
IN THE
Supreme Court of the United States

BRENNA BIRD, ATTORNEY GENERAL OF IOWA,
Petitioner,

v.

IOWA MIGRANT MOVEMENT FOR JUSTICE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF *AMICI CURIAE* OKLAHOMA,
FLORIDA, AND 23 ADDITIONAL STATES
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

The States of Oklahoma, Florida, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming submit this brief as amici curiae in support of the Petition for Certiorari.

Amidst a profound crisis of illegal immigration, various States enacted laws mirroring federal law by regulating the entry into those States of aliens in the United States illegally. Notwithstanding the complementarity of such statutes with federal law, and this Court’s having “made facial challenges hard to win,” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024), several courts—including the Eighth Circuit below—have downplayed obvious justiciability problems and embraced an overbroad interpretation of *Arizona v. United States*, 567 U.S. 387 (2012), holding as a facial matter that these key laws are completely preempted.

This cannot be correct. As sovereign States, Amici have a compelling interest in ensuring that they retain the ability in our federalist system to protect their sovereign territory, their citizens, and their lawfully present visitors from the harms of people who wish to flout our nation’s laws and borders. Under their robust police power, Amici can indisputably prosecute illegal aliens for

1. *Amici* submit this brief pursuant to Sup. Ct. R. 37.2. *Amici* provided the respective counsels of record timely notice of Oklahoma and Florida’s intent to file this brief.

murder, kidnapping, rape, theft, and other crimes. There is no logical reason that the same principles underlying these prosecutions cannot apply to State prosecutions complementing federal crimes for illegal entry into the country, as well.

Illegal immigration has hammered local communities, increased burdens on local law enforcement, overextended social services, and more. Drug trafficking, human trafficking, and other organized criminal activities have flowed relentlessly through unsecured borders into local communities—border States or not. Amici States have a vested interest in ensuring their communities are safe, and this includes the ability to enact legislation to support federal law. Amici States also have a strong interest in protecting the fairness and integrity of legal immigration. *See* App.106a (Stras, J., dissenting from denial of rehearing en banc) (“The welcome mat we offer to those who come here legally ... means little if skipping the line results in the same (or even better) treatment.”).

In the end, courts should not obstruct a State acting in good faith to safeguard its people, when the means chosen resemble, rather than conflict with, federal law.

SUMMARY OF THE ARGUMENT

The Eighth Circuit’s decision enjoining Iowa’s law (“SF2340”) in its entirety warrants certiorari for at least three reasons.

First, Plaintiffs lack Article III standing to challenge Iowa’s law, much less to succeed on a facial challenge. The individual Plaintiffs claim to fear prosecution, but SF2340

only criminalizes entry by persons illegally present under federal law, and Iowa has disavowed the application of SF2340 to Plaintiffs. Plaintiffs' purely speculative fears about hypothetical enforcement mistakes cannot confer standing. The organizational Plaintiff similarly fails to establish a concrete injury. And even if Plaintiffs were present unlawfully pursuant to federal law, and thus exposed to prosecution, that federal illegality could not constitute a legally protected interest that would bestow standing on Plaintiffs here, either.

Second, the Eighth Circuit committed a critical error by holding SF2340 facially unconstitutional. This Court has been clear that even one constitutional application of a law can defeat facial challenges. Here, Iowa has identified numerous instances where SF2340 could be applied constitutionally: prosecutions where federal officials arrested the illegal alien, where States receive federal approval for a prosecution, where enforcement occurs pursuant to Section 287(g) agreements, and so on. The Eighth Circuit's failure to truly wrestle with these applications violates this Court's precedent governing facial challenges and threatens State sovereignty.

Third, the Eighth Circuit's preemption analysis disregarded the States' historic authority and sharply conflicts with controlling precedent. For the first century of the Republic, States regulated immigration, excluding categories of aliens they deemed undesirable. Although federal authority over immigration has expanded, States never surrendered their concurrent power to enforce criminal laws. Nevertheless, the Eighth Circuit held that any overlap with federal immigration law plus federal enforcement discretion creates obstacle preemption. Yet

every federal crime involves enforcement discretion. That reasoning effectively converts all immigration matters into an occupied field, contravening the distinction between field and conflict preemption in *Arizona*, 567 U.S. 387. Underscoring the need for review, another Eighth Circuit panel has since rejected that same discretion-based reasoning and upheld a state law that mirrors federal law—an apparent intra-circuit split that needs to be resolved. *See infra* Part II.

If States cannot prosecute conduct that federal law also criminalizes, then felon-in-possession laws, controlled-substance prosecutions, fraud protections, and identity-theft statutes may also be preempted (among others). But this Court has recently and repeatedly affirmed that “[t]he mere fact that [a] state law[] ... overlap[s] to some degree with federal criminal provisions does not even begin to make a case for conflict preemption.” *Kansas v. Garcia*, 589 U.S. 191, 211 (2020).

ARGUMENT

I. THE PLAINTIFFS LACK STANDING.

Plaintiffs lack Article III standing. And without standing, the Eighth Circuit lacked jurisdiction to reach the merits, much less to hold state legislation facially unconstitutional. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

A. The Individual Plaintiffs’ Alleged Injuries Lack Credibility.

The individual Plaintiffs claim to face a credible threat of prosecution despite holding legal immigration status.

But SF2340, by its express terms, only criminalizes entry or attempted entry into Iowa by persons who are in the United States illegally. Iowa Code § 718C.2(1) (2024). And the Iowa Attorney General has disavowed prosecuting Plaintiffs or any others with lawful presence in the United States. This should make Plaintiffs’ case for standing a difficult one, to say the least.

Below, however, “[t]he panel all but ignored” the Article III requirement of a “credible threat of enforcement.” App.111a (Stras, J., dissenting from denial of rehearing en banc). To the limited extent that it analyzed the question, the Eighth Circuit erroneously credited Plaintiffs’ unfounded fears that SF2340 applies to lawfully present individuals, finding their claims of potentially falling within the statute’s reach “arguabl[e],” App.7a, despite the statute’s clear limitation to persons illegally present under federal law, and despite Iowa’s insistence that it would not enforce the law against Plaintiffs.

Plaintiffs’ assertions are further belied by SF2340’s text and structure. The law incorporates federal immigration status as an element, meaning anyone with current lawful status cannot be prosecuted. And speculative concerns about hypothetical future government mistakes do not confer standing. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409–10 (2013) (alleged injury must be “certainly impending,” not based on a “highly attenuated chain of possibilities”). At most, the allegations here “show ... that Iowa *might* enforce the law against *someone* at *some* point, not that these plaintiffs are ‘actual[ly] or imminent[ly]’ at risk.” App.109a (Stras, J., dissenting from denial of rehearing en banc) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

The Eighth Circuit did, in the alternative, seemingly agree with the district court that the pleadings could allow a reasonable inference that one Plaintiff (David) “is in the United States unlawfully.” App.13a. But the basis for this finding was razor-thin: The Eighth Circuit primarily pointed to an allegation that David “could be arrested, prosecuted, imprisoned, and removed.” *Id.* (citation omitted). But this is far closer to a legal conclusion than a factual statement, and it says nothing about David’s unlawful presence, which would have been the easiest thing in the world to plead or admit. The only reasonable inference here is that this allegation ties back into Plaintiffs’ theory that Iowa’s law reaches those who are lawfully present.

Even if David had alleged unlawful presence, violations of uncontested federal immigration law cannot serve as an Article III basis to challenge SF2340’s constitutionality. If an individual plaintiff *is* illegally present under federal law, he lacks a “legally protected interest” in his presence in a State to vindicate, *Biden v. Nebraska*, 600 U.S. 477, 489 (2023), and thus cannot show injury from a state law that merely complements federal restrictions. Put simply, if Congress has criminalized a person’s presence in *any* State, and that person is not contesting the constitutionality of Congress’s criminalization, then how can the person have legitimate standing to challenge a State law that also criminalizes his presence in a State? At most, the person could challenge an actual State prosecution, in an as-applied and defensive manner. But he would not have standing to bring a pre-enforcement challenge; nor, for that matter, would he have a cause of action.

The Iowa Migrant Movement for Justice (“MMJ”) also lacks standing. Although organizations may assert their members’ standing, they must still satisfy the requirements for injury, causation, and redressability. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 393–94 (2024). An organization has representational standing only if “its members would otherwise have standing to sue in their own right.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023). MMJ has failed to identify any specific members who are likely to suffer a concrete injury. MMJ also claims SF2340 frustrates its mission and forces resource diversion. But this Court has rejected such generalized organizational injury theories. *See Hippocratic Med.*, 602 U.S. at 390–96.

B. Uniform Standing Principles Are Critical to Federalism.

The high bar for standing “implements ‘the Framers’ concept of the proper—and properly limited—role of the courts in a democratic society’” and “screen[s] out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action.” *Hippocratic Med.*, 602 U.S. at 380–81.

These principles have particular force when federal courts are asked to enjoin state legislation. Amici States have a compelling interest in ensuring that standing principles are applied uniformly. But on these types of laws, courts have divided on standing, albeit for different scenarios. The Fifth Circuit, in evaluating Texas’s law, found a lack of organizational standing, both for El Paso County and for non-profit plaintiffs. *United States v.*

Texas, 173 F.4th 659, 664–67 (5th Cir. 2026) (en banc) (“Federal courts have a solemn responsibility to apply neutral principles, such as standing, to the cases that come before them ...”). Thus, Texas is allowed to enforce its law. Oklahoma, on the other hand, has been enjoined by a federal district court from enforcing its law against anyone, as a facial matter, with the court finding that illegal aliens have a “legally protected interest” in a pre-enforcement challenge to Oklahoma’s law. *Padres Unidos v. Drummond*, 785 F. Supp. 3d 993 (W.D. Okla. 2025), *appeal pending*, No. 25-6080 (10th Cir.). Similarly, Florida cannot enforce its law in part because a federal district court found standing for individual and organizational plaintiffs. *See Fla. Immigrant Coal. v. Uthmeier*, 780 F. Supp. 3d 1235, 1253–57 (S.D. Fla. 2025). And Iowa, of course, cannot enforce its law because Plaintiffs without a credible threat of enforcement were deemed to have standing. This Court’s guidance is needed on standing.

II. THE EIGHTH CIRCUIT’S FACIAL ANALYSIS THREATENS STATE AUTHORITY TO DEFEND DULY ENACTED LEGISLATION.

The Iowa Attorney General correctly explains the Eighth Circuit’s facial analysis error in its Petition. *See, e.g.*, Pet. at 23–25. Amici States emphasize how this error threatens state sovereignty nationwide. Under *United States v. Salerno*, even one constitutional application can defeat a facial challenge to a State statute. 481 U.S. 739, 745 (1987); *see also* App.113a (Stras, J., dissenting from denial of rehearing en banc) (“The hill is even steeper than it looks.”). The Eighth Circuit never undertook that inquiry. And here, numerous scenarios exist where SF2340’s application would be constitutional: (1) a

prosecution of an alien whom federal officials have already arrested and charged federally for the same unlawful entry; (2) a prosecution of an alien subject to a final order of removal—one to whom none of the federal-law defenses the Eighth Circuit hypothesized could apply; (3) a prosecution initiated only after federal officials approve it; (4) an arrest and prosecution carried out by state officers deputized under a Section 287(g) agreement, 8 U.S.C. § 1357(g); or (5) a state order of removal to the very country federal officials have already designated. Where is the conflict or obstacle in such cases? As Judge Stras pointed out, “[p]reemption *could* occur if state officials pursue charges against aliens who are under no federal obligation to leave the country,” but otherwise a state prosecution under a law mirroring a mandatory federal criminal law undeniably “furthers” congressional purposes and objectives. App.114a–115a (Stras, J., dissenting from denial of rehearing en banc). It certainly does not stand in their way.

Faced with these specific examples, the Eighth Circuit deployed something “that more closely resembles field preemption.” App.115a (Stras, J., dissenting from denial of rehearing en banc). Iowa’s law, per the Eighth Circuit, constitutes “an obstacle to the exercise of the discretion that Congress gives federal officials charged with enforcing immigration law.” App.23a. Deferring to this prosecutorial discretion, the Eighth Circuit “completely rul[ed] out Iowa’s ‘parallel scheme of enforcement,’” without fully parsing through the possible constitutional applications Iowa had pointed to. App.115a (Stras, J., dissenting from denial of rehearing en banc) (citation omitted); *see also* App.30a (“Because the Act conflicts with the discretion Congress gives to federal officials, the Act

is preempted, even if federal officials support the Act.”). This “patchwork analysis even confused the plaintiffs, who now try to defend the decision on field-preemption grounds.” App.116a (Stras, J., dissenting from denial of rehearing en banc).

The Eighth Circuit’s approach violates *Salerno* and threatens States’ authority to defend their laws. Under the Eighth Circuit’s method, federal courts could block enforcement of state laws based on amorphous federal discretion, hypothetical future conflicts, or generic “obstacle[s]” without ever identifying an actual constitutional violation. This turns *Salerno* on its head and gives plaintiffs a roadmap to challenge state laws through sheer speculation rather than a definitive showing. The stakes extend far beyond immigration. If courts need not identify actual unconstitutional applications before holding state statutes facially unconstitutional, then the *Salerno* standard becomes meaningless. The States’ ability to defend their democratically enacted laws is undermined, and facial challenges could become easy wins for plaintiffs based on conjecture. This threatens state sovereignty and federalism itself.

Tellingly, the Eighth Circuit itself has recently *rejected* relying on federal law enforcement discretion to find a “mirror” state law preempted—creating an apparent intra-circuit split. In *Iowans for Alternatives to Smoking & Tobacco, Inc. v. Mosiman*, --- F.4th ---, 2026 WL 2197766, at *1 (8th Cir. July 30, 2026), the Eighth Circuit vacated a district court decision and upheld, against a preemption challenge, an Iowa law “prohibit[ing] the manufacture and sale of electronic nicotine delivery systems in Iowa that have not yet received marketing

authorization from the United States Food and Drug Administration (FDA).” “[B]y replicating federal law,” the Eighth Circuit held, “the state ‘recognizes the supremacy of the national law and conforms to it.’” *Id.* at *7 (quoting *Asbell v. Kansas*, 209 U.S. 251, 258 (1908)). Thus, “there is no conflict.” *Id.* at *8. “Even more significantly,” the plaintiffs in that case “conflate[d] federal enforcement priorities with federal law.” *Id.* “Rather than arguing that Congress’s intention would be frustrated,” they argued that “the FDA’s purpose would be hindered.” *Id.* “But even assuming that is true, ‘the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption.’” *Id.* (quoting *Kansas*, 589 U.S. at 212). Ignoring the Eighth Circuit panel in the present case, the panel in *Mosiman* could not have been clearer: “[A]lthough the FDA has implemented a discretionary ... enforcement scheme, it does not follow that Congress intended to allow violations of its own duly enacted laws.” *Id.* The decision below cannot be squared with the Eighth Circuit’s subsequent precedent, much less this Court’s decisions.

The Eighth Circuit below also expressed concern that Iowa’s law could “complicate U.S. foreign relations.” App.25a. That cannot be a correct view of preemption, federalism, or U.S. foreign relations, in part because it proves far too much. States regulate and prosecute unlawfully present individuals *all the time*. State prosecutions of aliens (illegal or otherwise) for fraud, murder, or bank robbery could anger foreign governments, but Amici are not aware of any instance where such a possibility has been wielded to declare the State effort preempted.

Take an illegal immigrant who is arrested in Oklahoma for trespassing on private property. Would that arrest not risk angering a foreign government just as much as arresting him for unlawfully entering Oklahoma in general? Why can an illegal immigrant be prosecuted by Oklahoma for trespassing on, say, a private farm but not for effectively trespassing in the State as a whole? We are not told.

The “Supremacy Clause gives priority to ‘the laws of the United States,’ not the criminal law enforcement priorities or preferences of federal officers.” *Kansas*, 589 U.S. at 212 (quoting U.S. Const. art. VI, cl. 2). Thus, courts cannot find preemption with state laws that duplicate federal law by claiming the United States must have discretion not to enforce laws that Congress has passed. *See Plyler v. Doe*, 457 U.S. 202, 225 (1982) (States may “act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”). This is especially so when the federal statutes in question are phrased mandatorily—they both require (“shall”) punishment for these offenses. *See* 8 U.S.C. §§ 1325(a), 1326(a).

III. THE PANEL’S PREEMPTION ANALYSIS DISREGARDS STATES’ HISTORIC AUTHORITY AND CONFLICTS WITH CONTROLLING PRECEDENT.

The regulation of immigrants inside the country is a traditional area of state regulation, contrary to the “myth of an era of unrestricted immigration” in the first 100 years of the nation. Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776-1875), 93 Colum. L. Rev. 1833, 1835 (1993). That history further bolsters

the presumption against preemption and confirms that the federal government does not have the sole interest in regulating aliens. It does not matter that “the Federal Government has regulated [immigration] for more than a century,” as such an argument “misunderstands the principle” of the presumption. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

A. The Eighth Circuit Improperly Held that Congress Has Preempted the Field in an Area of Historic State Police Powers.

In 2025, in upholding state prescription drug laws that “mirror federal law,” the Fifth Circuit found that even in “the face of th[e] ever-expanding federal regulation of drugs ... the States have not forfeited their traditional prerogative to police drug safety.” *Zyla Life Scis. v. Wells Pharma of Houston*, 134 F.4th 326, 330 (5th Cir. 2025). The Eighth Circuit distinguished *Zyla* by asserting that “[i]mmigration is not a traditional subject of state regulation.” App.26a. This is historically mistaken. State regulation of aliens is a well-established tradition. Since the Founding, a variety of state laws directly regulated aliens, and common understanding around the Founding recognized state authority in that area.

Alien migration laws. Most on point, States heavily regulated the movement of aliens both before and after the Founding. “States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals” and “persons with contagious diseases.” *Arizona*, 567 U.S. at 419 (Scalia, J., concurring in part, dissenting in part). In 1787, for instance, Georgia decreed that “felons transported or banished from another

state or a foreign country be arrested and removed beyond the limits of the state.” Neuman, *supra*, at 1842. Other States followed suit. *Id.*² Respecting state power, Congress in 1866 passed a resolution against foreign pardons for those convicted of assisting in the emigration of convicts in violation of these laws. *See* S.J. Res. 24, 39th Cong., 1st Sess., 14 Stat. 353 (1866). In addition, States also passed laws preventing the migration of indigent persons³ and of those suspected of carrying infectious disease.⁴ Neuman,

2. Before the Founding, Connecticut, Delaware, Georgia, Massachusetts, Pennsylvania, South Carolina, and Virginia prohibited the importation of persons who had ever been convicted of crime. Act of Oct. 9, 1788, 1788 Conn. Acts and Laws 367; 1740 Laws of the State of Del. ch. 66.a, § 2, at 166; Act of Feb. 10, 1787, 1787 Ga. Acts and Resol. 40; Act of Feb. 14, 1789, ch. 61, § 7, 1789 Mass. Acts 98, 100–01; Act of Mar. 27, 1789, ch. 463, 1788–89 Pa. Acts 692; Act of Nov. 4, 1788, 1788 S.C. Acts and Ordinances 5; Act of Nov. 13, 1788, ch. 12, 1788 Va. Acts 9. Shortly after the Founding, Maine, Maryland, New Jersey, New York, and Rhode Island followed suit. *See, e.g.*, Act of Feb. 24, 1821, ch. 22, § 6, 1821 Me. Laws 90, 91–92; Act of Jan. 6, 1810, ch. 138, § 7(3), 1809–10 Md. Laws; Act of Jan. 28, 1797, ch. 611, § 3, 1797 N.J. Acts 131; Act of Apr. 25, 1833, ch. 230, 1833 N.Y. Laws 313; Act of 1798, § 17, 1798 R.I. Laws 357–58.

3. *See, e.g.*, Act of Feb. 11, 1794, ch. 8, 1794 Mass. Acts & Laws 347; Act of May 24, 1851, ch. 342, § 3, 1851 Mass. Acts & Laws 847, 848; Act of Mar. 7, 1788, ch. 62, § 5, 1788 N.Y. Laws 733, 734; Act of June 27, 1820, ch. 26, 1820 Me. Laws 35; Act of May 14, 1718, ch. 37, N.H. Province Laws 312; Act of June 14, 1820, ch. 1, N.H. Laws 255; Act of June 1847, 1847 R.I. Acts 27; Act of Mar. 29, 1803, ch. 155, § 21, 1801–03 Pa. Laws 507, 525–26.

4. Many of these laws regulated movement of aliens from sister States. *See, e.g.*, Conn. Rev. Stat. tit. 91, §§ 3, 15 (1821); Act of Jan. 1799, ch. 17, § 1, 1799 Del. Laws 47; Act of Nov. 1793, ch. 34, § 2, 1793 Md. Laws; Act of Apr. 8, 1811, ch. 175, § 2, 1811 N.Y.

supra, at 1846–65; Benjamin J. Klebaner, *State and Local Immigration Regulation in the United States Before 1882*, 3 Int’l Rev. Soc. Hist. 269, 290–95 (1958) (chart of alien migration laws). In each instance, those States acted within their sovereign prerogative to “protect [their] citizens.” *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 141 (1837).

Alien land laws. States extensively regulated the ability of aliens to hold property. That doctrine stemmed from an ancient common-law tradition. *See* Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 Geo. Immigr. L.J. 77, 92 (2012); 1 William Blackstone, *Commentaries on the Laws of England* *367–72. Even when the Fourteenth Amendment passed, state restrictions on alien land ownership were ubiquitous. *See Terrace v. Thompson*, 263 U.S. 197, 217 (1923). Like migration laws, alien land laws regulated the conduct of aliens and were focused on local concerns that “affect the safety and power of the state itself.” *Id.* at 221. The power to determine who could “own” the soil of a state is a “matter[] of [the] highest

Laws 247; Act of Apr. 10, 1850, ch. 275, tit. 2, art. 1, § 2, 1850 N.Y. Laws 599; Act of Apr. 17, 1795, ch. 327, § 4, 1795 Pa. Acts 734, 735. That is in addition to laws regulating movement from abroad. *See* Act of June 10, 1803, § 7, 1803 N.H. Laws 7, 11–12; Act of Mar. 10, 1821, ch. 127, §§ 1–2, 1821 Me. Laws 443; Act of June 20, 1799, ch. 9, § 8, 1799 Mass. Acts & Laws 308, 311; Act of Dec. 17, 1793, 1793 Ga. Acts and Resol. 25; Act of 1793, ch. 3, § 1, 1793 N.C. Acts 36; Act of Dec. 5, 1793, ch. 19, § 2, 1793 Va. Acts 26; Act of Feb. 3, 1812, § 1, 1812 N.J. Laws 19; Act of Apr. 14, 1820, ch. 229, §§ 4–5, 1820 N.Y. Laws 208, 210; Act of Apr. 1, 1803, ch. 178, § 6, 1803 Pa. Acts; Act of Apr. 2, 1821, ch. 126, § 1, 1821 Pa. Laws 210; Act of Apr. 18, 1825, ch. 212, 1825 N.Y. Laws 322.

importance” to state sovereignty, *id.*, just as “the power to exclude” is “the defining characteristic of sovereignty,” *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part, dissenting in part).

This history is buttressed by understandings of the States’ role at the national level. In 1788, after the Constitutional Convention, the Congress of the Confederation recommended that the several states “pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States.” 34 J. Cont’l Cong. 528 (Sept. 16, 1788). Some “distinguished members of the convention which formed the constitution” moved for that recommendation just one year “after the adoption of the constitution by the convention,” and one year before the Constitution’s ratification by the States. *Miln*, 36 U.S. (11 Pet.) at 149 (Thompson, J., concurring). That recommendation is thus “a strong contemporaneous expression ... [that the regulation of immigrants] was a power resting with the states.” *Id.*

After the Founding, this understanding continued. Far from evincing an exclusive federal authority over aliens, commentary and early practice after the passage of the Constitution were to leave alien rights entirely to the States. See Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 Mich. J. Race & L. 1, 20 (2013) (“the federal government’s control over naturalization did not translate into control over most other alien rights, which remained the province of the states”). The debates over the first Naturalization Act reveal this sharp distinction—Congress claimed exclusive authority to regulate naturalization, but it shared with the States the power

to determine what rights flowed to immigrants before naturalization. *See id.* at 15–20; *see also* 1 Annals of Cong. 1162 (1790) (Representative Seney: “We can go no further than to prescribe the rule by which it can be determined who are, and who are not citizens; but we cannot say they shall be entitled to privileges in the different States.”). The First Naturalization Act thus granted no rights to aliens. Tirres, *supra*, at 20; *see also* Naturalization Law of Mar. 26, 1790, ch. 3, 1 Stat. 103 (1790).

From there, Congress continued to leave the States with primary authority to regulate aliens for the first 100 years of the country. *Arizona*, 567 U.S. at 417–21 (Scalia, J., concurring in part, dissenting in part). Except for the Alien Act of 1798, Congress did not enact any immigration statutes until the late 1800s. *Id.* at 421. And the Alien Act drew sharp condemnation for encroaching on the States’ authority over aliens. *See id.* at 419 (noting that the “controversy surrounding the Alien and Sedition Acts” circled whether “the States had exclusive authority to enact such immigration laws”). For instance, Thomas Jefferson wrote in condemnation of the Alien and Sedition Acts “that alien friends are under the jurisdiction and protection of the laws of the state wherein they are [and] that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct from their power over citizens.” Kentucky Resolutions of 1798, reprinted in J. Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* 131 (1991).

In sum, States enacted numerous laws restricting the movement of certain classes of aliens, including convicted criminals, indigent persons, and those suspected of

carrying infectious disease—authority this Court upheld as within states’ “undeniable and unlimited jurisdiction” over persons within their borders. *Miln*, 36 U.S. at 139.

This Court has never suggested that federal immigration authority strips States of power to prosecute aliens for violations of state criminal law. In *Arizona*, this Court recognized that where a State is not operating in an occupied field, “a State may make violation of federal law a crime in some instances.” 567 U.S. at 402. SF2340 follows this historical tradition by criminalizing conduct that threatens state welfare and public safety—just as States historically excluded those likely to become public charges or endanger their communities.

The Eighth Circuit, by contrast, held that any state law overlapping with federal immigration law is obstacle preempted because “immigration is not a traditional subject of state regulation.” App.26a. This wrongly converts all immigration-related matters into an occupied field. It also contravenes *Arizona*’s careful distinction between field preemption (limited to alien registration) and conflict preemption (requiring an actual conflict). Criminal law enforcement is unquestionably within States’ historic police powers. And the presumption against preemption has “greatest force” when federal law potentially displaces state criminal law.

B. The Constitutional Powers of Congress Do Not Withdraw State Authority to Regulate Aliens Consistent with Federal Directives.

Nothing in the text of the Constitution expressly confers exclusive authority or a “preeminent role” to

Congress in regulating aliens. Had the Framers thought so, “[t]he delegates ... would have rushed to the exits.” *Arizona*, 567 U.S. at 436 (Scalia, J., concurring in part, dissenting in part). To the contrary, the Constitution was written with a backdrop of extensive state regulation of aliens. The Constitution thus does not solve this case; rather, one must look to Congress’s express enactment in the Immigration and Nationality Act (“INA”). And like the Constitution, that federal law is “best understood in the context of antecedent [regulation of aliens] on the local level.” Klebaner, *supra*, at 269. That history means the presumption against preemption applies with full force.

The Eighth Circuit held that Iowa’s law is facially preempted even if it incorporated all federal-law defenses. App.23a. But nothing in the INA reveals that prosecutorial discretion for illegal entry and reentry crimes is special and distinct from any other federal crime. *See Kansas*, 589 U.S. at 212. Nevertheless, the Eighth Circuit indicated that the constitutional powers of naturalization, commerce, and foreign relations handed the subject of the regulation of immigrants in the country from the States to the federal government from the get-go. App.19a–20a. Not so. Naturalization refers to the process of determining who will become a citizen, not the rights given to aliens before they become citizens. The Founders understood that divide—retaining the States’ police powers to regulate aliens before they became citizens. Foreign commerce is no different. The Eighth Circuit relied on cases explicating Congress’s commerce authority to show an overshadowing federal interest in immigration regulation. App.25a (citing *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)). But cases like *Chy Lung* at best establish that Congress may regulate the “admission of citizens and

subjects of foreign nations to our shores.” 92 U.S. at 280. This Court should read those types of cases in the context of history, however, which bears out States’ broad powers of aliens unless Congress clearly disrupted that authority.

Properly reading those cases limits their holdings to entry and admission “to our shores,” an area in special need of uniform federal control. *Id.* If those cases did not purport to speak to the States’ ability to ban criminals from entering the country, it follows that those cases did not speak about their regulation of the movement of criminal aliens once they are already in the country. Instead, the “right of the state in this respect has its foundation,” as Justice Field once opined, “in the sacred law of self-defense, which no power granted to congress can restrain or annul.” *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (Field, Circuit J.).

So too with any “preeminent role” of the federal government in the entry of aliens. If the commerce power handed the federal government some predominant interest in entry to and removal from the country, that interest does not necessarily extend to the treatment of illegal aliens once they are here. What is more, a state fully respects congressional interests when it “follow[s] the federal direction” and affects only those who Congress has said may not enter. *Plyler*, 457 U.S. at 219 n.19.

This Court has reaffirmed the State’s “power to deter the influx of persons entering the United States against federal law,” *id.* at 228 n.23, just as at the Founding, *Miln*, 36 U.S. (11 Pet.) at 132–33. In the immigration context, *Arizona* held unequivocally that “the historic police powers of the States are not superseded unless that was

the clear and manifest purpose of Congress.” 567 U.S. at 400 (citation modified). Even when a state law singles out aliens, such as the employment law restricting the hiring of illegal aliens in *DeCanas v. Bica*, this Court refused to find preemption absent a “clear and manifest” showing that Congress intended a “complete ouster of state power.” 424 U.S. 351, 357 (1976).

The Eighth Circuit’s view is inconsistent, moreover, with foreign policy cases that afford wide deference to the States. Laws regulating aliens for their conduct in America do not express judicial criticism of foreign governments. Rather, courts still “carefully construe[]” express federal policies, when they relate to traditional state functions, “so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.” *United States v. Pink*, 315 U.S. 203, 230 (1942). Courts have focused on whether diplomatic relations would be harmed by “a lingering atmosphere of hostility ... created by state action” that is “contrary to national policy.” *Id.* at 233. But Congress’s express choice excludes these aliens from entering the country, so state laws furthering that policy cannot be “contrary” to it.

Despite that history and traditional deference to the States, the Eighth Circuit saw foreign policy problems with SF2340. App.19a–20a (citing *Arizona*, 567 U.S. at 395, and *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)). In those cases, this Court held that the INA’s alien registration scheme field preempted state registration laws. But there are no similarly unique federal interests in alien movement about the States, nor do the ones identified in *Arizona* translate to this context. *Arizona*, 567 U.S. at

400–03. In *Hines*, registration of “perfectly law-abiding” aliens created expectations about the “protection of the just rights of a country’s own nationals when those nationals are in another country.” 312 U.S. at 64–66. Those expectations stemmed from “obligations” under treaties and the “customs defining with more or less certainty the duties owing by all nations to alien residents” who are in another country lawfully. *Id.* at 65. That rationale does not apply to entry and reentry crimes, which inherently affect only non-law-abiding aliens, and thus have a more muted impact on “amity and commerce” between nations. *Id.* at 64–65.

C. The Eighth Circuit’s Analysis Threatens Numerous State Laws.

The Eighth Circuit’s reasoning has “staggering” implications for state sovereignty. *Zyla*, 134 F.4th at 335. If overlap with federal law plus federal enforcement discretion creates obstacle preemption, then “many state statutes [that] incorporate federal criminal requirements” are at risk. *Id.* at 334–35. The Eighth Circuit attempted to distinguish these scenarios by noting SF2340 applies only to aliens. App.27a. But many criminal laws have specific applications—felon-in-possession laws apply only to convicted felons; underage-drinking laws apply only to minors. And States indisputably (until now) can apply their criminal laws to aliens, as they have in cases of murder, rape, burglary, and countless other crimes. That Iowa’s law applies to illegal aliens can be significant only if there is sufficient textual evidence in the INA to overcome the presumption against preemption with its greatest force. *See Kansas*, 589 U.S. at 208. When the Supreme Court ran that analysis—to a version of the INA that regulated

illegal aliens in virtually identical respects—it found no field preemption: illegal aliens are not “plainly within” the “central aim of federal regulation.” *DeCanas*, 424 U.S. at 359 (citation omitted).

CONCLUSION

This case “is about as important as it gets.” App.119a (Stras, J., dissenting from denial of rehearing en banc). It therefore warrants this Court’s review.

Respectfully submitted,

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