NO:

In The

Supreme Court of the United States

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IN RE RICHARD MACK,

***Petitioner*,**

V.

SUSAN BOLTON, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Respondent

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On Petition for a Writ of Mandamus to the United States District Court for the District of Arizona

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PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED FOR REVIEW

Question #1:

Does the United States Supreme Court have original and exclusive jurisdiction over cases wherein the United States brings an original suit against a State?

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PETITION FOR WRIT OF MANDAMUS

The Petitioner, Richard Mack, respectfully petitions this Court for a writ ordering Respondent Susan Bolton to dismiss United States District Court for the District of Arizona case number 10-1413-PHX-SRB, styled United States of America v. State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her official Capacity, for lack of jurisdiction.

OPINION BELOW

An order of the United States District Court for the District of Arizona, granting the United States' motion for preliminary injunction, was entered by respondent in her official capacity as United States District Judge on July 28, 2010.

Neither the legal assertions nor conclusions of fact contained within said order are disputed by the petitioner for purposes of this petition. Said order is relevant to this petition only because it establishes respondent's exercise of jurisdiction over the case below. The relevant portion of said order is reproduced at App. 1a-2a.

JURISDICTION

Respondent exercised jurisdiction over case number 10-1413-PHX-SRB on July 28, 2010 through entry of an order granting the United States' motion for preliminary injunction.

This Court has jurisdiction to issue the requested writ pursuant to 28 U.S.C. § 1651.

Petitioner has made all notices required by this Court's Rule 29.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Constitutional provisions involved are Article III §2 ¶2 and Amendment X, and are reproduced at App. 3a.

STATEMENT OF THE CASE

This is one of the most important cases ever to reach this Court. Resolution of the question presented by this case will affect policies in every Federal court in the country, and will determine whether States will be granted the respect, protection, and Sovereignty that the Founding Fathers intended to grant to them.

In April of this year the State of Arizona enacted a set of statutes intended to ensure enforcement of Federal immigration laws within the State of Arizona. On July 6 the United States filed a complaint against Arizona in the United States District Court for the District of Arizona. The United States also filed a motion for preliminary injunction requesting an order prohibiting the State of Arizona from enforcing key provisions of its law. On July 28 the Respondent, Susan Bolton, entered an order in her official capacity as District Court Judge granting portions of the United States' motion.

Petitioner, Richard Mack, is a former Sheriff for Graham County, Arizona, and was one of the petitioners that successfully challenged aspects of the Brady Bill which attempted to compel state law enforcement officers to act at the direction of the Federal government. *Printz/Mack v. United States*, 521 U.S. 898 (1997). Petitioner is an author and lecturer on the subjects of State Sovereignty, the 10th Amendment, and the proper role of law enforcement in American government.

Petitioner asserts that Article III §2 grants original and exclusive jurisdiction to this Court when the United States brings an original action against a State. Therefore, the authority exercised by the Respondent is not within the jurisdiction of the District Court.

REASONS FOR GRANTING THE PETITION

Petitioner acknowledges that current precedent supports jurisdiction vested in the lower Federal courts for cases brought by the Federal government against a state. However, "it is common wisdom that the rule of *stare decisis* is not an 'inexorable command.' *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1986). "Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a

series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." *Casey*, 505 U.S. at 854, citing *Swift v. Wickham*, 382 U.S. 111 (1965); *Burnet,* 285 U.S. at 405-411; *Payne,* 501 U.S. at 842; *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 (1984).

The present case represents an opportunity to correct and clarify the intent of Constitutional language that identifies and separates States for different treatment as compared to the rest of the world. As discussed below, the purpose of this language in Article III §2 was to honor and protect state sovereignty. Granting the present petition will lead to relatively little increased burden on this Court because original cases brought by the United States against a State are relatively rare. Yet, granting the petition will have a huge positive impact on the nation by re-establishing Federal respect for state sovereignty. This is exactly the return to "ideal of the rule of law" discussed in *Casey*. 505 U.S. at 854.

For the following reasons, the present petition should be granted.

I. Original Jurisdiction Intended to Protect State Sovereignty

Petitioners do not assert here that all grants of original jurisdiction under Article III §2 were intended to be exclusive. Petitioners do assert that original jurisdiction in this Court was intended to be exclusive,

and should be exclusive, when an original suit is brought by the United States against a State.

In 1884 this Court thoroughly reviewed the issue of original jurisdiction as established in Article III § 2. *Ames v. State of Kansas ex rel. Johnston*, 111 U.S. 449. The *Ames* court acknowledged original jurisdiction was granted to states, foreign governments, and their representatives in order to respect the "dignity of those for whom the provision was made." 111 U.S. at 464. It concluded that such an intent did not require exclusive jurisdiction where the state or foreign government brought the suit. *Id* at 364-65. However, it also acknowledged that a very different question was presented when a state or foreign government was being brought into court against its will. *Id*.

In 1793 this Court established that *representatives* of foreign governments could be brought before lower courts. *U.S. v. Ravara*. 2 Dall. 297 (1793). However, that decision had been a close call. One of the three sitting Circuit Justices in *Ravara* concluded: "for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation that the word 'original' means exclusive jurisdiction." *Ames*, 111 U.S. at 464, quoting Justice Iredell in *Ravara*, 2 Dall. 297.

Clearly the word "original" was intended to have some meaning in the Constitution, setting apart those

entities granted original jurisdiction from the rest of the world. The argument that jurisdiction was to be original but not exclusive is logically supportable under some circumstances. However, if the intent was to honor and protect the sovereignty of certain parties, then any option to bring suits in lower courts was intended to be reserved to the option of those protected parties, not to parties bringing suit against them.

While the Court in *Rava* refused to grant such protection to foreign consuls, such protection should be conferred to sovereign states of the United States. The need to honor and protect a state's sovereignty cannot be higher than when the Federal government sues a state in Federal court. The Federal government has no authority but that which is affirmatively "delegated" to it by the States. U.S. Const. Amend. X. The Federal government is the servant of the States. When the Federal government sues a State in Federal Court, that state should not be required to wade through the appellate process. As a matter of respect to the sovereignty of the States, such a suit should be granted the immediate attention of the highest Federal Court.

The *Ames* Court clearly understood that original jurisdiction was granted to this Court in order to honor and protect the sovereignty of the States by requiring anyone suing them to have their cases heard before this Court. *Id* at 464-65. Despite this understanding the *Ames* Court concluded that "it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those whose protection the constitutional provision was

intended." History has proven the *Ames* Court's assumption to be completely wrong.

Throughout the twentieth century the Federal government has made broad strides to increase its scope of authority and power at the cost of the States and the People. The rapid growth of the Tea Party, Liberty, and 10th Amendment movements serve as evidence that Americans are frustrated with this Court's historic failures to enforce the Constitution when the Federal government encroaches upon State sovereignty. This petition serves as an opportunity to correct the clear mistake made by the well-meaning, but obviously naïve *Ames* decision.

The Federal government's audacity in suing a State that simply intended to ensure enforcement of Federal immigration law, a set of laws that the Federal government itself refuses to enforce, serves as one more example of the Federal government's waning respect for State Sovereignty.

This Court has acknowledged the importance of Federal respect for State Sovereignty: "the Framers rejected the concept of a central government that would act upon and through the States…Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Printz* 521 U.S. at 919 & 922. Returning original and exclusive jurisdiction to this Court for original cases

brought by the United States against States will help to reverse the trend of Federal government tyranny and abuse of the individual States.

This petition affords this Court the opportunity to recapture jurisdiction that never should have been delegated to lower courts. This Court should, therefore, grant the present petition.

II. In Aid of Appellate Jurisdiction

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Schlagenhauf v. Holder*, 379 U.S. 104, 109-110 (1964).

Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick,* 298 U.S. 435, 440 (1936).

III. Exceptional Circumstances Warrant Grant of Petition

The first sentence of Respondent's order establishes the exceptional circumstances leading to the lawsuit at issue: "Against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns…" App. A at 1a. Despite such exceptional and well established facts, Respondent's order granted the Federal government's motion enjoining the State of Arizona from enforcing certain aspects of Federal immigration law. Resolution of the lawsuit below may take years. In the interim millions of Americans will suffer from rising crime rates caused by a Federal government refusing to allow local law enforcement to enforce existing law. This Court's exercise of its power to grant the present writ would lead to immediate resolution of this pressing matter. More importantly, grant of the present writ would re-establish respect for State sovereignty as intended by our Founding Fathers.

IV. Adequate Relief Cannot be Obtained in Any Other Form or From Any other Court

Because original and exclusive jurisdiction properly rests with this Court, adequate relief cannot be obtained in any other Court.

Because illegal immigration is "rampant" and "escalating drug and human trafficking crimes, and

serious public safety concerns" are the "backdrop" of the case at issue, waiting for other forms of action to determine where pre-emption doctrine ends and State sovereignty begins, is not practical.

Because the Petitioner is a citizen of Arizona, and not currently an office holder of that state, current precedent would likely lead lower courts to determine that he has no standing to challenge the Respondent's exercise of jurisdiction in the case below.[1] As discussed below, the present petition is not subject to the limitations of modern standing doctrine. Therefore, this petition represents the only form of relief available to petitioner.

V. Standing Not Required for Writ of Mandamus

If Petitioner was filing a typical lawsuit against the United States, or attempting to intervene in the case below, he would expect to encounter difficulty establishing standing under modern standing doctrine. However, for the reasons discussed below, modern standing doctrine does not prevent grant of the present writ.

[1] Petitioner makes no admission here nor waives any right regarding his standing to bring this petition before this Court or to bring any action in any other court. He simply points out that under current precedent regarding standing doctrine and applying conventional analysis, his right to intervene in the case below would likely be denied.

A. Common Law Writs Supported Assertion of Public Rights

Public rights have long been enforced by private parties via the use of writs of mandamus and prohibition. *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343, 355 (1875); *Weston v. City Counsel of Charleston*, 27 U.S. 449 (1829). While a stranger is not permitted to officiously interfere and sue out a mandamus in a matter of private concern, where the object is the enforcement of a public right, the People are regarded as the real party. Steven Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1402 (1987). Whether Arizona has a right under Article III §2 of the Constitution to have any original suit brought by the United States be heard exclusively by this Court, is a public right. Therefore the Petitioner has a right to have the present writ granted.

B. Prior to 1923 Taxpayer Standing was Sufficient to Enforce a Public Right

Arguendo, prior to 1923 so-called taxpayer standing was sufficient for a private citizen to enforce a public right. Modern cases that refuse to allow private enforcement of public rights remove all ability of the People to enforce the restrictions placed upon Federal authority by the Constitution. Therefore, modern taxpayer-standing doctrine should be overturned.

Prior to this Court's decision in *Commonwealth of Massachusetts v. Mellon* citizens had the right to bring suit when government ignored the law. 262 U.S. 447 (1923). In fact, the three cases cited in *Mellon* to support its assertion that taxpayers had no right to enjoin unconstitutional laws, were all resolved on the merits. *See Id*, *citing Millard v. Roberts*, 202 U.S. 429 (1906), *Wilson v. Shaw*, 204 U.S. 24 (1906), *Bradford v, Roberts*, 175 U.S. 291 (1899). Other similar cases were also considered "justiceable" and were adjudicated on the merits. *Hawke v. Smith* 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922). Even *Fairchild v. Hughes*, considered by some to be the first taxpayer standing case, was dismissed for lack of ripeness, not because the plaintiff lacked an injury in fact: "Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys not be wasted." 258 U.S. 126, 129 (1922).

Petitioner understands the need for separation of powers and he is not asserting that all standing doctrine is flawed. Instead, petitioner is asserting that when government ignores the law all citizens are injured. Such injury should be sufficient, without showing direct damages, to enforce a public right. The purpose of the Judicial branch of our Federal government is to interpret and apply the law. If the Courts are unwilling to enforce the law, then the people have no means to redress their grievances when government breaks the law. If the people have no method to enforce the Constitution and laws flowing from Constitutional authority, then the Constitution and law lose all meaning.

CONCLUSION

For the reasons discussed above the request for a writ of mandamus should be granted.

Respectfully submitted,

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APPENDIX
Part A
Partial Order Granting Preliminary Injunction

UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF ARIZONA

United States of America,

Plaintiffs,

vs.

CASE NO: CV 10-1413-PHX-SRB
ORDER

State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity

Defendants

At issue is the Motion for Preliminary Injunction filed by Plaintiff the United States ("Pl.'s Mot.") (Doc. 27).

I. SUMMARY

Against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, the Arizona Legislature enacted a set of statutes and statutory amendments in the form of Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," 2010 Arizona Session Laws, Chapter 113, which Governor Janice K. Brewer signed into law on April 23, 2010.

Seven days later, the Governor signed into law a set of amendments to Senate Bill 1070 under House Bill 2162, 2010 Arizona Session Laws, Chapter 211.

(Remaining Text of Opinion Omitted)

IT IS THEREFORE ORDERED granting in part and denying in part the United
States' Motion for Preliminary Injunction (Doc. 27).

IT IS FURTHER ORDERED denying the United States' Motion for Preliminary
Injunction as to the following Sections of Senate Bill 1070 (as amended by House Bill 2162):
Section 1, Section 2(A) and (C)-(L), Section 4, the portion of Section 5 creating A.R.S. § 13-
2929, the portion of Section 5 creating A.R.S. § 13-2928(A) and (B), and Sections 7-13.

IT IS FURTHER ORDERED preliminarily enjoining the State of Arizona and
Governor Brewer from enforcing the following Sections of Senate Bill 1070 (as amended by
House Bill 2162): Section 2(B) creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. §
13-1509, the portion of Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S.
§ 13-3883(A)(5).

DATED this 28th day of July, 2010.

s/Susan Bolton
Susan Bolton
United States District Judge

Part B
Constitutional Provisions Involved

Article III §2 ¶2.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.