

No. 26-49

IN THE
Supreme Court of the United States

BRENNA BIRD, IN HER OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF IOWA, *Petitioner*,

v.

IOWA MIGRANT MOVEMENT FOR JUSTICE, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE* THE FOUNDATION
FOR GOVERNMENT ACCOUNTABILITY
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE**

The Foundation for Government Accountability (FGA) is a 501(c)(3) non-profit organization that helps millions achieve the American Dream by improving welfare, workforce, health care, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependency, restore dignity and self-sufficiency, and empower individuals to take control of their futures. FGA's policy reforms are grounded in the principles of government transparency, the free market, individual freedom, and limited constitutional government.

Since its founding, FGA has helped achieve more than 1,400 reforms impacting policies in 42 states and more than 200 federal policy reforms in welfare, health care, the workforce, taxation, regulations, election integrity, and more. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing as *amicus curiae* before state and federal courts, including this Court in *FCC v. Consumers' Rsch.*, 145 S. Ct. 2482 (2025), *Azar v. Gresham*, 141 S. Ct. 1043 (2021), *Biden v. Nebraska*,

* Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission. On July 31, 2026, Amicus Curiae gave notice to the parties of its intent to file this brief pursuant to Rule 37.2.

143 S. Ct. 2355 (2023), *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 143 S. Ct. 978 (2023), and *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

This petition directly implicates FGA’s interest as the organization regularly develops state policies that are shared with policymakers across the country and overlap with federal law. FGA has developed such policies in areas including welfare work requirements, public benefit eligibility cross-checks, voter registration maintenance requirements, and more.

INTRODUCTION & SUMMARY OF ARGUMENT

The Framers of the Constitution envisioned a federal government with a robust authority, embodied in the Supremacy Clause, by which federal law preempts state law under certain conditions:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

But the bounds of federal supremacy were limited in the Founders’ minds: “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the

State governments are numerous and indefinite ... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” THE FEDERALIST NO. 45 (James Madison), Avalon Project, Yale Law Sch., https://avalon.law.yale.edu/18th_century/fed45.asp.

The limits of such authority were of paramount concern at the founding, with fears that a Congress “invested with the power of making all laws, proper and necessary, for carrying all these into execution ... [would] annihilate all the state governments, and reduce [the] country to one single government.” Brutus No. 1 (Oct. 18, 1787) in 2 The Complete Anti-Federalist (Herbert J. Storing ed., 1981).

Brutus’s warning presaged the Eighth Circuit’s holding in this case. The opinion below splits from the Fifth Circuit on an issue of tremendous importance and, in doing so, erodes the limits on federal power. If left uncorrected, the Eighth Circuit’s reasoning will allow the federal government to run roughshod over the States whenever federal and state laws overlap by merely gesturing at federal enforcement discretion. This Court should grant certiorari and reverse.

ARGUMENT

I. The Court Should Grant Certiorari to Resolve a Circuit Split on an Issue of Exceptional Importance to Our Federal System

This Court has held that obstacle preemption exists only where “compliance with both federal and state regulations is a physical impossibility” or when a state regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona v. United States*, 567 U.S. 387, 399 (2012); *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In determining whether such a conflict exists, the Court begins its analysis “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And before the Court finds a conflict between state and federal law, “it ‘must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.’” *California v. Zook*, 336 U.S. 725, 733 (1949) (quoting *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942)).

The Iowa law at issue in this case, SF2340, creates a state law mirror of the federal law prohibiting illegal reentry into the United States. SF2340 criminalizes entering, attempting to enter, or being found in Iowa

after exclusion, deportation, or removal (Section 2); requires a return order and monitoring upon conviction, with noncompliance itself a felony (Section 4); makes it a separate felony for an individual to disobey a Section 4 return order (Section 5); and generally bars courts from abating a prosecution based on a pending federal immigration determination (Section 6). *See* SF2340, *codified at* Iowa Code ch. 718C (effective July 1, 2024).

The Eighth Circuit held these provisions were likely facially preempted because “[f]ederal immigration law grants broad discretion to federal officials.” *Iowa Migrant Movement for Just. v. Bird*, 157 F.4th 904, 921 (8th Cir. 2025). Accordingly, even if these provisions “were interpreted to have the same exceptions as federal law, the state law still conflicts with federal law” because a hypothetical federal official might exercise his discretion differently than Iowa. *Id.* at 922. Thus “the Act conflicts with the discretion that Congress gives to federal officials” and therefore “is preempted, even if federal officials support the Act.” *Id.* at 924.

In so holding, *Bird* explicitly treated the mere possibility of future federal enforcement discretion conflicting with state enforcement as a basis for facial preemption. *Id.* at 922-24. The Eighth Circuit did not limit its holding to instances where federal officials *attempted* to exercise discretion in a manner inconsistent with Iowa policy. In a decision of “staggering” breadth, *Zyla Life Sciences, LLC v. Wells Pharma of Houston, LLC*, 134 F.4th 326, 335 (5th Cir. 2025), the

Eighth Circuit held instead that federal enforcement discretion renders SF2340 facially unconstitutional and found that “*all* applications of the Act” were likely preempted by federal law. *Bird*, 157 F.4th at 919 (emphasis added).

The Fifth Circuit takes the opposite view of federal preemption. See *Zyla Life Sciences*, 134 F.4th 326. In *Zyla*, several States’ unfair competition laws incorporated the Food, Drug, and Cosmetic Act’s (FDCA) premarket approval requirement for new drugs. See 21 U.S.C. § 355. The defendant in that case argued these State laws were preempted on the grounds that “allowing States to enforce their own parallel laws” might frustrate “the discretion given to federal officials in enforcing the FDCA.” *Zyla*, 134 F.4th at 334. The Fifth Circuit soundly rejected that theory, explaining that “States may generally regulate the same conduct the Federal Government does,” and the “possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption.” *Id.* at 335-36 (quoting *Kansas v. Garcia*, 589 U.S. 191, 212 (2020)). Indeed, the Fifth Circuit warned that adopting the theory embraced by the Eighth Circuit would have “staggering” “implications.” *Id.* at 335. The Fifth Circuit was right.

That the Eighth Circuit couched its decision in the federal government’s broad powers to control immigration changes nothing. See *Bird*, 157 F.4th at 919, 922-23. Every legislative power Congress enjoys has a national scope, and many of its powers beyond regu-

lating immigration can have international consequences or touch on foreign affairs. *See, e.g.*, U.S. Const. art. I, § 8; *see, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952). But even if immigration were unique in this respect, its uniqueness does not support the Eighth Circuit’s aggressive holding: that SF2340 is likely facially unconstitutional in “all applications.” *Bird*, 157 F.4th at 919. In other words, *Bird* found preemption of Iowa’s law in every case regardless of whether foreign affairs were implicated by the federal government’s decision to not prosecute a particular violation of overlapping federal immigration law.

The *Bird* opinion also redefines the *Salerno* test for facial invalidity. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Under *Bird*, a challenger bringing a facial claim would not need to establish that under “[every] set of circumstances,” *Salerno*, 481 U.S. at 745, the federal government’s exercise of prosecutorial discretion would “implicat[e] ‘trade, investment, tourism, and diplomatic relations for the entire Nation,’” *Bird*, 157 F.4th at 922 (quoting *Arizona*, 567 U.S. at 395). Instead, the hypothetical possibility that enforcement of a state law may infringe on federal prosecutorial discretion in a rare case involving foreign affairs would be enough to facially invalidate the entire state regulatory scheme. *See id.* at 924 (acknowledging that, at present, federal officials are not likely to attempt to exercise discretion inconsistent with SF2340 because “federal officials support the Act”).

The Eighth Circuit attempts to distinguish the Fifth Circuit’s decision in *Zyla* on the grounds that immigration—unlike approval requirements for medication—“is not a traditional subject of state regulation.” *Id.* at 922. But no precedent of this Court has ever suggested that the *Salerno* test operates differently in the preemption context depending on whether a state law concerns “a traditional subject of state regulation.” *Id.* Invoking the federal character of immigration does not resolve the split between the Fifth and Eighth Circuits.

If left unaddressed, the split between *Bird* and *Zyla* will have “staggering” implications. *Zyla Life Sciences*, 134 F.4th at 335. To protect our federal system, this Court should resolve that split and find, as the Fifth Circuit did, that congressional delegation of federal enforcement discretion is insufficient to facially preempt a parallel state law. *Id.* at 332-36.

II. The Court Should Grant Certiorari to Stop an Unconstitutional and Wide-Reaching Expansion of Federal Preemption Authority

If the Eighth Circuit’s opinion stands, many state laws will be jeopardized. Because an expansive application of *Bird*’s enforcement-discretion rationale reaches well beyond immigration, the ensuing lack of clarity about the scope of conflict preemption will lead to a chilling effect on state legislatures. Many state criminal, tort, licensing, and regulatory schemes incorporate or operate alongside federal standards. Indeed, “the Federal Government has its hands in

nearly every facet of human existence.” *Zyla*, 134 F.4th at 335.

Consider some examples. Federal law makes it unlawful for a noncitizen to vote in an election involving federal candidates and separately criminalizes a knowing false claim of United States citizenship made for the purpose of registering or voting. *See* 18 U.S.C. §§ 611(a), 1015(f). Iowa supplies its own, independent consequences for substantially the same conduct. It is a felony to knowingly submit a materially false or fraudulent voter-registration application, falsely swear a registration oath, or vote while knowing that the person is not qualified. *See* Iowa Code § 39A.2(1)(a), (b)(3), (2). The upshot is that if federal prosecutors decline a § 611 or § 1015(f) case for any reason, Iowa may still prosecute the registration fraud. Under *Bird*’s reasoning, however, those state consequences become a mechanism to frustrate the federal decision not to prosecute in a rare hypothetical case touching on foreign affairs. And it is easy to imagine such a hypothetical case where a foreign national may be implicated. Thus *Bird* transforms routine concurrent enforcement into an obstacle-preemption problem even while federal and state law point in the same substantive direction.

New Mexico’s firearms law illustrates this problem as well because the State expressly incorporates federal enforcement machinery into a state offense. New Mexico generally makes it a misdemeanor to sell a firearm “without conducting a federal instant background check.” N.M. Stat. Ann. § 30-7-7.1(A), (C), (G)

(citing 18 U.S.C. § 922(t), (g), (n)). The State thus makes compliance with federally required procedures an element of its own public-safety law, and New Mexico may prosecute a sale after the federal government declines federal action arising from the transaction.

Once again, it is possible to imagine a rare hypothetical future case where enforcement of the federal background check requirement could implicate foreign affairs, such as a case involving a firearm purchased by a foreign national. *United States v. Batterjee*, 361 F.3d 1210, 1212-16 (9th Cir. 2004) (United States prosecuted Saudi national for violating federal firearms law). If that divergence alone is enough to establish facial obstacle preemption, New Mexico's cooperative law deliberately built around the federal background-check system becomes constitutionally suspect.

Connecticut's controlled-substance regime presents another striking example. Connecticut law provides that, subject to limited exceptions, the federal schedules prevail when state and federal controlled-substance schedules are inconsistent. *See* Conn. Gen. Stat. § 21a-243(g). When federal law designates a previously unscheduled drug as a controlled substance, Connecticut automatically treats that drug as controlled—in the corresponding schedule—at the state level. *Id.* § 21a-243(h). Connecticut allows enforcement of its own law even if federal officials investigated and declined to charge under the federal controlled-substance law. *See id.* § 21a-282. But under

Bird, this authority to prosecute cases where the federal government decides not to act would raise preemption concerns. As long as the court could imagine a hypothetical future case where the federal government might decline to prosecute because foreign affairs were implicated, the Connecticut law could be facially invalidated. Gov’t Mot. to Dismiss at 1, *United States v. Cienfuegos Zepeda*, No. 19-cr-366 (E.D.N.Y. Nov. 17, 2020), ECF No. 22 (moving to dismiss a federal drug prosecution against a foreign national because “sensitive and important foreign policy considerations outweigh the government’s interest in pursuing the prosecution”).

The same difficulty could extend beyond criminal law as well. For example, state negligence-per-se claims often incorporate federal law to supply the applicable standard of care. *Cf. Wiersgalla v. Garrett*, 486 N.W.2d 290, 292-93 (Iowa 1992). Once again, as long as a court could find some hypothetical connection between the federal standard and foreign affairs, the State’s law of negligence-per-se could be facially invalidated.

III. Even if the Eighth Circuit’s Rationale is Cabined to the Immigration Context, the Effects Are Broader Than Just Immigration Enforcement

Even if the Eighth Circuit’s holding could be limited to preemption of state laws touching on immigration, its breadth could still destabilize several discrete areas of preemption doctrine, since other bodies of law can overlap with immigration law.

Consider, for example, Arizona’s public-benefits reporting statute, A.R.S. § 46-140.01, which requires state and local employees administering certain public benefits to report any “discovered violatio[n] of federal immigration law” to federal officials. *See* A.R.S. § 46-140.01(A)-(B). The statute prevents Arizona benefit agencies from withholding a referral once they discover a suspected immigration violation. § 46-140.01. That mandatory referral thus requires federal officials to confront a suspected immigration violation at a time chosen by state law.

Arizona’s statute would be facially preempted under *Bird*’s reasoning. *Bird* held that Iowa’s SF2340 was facially preempted because the statute, like Arizona’s, prohibited a state court from abating a state prosecution while a federal immigration determination is pending, which “undermines the discretion Congress gives federal officials to decide if, when, and how to address the case of an individual alien.” *Bird*, 157 F.4th at 926-27.

Likewise, suppose a State statute required State election officials to cancel a voter’s registration whenever the Systematic Alien Verification for Entitlements (SAVE) program, or another federal database, failed to confirm citizenship, and the State prohibited officials from staying the cancellation while U.S. Citizenship and Immigration Services (USCIS) considered a citizenship claim. Functionally, that would closely resemble the provision in *Bird* that prohibited abatement while “a federal determination regarding the immigration status of the person is

pending.” *Bird*, 157 F.4th at 926-27. Like *Bird*, the State would be imposing its own legal consequence based on a federally controlled status, *see* 8 U.S.C. § 1452 (setting out the federal procedure for confirming citizenship through a certificate of citizenship), while the federal process runs its course—thereby triggering *Bird* preemption.

These examples—both real and potential—highlight the sweeping consequences that even a narrower understanding of the Eighth Circuit’s ruling portends. The sovereignty and dignity of the States deserve better. *See* U.S. Const. amend. X.

CONCLUSION

For these reasons and more, the petition for writ of certiorari should be granted.

Respectfully submitted,

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