No. 18-16496

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STATE OF CALIFORNIA, *et al.*
Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NO. 2:18-CV-00490-JAM-KJN
HON. JOHN A. MENDEZ, DISTRICT JUDGE

BRIEF FOR *AMICI CURIAE* MUNICIPALITIES AND ELECTED OFFICIALS IN SUPPORT OF FEDERAL APPELLANT IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amici curiae* all are political subdivisions or elected officials, for whom no corporate disclosure is required.

September 25, 2018

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amici curiae are California municipalities and elected officials identified in the addendum (collectively, "*Amici*"), who file this brief with the parties' consent.[1] *Amici* are or represent political subdivisions of both the United States and California. Under the California Constitution, officials must "solemnly swear … [to] support and defend the Constitution of the United States and the Constitution of the State of California," CAL. CONST. art. XX, §3; *cf.* CAL. GOV'T CODE §§1360, 36507, which is impossible when the two sovereigns issue conflicting commands. To ensure the liberties guaranteed by both the federal and state constitutions, *Amici* support the federal sovereign here.

STATEMENT OF THE CASE

The United States (the "Government") sued the State of California and state officials (collectively, "California") to enjoin three so-called sanctuary laws that purport to restrict cooperation with federal immigration-enforcement efforts and to impede those efforts.[2] The popular term "sanctuary" is historically inaccurate, based

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amici* and their counsel — contributed monetarily to this brief's preparation or submission.

[2] The three laws are: the Immigrant Worker Protection Act ("AB450"), 2017 Cal. Stat. c. 492; sections 6 and 12 of Assembly Bill 103 ("AB103"), 2017 Cal. Stat. c. 17, §§6, 12; and section 3 of Senate Bill 54 ("SB54"), adding the "California Values Act," 2017 Cal. Stat. c. 495, §3.

more on fiction and other countries' legal traditions, *see*, *e.g.*, VICTOR HUGO, THE HUNCHBACK OF NOTRE-DAME 189 (Lowell Bair ed. & trans., Bantam Books 1956), than on relevant legal doctrine. In a country like ours that derives its common law from English common law, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654 (1834), sanctuary would not suffice for what California seeks to accomplish, and — in any event — England ended sanctuary for criminal and civil process in 1623 and 1723, respectively, long before English common law fed into our common law. Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 168-69 & n.8 (1983). Significantly, even prior to its revocation, English common law allowed seeking sanctuary in a church, but only to choose between submitting to trial or confessing and leaving the country. *Id.* at 169 (*citing* 4 WILLIAM BLACKSTONE, COMMENTARIES *332-33). Coupling nonenforcement with *remaining in the country* does not seek sanctuary. It seeks to nullify the Constitution.

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration: the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica,* 424 U.S. 351, 354 (1976). Although

not every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power," *id.* at 355, state law is conflict-preempted when "it 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, 406 (2012) (interior quotation marks omitted).

Statutory Background

AB450 prohibits employers from voluntarily cooperating with federal immigration officials. Among other things, AB450 added §§7285.1 to .2 to the Government Code to prohibit employers' "voluntary consent to an immigration enforcement agent … enter[ing] any nonpublic areas of a place of labor" without a warrant, CAL. GOV'T CODE §7285.1(a), and "voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena or judicial warrant" or notice of inspection. CAL. GOV'T CODE §7285.2(a). AB450 also added §90.2 to the Labor Code to require posting notice of any immigration-related inspections of I-9 forms or other employment records within 72 hours of receiving an inspection notice. CAL. LABOR CODE §90.2(a)(1). AB450's legislative history confirms that the bill was intended to reduce the risk of deportation. Assembly Floor Analysis, Assembly Bill 450, at 3 (Cal. Sept. 13, 2017).

AB103 added Chapter 17.8 and §12532 to the Government Code. Under

§12532, state governmental officials must review "detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California," CAL. GOV'T CODE §12532(a), and report on the conditions of confinement, the standard of care and due process provided to detainees, and the circumstances of the detainees' apprehension and transfer to the facility. *Id.* §12532(b)(1). Under Chapter 17.8, municipal government or law-enforcement agencies with no contract to house adult or minor noncitizen detainees for civil-immigration purposes may not enter such contracts, and municipal government or law-enforcement agencies with such contracts may not renew or modify those contracts to expand the number of contract beds used in locked detention facilities. CAL. GOV'T CODE §§7310-7311. AB103's legislative history acknowledges its dual purposes to provide state "oversight of locked facilities throughout the state that detain immigrants who may be in the country without the proper documentation" and to "[establish] a moratorium on counties entering into new contracts or expanding existing contracts to detain adult and child immigrants in locked county facilities." Senate Floor Analysis, Assembly Bill 103, at 1 (Cal. June 14, 2017).

SB54 purports to restrict state and local law enforcement from voluntarily cooperating with federal immigration efforts, such as providing release dates or transferring detained individuals to immigration officials, detaining individuals

based on federal hold requests, providing individuals' home or work addresses to immigration officials, and making or intentionally participating in arrests based on civil immigration warrants. CAL. GOV'T CODE §7284.6(a)(1)(A)-(E). SB54's legislative history acknowledges that the federal government relies on state and local police as "force multipliers" in enforcing federal immigration law and that "the California Values Act … will prevent state and local law enforcement agencies from acting as agents of Immigration and Customs Enforcement." Assembly Floor Analysis, Senate Bill 54, at 8 (Cal. Sept. 15, 2017).

The lawfulness of these sanctuary laws hinges primarily on two provisions of the federal Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"): (1) the prohibition against concealing, harboring, and shielding from detection illegal aliens, *id.* §1324(a)(1)(A), and (2) the prohibition against restricting intergovernmental communication with federal immigration officials, *id.* §1373(a).

First, §1324 prohibits knowingly or recklessly concealing, harboring, and shielding from detection illegal aliens in furtherance of their continued violation of immigration laws and includes conspiracy and aiding-and-abetting liability. 8 U.S.C. §1324(a)(1)(A)(iii), (v). Under §1324(c), not only federal immigration agents but also "all other officers whose duty it is to enforce criminal laws" may enforce §1324. 8 U.S.C. §1324(c). The Senate version of §1324(c) provided that "all other officers *of the United States* whose duty it is to enforce criminal laws" could enforce §1324,

but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (*citing* H.R. REP. NO. 82-1505 (Conf. Rep.), *as reprinted in* 1952 U.S.C.C.A.N. 1360, 1361) (emphasis added). In 1996, Congress amended the Racketeer Influenced and Corrupt Organizations Act ("RICO") to add §1324 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996); 18 U.S.C. §1961(1)(F), thereby allowing enforcement not only by private parties but also in state court. 18 U.S.C. §1964(c); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Second, §1373 prohibits interfering with voluntary governmental exchanges with federal immigration officials regarding the citizenship or immigration status, lawful or unlawful, of any individual, notwithstanding any other provision of federal, state, or local law. 8 U.S.C. §1373(a). In addition to leaving a clear channel of intergovernmental communication open in §1373(a), the INA provides state and local roles in immigration enforcement in a variety of ways. For example, under 8 U.S.C. §1357(g)(10)'s savings clause, the absence of state-federal enforcement agreements under §1357(g) does not preclude state and local government involving themselves with immigration-related enforcement, including "otherwise … cooperat[ing] … in the identification, apprehension, detention or removal" of illegal aliens.

STANDARD OF REVIEW

The issues presented here all are issues of law, which this Court reviews *de novo*. *Edu v. Holder*, 624 F.3d 1137, 1142 (9th Cir. 2010).

SUMMARY OF ARGUMENT

Even without the contested §1373, California's sanctuary laws would be unlawful because they violate the First Amendment rights of law-enforcement officers to report to the federal government (Section I.A) and violate §1324's prohibition against shielding illegal aliens from detection (Section I.B). In order to prevail, then, California must show that §1324 and §1373 are unconstitutional.

That California cannot do. Notwithstanding the Supreme Court's recent *Murphy v. NCAA*, 138 S.Ct. 1461 (2018), decision, the INA continues to preempt California's inconsistent sanctuary policies, and nothing in §1373 commandeers California or any law-enforcement officers to do anything.

On preemption, the district court repeatedly relied on the presumption against preemption, which does not even apply to express-preemption statutes like §1373's "notwithstanding clause" (Sections II.A-B) or field-preemptive statutes like §1324 (Sections II.A, II.C). Regarding conflict preemption, laws that thwart federal enforcement by design and that constitute criminal shielding plainly are conflict preempted (Section II.D). *Murphy* demonstrates that even laws that appear cast as regulating governments can — and should — be recast as establishing freedom from

the proscribed government actions: in short, *Murphy* did not change the preemption analysis (Section II.E).

Similarly, §1373 and §1324 do not commandeer California to do anything, and certainly do not compel the state to legislate: §1373 applies *notwithstanding* the Legislature's enactments, and §1324 prohibits everyone — cities, states, smugglers, and church groups — from flouting federal immigration law by shielding illegal aliens from detection (Section III.A). Nothing in *Murphy* changed that analysis because the *Murphy* law directly regulated New Jersey's legislature, and Congress had failed to criminalize sports gambling, unlike shielding and harboring here (Section III.B). Even if Congress lacks *direct* authority for §1373 as a regulation of immigration, Congress nonetheless has authority for §1373 as a necessary and proper extension of §1324's prohibitions against shielding illegal aliens from detection: if California could be prosecuted or enjoined for unlawful shielding under §1324, the state cannot seriously complain of mere civil preemption under §1373 (Section III.C).

ARGUMENT

I. EVEN WITHOUT §1373, CALIFORNIA'S SANCTUARY LAWS ARE UNLAWFUL.

Before turning to §1373, *Amici* first demonstrate that California's sanctuary laws violate the First Amendment and §1324. Although the Government did not press these *arguments* below, the arguments concern the contested *issue* of whether

federal law preempts California's sanctuary laws. Because the Government could raise these arguments on appeal, *Yee v. Escondido*, 503 U.S. 519, 534-35 (1992), it would be passing strange if this Court cannot consider them here.

A. The sanctuary laws violate the First Amendment rights of law-enforcement officers.

Contacting and working with governmental enforcement authorities is protected First-Amendment activity, *Hutchinson v. Bear Valley Cmty. Servs. Dist.*, 191 F. Supp. 3d 1117, 1125-26 (E.D. Cal. 2016); *Kenne v. Stennis*, 230 Cal. App. 4th 953, 967 (Cal Ct. App. 2014) (collecting cases), although *public* employees must show that their petition or speech activity implicates a "matter of public concern." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 382-83 (2011) (petition); *Garcetti v. Ceballos*, 547 U.S. 410, 415-16 (2006) (speech). "[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," so "freedom of speech is not traded for an officer's badge." *Watters v. City of Philadelphia*, 55 F.3d 886, 899 (3d Cir. 1995) (interior quotation marks omitted); *Lane v. Franks*, 134 S.Ct. 2369, 2377 (2014) (employee speech is not precluded from protection simply because it "concerns information related to or learned through public employment"). Here, the public-concern test is readily met because "government employers have no legitimate interest in covering up wrongdoing." *Moran v. Washington*, 147 F.3d 839, 849 n.6 (9th Cir. 1998) (*citing Johnson v. Multnomah Cty.*, 48 F.3d 420, 424-25 (9th Cir. 1995)). Quite simply, California

cannot constitutionally prohibit employers — whether public or private — from cooperating with federal immigration officials about illegal aliens.[3]

B. The sanctuary laws violate §1324's prohibition of shielding illegal aliens from detection.

The avowed purpose of AB450 and SB54 to make it more difficult for the federal government to deport illegal aliens, which constitutes criminal concealing, harboring, or shielding from detection under §1324(a)(1)(A).[4] As this Circuit has made clear, "[t]he purpose of [§1324] is to keep unauthorized aliens from entering *or remaining* in the country." *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original). AB450 and SB54 put municipalities in an untenable position between the demands of state law and federal law. A preliminary injunction is needed to protect Californians from their own state government.

As this Court explained in *Acosta de Evans*, 531 F.2d at 430 & n.3, Congress added the "shield from detection" prong as "an independent addition" in 1952, whereas "harbor" simply means "afford shelter to" (*i.e.*, without the evasion inherent in §1324's other two prongs). In *United States v. Aguilar*, 883 F.2d 662, 689 (9th

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[3] Typically, a governmental employer could balance its efficiency interests against its employees' First Amendment interests, but that balancing cannot apply when federal law preempts the purported governmental interest. *See* Section I.B, *infra*.

[4] As indicated, the crime includes not only concealing, harboring, and shielding from detection, but also attempts, conspiracy, and aiding and abetting. 8 U.S.C. §1324(a)(1)(A)(iii), (v).

Cir. 1989) (interior quotations omitted), *abrogated in part on other grounds*, *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002), this Court upheld a jury instruction classifying concealing or shielding as "conduct tending to directly or substantially facilitate an alien's remaining in the United States unlawfully with the intent to prevent detection by the Immigration and Naturalization Service." Because the Legislature was acting to shield over 2 million illegal aliens at once, the Legislature had the required knowledge of the illegal aliens' immigration status. *United States v. Bunker*, 532 F.2d 1262, 1264 (9th Cir. 1976). The laws' stated "*purpose of* avoiding the aliens' detection by immigration authorities … is synonymous with having acted with necessary *intent*." *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (interior quotations and alterations omitted, emphasis in original). In sum, AB450 and SB54 criminally shield illegal aliens from detection in violation of §1324.

Even if one supported California's charitable goals toward illegal aliens, the sanctuary laws would remain illegal because charitable ends do not excuse unlawful means: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos." *United States v. Malinowski*, 472 F.2d 850, 858 n.9 (3d Cir. 1973) (interior quotation marks omitted); *Aguilar*, 883 F.2d at 696 ("government's interest in controlling immigration outweighs [the] purported

religious interest" of religiously motivated sanctuary workers); *United States v. Merkt*, 794 F.2d 950, 955 (5th Cir. 1986) ("[e]nforcement of [§1324] cannot … brook exceptions for those who claim to obey a higher authority"). Just as the *Aguilar* sanctuary workers' Bible counseled to "Render to Caesar the things that are Caesar's," Mark 12:17 (King James), our secular bible — the Constitution — counsels California to render to the federal Government the things — such as immigration policy — that are the federal Government's.[5]

Under §1324's plain terms, aiding and abetting is punished as the principal crime. 8 U.S.C. §1324(a)(1)(A)(v); *accord* 18 U.S.C. §2(a). To meet that standard, "a defendant must not just in some sort associate himself with the venture … but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Rosemond v. United States*, 134 S.Ct. 1240, 1251 n.10 (2014) (internal quotations omitted). By purporting to compel otherwise-willing law-enforcement officers and employers to desist from aiding federal enforcement efforts, both AB450 and SB54 seek to make illegal aliens' evasion of federal authorities succeed. Aiding-and-abetting liability requires neither "that the defendant was aware of every detail of the impending crime … nor that [the defendant] be present at, or personally participate in, committing the substantive

[5] By adding §1324 to RICO's list of predicate offenses, 18 U.S.C. §1961(1)(F), Congress signaled that it does not consider California's actions here benign.

crime." *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987). While "[m]ere participation … is not enough," the Legislature affirmatively intended AB450 and SB54 to thwart federal immigration efforts by shielding illegal aliens from the federal government. *United States v. Ramos-Rascon*, 8 F.3d 704, 711 (9th Cir. 1993) (aiding-and-abetting liability requires "that the defendant intentionally assisted in the venture's illegal purpose") (internal quotations omitted). The Legislature here fully acknowledged its purpose to thwart immigration enforcement and to reduce deportations. *See* Assembly Floor Analysis, SB54, at 8 (Cal. Sept. 15, 2017); Assembly Floor Analysis, AB450, at 3 (Cal. Sept. 13, 2017). That is more than enough for aiding-and-abetting liability.

II. FEDERAL IMMIGRATION LAW PREEMPTS THE SANCTUARY LAWS.

Misreading both §1373 and *Murphy*, the district court found §1373 either exceeds Congress's authority or allows California's sanctuary laws. In fact, §1373 preempts California's sanctuary laws under express, conflict, *and* field preemption.

A. No presumption against preemption protects the sanctuary laws.

At numerous junctures, the district court relied on either a presumption against preemption or decisions that rely on that presumption, PI Op. 4, 23, 40-41, 44, 51 [ER 11, 30, 47-48, 51, 58], which was error. Although courts sometimes apply a presumption against preemption in fields traditionally occupied by states, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), that presumption does not apply

to express-preemption or field-preemptive statutes. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016) (express); *Aguayo v. U.S. Bank*, 653 F.3d 912, 921 (9th Cir. 2011) (field). Even under conflict preemption, a presumption would not apply here.

For conflict preemption, the presumption applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and "not … when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 107-08 (2000) (interior quotation marks omitted); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). Moreover, where it applies, the presumption applies to the *federal* field (*i.e.*, immigration enforcement), *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits"), not to the state or local interest. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions for state spending). *Crosby* makes this point: Massachusetts obviously has discretion on *how to spend state funds*, but the Court analyzed the field of *Burma trade sanctions*, not state spending. *Id.*

Under the circumstances, this Court must reject the facile alternate suggestion that the sanctuary laws comply with §1373 because the statute reaches only whether an individual is a citizen or alien, not information like the individual's release date.

PI Op. 38-39 [ER 45-46]. To the contrary, §1373(a) reaches any "information *regarding* the … *immigration status* … of any individual," 8 U.S.C. §1373(a) (emphasis added), which applies here for two independent reasons. First, the term "regarding" is expansive, and the district court's narrow parsing "reads [the term] out of the statute." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1761 (2018). Second, while §1373(a)'s reach for an illegal alien's immigration status might not be unlimited, that reach certainly includes release dates because the INA prohibits removal proceedings until illegal aliens have served their state-law time. 8 U.S.C. §1231(a)(4)(A) ("Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment"). Given the clear relationship between release dates and immigration status, California's prohibition against disclosing release dates violates §1373(a).

B. §1373 expressly preempts the sanctuary laws.

Because it applies "[n]otwithstanding any other provision of Federal, State, or local law," 8 U.S.C. §1373(a), §1373 qualifies as *express* preemption. *PG&E Co. v. Cal. ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 946 (9th Cir. 2003); *accord In re Fed.-Mogul Glob.*, 684 F.3d 355, 369 (3d Cir. 2012). Thus, §1373 applies by its terms to preempt any state or local law that interferes with communications under §1373.

C. §1373 and §1324 field preempt the sanctuary laws.

On field preemption, this Circuit has gone further than *Arizona* for the field of concealing, harboring, and shielding under §1324: "in developing the scheme for prohibiting and penalizing the harboring of aliens, Congress specifically considered the appropriate level of involvement for the states," and thus "[§1324(c)] allows state and local law enforcement officials to make arrests for violations." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1025 (9th Cir. 2013). Based on the carefully calibrated evolutionary path of §1324 over time and the detailed federal-state enforcement relationship that §1324 contemplates, this Circuit concluded that §1324 preempts the entire field of illegal-alien concealment, harboring, and shielding from detection. *Id.* at 1023-26. Accordingly, the INA leaves no room for California to withhold the INA-contemplated voluntary participation of local law-enforcement officers with federal immigration authorities based on California's idiosyncratic parsing of lawfulness.

D. §1373 and §1324 conflict preempt the sanctuary laws.

The INA creates an elaborate scheme of state-federal cooperation for enforcing immigration laws. *See*, *e.g.*, 8 U.S.C. §§1324(c), 1357(g), 1373(a). According to *Arizona* — which cited examples from the Department of Homeland Security in the prior administration — state-federal cooperation under immigration law includes "situations where States participate in a joint task force with federal

officers, provide operational support in executing a warrant, or *allow federal immigration officials to gain access to detainees held in state facilities*," as well as "by *responding to [federal] requests for information about when an alien will be released from [state or local] custody*." *Arizona*, 567 U.S. at 410 (emphasis added). When state or local government deviates from the carefully calibrated state-federal enforcement scheme, that deviation poses "an obstacle to the full purposes and objectives of Congress," *id.*, triggering conflict preemption.

1. AB450 is conflict preempted.

In purporting to prevent California employers from voluntarily working with federal immigration officials (*e.g.*, without a warrant), AB450 runs afoul of not only INA but also the First Amendment. See Section I.A, *supra*. Thus, AB450 is both preempted and unconstitutional.

With respect to statutory conflict preemption, AB450 constitutes criminal concealing, harboring, and shielding of illegal aliens, *see* Section I.B, *supra*, which makes the conflict-preemption argument what golfers and the Seventh Circuit call a "gimme." *United States v. Hernandez*, 84 F.3d 931, 935 (7th Cir. 1996). Clearly, a state law that violates federal criminal law is civilly preempted as "an obstacle to the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 410. Accordingly, if this Court reaches conflict-preemption, it must find AB450 preempted.

2. AB103 is conflict preempted.

GOV'T CODE §12532 requires intrusive state oversight of federal immigration enforcement and restricts the federal government's access to detention facilities in California. A state lacks authority for either action, given the exclusively federal nature of immigration enforcement under the Constitution. *DeCanas*, 424 U.S. at 354. Thus, GOV'T CODE §12532 is conflict preempted.

As the Government explains, Fed. Br. at 29-30, the INA contemplates renting or leasing detention space, 8 U.S.C. §§1103(a)(11), 1231(g)(1)-(2), and federal regulations prohibit the disclosure of information about federal detainees to California's investigators:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.

8 C.F.R. §236.6. Insofar as the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas*, 424 U.S.at 354, these regulations were within the Attorney General's delegated authority and, as such, are just as preemptive as an act of Congress *vis-à-vis* an inconsistent state law. *New York v. FERC*, 535 U.S. 1, 17-18 (2002). Because the regulation bars disclosing information

required by GOV'T CODE §12532, GOV'T CODE §12532 is preempted.

Similarly, AB103's interference with the federal government's access to detention facilities in California not only constitutes "an obstacle to the full purposes and objectives of Congress," *Arizona*, 567 U.S. at 410, but also impermissibly discriminates against federal interests. *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) ("state … law is invalid … if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals) (internal quotations omitted); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842-43 (9th Cir. 2014) ("state … law discriminates against the federal government if it treats someone else better than it treats the government") (internal quotations omitted); *United States v. County of Fresno*, 429 U.S. 452, 462-64 (1977) (burdens imposed on federal interests must be imposed equally on similarly situated constituents). GOV'T CODE §12532 fails these preemption tests.

3. SB54 is conflict preempted.

In seeking to restrict state and local law-enforcement officers from voluntarily contacting federal immigration authorities, SB54 directly conflicts with — and is superseded by — §1373, which allows such contact "[n]*otwithstanding any other provision of Federal, State, or local law.*" 8 U.S.C. §1373(a). Given the express congressional override of inconsistent state laws, this Court need not inquire into the degree or extent of SB54's obstruction of federal law. The only question —

answered in Section III, *infra* — is whether Congress had the authority to enact §1373 in the first place. If §1373 is valid, SB54 falls under direct application of the Supremacy Clause.

E. ***Murphy* did not change the relevant preemption analysis.**

Murphy posits that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States," *Murphy*, 138 S.Ct. at 1481, but did not apply its private-actor-versus-State dichotomy to individual officers who are state or local employees (*i.e.*, arguably neither "private actors" nor States) when acting in their individual or even official capacities. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). Because individual officers — especially *municipal* officers, *Alden v. Maine*, 527 U.S. 706, 756 (1999) — do not qualify as sovereign States, either they qualify as "private actors" when exercising their First Amendment right to contact the federal government or they fall within a third category of actors.

Either way, *Murphy* shows how to understand a statute's true effect, "regardless of the language sometimes used by Congress." 138 S.Ct. at 1481. Specifically, *Murphy* reframes the INA's alien-registration requirements in *Arizona*, 567 U.S. at 401, to confer *individual* rights: "the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements." *Murphy*, 138 S.Ct. at 1481. A

similarly reframed §1373 permissibly protects law-enforcement officers' First Amendment rights and protects individual law-enforcement officers from unwillingly joining California's unlawful scheme to shield illegal aliens. Thus, nothing on preemption in *Murphy* saves California's laws from preemption.

III. THE RELEVANT INA PROVISIONS DO NOT VIOLATE THE TENTH AMENDMENT.

As indicated in Sections I-II, *supra*, California's sanctuary laws conflict with and are preempted by federal immigration policy, including §1373. To preempt state law, however, §1373 must fit within Congress's power. Constitutional law recognizes two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *United States v. Comstock*, 560 U.S. 126, 135 (2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). This section demonstrates that the Tenth Amendment's anti-commandeering doctrine does not bar §1373.

A. Neither §1373 nor §1324 commandeers the states.

Impermissible Tenth Amendment commandeering can occur when Congress directs states to perform certain functions, commands state officers to administer federal regulatory programs, or compels states to adopt specific legislation. *Printz v.*

United States, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992). As explained in this section, federal immigration law's allowance for a joint state and local role in immigration enforcement does not commandeer anyone.

At the outset, commandeering analysis "begin[s] with the time-honored presumption that the [statute] is a constitutional exercise of legislative power." *Reno v. Condon*, 528 U.S. 141, 148 (2000) (interior quotation marks omitted). Further, as its name suggests, commandeering analysis does not apply to *consensual* actions. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 808-09 (9th Cir. 2002). Thus, if state and local law-enforcement officers wish to cooperate with federal immigration efforts, federal law does not "commandeer" that cooperation. Instead, federal law simply allows and protects that cooperation.

With consensual cooperation with federal authorities thus outside a potential "commandeering" claim, all that remains as potentially impermissible federal commandeering is §1373's allowance for California officers — *i.e.*, actual *state* employees — to work voluntarily with federal immigration authorities, notwithstanding California's laws to the contrary. *See* 8 U.S.C. §1373(a) (applying "[n]*otwithstanding any other provision of Federal, State, or local law*"). While *Amici* respectfully submit that that question properly lies under the Necessary and Proper Clause, *see* Section III.C, *infra*, it is clear that nothing in 8 U.S.C. §1373(a) violates the anti-commandeering principles laid down in the pre-*Murphy*

commandeering line of cases.

In *New York*, the Supreme Court invalidated a federal law that required states to choose either to regulate the disposal of radioactive waste by private parties according to federal guidelines or to take title to the waste. *See New York*, 505 U.S. at 174-75. The Supreme Court rejected the ability of Congress to direct the workings of state legislatures:

> While Congress has substantial powers to govern … directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

Id. at 162. Nothing in §1373(a) directs California's Legislature to enact anything.

Coming closer to this case — but not close enough to aid California — *Printz* invalidated a provision of federal law that *required* state and local law enforcement officers to conduct background searches of prospective gun purchasers, something the court considered a backdoor attempt to compel states to enact or enforce a federal regulatory program. *See Printz*, 521 U.S. at 904. In essence, *Printz* applied *New York* to a federal statute that directed state officers, in lieu of directing the state legislature, which the Supreme Court found equally impermissible:

> Congress cannot circumvent [New York] by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 935. Again, nothing in §1373(a) directs state or local officers to do anything affirmatively.

In both *New York* and *Printz*, the challenged federal law impermissibly compelled state action, on pain of a dire-enough consequence to constitute the commandeering of states or state officers. With 8 U.S.C. §1373(a), the INA does not *compel* California to do anything. Instead, the INA merely prohibits California from preventing state and local law-enforcement officers from voluntarily cooperating with federal immigration authorities. To the extent that §1373's federal prohibition is inconsistent with state law, the Supremacy Clause makes clear that the federal law prevails, U.S. CONST., art. VI, cl. 2, unless the federal law falls outside the power of Congress to enact. *See* Section III.C, *infra* (§1373 is a "necessary and proper" exercise of Article I power over immigration).

B. *Murphy* did not change the relevant commandeering analysis.

In *Murphy*, the Supreme Court held that the Professional and Amateur Sports Protection Act ("PASPA") impermissibly commandeered New Jersey's legislature by prohibiting repeal of New Jersey's state-law prohibition against sports gambling. As the Court noted at the outset and the end of its decision, "PASPA does not make sports gambling a federal crime," and "Congress can regulate sports gambling directly." *Murphy*, 138 S.Ct. at 1470, 1484. Also, the object of PASPA's regulation was *state legislation*, not conduct, by purporting to prohibit New Jersey from

repealing its own *state-law* ban on sports gambling. *Id.* at 1476 (Congress cannot "command a state government to enact *state* regulation") (interior quotation marks omitted, emphasis in original). Viewed in that light, PASPA and *Murphy* have little to do with the INA and §1373 because the INA indeed makes it a federal crime to conceal, harbor, or shield illegal aliens, 8 U.S.C. §1324(a)(1)(A)(iii), (v), and §1373 is indifferent to the *enactments* of California's Legislature.

Rather, *notwithstanding* California's enactments, §1373 preempts anything inconsistent with §1373. *See* 8 U.S.C. §1373(a). California remains free to legislate as it wishes, but California's laws are unenforceable if they command violation of federal law. In the gambling context from *Murphy*, "[t]he nub of the matter [would be] that they aided and abetted if they consciously were parties to the concealment of [illegal activity] in these gambling clubs." *United States v. Johnson*, 319 U.S. 503, 518 (1943). As signaled by the Supreme Court's emphasizing that Congress has not regulated sports gambling, *Murphy* would have come out differently if PASPA — analogously to the INA, here — had criminalized sports gambling and prohibited state and local governments or officers from aiding illegal gambling by helping to shield or conceal it.

Simply, "[t]he anti-commandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S.Ct. at 1478. As explained, the INA's prohibition on shielding illegal

aliens from detection applies equally to traffickers and church groups, *Aguilar*, 883 F.2d at 696, and state officials are in no better a place than church groups. In effect, §1373(a) merely provides a civil-law basis to direct compliance with the criminal law, which is well within congressional power. Whether as permissible regulation of immigration in its own right or as a necessary and proper extension of that congressional power, *see* Section III.A, *supra*, §1373 provides a civil-law variant to the extant — and *unchallenged* — criminal prohibition against shielding illegal aliens.

C. §1373 is a "necessary and proper" exercise of federal power over immigration.

In addition to its enumerated powers, Congress also has "broad authority," *Comstock*, 560 U.S. at 136, under the Necessary and Proper Clause to "make all Laws which shall be necessary and proper for carrying into Execution" Congress's enumerated powers. U.S. CONST. art. I, §8, cl. 18. As Chief Justice Marshall explained, Congress "must also be entrusted with ample means for their execution." *McCulloch*, 17 U.S. (4 Wheat.) at 408. Under the Necessary and Proper Clause, the question is "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 560 U.S. at 134. Even assuming *arguendo* that §1373 falls outside Congress's plenary power over immigration, §1373 nonetheless falls comfortably within Congress's necessary-and-proper authority.

When Congress regulates pursuant to its enumerated powers, Congress — through the Necessary and Proper Clause — "possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). The Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment). Thus, although the Constitution speaks of only a few crimes, and "nowhere speaks explicitly about the creation of federal crimes beyond those" few, "Congress [has] broad authority to create … crimes" in support of its enumerated powers. *Comstock*, 560 U.S. at 135-36. California did not — and cannot seriously — dispute the federal authority to create the crime of concealing, harboring, and shielding from detection illegal aliens as necessary and proper to federal control of immigration, 8 U.S.C. §1324(a)(1)(A), but California's Tenth Amendment challenge to §1373 calls into question §1373's necessity and propriety.

As indicated, §1373 preempts state and local law that either prohibits or restricts inter-governmental communication on any individual's immigration status. 8 U.S.C. §1373(a). As signaled in Section I.A, *supra*, §1373 protects the First Amendment rights of speech and petition with respect to immigration issues; as signaled in Section I.B, *supra*, §1373 guards against criminal concealing, harboring, and shielding from detection illegal aliens in violation of §1324(a)(1)(A). For these

reasons, §1373 certainly is rationally related to the enumerated powers of Congress over immigration.

Courts defer to Congress under the Necessary and Proper Clause on issues such as necessity, efficacy, and the fit between the means chosen and the constitutional end. *Comstock*, 560 U.S. at 135. It suffices for a statute to be "convenient … or useful" or "conducive" to the exercise of an enumerated power. *McCulloch*, 17 U.S. (4 Wheat.) at 418; *accord Raich*, 545 U.S. at 33 (Scalia, J., concurring in the judgment). Failing to challenge federal authority to create the crime of concealing, harboring, and shielding from detection illegal aliens is a fatal omission. Even assuming *arguendo* that Congress could not enact §1373 *directly* under its plenary power over immigration, *DeCanas*, 424 U.S. at 354, the Necessary and Proper Clause *extends* that power to include measures "rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 560 U.S. at 134. As long as §1373 is both necessary and proper, Congress would have authority to enact §1373 under the Necessary and Proper Clause, even assuming that Congress lacked authority to do so as a direct regulation of immigration.

1. §1373(a) qualifies as "necessary."

As explained, courts defer to Congress under the Necessary and Proper Clause on issues such as necessity, efficacy, and the fit between the means chosen and the constitutional end. *Comstock*, 560 U.S. at 135. Neither California nor its officials

can complain that Congress enacted §1373 as an alternative to having the federal government *prosecute* California officials under §1324(c). Indeed, California's sanctuary laws prove that §1373 is *necessary*.

2. §1373(a) qualifies as "proper."

Nor is §1373 improper under the three tenets of federalism cited in *Murphy*, 138 S.Ct. at 1477. First, §1373 reflects a healthy federal-state balance consistent with the federal government's exclusive power over immigration and avoiding "the risk of tyranny and abuse" from California's seeking to suppress First Amendment rights and evade federalism by nullifying federal immigration law. Second, §1373 does not blur authority, given the exclusivity of federal immigration authority and the voluntariness of any officer's actions taken under §1373. Third, §1373 does not shift costs of immigration compliance, given the unlawfulness of shielding aliens from detection and the voluntariness of any officer's actions taken under §1373. In sum, §1373 is a *proper* exercise of congressional power.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and preliminarily enjoin the challenged laws.

September 25, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the accompanying brief with the following requirements of the FEDERAL RULES OF APPELLATE PROCEDURE and the Local Rules of this Court.

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(a)(5), because:

This brief contains 6,492 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *amici curiae* state that they know of no related case pending in this Court.

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No. 18-16496

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STATE OF CALIFORNIA, *et al.*
Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, NO. 2:18-CV-00490-JAM-KJN
HON. JOHN A. MENDEZ, DISTRICT JUDGE

ADDENDUM TO BRIEF FOR *AMICI CURIAE* MUNICIPALITIES AND ELECTED OFFICIALS IN SUPPORT OF FEDERAL APPELLANT IN SUPPORT OF REVERSAL

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ADDENDUM

The following California municipalities and elected officials have joined the accompanying *amici curiae* brief:

- The County of Tulare; the City of Hesperia; the City of Escondido; the City of Aliso Viejo; the City of Mission Viejo;-the City of Laguna Niguel; the City of San Jacinto; the City of Tehachapi; the City of Ridgecrest; the City of Carlsbad; the City of Los Alamitos; the City of Santa Clarita; and the City of Vista.
- The Hon. Ryan A. Vienna, City of San Dimas Council Member; the Hon. Mike Spence, City of West Covina Councilman; and the Hon. Jim Desmond, Mayor of the City of San Marcos, in their respective individual capacities.

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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