No. 18-2648

In the United States Court of Appeals for the Third Circuit

CITY OF PHILADELPHIA,
Plaintiff-Appellee,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. NO. 2-17-cv-3894-MMB
HON. MICHAEL M. BAYLSON, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF FEDERAL APPELLANT IN SUPPORT OF REVERSAL

Lawrence J. Joseph
DC Bar #464777
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: September 6, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief with the written consent of the parties.[1] IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

STATEMENT OF THE CASE

The City of Philadelphia sued the Attorney General to enjoin conditions imposed on applicants for federal grants under the Edward Byrne Memorial Justice Assistance Grant Program ("JAG Program"), which provides financial assistance to states and cities for criminal justice. 34 U.S.C. §10152(a).

---

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

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. U.S.*, 567 U.S. 387, 406 (2012) (interior quotation marks omitted).

Statutory Background

The JAG Program provides funds for the Attorney General to dispense as four-year grants to state and local law enforcement. Applications must include a "certification, made in a form acceptable to the Attorney General … that … the applicant will comply with all provisions of this part and all other applicable Federal laws." 34 U.S.C. §10153(a)(5)(D). The statute requires the Attorney General to "issue rules to carry out this part." *Id.* §10155. Before denying any application, the Attorney General must afford applicants notice of the deficiencies and an

opportunity to cure them. *Id.* §10154. The lawfulness of the JAG Program conditions here hinges on two provisions of the 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 Organization Act ("RICO") to add §1324 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996) (enacting 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.

Factual Background

Philadelphia challenges three requirements that the Attorney General imposed under the JAG Program: (1) access for federal enforcement officers to individuals of interest detained by grantees ("Access Provision"); (2) advance notice of release dates and times for detained aliens ("Release Notice"); and (3) certification of compliance with §1373 ("Certification Requirement"). App. A100-A101. These grant criteria conflict with a series of "sanctuary" policies adopted by Philadelphia over time, which encourage immigrants to use City services without fear of reprisal

by restricting Philadelphia police from (a) disclosing aliens' confidential information unless the officer or agency suspects the alien of "engaging in criminal activity (other than mere status as an undocumented alien);" (b) asking "a person's immigration status, unless the status itself is a necessary predicate of a crime the officer is investigating or unless the status is relevant to identification of a person who is suspected of committing a crime (other than mere status as an undocumented alien);" and (c) prohibiting disclosure of release except for aliens convicted of first or second degree felonies involving violence when a judicial warrant accompanies the federal detainer request. *See* App. A122-A125 (interior quotation marks omitted).

STANDARD OF REVIEW

The issues presented here all are issues of law, which this Court reviews *de novo*. *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 360 (3d Cir. 2011).

SUMMARY OF ARGUMENT

Philadelphia's sanctuary policies render Philadelphia ineligible for the JAG Program because Philadelphia cannot certify compliance with either §1373 (Section I.B.2), much less with the INA's prohibition against shielding illegal aliens from detection (Section I.B.1) or the First Amendment (Section I.A). In order to prevail, then, the City must show that the JAG Program's conditions are unconstitutional.

That the City cannot do. Notwithstanding the Supreme Court's recent *Murphy*

v. NCAA, 138 S.Ct. 1461 (2018), decision, the INA continues to preempt the City's inconsistent sanctuary policies, and nothing in §1373 commandeers Philadelphia or its police officers to do anything. On preemption, this Circuit's precedents establish that "notwithstanding clauses" like §1373 establish express preemption, to which no presumption against preemption applies (Section II.A). Moreover, Circuit precedent establishes that the INA preempts the entire field of harboring and shielding illegal aliens from detection, to say nothing of the direct conflicts between Philadelphia's policies prohibiting police from disclosing information to the federal government and §1373's prohibiting such interference (Section II.B). For its part, *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.C).

Similarly, §1373 and §1324 do not commandeer Philadelphia to do anything, and certainly do not compel the City to legislate: §1373 applies notwithstanding the City's enactments, and §1324 prohibits everyone — cities, states, smugglers, and church groups — from flouting federal immigration law by shielding illegal aliens from detection (Section IV.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 IV.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 Philadelphia could be prosecuted or enjoined for unlawful shielding under §1324, the City cannot complain of mere civil preemption under §1373 (Section IV.C).

Finally, the JAG Program complies with the Spending Clause because rules and policies such as those issued by the Attorney General under his rulemaking power can provide the clear statement that the Spending Clause requires here (Section III).

ARGUMENT

I. PHILADELPHIA CANNOT ESTABLISH ITS ELIGIBILITY FOR FUNDING UNDER THE JAG PROGRAM.

Before demonstrating that the challenged JAG Program and INA provisions are constitutional, *amicus* IRLI first establishes that Philadelphia's sanctuary policies violate the JAG Program and the INA. While the Release Notice and Access Provision are important aspects of immigration enforcement, this Court need reach only the Certification Requirement, which independently mandates denial of Philadelphia's applications. Because the JAG Program criteria were clearly explained to the City, any certification of compliance would disqualify JAG Program funding. 18 U.S.C. §1001(a)(2) (prohibiting "any materially false … or fraudulent statement or representation" to federal agencies).

A. Philadelphia violates the First Amendment rights of its law-enforcement officers.

Contacting and working with governmental enforcement authorities is protected First-Amendment activity, although *public* employees must meet the additional test 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); *Swineford v. Snyder Cty.*, 15 F.3d 1258, 1274 (3d Cir. 1994) (disclosing illegality in government agency is a matter of significant public concern). Philadelphia cannot constitutionally prohibit its employees from cooperating with federal immigration officials about

illegal aliens.[2]

B. Philadelphia's policies violate the INA.

Philadelphia's sanctuary policies violate two INA sections: the prohibition against shielding aliens from detection and the prohibition against interfering with communications between local officers and the federal government on individuals' immigration status. *See* 8 U.S.C. §§1324(a)(1)(A), 1373(a). Significantly, these two violations are independent (*i.e.*, Philadelphia would violate §1324(a)(1)(A) even if §1373(a) did not exist). Of the two, §1324(a)(1)(A) constitutes the more serious transgression, but either violation disqualifies Philadelphia from the JAG Program.[3]

1. Philadelphia violates §1324's prohibition of shielding illegal aliens from detection.

Philadelphia's sanctuary policies violate §1324(a)(1)(A), which criminalizes not only concealing, harboring, and shielding illegal aliens from detection, but also attempting or conspiring to commit or aiding and abetting those prohibited acts. 8 U.S.C. §1324(a)(1)(A)(iii), (v). As this Circuit has acknowledged, "Congress intended to strengthen the law in preventing aliens from entering *or remaining* in the

---

[2] Typically, a governmental employer could balance its efficiency interests against its employees' First Amendment interests, *Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3d Cir. 1997) (*en banc*), but that balancing cannot apply when federal law preempts the purported governmental interest. *See* Section I.B, *infra*.

[3] Because §1324(a)(1)(A) qualifies as a "predicate act" for RICO, 18 U.S.C. §1961(1)(F), the Attorney General not only could claw back the JAG Program funds that Philadelphia has received but also could claim treble damages. *Id.* §1964(c).

United States illegally." *United States v. Ozcelik*, 527 F.3d 88, 98 (3d Cir. 2008) (interior quotation marks omitted, emphasis in original); *accord United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976). Significantly, Congress added the "shield from detection" prong as "an independent addition" in 1952, *Ozcelik*, 527 F.3d at 98, thus distinguishing "shielding" from "harboring" and "smuggling."

For "'harboring' as that term is used in [§1324(a)(1)(A)(iii)] … culpability requires some act of concealment from authorities," *Lozano v. City of Hazleton*, 724 F.3d 297, 320 (3d Cir. 2013), and "requires some act of obstruction that reduces the likelihood the government will discover the alien's presence." *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241, 245-47 (3d Cir. 2012) (interior quotation marks omitted). With respect to obstruction, Circuit precedent "makes clear that the federal proceeding need not be pending at the time the conspiracy is formed. Indeed, the primary purpose of the conspiracy charged in the instant indictment was the total prevention of such proceedings by deliberately concealing evidence that could form the basis of a federal prosecution." *United States v. Messerlian*, 832 F.2d 778, 792-94 (3d Cir. 1987) (conspiracy to obstruct justice can occur without a specific judicial proceeding to obstruct); *cf. Pierre v. Attorney General of the United States*, 528 F.3d 180, 190 (3d Cir. 2008) ("[w]illful blindness can be used to establish knowledge"). The City's sanctuary policies here intentionally obstruct immigration enforcement.

Even if one supported Philadelphia's charitable goals toward illegal aliens,

the City's policies 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); *United States v. Aguilar*, 883 F.2d 662, 696 (9th Cir. 1989) ("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 8 U.S.C. § 1324 cannot … brook exceptions for those who claim to obey a higher authority").[4] 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 —

[4] As signaled by Judge Byrne's framing quotations, App. A96, the word "sanctuary" is historically inaccurate, based 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 Philadelphia 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.

the Constitution — counsels Philadelphia 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), 371. Aiding-and-abetting liability does not require awareness of every detail of an impending crime or that the defendant be present at or personally participate in committing the substantive crime. *United States v. Dixon*, 658 F.2d 181, 191 (3d Cir. 1981). Instead, an "aiding-and-abetting conviction requires that another committed the substantive offense and that the one charged with aiding and abetting knew of the substantive-offense commission and acted with the intent to facilitate it." *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991). 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) (interior quotation marks omitted). By purporting to compel otherwise-willing law-enforcement officers to desist from aiding federal enforcement efforts, the City seeks to make illegal aliens' evasion of federal authorities succeed.

[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 Philadelphia's actions here benign.

2. Philadelphia violates §1373's prohibition of interference with communications on immigration status.

In an alternate holding, the district court found that Philadelphia complies with §1373 because the statute reaches only whether an individual is a citizen or alien, not the individual's release date from state or local confinement. App. A167-A168. In fact, however, §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 the alien's release date because federal law prohibits removal proceedings until the illegal alien has served his or her state-law time. 8 U.S.C. §1231(a)(4)(A) ("the 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, Philadelphia's prohibition against disclosing release dates violates §1373(a).

II. FEDERAL IMMIGRATION LAW PREEMPTS PHILADELPHIA'S SANCTUARY POLICIES.

Misreading both §1373 and *Murphy*, the district found §1373 either exceeds Congress's authority or allows Philadelphia's sanctuary policies. Quite the contrary,

§1373 preempts Philadelphia's sanctuary policies under express, conflict, *and* field preemption.

A. No presumption against preemption protects Philadelphia because §1373 expressly preempts sanctuary policies.

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 under this Circuit's clear and longstanding precedents on "notwithstanding clauses." *In re Fed.-Mogul Glob.*, 684 F.3d 355, 369 (3d Cir. 2012); *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 295-96 (3d Cir. 2005); *Johnson v. Orr*, 780 F.2d 386, 400 (3d Cir. 1986). 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 statutes. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016).[6] Thus, §1373 applies by its terms

[6] Even if a presumption against preemption could apply, it would not apply here because 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); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). 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 all tort law), 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

to preempt any state or local law that interferes with communications under §1373.[7]

B. §1373 and §1324 conflict and field preempt Philadelphia's sanctuary policies.

As indicated, 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 the *Arizona* court — which was citing 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.

On the other hand, if the federal statutory scheme is elaborate enough, that scheme can evidence a congressional intent to displace state and local government

---

for state spending). *Crosby* makes this point clearly because the state obviously has discretion on how to spend state funds, but the Court analyzed the field of Burma trade sanctions, not state spending. *Id.*

[7] The district court's facile suggestion that Philadelphia complies with §1373 is semantic legerdemain. *Compare* App. A167-A168 *with* Section I.B.2, *supra*.

from the entire field:

> The intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Id. at 399. As indicated, in *Arizona* and this Court's precedents, the INA is both conflict- and field-preemptive of inconsistent state laws in the immigration area.

Philadelphia's policies constitute criminal concealing, harboring, and shielding of illegal aliens, *see* Section I.B.1, *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. But that is not all.

On field preemption, this Circuit has gone further than the *Arizona* court in the particular field of concealing, harboring, and shielding under §1324: local regulations "constitute an impermissible regulation of immigration and are field pre-empted because they intrude on the regulation of residency and presence of aliens in the United States and the occupied field of alien harboring." *Lozano*, 724 F.3d at 317; *accord 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, §1324 preempts the

entire field of illegal-alien concealment, harboring, and shielding from detection. *Lozano*, 724 F.3d at 317; *Valle del Sol*, 732 F.3d at 1023-26. Accordingly, the INA leaves no room for Philadelphia to withhold the INA-contemplated voluntary participation of local law-enforcement officers with federal immigration authorities based on Philadelphia's own local and idiosyncratic parsing of lawfulness (*e.g.*, first- or second-degree violent felonies, but not unlawful presence).

C. ***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 an 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, they either qualify as "private actors" when exercising their First Amendment right to contact the federal government or there is 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. Just as *Murphy* reframes the INA's alien-registration requirements in *Arizona*, 567 U.S. at 401, to confer individual rights, *id.* ("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"), a similarly reframed §1373 permissibly protects law-enforcement officers' First Amendment rights, protects individual law-enforcement officers from inadvertently or unwillingly joining Philadelphia's unlawful scheme to shield illegal aliens, and protects American workers from illegal aliens' unlawful competition. Thus, nothing in the *Murphy* preemption holding saves Philadelphia's policies from preemption.

III. THE JAG PROGRAM DOES NOT VIOLATE THE SPENDING CLAUSE.

Although Philadelphia did not press the Spending Clause at trial, the district court liked its own preliminary-injunction analysis of that issue enough to incorporate the preliminary-injunction analysis by reference. App. A155. Of course, establishing a *likelihood of prevailing* on the merits for a preliminary injunction is not the same as *prevailing*, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), and district-court decisions do not establish the law of the case. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). In any event, the district court erred: §1373 complies with the Spending Clause.

Although §1373 and the JAG Program criteria are consistent Congress's plenary authority over immigration, *see* Section II, *supra*; Section IV, *infra*, that is not the test under the Spending Clause: "Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Lawrence Cty.*

v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985). Philadelphia has the burden to prove the JAG Program's unconstitutionality, and it cannot.

Although conditions under the Spending Clause must be clear, *see Sossamon v. Texas*, 563 U.S. 277, 288-89 (2011), the JAG Program clearly authorizes the Attorney General to "issue rules to carry out this part." 34 U.S.C. §10155. Such implementing rules and guidelines can guide the interpretation of Spending Clause conditions. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). Moreover, such implementing rules are entitled to federal courts' deference. *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). While *amicus* IRLI might argue against *Chevron* and *Auer* deference in an appropriate setting, this is not an appropriate setting:

> If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Until the Supreme Court reverses or narrows *Chevron* and *Auer*, this Court must follow those decisions, which compel granting deference to the Attorney General's

reasonable interpretations of the JAG Program.[8]

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

As indicated in Sections I-II, *supra*, Philadelphia's sanctuary policies conflict with and are preempted by federal immigration policy, including §1373. To preempt Philadelphia's policies, however, §1373 must fit within Congress's power. The Supreme Court has recognized 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

[8] Spending-Clause jurisprudence has its own commandeering analysis, under which the government cannot terminate *existing* federal funding for failure to meet *new* funding criteria, *Nat'l Fed'n of Indep. Businesses v. Sebelius*, 567 U.S. 519, 577-78 (2012) (Medicare funding), but that rationale is inapposite to discrete grants like the JAG Program, 34 U.S.C. §10152(f) (four-year term), as opposed to continuing programs like Medicare.

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 Philadelphia police 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 immigration authorities thus outside the City's potential "commandeering" claim, all that remains as potentially impermissible federal commandeering is the allowance for Philadelphia officers — *i.e.*, actual City employees — to work voluntarily with federal immigration authorities, notwithstanding Philadelphia's policies and laws to the contrary. *See* 8 U.S.C. §1373(a) (applying "[n]*otwithstanding any other provision of Federal, State, or local law*"). While *amicus* IRLI respectfully submit that that question properly lies under the Necessary and Proper Clause, *see* Section IV.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 Philadelphia's city government to enact anything.

Coming closer to this case — but not close enough to aid the City — *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), INA does not *compel* Philadelphia to do anything. Instead, INA merely prohibits Philadelphia from preventing state and local law-enforcement officers from voluntarily cooperating with federal immigration authorities. To the extent that that 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 IV.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 Philadelphia's government.

Rather, notwithstanding Philadelphia's enactments, §1373 preempts anything inconsistent with §1373. *See* 8 U.S.C. §1373(a) (applies "[n]*otwithstanding any other provision of Federal, State, or local law*"). Philadelphia's government remains free to legislate as it wishes, but Philadelphia's ordinances and policies 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 activity 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, and state officials are in no better a place than church groups. *See* note 4 & accompanying text, *supra*. All that §1373(a) does is provide 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 IV.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 Article I 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. Philadelphia 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 Philadelphia'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.1, *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 are deferential 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). Philadelphia's failing to challenge federal authority to create the crime of concealing, harboring, and shielding from detection illegal aliens is a fatal omission here. Even assuming *arguendo* that Congress could not enact §1373 *directly* under its exclusive and plenary power over immigration, *DeCanas*, 424 U.S. at 354, the Necessary and Proper Clause *extends* those powers to include measures "rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 560 U.S. at 134. For that reason, 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. As long as it is both necessary and proper, §1373 falls with congressional powers.

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 Philadelphia nor its officials can complain that Congress enacted §1373 as an alternative to having the federal government *prosecute* Philadelphia officials under §1324(c). Indeed, Philadelphia's policies 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 Philadelphia's seeking to suppress First Amendment rights and evade federalism by nullifying federal immigration law. Second, §1373 does not blur authority, given both the exclusivity of federal immigration authority and the voluntariness of any officer's actions taken under §1373. Third, §1373 does not shift any 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 and those argued by the Attorney General, this Court should vacate the injunction and remand with instructions to dismiss for

failure to state a claim.

Dated: September 6, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

COMBINED 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. Pursuant to Local Rule 28.3(d), counsel for *amicus curiae* is a member of this Court's bar.

2. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(c)(5) and this Court's order dated April 12, 2018, because:

This brief contains 6,500 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

3. 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.

4. Pursuant to Local Rule 31.1(c), (1) the electronic submission of this document is an exact copy of the corresponding paper document filed with the Court; and (2) the document has been scanned for viruses with Norton 360 (version 22.15.0.88), the most recent version of a commercial virus-scanning program, and is free of viruses.

Dated: September 6, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third 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.

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com