No. 18-02885

In the United States Court of Appeals for the Seventh Circuit

City of Chicago,
Plaintiff-Appellee,

v.

Jefferson B. Sessions III, Attorney General of the United States,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 17-cv-5720 (Leinenweber, J.)

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT

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CIRCUIT RULE 26.1DISCLOSURE STATEMENT

Appellate Court No: 18-02885

Short Caption: Chicago v. Sessions

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Attorney's Signature: /s/ Mark S. Venezia Date: October 15, 2018

Attorney's Printed Name: Mark S. Venezia

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes x

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Attorney's Signature: /s/ Christopher J. Hajec Date: October 15, 2018

Attorney's Printed Name: Christopher J. Hajec

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

The parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The Department of Justice places three conditions on a jurisdiction's eligibility to receive funds under the Edward Byrne Memorial Justice Assistance Grant Program ("JAG"). These conditions are that the jurisdiction: (1) honor formal written requests for advance notice of scheduled release dates and times for

particular aliens in the jurisdiction's correctional facilities ("the notice condition"); (2) provide federal agents acting under federal law with access to the jurisdiction's correctional facilities to meet with aliens and inquire into their right to be or remain in the country ("the access condition"); and (3) submit a certification of compliance with 8 U.S.C. § 1373 ("the compliance condition"). Appellant's Short Appendix (SA) 24.

Application requirements for JAG grants are specified by federal statute, and include:

> (1) A certification, made in a form acceptable to the Attorney General and executed by the chief executive officer of the applicant (or by another officer of the applicant, if qualified under regulations promulgated by the Attorney General), that—
> . . .
> (D) the applicant will comply with all provisions of this subpart [34 U.S.C. §§ 10151 et seq.] and all other applicable Federal laws.

34 U.S.C. § 10153.

The court below ("the District Court") held that the Attorney General lacked authority to impose any of the three conditions. SA56-57, 61. Notably, the compliance condition, alone among the three, earlier had escaped preliminary injunction. SA20. Following *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), however, the District Court also permanently enjoined the compliance condition. The court opined that 8 U.S.C. § 1373 is void as unconstitutional under the Tenth

Amendment, and consequently held that the Attorney General lacked authority to require certification of compliance with it as an "applicable law." SA61.

Though IRLI agrees with Appellant that all three of the conditions are valid exercises of the Attorney General's authority, this brief is focused on the compliance condition and the District Court's misapplication of *Murphy* to § 1373.

SUMMARY OF ARGUMENT

Chicago's sanctuary policies make it impossible for local law enforcement officers to avoid shielding illegal aliens from federal authorities, putting those policies in direct conflict with the anti-harboring statute, 8 U.S.C. § 1324, which applies to all "persons," including municipalities and their officials. The purpose of § 1373, which bars state and local governments from prohibiting communication regarding the immigration status of those in custody to federal authorities, is to make this conflict preemption clear. It does so in two ways.

First, § 1373 protects local law enforcement officers and municipalities from being compelled to violate § 1324. They already are so protected by the preemptive effect of § 1324 on policies so compelling them, but § 1373, correctly seen as recognizing a federal right in state or local law enforcement not to be so compelled, makes this preemptive effect clear, and provides further protection. So recast, § 1373 is not a prohibition on states or local governments, or on the officials of either, and does not constitute commandeering under *Murphy*.

Second, § 1373 fills in a gap in § 1324 created by 8 U.S.C. § 1231(a)(4)(A), which prohibits the deportation of aliens while they are serving prison sentences. Any doubt that this provision, which in effect exempts local officers from harboring aliens during such periods, does not likewise exempt them from shielding aliens during such periods is dispelled by § 1373.

ARGUMENT

I. 8 U.S.C. § 1324 Preempts Chicago's Sanctuary Policies.

As a matter of policy, Chicago obstructs the enforcement of federal immigration law by federal officers. This policy of obstruction is codified in its Code of Ordinances as follows:

> **Civil immigration enforcement actions, Federal responsibility.**
> (b) (1) Unless an agency or agent is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall:
> (A) Permit ICE agents access to a person being detained by, or in the custody of, the agency or agent;
> (B) Permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or
> (C) While on duty, expend their time responding to ICE inquiries or communicating with ICE regarding a person's custody status or release date.

Chicago, Illinois Code of Ordinances § 2-173-042 ("the Ordinance").

What are generally referred to as the "anti-harboring" provisions of the Immigration and Nationality Act ("INA")—located at Title II, Chapter 8, § 274, and codified at 8 U.S.C. § 1324—read in pertinent part:

> **Bringing in and Harboring Certain Aliens**
>
> **(a) Criminal penalties.—**
>
> (1) (A) Any person who—
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; . . .
>
> (v) (I) engages in any conspiracy to commit any of the preceding acts, or (II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).
>
> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—
> (ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both . . . .

The INA defines "person" when used in Title II as "an individual or an organization." 8 U.S.C. § 1101(b)(3). "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." 8 U.S.C. § 1101(a)(28). Thus, § 1324 applies to municipal corporations and unincorporated areas alike, which, under the INA's sweeping definition, are organizations, and thus persons.

By preventing state and local law enforcement from providing the information or cooperation that U.S. Immigration and Customs Enforcement (ICE)

requests in the course of enforcing federal immigration laws, the Ordinance compels local law enforcement to "conceal[], harbor[], or shield[] from detection" aliens in "any place, including any building" (or to attempt to do so) in violation of 8 U.S.C. § 1324(a)(1)(a)(iii). For example, when ICE requests the release date of an illegal alien from a local jail, and local authorities refuse to give that information to it, the local authorities are thereafter, at any given moment during the remainder of the alien's confinement, concealing from ICE whether the alien is inside or outside of the jail, and thus "conceal[ing]" the alien's presence "in . . . a[] building." More drastically, if ICE agents arrive at or enter a local jail to assume custody of an illegal alien, and local authorities either refuse them entry or refuse to allow them to assume custody, as mandated by the Ordinance, the local officials are preventing the alien from being taken out of the jail, and thus "harbor[ing]" the alien "in . . . a[] building." Even if local law enforcement claims that receiving a Form I-247A from ICE does not give it the requisite knowledge of an alien's unlawful presence, the form includes a probable cause determination by the U.S. Department of Homeland Security that the alien is removable, thus at the very least making law enforcement's noncompliance in "reckless disregard" of the alien's unlawful presence.

Accordingly, the Ordinance forces local law enforcement officers to violate the federal anti-harboring statute. In other words, it is impossible for these officers

to comply with both the Ordinance and federal law, and thus the latter preempts the former. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) ("[S]tate laws are pre-empted . . . where compliance with both federal and state regulations is a physical impossibility") (internal citations and quotation marks omitted).

II. Section 1373 Protects Local Law Enforcement.

Section 1373 is phrased as a prohibition on state or local restrictions on communications of immigration status to federal authorities:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

On the basis of the form of § 1373, as a prohibition rather than an affirmative requirement, the District Court originally found that statute likely to withstand challenge, and thus denied a preliminary injunction against the compliance condition. SA20. Subsequently, in *Murphy*, 138 S. Ct. at 1478, the Supreme Court found that this distinction was generally insufficient to save Congress's attempts to commandeer local law making. The District Court tried to follow suit: having earlier found § 1373 constitutional solely because of its negative form, it now found § 1373 to be commandeering because of that same form. SA36-37.

The District Court's conclusion was erroneous. The *Murphy* court had held that the mere form of a rule imposed on local lawmakers is not determinative of its Tenth Amendment status. Statutes should be rephrased for analysis to see it if they are merely statements of preemption, conferring federal rights on some set of individuals. *Murphy* 138 S. Ct. at 1461; SA41. For example, a prohibition on state airline regulation can be rephrased as the right of airlines not to be regulated by field-preempted state law, *Murphy* 138 S. Ct. at 1480 (citing *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374 (1992)), and a prohibition on state registration of aliens can be rephrased as the right of aliens not to be regulated by field-preempted state registration laws, *id.* at 1481 (citing *Arizona* v. *United States*, 567 U. S. 387 (2012)). The crux of the District Court's error was its failure to find a way of parsing § 1373 as declaring a federal right of individuals not to be regulated by state bans on communication of immigration status information. SA41-42.

Yet in light of § 1324's preemptive effect, that task is quite easy: § 1373 recognizes a federal right in state and local officers not to be forced to violate the federal anti-harboring statute. True, *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 (emphasis added). But *Murphy* did not involve state or local law enforcement officers, and thus did not apply its private-actor-versus-state dichotomy to such officers, who, though state or local

employees, are not states when acting in their individual or even official capacities. *See Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989) ("[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under [42 U.S.C.] § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.") (internal citations and quotation marks omitted). Because individual officers do not qualify as sovereign states, either they qualify as "private actors" when violating, or not violating, § 1324 (and thus when being protected from violating § 1324 by § 1373) or there is a third category of actors, neither private parties nor states, that *Murphy* did not address, and that Congress may protect without regulating states.

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. Just as *Murphy* reframes the INA's alien-registration requirements in *Arizona* to confer individual rights, *id.* ("[T]he 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"), a similarly reframed § 1373

permissibly protects law-enforcement officers from being forced to join Chicago's unlawful scheme to shield illegal aliens. Recast as such a protection, § 1373 is not a prohibition on states, and thus does not constitute commandeering under *Murphy*.

The Supreme Court's language in *Printz v. United States*, 521 U.S. 898, 930-31 (1997), that "[t]o say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance" is not to the contrary; § 1373 does not command any state or local officer to do anything, nor prohibit any such officer from doing anything, and so does not control such officers. Of course, § 1373 does lessen a *state's* control over its officers, but so does many a federal law, and states may not "control" their officers by commanding them either to violate federal law or to interfere with a federal program. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373 (2000) ("We will find preemption where . . . under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."); *see also, a fortiori*, *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) ("We therefore hold that states do not retain under the Tenth Amendment an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs.").

III. Section 1373 Can Be Recast As Filling A Gap In Federal Law.

In addition, § 1373 fills in a gap in § 1324 created by another federal law, 8 U.S.C. § 1231(a)(4)(A), which prohibits the deportation of aliens while they are serving prison sentences. During such periods, federal authorities do not, and may not, attempt to acquire custody of aliens, so their detention in state or local prisons during such periods does not constitute the harboring of them from federal authorities. Thus, § 1231 sets forth circumstances in which local law enforcement is safe from violating *some* of § 1324. But by doing so, it creates uncertainty about whether it makes local law enforcement safe from violating *other* parts of § 1324—such as its prohibition on shielding—in those same circumstances.

Section 1373 relieves this uncertainty. It makes clear that any local policy or state law prohibiting law enforcement officers from sharing information regarding immigration status—such as release dates—with federal officials remains conflict preempted by the prohibition on shielding in § 1324. Thus, § 1373 can be recast as a statement of preemption, clarifying the scope, and thus the preemptive force, of another federal law, § 1324, by in effect providing that nothing in § 1231 makes local law enforcement immune from liability for shielding under § 1324 by such practices as refusing to share aliens' release dates with federal officials.

Seen in this light, too, § 1373 is not a prohibition on states, and thus does not constitute commandeering under *Murphy*.

CONCLUSION

For the foregoing reasons, the District Court's judgment granting an injunction should be reversed.

DATED: October 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 29 because it contains 2,724 words. This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Mark S. Venezia
Mark S. Venezia

CERTIFICATE OF SERVICE

I certify that on October 15, 2018, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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