No. 19-532

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

CHRISTOPHER J. HAJEC*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
*Counsel of Record

Counsel for Amicus Curiae

November 22, 2019

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Formed in 1940, the National Sheriffs' Association (NSA) seeks to promote the fair and efficient administration of criminal justice throughout the United States, and in particular to advance and protect the Office of Sheriff throughout the United States. NSA has over 20,000 members, and is the advocate for over 3,000 sheriffs across the country. NSA supports the enforcement of the nation's immigration laws, which California Senate Bill 54 (SB 54) frustrates.

SUMMARY OF THE ARGUMENT

The power to make laws that frustrate Congress's purposes in federal laws is prohibited to the states by the U.S. Constitution. In neglecting this implication of the Constitution's Supremacy Clause, the U.S. Court of Appeals for the Ninth Circuit applied the Tenth Amendment to the Constitution in a way that is profoundly mistaken, so much so that it cries out for correction by this Court.

It is not difficult to show that SB 54 stands as an obstacle to the purposes Congress sought to achieve in federal immigration laws. SB 54 prohibits state and local officers from sharing the release dates of aliens, and their personal information, with U.S. Immigration

---

[1] After receiving more than ten days' written notice, the parties have consented in writing to the filing of this *amicus curiae* brief in this case. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

and Customs Enforcement ("ICE"), and forbids such officers to transfer custody of aliens to ICE. In these prohibitions, California compels many state and local officers who would cooperate with federal enforcement not to cooperate with that enforcement. This choking-off of cooperation that would otherwise take place is an obstacle to that enforcement, and to the congressional purpose that criminal aliens, after they have served their sentences, be detained by federal authorities and deported.

The attempt by a panel of the U.S. Court of Appeals for the Ninth Circuit to say otherwise, on the ground that, in SB 54, California merely adopts an inactive stance, declining to involve itself in immigration law enforcement, is belied by the active nature of California's response—the passage of a law—and by the (intended) crippling effect that law has on the fulfillment of federal aims. If California had truly chosen to be inactive, it would have passed no law governing the cooperation of its officers with federal immigration law enforcement, either to command such cooperation or to prohibit it. Of course, that truly inactive stance would not have violated the Supremacy Clause, under which laws, but not the absence of laws, can be preempted.

The Ninth Circuit went further than to argue that SB 54 is not an obstacle. It also reached the remarkable holding that, even if SB 54 is an obstacle, the Tenth Amendment prevents it from being preempted.

This holding by the Ninth Circuit betrays a profound misunderstanding of this Court's federalism jurisprudence, and of the relation between the Supremacy Clause and the Tenth Amendment. The Tenth Amendment sets forth a method of determining whether given powers are reserved to the states (or the people) by the Constitution. According to the Tenth Amendment, if a given power is not delegated to the federal government by the Constitution, nor prohibited to the states by the Constitution, then it is so reserved.

The Ninth Circuit did not follow the method spelled out in the Tenth Amendment when deciding that that amendment blocked SB 54 from being obstacle preempted. If it had, it would have asked whether a power to make laws that stand as obstacles to the purposes of federal laws is prohibited to the states. The Supremacy Clause and this Court's doctrine of obstacle preemption provide the ready, affirmative answer—and that answer implies that the power to make SB 54, on the Ninth Circuit's assumption that it is an obstacle to federal aims, is not reserved to the states by the Tenth Amendment.

The Ninth Circuit's analysis notwithstanding, absent a sustained and robust presumption against preemption founded in Tenth Amendment-related sensitivities, SB 54, being an obstacle to federal aims, is obstacle preempted under the Supremacy Clause. And no presumption designed to protect states' legitimate prerogatives applies here, given the plenary federal power, and the lack of any traditional state power, over immigration.

ARGUMENT

The Ninth Circuit held that, even if SB 54 stands as an obstacle to congressional purposes in federal immigration law, the Tenth Amendment prevents it from being obstacle preempted. This Court should grant review to reverse this deeply mistaken holding, and to find that SB 54 is, indeed, an obstacle, and thus preempted under the Supremacy Clause.

I. SB 54 Is An Obstacle

SB 54 was enacted to "counterbalance" federal immigration enforcement efforts in California. Hearing on SB 54 before the Senate Standing Comm. on Public Safety (Jan. 31, 2017) (statement of Sen. Scott Wiener); Committee on the Judiciary Report (Senate), July 10, 2017, at 1.

To this end, SB 54 prohibits state and local law enforcement from "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information" to immigration authorities, unless that information is already publicly available or the individual has been convicted of certain enumerated crimes. Cal. Gov't Code §§ 7284.6(a)(1)(C), 7282.5(a). SB 54 further prohibits state and local law enforcement from providing "personal information" about aliens, such as a work or home address, to federal immigration authorities, unless such information is already publicly available. Cal. Gov't Code § 7284.6(a)(1)(D). Also, under SB 54, state and local law enforcement may "[t]ransfer an individual to immigration authorities" only if the United States presents a "judicial warrant

or judicial probable cause determination" or if the individual has been convicted of certain enumerated crimes. Cal. Gov't Code §§ 7284.6(a)(4), 7282.5(a).

Thus, under SB 54, in many cases, if a federal immigration officers asks when an alien in local custody will be released, or that alien's home or work address, local officials who otherwise would be perfectly willing to provide that information may not provide it. In many cases, if a federal immigration officer seeks to assume custody of an alien from local officials, local officials who otherwise would be perfectly willing to transfer custody may not do so.

The Supremacy Clause provides that federal law "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. Under this clause, Congress has the power to preempt state and local laws. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

Preemption may be either express or implied, and implied preemption includes both field preemption and conflict preemption. *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3d Cir. 2013) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption can occur in one of two ways: where "compliance with both federal and state regulations is a physical impossibility," or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lozano*, 724 F.3d at 303 (citing *Arizona*,

567 U.S. at 399) (internal quotation marks and citations omitted). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912), *quoted in Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941). The judgment of courts about what constitutes an unconstitutional impediment to federal law is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Underlying the doctrine of obstacle preemption is the necessity of cooperation between state and federal sovereignties for our federal system to function properly. As the U.S. Court of Appeals for the Second Circuit has explained:

> A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from

> taking actions that frustrate federal laws and regulatory schemes.

City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (internal citations omitted).

As Petitioner shows, one purpose of federal immigration law is that criminal aliens, after serving their sentences, be detained by federal authorities and deported. Pet. 3-4. By design, SB 54 frustrates this federal purpose. It is therefore an obstacle to Congress's purposes in federal immigration law according to this Court's precedents.

Nevertheless, the Ninth Circuit denied that SB 54 is such an obstacle, "agree[ing]" with the district court that "'California's decision not to assist federal immigration enforcement in its endeavors is not an "obstacle" to that enforcement effort'" because "'refusing to help is not the same as impeding.'" Pet. App. 34a (quoting *United States v. California*, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018)).

The flaw in the Ninth Circuit's conclusion is readily apparent: the court misread SB 54 as a refusal of *California* to assist the federal government. In fact, SB 54 is a prohibition on California cities, counties, and state and local law enforcement officers, ordering *them* not to assist the federal government. The question is whether this prohibition raises an obstacle to federal enforcement of immigration laws.

It certainly does. Many cities and officials would assist the federal government, as shown by the submission of an *amici curiae* brief in this case by

numerous California municipalities and elected officials in support of the United States, were they not blocked from doing so by SB 54. Had these officers been allowed to cooperate, Congress's purposes would have been achieved much more fully than they have been. Thus, SB 54, operating as a but-for cause, has lessened the achievement of Congress's purposes. Saying that it has so acted is no different than saying that it has "frustrated" or is an "obstacle" to the achievement of those purposes.

True, federal law cannot preempt inaction by a state. But, in SB 54, California has taken a step as active as it could take—the passage of a state law. Had California truly decided to be inactive, it would have passed no law to control cooperation by its officers, either to compel or to forbid it. California did not adopt this passive course. Instead, it chose to exert itself, through SB 54, to "counterbalance" federal immigration enforcement efforts in California. Hearing on SB 54 before the Senate Standing Comm. on Public Safety (Jan. 31, 2017) (statement of Sen. Scott Wiener); Committee on the Judiciary Report (Senate), July 10, 2017, at 1. It cannot now claim merely to be holding itself aloof.

II. SB 54 Is Obstacle Preempted

The Ninth Circuit held that, even if SB 54 is an obstacle to federal aims, the Tenth Amendment prevents it from being preempted. Pet. App. 34a-39a. This remarkable holding—which contradicts the letter of this Court's well-established obstacle-preemption cases—implies that the Tenth Amendment reserves to the states a power to make laws that, through controlling the level of state officers' cooperation with federal immigration law enforcement, determine or influence what happens to criminal aliens after they are released from state custody. This holding is a sharp departure from this Court's carefully-wrought federalism jurisprudence.

A. *The Ninth Circuit misunderstood the Tenth Amendment*

The Ninth Circuit failed to appreciate the relation between the Supremacy Clause and the Tenth Amendment, and even to understand the Tenth Amendment itself. The Tenth Amendment sets forth a method of determining whether given powers are reserved to the states (or the people) by the Constitution:

> 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.

U.S. Const. amend. X.

Thus, under the Tenth Amendment, before it can be decided that a given power is reserved to the states, it

must be determined whether that power is delegated to the federal government by the Constitution, and whether it is prohibited to the states by the Constitution. Only if the answer to both questions is in the negative does the Tenth Amendment reserve that power to the states.

This Court has proceeded consistently with this rubric in its commandeering cases. First, it derived the anticommandeering rule from the structure of the Constitution and the principle, assumed in the Constitution, that governments govern individuals, not other governments. *See generally New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Then this Court noted that the power to commandeer states or state officers is never a proper means of effectuating any enumerated power, and thus that this power is not delegated to the federal government by the Constitution. *Printz*, 521 U.S. at 923-24.

By contrast, the Ninth Circuit simply ignored the method of decision spelled out in the Tenth Amendment when finding that the Tenth Amendment blocked SB 54 from being obstacle preempted. Had it followed that method, it would have asked whether a power to make laws that stand as obstacles to the purposes of federal laws is prohibited to the states. Of course, that power is prohibited to the states by the Supremacy Clause, as interpreted by this Court's obstacle preemption cases. *See, e.g., Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) ("[T]he Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, §8, while

providing in the Supremacy Clause that federal law is the 'supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,' Art. VI, cl. 2."). Since the power to make laws that are obstacles to federal aims is prohibited to the states, the power to make SB 54, on the Ninth Circuit's assumption that it is an obstacle to federal aims, is not reserved to the states by the Tenth Amendment. In other words, the Ninth Circuit put the cart of the reservation of states' powers before the horse of preemption. Here, it is the issue of preemption that must be decided before it can be determined whether the power at issue has been reserved to the states by the Tenth Amendment.

B. *No presumption against preemption protects SB 54*

Nevertheless, based on federalism balancing concerns, if not on the straightforward text of the Tenth Amendment, this Court has employed a presumption against preemption in some cases. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). But any such presumption, which the Ninth Circuit did not even invoke to protect SB 54, is easily overcome here. First, a leading case setting forth this presumption held that, in cases of obstacle preemption, the presumption is *ipso facto* surmounted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. . . [For example,] the state

policy may produce a result inconsistent with the objective of the federal statute."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) ("Assuming, *arguendo,* that some presumption against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted.").

Second, "an 'assumption' of nonpre-emption is not [even] triggered 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, 108 (2000) (quoting *Rice, supra*); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (finding that the presumption against preemption did not apply to fraud on the Federal Drug Administration because it is not an area of traditional state regulation). The question of what happens to deportable aliens has always and quintessentially been in the purview of the federal government. *See, e.g., Arizona v. United States*, 567 U.S. 387, 394 (2012) (recognizing that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens") (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). There is no traditional state power to decide this question, and certainly not to decide it inconsistently with how the federal government has decided it. That California has intruded into an area of federal concern prevents even the application of any presumption against preemption in this case.

CONCLUSION

For the foregoing reasons, this Court should grant review and reverse the judgment of the court below upholding SB 54.

Respectfully submitted,

CHRISTOPHER J. HAJEC*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
*Counsel of Record

Counsel for Amicus Curiae