

No. 11-182

In the Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

**BRIEF OF THE ARIZONA EMPLOYERS FOR
IMMIGRATION REFORM, ARIZONA
HISPANIC CHAMBER OF COMMERCE,
AMERICAN SUBCONTRACTORS
ASSOCIATION OF ARIZONA, AND
HILL & USHER, L.L.C., AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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United Haulers Ass’n. v. Oneida-Herkimer Solid Waste Mgm’t. Authority, 550 U.S. 330 (2007) 6, 7, 8

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U.S. Const. art. 1, § 8, cl. 3 *passim*

STATUTES:

Ariz. Rev. Stat. § 13-2929 5

Immigration and Nationality Act, 8 U.S.C. § 11.01, *et seq.* 3

S.B. 1070, 2010 Ariz. Sess. Laws *passim*

RULES:

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OTHER AUTHORITIES:

- Ariz. Dept. of Corrections, *ADC Data & Information FY 2011* (Jun. 30, 2011) http://www.azcorrections.gov/data_info_081111.pdf 17
- Bookman, Jay *GA's Farm-Labor Crisis Playing Out as Planned*, Atlanta Journal Constitution, June 17, 2010. <http://blogs.agc.com/jay-bookman-blog/2011/06/17/gas-farm-labor-crisis-playing-out-as-planned> 10
- Castillo, Dave *S.B. 1070 and the Future of Lettuce in Arizona*, All Voices (Aug. 5, 2010), <http://www.allvoices.com/contributed-news/6455388-SB1070-and-the-future-of-lettuce-in-arizona> 11
- Chin, Gabriel *et al.*, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 Geo. Immigr. L. J. 47 (2010) 6
- Condon, Stephanie, *Arizona to Spend \$250K on PR to Combat Negative Immigration Image*, CBS News (July 2, 2010) http://www.cbsnews.com/8301-503544_162-20009593-503544.html 8
- Delaney, Erin F. *Note: In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Law Regulating Aliens*, 82 N.Y.U.L. Rev. 1821 (2007) 6
- East Valley Tribune, *Reasonable Doubt: A Look Into Arpaio's Immigration Campaign*, (Jul. 9–13, 2008) . 17

Fernandez, Valeria, *Undocumented Immigrants Steer Clear of Arizona*, New American Media (Jul. 11, 2011) <http://www.newamericanmedia.org/2011/07/undocumented-immigrants-steer-clear-of-arizona.php> 8

Fitz, Marshall and Kelly, Angela, *Stop the Conference: the Economic and Fiscal Consequences of Conference Cancellations due to Arizona’s S.B. 1070*, Center for American Progress Report (Nov. 2010), <http://www.americanprogress.org/issues/2010/11/pdf/aztourism.pdf> 8

Gans, Judith *Immigration in Arizona Fiscal and Economic Impacts Report of the Udall Center for Studies of Public Policy*, The University of Arizona (Jul. 2007) [http://udallcenter.arizona.edu/immigration/publication/impact of immigrants08.pdf](http://udallcenter.arizona.edu/immigration/publication/impact%20of%20immigrants08.pdf) 14, 19

Georgia Immigration Reform Restaurant Impact Survey, [http://www.garestaurants.org/resources/documents/immigrationstudy/executive summary.pdf](http://www.garestaurants.org/resources/documents/immigrationstudy/executive_summary.pdf). 10

Gray, Steven, *Convicts or Illegals: Georgia Hunts for Farmhands as Tough Immigration Law Takes Hold*, Time (Jun. 26, 2001), <http://www.time.com/time/nation/articles/0,8599,207952,00.html> 11

Griswold, Daniel, *The Fiscal Import of Immigration Reform: The Real Story*, Cato Institute Center for Trade Policy Studies (May 21, 2007) 13, 18

Hinojosa-Ojeda, Raul & Fitz, Marshall, *A Rising Tide or Shrinking Pie: The Economic Impact of Legalization vs. Deportation in Arizona*, Center for American Progress and Immigration Policy Center, http://www.americanprogress.org/issues/2011/03/pdf/rising_tide.pdf 13

Immigration Policy Center, *A Q&A Guide to State Immigration Laws* (citing J. Reed *Consequences of the Immigration Law*, Birmingham Bus. J. (Oct. 7, 2011)) 12

Immigration Policy Center, *Arizona Punishment Doesn't Fit the Crime: Studies Show Decrease in Arizona's Crime Rates* (Jun. 22, 2010), <http://www.immigrationpolicy.org/just-facts/arizona's-punishment-doesn't-fit-crime-studies-show-decrease-arizona-crime-rates> 16

Immigration Policy Center, *Bad for Business: How Harsh Anti-Immigration Legislation Drains Budgets and Damages State Economies*, <http://www.immigrationpolicy.org/just-facts/bad-business> 14

Immigration Policy Center, *Unauthorized Immigrants Pay Taxes, Too*, <http://www.immigrationpolicy.org/just-facts/undocumented-immigrants-pay-tax-too>. Arizona collected \$433,239,486.00 in tax revenue from unauthorized immigrants 13

Johnson, Kevin *Mexico Issues Travel Alert Over New Ariz. Immigration Law*, USA Today (Apr. 28, 2010)

http://www.usatoday.com/news/world/2010-4-7-immigration_N.htm 14

Kobach, Kris W., *Refining the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 *Geo. Immigr. L. J.* 459 (2008) 6

McKissick, John C. & Kane, Sharon P., *An Evaluation of Direct and Indirect Economic Losses Incurred by Georgia Fruit and Vegetable Producers in Spring 2011—a Preliminary Data Analysis and Summary Working Paper* 10

Pew Hispanic Center, *Unauthorized Immigration Population: National & State Trends, 2010* (Feb. 1, 2011) <http://pewhispanic.org/files/reports/133.pdf>. 12

Rand Corporation, *Rand Study Shows Relatively Little Public Money Spent Providing Healthcare to Undocumented Immigrants*, News Release (Nov. 14, 2006) <http://www.rand.org/news/press/2006/11/14.html> . . 18

Rubin, Sara, *Will Immigration Law Doom America’s Lettuce?*, *The Atlantic*, (May 11, 2010) <http://www.theatlantic.com/health/archive/2010/05/will-immigration-law-doom-americas-lettuce/56534> 10

Rumbaut, Ruben G. & Ewing, Walter A., *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign Born Men*, Immigration Policy Center Special Report (2007) [http://www.immigrationpolicy.org/site/default/file/docs/ImmCriminality\(Ipc\).pdf](http://www.immigrationpolicy.org/site/default/file/docs/ImmCriminality(Ipc).pdf) 16

Thunderbird School of Management, *Economic Import of the Mexico-Arizona Relationship* (2003) 19

U.S. Dept. of Labor, *Adverse Effect Wage Rates Year 2012*, <http://www.foreignlaborcert.doleta.gov/adverse.html>. The minimum wage in Arizona is \$7.65 per hour. http://www.ica.state.az.us/Labor/Labor_MinWag.main.aspx 11

INTERESTS OF THE *AMICI CURIAE*¹

Arizona Employers for Immigration Reform (“AZEIR”) is a grass roots organization comprised of 350 small, medium, and large businesses dedicated to sensible federal immigration reform. In furtherance of this goal, AZEIR seeks to inform the public and elected officials about the facts of local and state immigration enforcement efforts. AZEIR believes sensible immigration reform must come from the federal government and must address economic and labor concerns as well as border security.

The Arizona Hispanic Chamber of Commerce (“AZHCC”) is a membership trade association that advocates on behalf of Latino-owned businesses in Arizona. AZHCC seeks to empower Latino-owned businesses to succeed in the state, national, and global economy. Consistent with this goal, AZHCC is a proponent of pragmatic federal immigration reform that respects Latino-owned business and does not hurt Arizona’s or the national economy.

The American Subcontractor’s Association of Arizona (“ASA”) is a membership trade association with over 5,000 subcontractors, specialty trade contrac-

¹Written consents from both parties to the filing of *amicus curiae* briefs in support of either party are on file with the clerk. In accordance with Supreme Court Rule 37.6, AZEIR avows that no counsel for any party in this case authored this brief in whole or in part. Additionally, no party nor any counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief.

tors, suppliers, and service providers serving Arizona's construction industry. ASA is dedicated to improving the business environment for all segments of the construction industry, working at both the federal and state level to protect subcontractors' rights. The ASA is concerned about the effect laws like S.B. 1070 will have on Arizona's construction industry—for instance, that it will discourage skilled Hispanic laborers from returning to Arizona when the economy recovers.

Hill & Usher, L.L.C., is an Arizona insurance company that insures businesses and individuals, including many construction companies. Hill & Usher joins this brief because it is worried about the burden S.B. 1070 imposes on the commercial insurance industry. For instance, proponents of S.B. 1070 argue that businesses should employ convicts to mitigate labor shortages caused by the law. Needless to say, forcing businesses to hire convicts, many of them violent felons, will greatly affect commercial insurance in Arizona.

While none of these *amici curiae* support unfettered illegal immigration, they oppose Arizona's immigration law, S.B. 1070, as an improper exercise of state power, a threat to our national free market economy, and damaging to Arizona's and the nation's business reputation.

SUMMARY OF ARGUMENT

The principal parties direct their briefs to the issue of federal preemption, that is, whether Arizona's immigration law, S.B. 1070, conflicts with Congress's plenary authority to regulate immigration or with the

Immigration and Nationality Act, 8 U.S.C. § 11.01, *et seq.* But preemption focuses the analysis on the scope of federal and state power while ignoring an equally important issue—namely, S.B. 1070’s negative impact on interstate commerce. S.B. 1070 affects other states and the national economy as a whole. The law violates the Dormant Commerce Clause.

A state law violates the Dormant Commerce Clause when (1) it discriminates against out of state interests, or (2) it burdens interstate commerce such that the burden outweighs the law’s putative benefits. As an initial matter, S.B. 1070 is discriminatory. It encourages immigrants to move to other states, thereby externalizing the supposed costs of unauthorized immigration to these states. Additionally, S.B. 1070 burdens commerce. It raises the price of produce by driving away migrant agricultural workers. It imposes costs on out of state businesses with operations in Arizona. And, by discouraging immigration, S.B. 1070 depletes the national tax base and labor pool.

What is more, the supposed benefits of S.B. 1070 are illusory and do not outweigh its burdens. Arizona claims it enacted S.B. 1070 to address the severe fiscal and economic effects of unauthorized immigrants—specifically, the rising costs of incarceration, education, and health care. But Arizona’s contentions lack empirical support. To the contrary, unauthorized immigrants provide a net benefit to state economies.

In short, S.B. 1070 violates the Dormant Commerce Clause, discriminates against other states, and it burdens interstate commerce without any real local benefit. Unfortunately, several states—Alabama, Georgia, Indiana, South Carolina, Utah—have enacted laws

similar to S.B. 1070. Therefore, it is necessary for this court to strike S.B. 1070; otherwise the burden it imposes on commerce will metastasize.

ARGUMENT

I. STATE IMMIGRATION LAWS AFFECT INTERSTATE COMMERCE

The National Government’s authority to regulate immigration arises out of its power to establish a “uniform rule of Naturalization,” its power to regulate commerce, and its authority over foreign affairs. *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Over the years, this court has repeatedly invoked Congress’s power under the Constitution’s Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, to strike state regulation of immigration. See *The Passenger Cases*, 48 U.S. 283 (1849) (striking state immigration statute with four justices in the majority invoking federal commerce power); *Henderson v. Mayor of City of New York, et al.*, 92 U.S. 259, 273 (1876), (striking state immigration law as “a regulation which imposes onerous, perhaps impossible conditions on those engaged in active commerce”); *Chy Lung v. Freeman, et al.*, 92 U.S. 275, 279 (1876) (invalidating a California immigration statute as violative of the Commerce Clause); *Cf. The Head Money Cases*, 112 U.S. 580, 595 (1884) (upholding a federal immigration statute because immigration is a branch of foreign commerce).

The foregoing cases invalidated state immigration laws as violative of the federal government’s power to regulate foreign commerce. The Commerce Clause,

however, also grants Congress plenary power to regulate interstate commerce. And while few cases have addressed this issue, state immigration regulation certainly affects interstate commerce:

It is undeniable that entry of foreign nationals could affect both foreign and interstate commerce. Indeed, one can assume that many individuals enter the United States illegally because of their desire to find better economic opportunities here. Such individuals provide an inexpensive source of federal labor and a market for domestic goods and services, thereby affecting both interstate and foreign commerce.

United States v. Hernandez-Guererro, 963 F.Supp. 933, 937–38 (S.D.Cal. 1997).²

If state immigration laws affect interstate commerce, then they are potentially void under Congress’s power to regulate interstate commerce. In particular,

² The Arizona District Court below that first enjoined portions of S.B. 1070 found that “the regulation of immigration does have an impact on interstate commerce.” *United States v. Arizona*, 703 F.Supp. 2d 980, 1003 (D.Ariz. 2010). The court made this finding while analyzing a portion of section 5 of S.B. 1070 that is not at issue here. That portion, codified at Ariz. Rev. Stat. § 13-2929, makes it a crime to transport, conceal, or harbor an unauthorized immigrant. The United States contended below that this section violated the Commerce Clause because it restricted interstate movement of aliens. While agreeing that such a violation is possible, the District Court determined the United States had not made an adequate showing.

state immigration laws may violate the Dormant Commerce Clause—that is, the implied restraint on state regulation of commerce, even in the absence of a conflicting federal statute. *United Haulers Ass’n. v. Oneida-Herkimer Solid Waste Mgm’t. Authority*, 550 U.S. 330, 338 (2007).

Legal commentators have noted the applicability of the Dormant Commerce Clause to state immigration laws.³ A Dormant Commerce Clause analysis is particularly apt in analyzing state immigration laws like S.B. 1070 because these laws potentially create “an inconsistent patchwork of varying solutions” to the immigration problem and “the more states that enter this legislative tangle, the stronger the federal government’s argument becomes that a uniform national solution is necessary.”⁴ Indeed, proponents of S.B. 1070 contend that harsh immigration laws are necessary to mitigate the “the fiscal and economic effects of the illegal immigration and unauthorized work by aliens in Arizona [which] are severe.” Pet. Br., 6.⁵ Thus, in en

³ See, e.g., Erin F. Delaney, *Note: In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Law Regulating Aliens*, 82 N.Y.U.L. Rev. 1821 (2007).

⁴ Gabriel Chin, *et al.*, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 Geo. Immigr. L. J. 47, 88 (2010).

⁵ See also Kris W. Kobach, *Refining the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L. J. 459, 459 (2008) (“without question the single largest factor motivating state governments to enact legislation discouraging illegal immigration is the fiscal burden it imposes on the

acting S.B. 1070, Arizona has essentially attempted to regulate commerce. The law interferes with interstate commerce; it must be invalidated.

II. ARIZONA'S IMMIGRATION LAW BURDENS COMMERCE

The Commerce Clause grants Congress authority to directly regulate commerce while simultaneously serving as an implicit restraint on state regulation of commerce in the absence of a conflicting federal statute. *United Haulers*, 550 U.S. at 338. States violate this dormant aspect of the Commerce Clause in two ways. First, a state violates the Dormant Commerce Clause when it discriminates in favor of a local business—that is, it prescribes different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Or. Waste Sys. v. Dept. of Env'tl. Quality*, 511 U.S. 93, 99 (1994). This discrimination analysis is obviously not apposite to S.B. 1070. To be sure, the law is patently discriminatory in that it treats unauthorized immigrants differently from authorized aliens and U.S. citizens. S.B. 1070 harms Arizona's economy, as detailed below, even though it does not patently discriminate in favor of Arizona business.⁶

states”).

⁶ Passage of S.B. 1070 sparked an economic boycott of Arizona, particularly in the convention industry. In 2010, the year S.B. 1070 was enacted, Arizona lost \$141 million in direct spending by convention attendees, 2,761 jobs, \$86.5 million in lost earnings,

S.B. 1070 tacitly discriminates by favoring Arizona’s economic interests over other states. As noted, proponents of S.B. 1070 assert the law is necessary to address the costs that unauthorized immigrants impose on the state. The supposed costs are likely illusory. But even if unauthorized immigration imposed a cost on Arizona, S.B. 1070 just shifts Arizona’s costs to other states. Since its passage, S.B. 1070 has diverted the migration of immigrants to other states.⁷ Thus, Arizona is externalizing the presumed costs of immigration on other states. This is an undeniable violation of the Dormant Commerce Clause. *See United Haulers*, 550 U.S. at 345 (“our dormant Commerce Clause cases often find discrimination when a state shifts the costs of regulation to other states”); *see also S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68, n.2 (1945) (when “the burden of state regulation falls on

\$253 million in lost economic output, and \$9.4 million in tax revenues. Marshall Fitz and Angela Kelly, *Stop the Conference: the Economic and Fiscal Consequences of Conference Cancellations due to Arizona’s S.B. 1070*, Center for American Progress Report (Nov. 2010), <http://www.americanprogress.org/issues/2010/11/pdf/az-tourism.pdf>. In fact, the law so tarnished Arizona’s image that the state spent \$250,000 on a marketing campaign to combat its negative associations with illegal immigration. Stephanie Condon, *Arizona to Spend \$250K on PR to Combat Negative Immigration Image*, CBS News (July 2, 2010) http://www.cbsnews.com/8301-503544_162-20009593-503544.html.

⁷ See Valeria Fernandez, *Undocumented Immigrants Steer Clear of Arizona*, New American Media (Jul. 11, 2011) <http://www.newamericanmedia.org/2011/07/undocumented-immigrants-steer-clear-of-arizona.php> (noting that, as a result of S.B. 1070, immigrants are avoiding Arizona and going to California).

interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests in the state are affected”).

A state law also violates the Dormant Commerce Clause wherever it burdens commerce or, as in Judge Richard Posner’s formulation, “distort[s] the operation of interstate markets.” *Cavel Int’l., Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007). After all, the purpose of the Dormant Commerce Clause is to protect the nation’s free market. See *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J. dissenting) (“our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market”).

The test for whether a non-discriminatory state law violates the Dormant Commerce Clause is whether the burden imposed on commerce is excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In particular, a state law is burdensome when it “undermines a compelling need for national uniformity and regulation,” *GMC v. Tracy*, 519 U.S. 278, 299, n. 12 (1997), as is the case with immigration.

Georgia’s experience is instructive. Georgia enacted an immigration law, H.B. 87, in 2011 modeled on S.B. 1070. Georgia’s law had its intended effect of scaring off immigrants, many of whom were agricultural workers. Immediately after the law was enacted, a report issued by the Georgia Department of Agriculture found a labor shortage of 11,000 jobs in the state’s agri-

cultural industry.⁸ This shortage forced “Georgia’s farmers to leave millions of dollars worth of blueberries, onions, melons and other crops unharvested and rotting in the fields.”⁹ Millions of dollars worth of crops rotting in the field impacts the national economy by increasing the prices of produce. This court has invoked the Commerce Clause to address far more trivial effects on agriculture losses in the past. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942).

S.B. 1070 would have a similar effect on Arizona’s agriculture. Arizona’s highest value crop is lettuce, a \$1 billion industry. Yuma Arizona is the winter lettuce capital of the world with 12 million heads of lettuce harvested each day during the growing season.¹⁰ S.B. 1070 has and will discourage migrant work

⁸ John C. McKissick & Sharon P. Kane, *An Evaluation of Direct and Indirect Economic Losses Incurred by Georgia Fruit and Vegetable Producers in Spring 2011—a Preliminary Data Analysis and Summary Working Paper*. A Georgia Restaurant Association survey also found that nearly half of the restaurants had experienced a labor shortage. Georgia Immigration Reform Restaurant Impact Survey, http://www.garestaurants.org/resources/documents/immigrationstudy/executive_summary.pdf.

⁹ Jay Bookman, *GA’s Farm-Labor Crisis Playing Out as Planned*, Atlanta Journal Constitution, June 17, 2010. <http://blogs.agc.com/jay-bookman-blog/2011/06/17/gas-farm-labor-crisis-playing-out-as-planned>.

¹⁰ Sara Rubin, *Will Immigration Law Doom America’s Lettuce?*, The Atlantic, (May 11, 2010) <http://www.theatlantic.com/health/archive/2010/05/will-immigration-law-doom-americas-lettuce/56534>; *see also*, Dave Castillo, *S.B. 1070 and the Future of Lettuce in*

ers from coming to Arizona.¹¹ Lettuce growers may similarly find their crops rotting in the fields. This will, in turn, affect the national economy. As the American Farm Bureau Federation has noted, as a result of immigration laws like S.B. 1070, crops like lettuce will be increasingly sourced from Mexico, not from places like Yuma, representing \$9 billion in lost farm production.¹²

But the burden caused by laws like S.B. 1070 is not restricted to agriculture. Businesses operating in Arizona would have to spend more on employee screening to protect themselves from running afoul of the law if S.B. 1070 were implemented in full. More third-party assistance for employment eligibility and extra human resources staff.¹³ This, of course, is

Arizona, All Voices (Aug. 5, 2010), <http://www.allvoices.com/contributed-news/6455388-SB1070-and-the-future-of-lettuce-in-arizona>.

¹¹ Proponents of S.B. 1070 believe that migrant workers are just cheap labor that drive down wages for citizens. Not so. The Department of Labor requires that farmers pay migrant agricultural workers the Average Effect Wage Rate (AEWR) as base pay. The 2012 AEWR for Arizona was \$9.94 per hour. U.S. Dept. of Labor, *Adverse Effect Wage Rates Year 2012*, <http://www.foreignlaborcert.doleta.gov/adverse.html>. The minimum wage in Arizona is \$7.65 per hour. http://www.ica.state.az.us/Labor/Labor_MinWag.main.aspx.

¹² Steven Gray, *Convicts or Illegals: Georgia Hunts for Farmhands as Tough Immigration Law Takes Hold*, *Time* (Jun. 26, 2001), <http://www.time.com/time/nation/articles/0,8599,207952,00.html>.

¹³ Immigration Policy Center, *A Q&A Guide to State Immigration*

problematic for businesses operating solely in Arizona, but it raises Dormant Commerce Clause problems for businesses with national operations that include Arizona. Suppose a business has distribution centers around the country, including Arizona. If S.B. 1070 is fully implemented, that business will have to spend additional resources ensuring that it complies with the law in Arizona. *See Pike*, 397 U.S. 137 (striking Arizona law that required all cantaloupes grown in Arizona be packed in certain approved containers as a violation of Dormant Commerce Clause). Without a doubt, that business would pass those expenses on to consumers, raising prices. This impedes interstate commerce.

Proponents of S.B. 1070 refuse to acknowledge this empirical truth: immigrants contribute to the national economy. According to the Pew Hispanic Center there were eight million unauthorized immigrants working in the United States in 2010, representing 5.2% of the national workforce. At least half of these unauthorized immigrants paid taxes.¹⁴ Indeed, in 2010, these immigrants collectively paid \$11.2 billion in state and local taxes.¹⁵ State and local

Laws (citing J. Reed *Consequences of the Immigration Law*, Birmingham Bus. J. (Oct. 7, 2011). Section 5 of S.B. 1070 makes it a crime for an unauthorized immigrant to work or seek work. It is therefore conceivable that an employer who hired an unauthorized immigrant could be guilty of solicitation.

¹⁴ Pew Hispanic Center, *Unauthorized Immigration Population: National & State Trends, 2010* (Feb. 1, 2011) <http://pewhispanic.org/files/reports/133.pdf>.

taxes are just one metric and do not account for the value that unauthorized immigrants contribute as workers, consumers, and entrepreneurs. A study by the Center for American Progress found that when undocumented workers are taken out of the economy, the jobs they support through labor consumption, and tax payments disappear as well.¹⁶ Additionally, as the Cato Institute has noted, low-skilled immigrants allow important sectors of the economy, like retail, cleaning, and food preparation, to expand to meet the needs of customers.¹⁷ They help the economy produce a wider array of affordably priced goods, raising the real wages of most Americans. Additionally, by filling gaps in the labor market, immigrants create opportunities for investment. Laws like S.B. 1070 threaten a sizeable portion of the national tax base and have a deleterious effect on gross domestic product.¹⁸

¹⁵ Immigration Policy Center, *Unauthorized Immigrants Pay Taxes, Too*, <http://www.immigrationpolicy.org/just-facts/undocumented-immigrants-pay-tax-too>. Arizona collected \$433,239,486.00 in tax revenue from unauthorized immigrants. *Id.*

¹⁶ Raul Hinojosa-Ojeda & Marshall Fitz, *A Rising Tide or Shrinking Pie: The Economic Impact of Legalization vs. Deportation in Arizona*, Center for American Progress and Immigration Policy Center, http://www.americanprogress.org/issues/2011/03/pdf/rising_tide.pdf.

¹⁷ Daniel Griswold, *The Fiscal Import of Immigration Reform: The Real Story*, Cato Institute Center for Trade Policy Studies (May 21, 2007).

¹⁸ See Judith Gans, *Immigration in Arizona Fiscal and Economic*

While this brief is devoted to a discussion of the impact of S.B. 1070 on interstate commerce, laws like S.B. 1070 also burden foreign commerce. *See South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (state restraints that burden foreign commerce are subject to especially close scrutiny so that the federal government can speak with one voice). For example, shortly after the adoption of S.B. 1070, Mexico issued a travel alert to its citizens traveling to Arizona, warning that Arizona had created “a negative political environment for migrant communities and for all Mexican visitors.”¹⁹ Also, laws like S.B. 1070 almost certainly discourage companies from doing business in the United States. In 2007, after Alabama passed a law similar to S.B. 1070, a German Mercedes-Benz executive was arrested and a Japanese Honda employee was cited for failing to adequately prove they were in the United States legally.²⁰ This kind of

Impacts Report of the Udall Center for Studies of Public Policy, The University of Arizona (Jul. 2007) [http://udallcenter.arizona.edu/immigration/publication/impact of immigrants08.pdf](http://udallcenter.arizona.edu/immigration/publication/impact%20of%20immigrants08.pdf) (noting that economic output in Arizona would drop by \$29 billion or 8.2% if all non-citizens, including unauthorized workers, were removed from the state).

¹⁹ Kevin Johnson, *Mexico Issues Travel Alert Over New Ariz. Immigration Law*, USA Today (Apr. 28, 2010) http://www.usatoday.com/news/world/2010-4-7-immigration_N.htm.

²⁰ Immigration Policy Center, *Bad for Business: How Harsh Anti-Immigration Legislation Drains Budgets and Damages State Economies*, <http://www.immigrationpolicy.org/just-facts/bad-business>.

harassment discourages foreign companies from doing business in the United States.

III. S.B. 1070 PROVIDES LITTLE TO NO BENEFIT FOR ARIZONA

S.B. 1070 burdens commerce. But the law's burden must outweigh its asserted benefit to violate the Dormant Commerce Clause. A state law's burden outweighs its benefit when there is no rational justification for the law, that is, when its benefits are illusory. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J. concurring) ("if the safety justifications [for a law] are not illusory, the court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce."). For instance, in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), this court struck down an Illinois law that required all trucks traveling through the state to have rear wheels equipped with contour mud guards. The court was persuaded by the district court's findings that contour mud flaps required by the law promised no benefit over conventional mud flaps. *Id.* at 525. In fact, the contour flaps created a new set of hazards. *Id.*

Here, S.B. 1070's supposed benefits are similarly illusory. Arizona contends it passed S.B. 1070 to address an increase in crime caused by unauthorized immigrants and to reduce the cost of incarcerating immigrants. This concern is a fantasy. As a report from the Immigration Policy Center notes, because many immigrants from Mexico and Central America are young men with very low levels of formal education,

people stereotypically tend to associate them with higher rates of crime and incarceration.²¹ This is compounded by the fact that many immigrants enter the country through unauthorized channels, which is seen as a violation of the law, and thus reinforces the association of immigration and crime. The data demonstrates this “criminal” perception is wrong. Among the Immigration Policy Center’s findings is that while the undocumented population has doubled since 1994, the violent crime rate in the United States has declined 34.2%, and the property crime rate has fallen 26.4%. Indeed, data from the U.S. Bureau of Justice Statistics shows the violent crime rate in Arizona fell from 545.4 per 100,000 people in 2006 to 481.1 per 100,000 in 2008.²² Additionally, the incarceration rate of young men is lowest for immigrants, even those who are the least educated. The incarceration rate among native-born men 18–35 in 2000 was 3.5%, which was five times higher than the 0.7% incarceration rate among the foreign born

²¹ Ruben G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign Born Men*, Immigration Policy Center Special Report (2007) [http://www.immigrationpolicy.org/site/default/file/docs/ImmCriminality\(Ipc\).pdf](http://www.immigrationpolicy.org/site/default/file/docs/ImmCriminality(Ipc).pdf).

²² Immigration Policy Center, *Arizona Punishment Doesn’t Fit the Crime: Studies Show Decrease in Arizona’s Crime Rates* (Jun. 22, 2010), <http://www.immigrationpolicy.org/just-facts/arizona’s-punishment-doesn’t-fit-crime-studies-show-decrease-arizona-crime-rates>.

As a matter of fact, S.B. 1070 has likely made Arizona less safe. As the Maricopa County Sheriff's office has diverted its resources to immigration, arrest rates have dropped, felony warrants have not been served, and several crimes, including armed robberies, aggravated assaults and sex crimes receive little investigation.²³ Arizona's incarceration rate has declined recently. The Arizona Department of Corrections attributes this decline to the national economic slow down, not to S.B. 1070.²⁴

Aside from crime and incarceration, Arizona claims S.B. 1070 is necessary to address the financial burden unauthorized immigrants impose on its education and health care system. But it is worth noting that the proponents of harsh immigration laws like S.B. 1070 make these claims based upon a single, deeply flawed report from the Federation for American Immigration Reform. Much of the cost that report attributes to unauthorized immigration is the amount spent on education and healthcare for the U.S. children

²³ East Valley Tribune, *Reasonable Doubt: A Look Into Arpaio's Immigration Campaign*, (Jul. 9–13, 2008).

²⁴ Ariz. Dept. of Corrections, *ADC Data & Information FY 2011* (Jun. 30, 2011) http://www.azcorrections.gov/data_info_081111.pdf. It is also worth noting that the Arizona Department of Correction does not make a distinction between documents and undocumented aliens. It simply refers to "criminal aliens." Proponents of S.B. 1070 seize on this unclear definition and use it to confuse the public about the impact of unauthorized immigrants.

of unauthorized parents. Indeed, 72% of the children counted in the report are native born U.S. citizens.²⁵

Regardless, to the extent there is a problem with overcrowding of public schools, it is not solely attributable to unauthorized immigrants. As a report from the CATO Institute details, enrollment in public schools has actually been declining relative to the country's overall population.²⁶ The share of the American population in K–12 schools fell from 22% in 1970 to 16% today. Overcrowding in certain schools is more likely driven by new births and internal migration than by newly arrived immigrants.

As to health care, there is no evidence that unauthorized immigrants are responsible for rising costs. In fact, low skilled immigrants are typically young and healthy and tend to under-use healthcare. The Rand Corporation estimates that in 2006, all levels of government spent \$1.1 billion on healthcare for undocumented workers aged 18–34. Compare this to \$88 billion in government funds spent on healthcare for all adults in the same age group. Thus, while unauthorized immigrants account for 5% of the work force, they count for 1.2% of spending on public health care.²⁷

²⁵ See Immigration Policy Center, *supra*, n. 13.

²⁶ Griswold, *supra*, n. 17.

²⁷ Rand Corporation, *Rand Study Shows Relatively Little Public Money Spent Providing Healthcare to Undocumented Immigrants*, News Release (Nov. 14, 2006) <http://www.rand.org/news/press/>

Arizona’s contention that unauthorized immigrants impose “severe” costs on the state is unsubstantiated bluster. Immigration provides a net benefit to the state. A report from the Udall Center for the Study of Public Policy shows that in 2004 immigration cost Arizona \$1.4 billion. Nevertheless, in that same year, immigrants paid \$2.3 billion in state taxes. Thus, Arizona actually experienced a \$941 million benefit from immigration.²⁸

In sum, Arizona’s alleged reasons for enacting S.B. 1070 are groundless. The law does little to address the rising cost of crime, education, or healthcare. If Arizona really wanted to address these problems, it has other alternatives—e.g. hiring more police or teachers. *See Pike*, 397 U.S. at 145 (whether a state regulation burdens commerce depends on whether there are alternative methods for advancing the local interests without burdening the national one). The benefits of S.B. 1070 are illusory, but its burdens on commerce are real. S.B. 1070 violates the Dormant Commerce Clause.

2006/11/14.html.

²⁸ Gans, *supra*, n. 18; *see also* Thunderbird School of Management, *Economic Import of the Mexico-Arizona Relationship* (2003) (noting that in 2001, immigrants generated a surplus of \$106 million for the Arizona economy).

CONCLUSION

Ultimately, rather than pass laws like S.B. 1070 that burden commerce, these *amici curiae* urge Arizona to support federal immigration reform efforts, work with businesses to address the labor, economic, and commercial issues that attend immigration, and refrain from passing laws like S.B. 1070 that serve only to burden commerce and increase the state's litigation costs.

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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