREST OF THE *AMICUS CURIAE*¹

Amicus curiae Sheriff Larry A. Dever has a profound interest in the issue of cooperative state enforcement of federal immigration law. Sheriff Dever is a 34-year Cochise County law enforcement veteran. He was elected to his first term as Sheriff in 1996, following a distinguished 20-year career working in the trenches of Cochise County Sheriff's Department.

Cochise County occupies approximately 6,200 square miles (about five times the size of Rhode Island) in the southeast corner of Arizona and it shares an 83.5-mile border with Mexico. It is one of four counties that comprise the United States Border Patrol's Tucson Sector. For the past several years, beginning in 1999, this area has led the nation in illegal alien apprehensions and drug seizures, accounting for almost half of both categories.

¹Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party 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. Monetary contribution to its preparation or submission has been made by The Legacy Foundation, an Iowa-based, non-profit, non-partisan 501(c)(3).

Sheriff Dever's administration has been challenged by the exponential increase in illegal immigration and the concomitant escalation of violence in his community over the past decade. As Sheriff Dever has testified to Congress, the border region is more dangerous today than it ever has been.² Criminal aliens, smuggling drugs and weapons, are armed with high capacity assault weapons and are ordered to protect their cargo at all costs. These criminals stand their ground and fight instead of running.

Although state sheriffs are not federal border patrol officers, they possess the obligation to investigate the criminal activities associated with illegal entry, including, murder, kidnapping, drug running, gun smuggling and human trafficking. In an effort to combat this growing epidemic, several states have enacted legislation, such as Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070"). These state efforts seek to empower local law enforcement officers with

² Testimony of Larry A. Dever to the United States Senate Judiciary Subcommittee on Immigration, Border Security, and Citizenship and Terrorism, Technology and Homeland Security (March 1, 2006); Testimony of Larry A. Dever on behalf of the National Sheriff's Association to the United States House of Representatives Subcommittee on Emergency Communications, Preparedness, and Response (April 28, 2009); Testimony of Larry A. Dever to the United States Senate Committee on Homeland Security and Governmental Affairs (April 20, 2010); Testimony of Larry A. Dever to United States House of Representatives Committee on Homeland Security Subcommittee on Border and Maritime Security (May 3, 2011).

the additional, reasonable, tools necessary to combat the adverse effects of illegal immigration.

If the Ninth Circuit's decision in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) is allowed to stand, Sheriff Dever and other local law enforcement officers across the United States will see their authority compromised while their communities continue to be battered by the waves of crime cascading across the southern border. Local law enforcement will be deprived of a vital tool by virtue of a flawed conclusion that states are wholly preempted from taking any action within the realm of immigration for fear that such steps might ruffle foreign feathers. This Court is urged to overrule the Ninth Circuit's finding that S.B. 1070 is preempted by this United States' foreign affairs power, and reject foreign influence on domestic law and preserve the balance of power between the three branches of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States' foreign affairs powers may preempt a state law when it (1) conflicts with an "*express*" foreign policy; (2) has more than an incidental or indirect effect on national foreign affairs; or (3) prevents the federal government with speaking with "one voice" on foreign commerce issues. Each one of these preemption doctrines has

its own separate analyses that courts are to consider.

In the Ninth Circuit, the United States argued, in part, that United States foreign policy preempts S.B. 1070. The Ninth Circuit agreed. But rather than analyze S.B. 1070 under the factors set forth by this Court, the Ninth Circuit summarily concluded that the United States' foreign affairs power preempts S.B. 1070 because it had a "deleterious effect on the United States' foreign relations" and "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." The majority panel relied on two kinds of evidence to support this finding: the criticisms of foreign governments and officials and statements by Executive Branch officials.

This *Amicus* Brief addresses the following issue: Does the United States' foreign affairs power actually preempt S.B. 1070?

The majority panel failed to properly analyze this issue using the factors set forth by this Court and improperly considered the evidence of foreign governments and Executive Branch officials. Applying the proper analysis and consideration of the evidence, however, it is clear that this Nation's foreign affairs power does not preempt S.B. 1070. In holding the contrary, the Ninth Circuit unconstitutionally increased the power of the Executive Branch by allowing it to preempt state laws based on mere opinions of Executive Branch

officials, and granted foreign nations a “heckler’s veto” of state laws.

ARGUMENT

I. The Ninth Circuit Improperly Applied The United States’ Foreign Affairs Doctrine.

There are three separate and distinct foreign affairs preemption doctrines. The first doctrine, “statutory” foreign affairs preemption, requires a conflict between a state law and an “*express*” foreign policy. *See American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). The second doctrine, the dormant foreign affairs doctrine, applies when a state law or activity has “more than an incidental or indirect effect” on national foreign relations. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). The third doctrine, the dormant foreign commerce clause doctrine, preempts state laws inhibiting Congress from speaking with “one voice” in matters relating to foreign commerce. *See Barclays Bank PLC. v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

Rather than properly employing each of the three established doctrines, the Ninth Circuit improperly picks and chooses elements from each of these doctrines to reach the conclusion that the United States’ foreign affairs power preempts S.B. 1070. A proper analysis under these doctrines, however, shows that the United States’ foreign affairs power does not, in fact, preempt S.B. 1070. S.B. 1070 does not conflict with any “*express*” foreign

policy, does no more than indirectly affect federal foreign policies, and does not prevent the United States from speaking with “one voice”.

A. The “Statutory” Foreign Affairs Preemption Doctrine is Inapplicable to S.B. 1070.

The Ninth Circuit first relied on statutory foreign affairs preemption. To find preemption under this doctrine, the state law must conflict with an “*express*” foreign policy of the United States. See *Garamendi*, 539 U.S. 396; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). The Ninth Circuit erred in its application of this doctrine because it failed to articulate a conflict between S.B. 1070 and any “*express*” federal foreign policy. See *Garamendi*, 539 U.S. 396; *Crosby*, 530 U.S. 363.

1. “Statutory” Foreign Affairs Preemption Must Be Based Upon A Clear Conflict With An “Express” Foreign Policy Of The United States.

This Court articulated the contours of “statutory” foreign affairs preemption in *Crosby*, *Garamendi*, and *Medellin*.

a. *Crosby v. Nat’l Foreign Trade Council*

The issue in *Crosby* was a 1996 Massachusetts law barring its state agencies from purchasing goods or services from companies doing business with Burma. See *Crosby*, 530 U.S. at 366-68. Three months after Massachusetts passed this law,

Congress passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act, imposing a series of mandatory and conditional sanctions on Burma. *Id.* at 368. This Court found that the United States’ foreign affairs power preempted the Massachusetts law because it directly undermined the “intended purpose” and “natural effect” of at least three aspects of the “*express*” foreign policy set forth by Congress in the Act. *See id.* at 373-74. “First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma.” *Id.* at 374. The Massachusetts law, however, interfered with Congress’s “*express*” intent to delegate discretion to the President regarding the control of economic sanctions by imposing “a different, state system of economic pressure against the Burmese political regime.” *Id.* at 376. Second, “Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range.” *Id.* at 377. The Massachusetts law directly conflicted with the Act by penalizing activities Congress specifically exempted from sanctions, thus undermining Congress’s “calibration of force.” *See id.* at 378-80. Third, under the Act, Congress expressly granted to the President the authority to cooperate with other countries in developing a comprehensive, multilateral Burma policy. *See id.* at 380-81. The Massachusetts law, however, undermined this express congressional grant of authority to the President to speak for the United States on the matter. *See id.* at 380-84. For these reasons, this Court found that the United States’ foreign affairs policy, as set forth in federal

statutory objectives, preempted the Massachusetts law. *See id.* at 388.

b. *American Ins. Ass'n v. Garamendi*

Garamendi, the other seminal case regarding statutory foreign affairs preemption, considered California's Holocaust Victim Insurance Relief Act of 1999. *See Garamendi*, 539 U.S. 396. The California Act's intent was to ensure that Holocaust victims or their heirs could take direct action on their own behalf regarding insurance policies and claims confiscated or dishonored by Nazi Germany. *See id.* at 410. As such, the California Act required any insurer doing business with California to disclose information about all policies sold in Europe between 1920 and 1945. *See id.* at 409-10. At this same time, however, the United States was extensively engaged in international efforts to settle Holocaust-related insurance confiscation claims. *See id.* at 402- 406. These efforts culminated in an executive agreement between President Clinton and the German Chancellor, in which Germany agreed to enact legislation establishing a foundation to compensate those who suffered at the hands of German companies during the National Socialist Era. *See id.* at 405. Germany's willingness to establish a compensation fund was conditioned on the United States' agreement to use the foundation as the exclusive mechanism for resolving such claims. *See id.* at 405-6. The passage of the California Act, however, resulted in legal action that threatened to derail the executive agreement with Germany, and

similar agreements with Austria and France. *See id.* at 408-13.

This Court noted the President's power to settle Americans' claims against foreign governments by way of executive agreement is a 200 year old practice. *See id.* at 415. Moreover, because Congress historically acquiesced to this longstanding practice, "the conclusion that the President's control of foreign relations includes the settlement of [war time] claims is indisputable." *Id.* (quoting *United States v. Pink*, 315 U.S. 203, 204 (1942) (Frankfurter, J., concurring) (internal quotation marks omitted)). Thus, this Court struck down the California Act because it clearly interfered with Congress's implicit approval of these Presidential diplomatic objectives. *See id.* at 427 (quoting *Crosby*, 530 U.S. at 386). "That is, California's law conflicted with *specific* foreign policy objectives of the Executive, as addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." *United States v. Arizona*, 641 F.3d 339, 381 (9th Cir. 2011) (Bea, J., dissent) (quoting *Garamendi*, 539 U.S. at 421) (internal quotation marks omitted).

c. *Medellin v. Texas*

In *Medellin v. Texas*, this Court examined the application of an International Justice Court decision and a Presidential Memorandum to Texas' decision to sentence the defendant, a Mexican national, to death. *Medellin v. Texas*, 552 U.S. 491 (2008). The defendant claimed an unconstitutional denial of his Vienna Convention rights. *See id.* at

501-2. These rights required that the United States notify his home country of his arrest for the purposes of requesting assistance. *See id.* at 499-501. During Medellin’s appeal to the 5th Circuit, the International Justice Court issued its opinion in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (March 31) stating that the United States violated 51 Mexican nationals’ rights, including Medellin’s. *See id.* at 502. Shortly after the *Avena* opinion, and before this Court was to hear oral arguments in *Medellin*, President Bush issued a Memorandum to the United States Attorney General stating that the United States would “discharge its international obligations under [*Avena*], by having State courts give effect to the decision” *See id.* at 503. Relying on the *Avena* opinion and the Presidential Memorandum, Medellin re-filed a habeas action in state court. *See id.*

This Court found that neither the *Avena* opinion nor the Presidential Memorandum preempted Texas’ law. First, this Court found that while the *Avena* opinion may qualify as a treaty, it is a “non-self-executing” treaty. *See id.* at 505. As such, application of *Avena* to domestic law would require Congress to implement statutes in accordance with the treaty, thereby adopting its rule as law in the United States. *See id.* Because Congress did not do this, *Avena* could not preempt state law. *See id.* at 506. This Court further stated that finding that *Avena* dictated domestic law would be “extraordinary, given the basic rights guaranteed by

our own Constitution do not have the effect of displacing state procedural rules.” *See id.* at 523.

Second, this Court found the President’s Memorandum did not preempt Texas state law. This Court noted that the President has many options available to enforce international obligations; converting a non-self-executing treaty to a self-executing one, however, is not among them. *See id.* at 525-26. Further, this Court noted that the President was not employing any congressional authority because a non-self-executing treaty did not “express[ly] or implied[ly]” vest the President with the unilateral authority to make them self-executing. *See id.* at 527; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). Thus, the President did not have any authority, either impliedly or expressly, to preempt Texas’ decision.

Therefore, at minimum, preemption under the statutory foreign affairs doctrine requires a conflict with an “*express*” foreign policy articulated in a federal statute, a treaty, or (in limited circumstances) an executive agreement or a formal foreign policy statement. *See Medellin*, 552 U.S. 491; *Garamendi*, 539 U.S. 396; *Crosby*, 530 U.S. 363. Absent a conflict between state law and an “*express*” foreign policy of the United States, this preemption doctrine does not apply.

2. The Ninth Circuit Erred By Failing To Articulate An Express Foreign Policy Conflicting With S.B. 1070.

The Ninth Circuit erred when it failed to identify an “*express*” foreign policy that S.B. 1070 conflicts with. A mere “deleterious effect on the United States’ foreign relations” is an insufficient basis for finding preemption. *See Arizona*, 641 F.3d at 352. Judge Bea, in his dissent, articulates this point well:

Crosby and *Garamendi* demonstrate, it is not simply any effect on foreign relations generally which leads to preemption, as the majority asserts. Instead, a state law is preempted because it conflicts with federal law only when the state law’s effect on foreign relations conflicts with federally established foreign relations goals.

Id. at 381 (Bea, J., dissenting) (internal citations omitted).

The Ninth Circuit’s err has grave constitutional ramifications. This decision increases the courts’ role in political and legislative functions, such as deciding what constitutes foreign policy and when that foreign policy preempts domestic law. Almost seventy years ago, Justice Stone foresaw this problem of declaring foreign affairs preemption without identifying an “*express*” foreign policy:

Under our dual system of government there are many circumstances in which the legislative and executive branches of the national government may, by affirmative action expressing its policy, enlarge the exercise of federal authority and thus diminish the power which otherwise might be exercised by the states. *It is indispensable to the orderly administration of the system that such alteration of powers and the consequent impairment of state and private rights should not turn on conceptions of policy which, if ever entertained by the only branch of the government authorized to adopt it, has been left unexpressed. It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government.* It is not its function to supply a policy where none has been

declared or defined and
none can be inferred.

Pink, 315 U.S. at 256 (Stone, J., dissenting)
(emphasis added).

**B. S.B. 1070 Is Not Preempted By The
“Dormant” Foreign Affairs Power Of The
National Government.**

Unlike the statutory foreign affairs doctrine, the dormant foreign affairs doctrine does not require a finding that the state act conflicts with an “*express*” foreign policy. Rather, this doctrine is invoked upon a showing that the state law has “more than ‘some incidental or indirect effect’” on the federal government’s power to conduct foreign affairs. See *Zschernig*, 389 U.S. at 434. The Ninth Circuit made reference to this doctrine and held: “The record before this court demonstrates that S.B. 1070 does not threaten a ‘*likelihood . . . [of] produc[ing] something more than incidental effect;*’ rather, Arizona’s law has created *actual* foreign policy problems of a magnitude far greater than incidental.” *Arizona*, 641 F.3d at 353 (quoting *Garamendi*, 539 U.S. at 419). Even under this more relaxed doctrine, however, S.B. 1070 is not preempted.

**1. Dormant Foreign Affairs
Preemption Doctrine.**

The only application of the dormant foreign affairs preemption doctrine occurred forty years ago, at the height of the Cold War, in *Zschernig*. To

understand this doctrine, however, *Zschernig* must be read together with *Clark v. Allen*, 331 U.S. 503 (1947), decided twenty-one years earlier.

In *Clark*, this Court upheld a California statute conditioning a foreign alien's rights to inherit personal property in the United States on reciprocal inheritance rights for United States citizens in the alien's home nation. *Clark*, 331 U.S. at 516-17. The petitioner in *Clark* argued that the reciprocal inheritance statute was unconstitutional because it was "an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." *Id.* at 516. The Court rejected this argument, reasoning that rights of succession of property are determined by local law, there was no treaty governing the rights of succession to the personal property, and California had not entered "the forbidden domain of negotiating with a foreign country or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution." *Id.* at 517 (internal citations omitted). For these reasons, this Court upheld the statute, stating, "[w]hat California has done will have *some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.*" *Id.* (emphasis added).

In *Zschernig*, however, this Court struck down a statute similar to the statute at issue in *Clark* because, *as applied*, the Oregon statute required courts to engage in "minute inquiries concerning the actual administration of foreign law. . . ." and had

made “unavoidable judicial criticism of nations established on a more authoritarian basis than our own.” *Zschernig*, 389 U.S. at 435, 440. Specifically, the Oregon statute left open the possibility of application in line with foreign affairs attitudes concerning the Cold War. *See id.* at 437. Applied in such manner, this Court concluded that the Oregon statute had “*more* than ‘some incidental or indirect effect’” on the federal government’s power to conduct foreign affairs; such criticism had a “*direct impact* upon foreign relations” *Id.* at 434-35 (emphasis added). The Court did not overrule *Clark*. *See id.* at 432-33. Instead it found *Zschernig* to be distinguishable from *Clark*. Unlike *Zschernig*, *Clark* was a facial challenge and “concerned with the words of a statute on its face, not the manner of its application.” *Id.* at 433. In contrast, *Zschernig* was concerned with the Oregon statute’s application.

In her *Garamendi* dissent Justice Ginsburg explained that dormant foreign affairs preemption, as described in *Zschernig*, “resonates most audibly” when a state policy or action is critical of a foreign government and involves “sitting in judgment” of that government.³ *See Garamendi*, 539 U.S. at 439-

³ Some scholars have commented that the Court’s focus on the factual basis for its holding in *Zschernig* and insistence that it was not overruling *Clark* suggests that the dormant foreign affairs preemption doctrine should be reserved to specific and fairly narrow categories of state acts. *See* Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs* (Univ. of San Diego Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 6, 2004), *available at* <http://law.bepress.com/sandiegolwps/pllt/art6>].

40 (Ginsburg, J., dissenting). Consistent with Justice Ginsburg’s interpretation, courts use the following factors to determine whether a state law has *more* than an indirect or incidental effect on national foreign relations:

- (1) Does the statute, on its face, single out any particular foreign country?
- (2) Is there evidence that the statute has been applied selectively according to foreign policy attitudes?
- (3) Does the statute provide an opportunity for state officials to comment on or make judgments regarding the nature of foreign regimes?
- (4) Does the statute involve the state in the actual conduct of foreign affairs or was it intended to address a legitimate state interest?⁴

⁴ Other courts have looked to these factors to determine whether a state law has more than an indirect or incidental effect on national foreign relations. *See e.g., Faculty Senate of Florida Intern. Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010) (finding a Florida law prohibiting schools from expending funds on travel to countries designated terrorist states by the federal government was not preempted by dormant foreign affairs power because the state had a strong interest in managing spending and education and the state itself made no judgment on any foreign regime nor “entangle” itself in foreign affairs); *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (finding a state law requiring U.S. steel be used in public works projects was not preempted by dormant foreign affairs power because the statute was neutrally applicable to all foreign countries, did not allow for state officers to comment on foreign affairs or regimes, and had no concrete effects on foreign

affairs); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp.2d 1151 (E.D. Cal. 2007) (state regulation of greenhouse gasses not preempted by dormant foreign affairs doctrine because the regulations were not aimed at any particular foreign nation, the state was acting in a traditional role when it enacted the regulations, and there was no showing of a clear or non-incidental conflict with federal foreign policy); *Cruz v. United States*, 387 F. Supp.2d 1057 (N.D. Cal. 2005) (noting that dormant foreign affairs doctrine is appropriately applied only to state statutes that constituted state positions, embargoes, or boycotts of foreign nations or practices and upholding a state law that lifted the statute of limitations on certain claims by Mexican nationals because the statute did not condemn any specific foreign power, was consistent with federal law, and was generally applicable to any foreign government subject to a valid claim); *Bd. of Trs. of Emps. Ret. Sys. Of the City of Baltimore v. Mayor of Baltimore City*, 562 A.2d 720 (Md. 1989) (holding that ordinances requiring city pension funds to divest their holdings in companies doing business in South Africa was not preempted by dormant foreign affairs power because investment of public pension funds is normally controlled locally, the impacts on South Africa would be “minimal and indirect,” and the ordinances were limited to only targeting companies doing “significant” business with South Africa and divestment would be gradual); *cf. Tayyari v. New Mexico St. Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (invalidating a state policy forbidding students from countries holding U.S. citizens hostage from gaining admission into state colleges because the state policy specifically targeted Iranian citizens in response to actions committed by the Iranian government and found the policy would constitute “a serious unsanctioned” interference with the federal government’s dealings with Iran); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down a state tax regulation, finding that the regulation’s “sole motivation” was to target a particular nation, in this case South Africa, and express the state’s disapproval of South Africa’s policies); *Bethlehem Steel Corp. v. Bd. of Comm’rs of the Dep’t. of Water and Power of Los Angeles*, 80 Cal. Rptr. 800 (Ct. App. 1969)

2. The Ninth Circuit Erred By Concluding That S.B. 1070 Has More Than An Incidental Effect On National Foreign Policy.

Properly analyzing S.B. 1070 under these *Zschernig* factors leads to one conclusion: S.B. 1070 does not have *more* than “some incidental or indirect effect” on national foreign relations. First, on its face S.B. 1070 does not single out any particular foreign country. Second, like *Clark*, this case arose as a facial challenge, so any suggestion of selective application according to foreign policy attitudes is purely speculative. Third, S.B. 1070 does not provide an opportunity for state officials to comment on, or make judgments regarding, the nature of foreign regimes. Fourth and finally, S.B. 1070 does not involve Arizona in the actual conduct of foreign affairs. To the contrary, as the Ninth Circuit recognized, S.B. 1070 is a “response to a serious problem of unauthorized immigration along the Arizona-Mexico border.” *Arizona*, 641 F.3d at 343. “[I]n individual towns and areas those illegally present can be a substantial presence. In the state of Arizona, their estimated number is 470,000, or seven percent of the population of the state. The local impact appears to call for local response.” *Id.* at 367-68 (Noonan, J., concurring).

(finding that a state act requiring state contractors to purchase U.S.-produced materials was preempted because it amounted to an embargo and had more than an incidental or indirect effect on federal foreign policy).

Arizona must determine how to integrate immigrants into its own communities. Immigration directly affects quintessential state interests such as education, employment regulation, crime control, and the regulation of health, safety and welfare. Additionally, managing immigration movement in itself is a state interest. Thus, S.B. 1070 is not an attempt to directly regulate *external* relations with foreign nations or establish its own foreign policy – it is a purely *domestic* law intended to address legitimate *state* interests. S.B. 1070, therefore, is not preempted by the foreign affairs power of the Federal Government because none of the *Zschernig* factors are implicated.

C. S.B. 1070 Is Not Preempted Under The “One Voice” Doctrine.

The dormant foreign commerce clause preempts state laws that prevent the federal government from speaking with “one voice” in issues relating to foreign commerce. The Ninth Circuit also borrows from the dormant foreign commerce clause doctrine in concluding that S.B. 1070 “thwarts the Executive’s ability to singularly manage the spillover effects of the nation’s immigration laws on foreign affairs.” *Id.* at 354. That is, the Ninth Circuit found that S.B. 1070 thwarted the Executive’s ability to speak with “one voice” on immigration enforcement issues. This, too, was in error.

1. The “One Voice” Standard.

Federal authority regulating the status of aliens derives, in part, from the constitutional power of Congress to regulate foreign commerce, and this Court has recognized the “[n]ation’s need to ‘speak with one voice’ in immigration matters.” *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); see *Hines v. Davidowitz*, 312 U.S. 52, 63-66 (1941); *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581, 605 (1889); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). The “one voice” at issue here—importantly—is the voice of Congress.

Originally, the “one voice” standard turned primarily on independent judicial assessment of the extent to which a state law offended foreign nations and might provoke foreign retaliation.⁵ See *Japan Lines Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979); see also Jack Landman Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 218-19. In *Japan Lines*, this Court struck down a 1979 California ad valorem tax on foreign-owned cargo containers used exclusively in international commerce and fully taxed in the domiciliary country because the law “impair[ed] federal uniformity in an area where federal uniformity is essential.” *Japan Lines Ltd.*, 441 U.S. at 448. The Court found three ways the California state tax frustrated federal uniformity in foreign commerce. First, disputes with foreign nations

⁵ These concerns are reflected in early preemption decision relating to immigration. See, e.g., *Hines*, 312 U.S. at 61; *Chy Lung*, 92 U.S. 275 at 280.

might arise over application of the state tax law. *See id.* at 450. Second, foreign nations might retaliate against the nation as a whole, not just California. *See id.* Third, if each state taxed the instrumentalities of foreign commerce, the resulting patchwork would “plainly prevent this Nation from ‘speaking with one voice’ in regulating foreign commerce.” *Id.* at 451. For these reasons, the Court held that the foreign commerce clause preempted California’s ad valorem tax law.

This “one voice” standard, however, has evolved. Accepting mere foreign disputes or possible foreign retaliation is no longer a sufficient basis for preemption. *See Barclays Bank*, 512 U.S. at 328-29. In *Barclays*, this Court considered whether California’s use of a worldwide combined reporting method to determine corporate franchise tax owed by foreign multinational corporations was preempted under the “one voice” standard. Departing entirely from the *Japan Lines* factors, this Court focused not on possible foreign retaliation, but rather, on whether Congress had implicitly or explicitly permitted the challenged state action. *See id.* at 324-29 (specifically rejecting the petitioner’s argument that California’s worldwide combined reporting requirement is “unconstitutional because it is likely to provoke retaliatory action by foreign governments.”); *see Wardair Canada, Inc. v. Florida Dep’t. of Revenue*, 477 U.S. 1, 12 (1986). This Court noted that Congress had studied state taxation of multinational businesses and had failed to enact several bills prohibiting the California-style reporting requirement. *Barclays Bank*, 512 U.S. at

324-26. Congressional inaction was sufficient to establish that California’s worldwide combined reporting requirement was not preempted under the “one voice” doctrine. *See id.* at 323-27 (Congress, through inaction, could “passively indicate that certain state practices do not impair federal uniformity in an area where federal uniformity is essential.”).

2. The Ninth Circuit Erred In Holding That S.B. 1070 Prevented the Government From Speaking With “One Voice” On Immigration Issues.

S.B. 1070 does not interfere with the federal government’s ability to speak with “one voice” in foreign affairs because Congress has not shown any “specific indications of congressional intent” to preempt Arizona’s cooperative state enforcement of federal immigration law. *See id.* at 321. If Congress, the branch responsible for regulating immigration, believed that state involvement in immigration enforcement efforts “impair[ed] federal uniformity in an area where federal uniformity is essential,” it could have enacted legislation expressly prohibiting the kind of cooperative state enforcement embodied by S.B. 1070. *See id.* at 323.

Congress has spoken with respect to the state action Section 2(B) requires. As Justice Bea aptly observes in his dissent:

The majority would have us believe that Congress has provided the Executive

with the power to veto any state law, which happens to have some effect on foreign relations, as if Congress had not weighed that possible effect in enacting laws permitting state intervention in the immigration field. To the contrary, here Congress has established – through its enactment of statutes such as 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644 – a policy which encourages the free flow of immigration status information between federal and local governments. Arizona’s law embraces and furthers this federal policy; any negative effect on foreign relations caused by the free flow of immigration status information between Arizona and federal officials is due not to Arizona’s law, but to the laws of Congress.

Arizona, 641 F.3d at 382 (Bea, J., dissenting). As for the other contested Sections of S.B. 1070, the Ninth Circuit did not point to any federal statute

“*expressly*” preempting the challenged provisions of S.B. 1070 or unambiguous indications of congressional intent to do the same. As this Court stated in *Barclays Bank*, Congress, through inaction, can “passively indicate that certain state practices do not impair federal uniformity in an area where federal uniformity is essential.” *See Barclays Bank*, 512 U.S. at 323-27. Thus, it would be improper to conclude that S.B. 1070 is preempted under the “one voice” standard.

II. The Ninth Circuit’s Reliance On Executive Branch Statements And Foreign Protests Was Err.

The Ninth Circuit based its conclusion that United States foreign policy preempts S.B. 1070 on two kinds of evidence: foreign protests and executive branch statements. *Arizona*, 641 F.3d at 353-55.

According to the majority, foreign complaints were relevant “insofar as they demonstrate the factual effects of Arizona’s law on U.S. foreign affairs, an issue that the Supreme Court has directed us to consider in preemption cases.” *Id.* at 339 n.14. The court noted that the following foreign governments and foreign officials have criticized S.B. 1070 publicly: the Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua; the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American

States; the Inter–American Commission on Human Rights; and the Union of South American Nations. The court also noted that “Mexico has taken affirmative steps to protest [S.B. 1070].” *Id.* at 353.

The majority also explained that it properly relied on statements by Executive Branch officials because “opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act.” *Id.* at 353-54. The court noted that Deputy Secretary of State James B. Steinberg stated in an affidavit that S.B. 1070 “threatens at least three different serious harms to U.S. foreign relations.” *Id.* The court also noted that Deputy Assistant Secretary for International Policy and Acting Assistant Secretary for International Affairs at DHS attested that Arizona’s immigration law “is affecting DHS’s ongoing efforts to secure international cooperation in carrying out its mission to safeguard America's people, borders, and infrastructure.” *Id.*

This evidence, according to the Ninth Circuit, was “competent and direct evidence of the frustration of congressional objectives by the state Act.” *Id.* (quoting *Crosby*, 530 U.S. at 385). What the Ninth Circuit failed to recognize, however, is that this kind of evidence is only relevant in foreign affairs preemption analysis when the court is first able to discern an “*express*” foreign policy of the National Government. This evidence is not, by itself, a sufficient basis for preemption under any foreign affairs preemption doctrine.

A. Executive Branch Statements And Foreign Protests Are Relevant Evidence In Foreign Affairs Preemption Analysis Only To Demonstrate How State Action Interferes With An Express National Foreign Policy.

This Court has firmly rejected the proposition that Executive Branch statements, in the absence of a congressionally “*expressed*” foreign policy, provide a proper basis for preemption. *See Barclays Bank*, 512 U.S. at 330; *Medellin*, 552 U.S. at 497-98. For example, in *Barclays Bank*, the petitioner argued for preemption on the basis of several Executive Branch statements as evidence of the offended foreign policy. *See Barclays Bank*, 512 U.S. at 328. Specifically, the petitioner offered an executive decision to introduce legislation requiring states to apply a particular method of tax calculation, letters from Executive Branch members expressing opposition to California’s method of worldwide combined reporting, and “Department of Justice amicus briefs filed in this Court, arguing that the worldwide combined reporting method violates the dormant Commerce Clause.” *Id.* at 328 n.30 (internal citations omitted). This Court explained that these kinds of executive statements were “merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned, use of worldwide combined reporting.” *Id.* at 329-30.

Executive Branch statements articulating foreign policy may be relevant evidence to

demonstrate a conflict with an “*express*” foreign policy established by a federal statute. For instance, in *Crosby*, this Court looked to Executive statements for this reason. *Crosby*, 530 U.S. at 385-86. The *Crosby* Court found that it was “perfectly obvious on the face of the statute that Congress intended the President to develop a ‘multilateral strategy’ in cooperation with other countries.” *Id.* at 390 (Scalia, J., concurring). It was also “perfectly obvious on the face of this statute” that Congress intended to provide the President with flexibility in implementing its Burma sanctions policy. *Id.* It is not surprising, given the nature of these foreign policy objectives “*expressly*” assigned to the President by Congress, that Executive Branch statements supported by “formal diplomatic protests and concrete disputes” were competent evidence “to show the practical difficulty of pursuing a congressional goal requiring multinational agreement” and “more than sufficient to demonstrate that the state Act stands in the way of Congress’s diplomatic objectives.” *Id.* at 386.

Similarly, in *Garamendi*, several executive agreements regarding the settlement of Holocaust-era insurance claims coupled with the “longstanding practice” of Congressional acquiescence to the President’s resolution of international claims disputes was sufficient to establish an “*express*” foreign policy. *See Garamendi*, 539 U.S. at 420; *Medellin*, 552 U.S. at 531-32. As in *Crosby*, international cooperation was critical to the success of this foreign policy. *See Garamendi*, 539 U.S. at 424-25; *Crosby*, 530 U.S. at 373-74. Executive

Branch statements and the opinions of foreign governments were competent evidence to show the practical difficulty of pursuing an “*express*” foreign policy goal requiring the voluntary participation of foreign governments and foreign companies. Thus, this Court relied upon such evidence to conclude that the state law was “an obstacle to the success of the National Government’s chosen ‘calibration of force’ in dealing with the Europeans using a voluntary approach.” See *Garamendi*, 539 U.S. at 425 (citations omitted).

Moreover, in *Garamendi*, Justice Ginsburg stated:

We should not [rely on Executive Branch statements] here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. . . . [N]o authoritative text accords such officials the power to invalidate state law simply by conveying the Executive's views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal

and binding federal
instrument.

Id. at 442 (Ginsburg, J., dissenting).

This Court has repeatedly declined to consider foreign protests in its preemption analysis. See *Beard v. Greene*, 523 U.S. 371 (1998) (upholding state right to execute foreign national in face of vigorous foreign protest); *Fed. Republic of Germany v. United States*, 526 U.S. 111 (1999) (same); *Medellin*, 552 U.S. at 497-98 (same); *Barclays Bank*, 512 U.S. at 324-29 (finding foreign government protests against California tax irrelevant to foreign dormant commerce clause analysis). Finally, this Court recognized that the judiciary lacks the competence and authority to weigh “a particular risk of retaliation” in preemption analysis. See *Barclays Bank*, 512 U.S. at 327-29; *Crosby*, 530 U.S. at 385-86.

B. The Ninth Circuit Improperly Relied On Executive Branch Statements And Foreign Protests Because It Failed To Identify An Express Foreign Policy Conflicting With S.B. 1070 Conflict With.

The Ninth Circuit erred by concluding that, “statements attributable to foreign governments necessarily involved the opinions of senior United States’ officials” and provided a sufficient basis for preemption under foreign affairs preemption doctrine for at least two reasons. *Arizona*, 641 F.3d at 353-54. First, the Ninth Circuit did not identify an “*express*” foreign policy that S.B. 1070 conflicts

with. *See Garamendi*, 539 U.S. 396; *Crosby*, 530 U.S. 363. There is no “federal foreign relation policy which establishes the United States must avoid ‘spillover effects,’ if that term is meant to describe displeasure by foreign countries with the United States’ immigration policies.” *Arizona*, 641 F.3d at 381-82 (Bea, J., dissenting). Second, “a foreign nation may not cause a state law to be preempted simply by complaining of the law’s effects on foreign relations generally. We do not grant other nations’ ministers a ‘heckler’s veto.’” *Id.* at 383 (Bea, J., dissenting).

Acceptance of the Ninth Circuit’s approach unconstitutionally would expand Executive Branch power, giving it the ability to preempt state law by simply issuing statements declaring a law preempted. This practice effectively grants virtually limitless Executive Branch authority in matters implicating a state law and foreign affairs without the need for any textual basis in the Constitution, a particular act or treaty of Congress, or even an executive agreement. *See Garamendi*, 539 U.S. 396; *Crosby*, 530 U.S. 363. The Constitution vests “law-making” power in Congress, not the Executive Branch. *Youngstown*, 343 U.S. at 526-28. “As Madison explained in *The Federalist* No. 47, under our constitutional system of checks and balances, ‘[t]he magistrate in whom the whole executive power resides cannot of himself make a law.’” *Medellin*, 552 U.S. at 527-28 (quoting *The Federalist* No. 47 (James Madison) (J. Cooke ed., p. 326 (1961))).

CONCLUSION

As the foregoing demonstrates, foreign affairs considerations should not have played a role in the Ninth Circuit's analysis of S.B. 1070. "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). It is up to Congress "whose voice, in this area, is the Nation's" to balance the need for uniformity in immigration enforcement with state autonomy. *Barclays*, 512 U.S. at 331. Whether S.B. 1070 is preempted turns entirely on federal immigration statutes and questions regarding whether Congress intended to occupy the field of immigration enforcement regulations or to leave room for states to act. Injecting foreign affairs into the analysis, in the absence of an "*express*" foreign policy of the United States, merely because state laws touching on immigration have "foreign resonance" leads to

unprincipled decision-making and requires the judiciary to step outside its constitutional role.

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