No. 19-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARIAN RYAN, in her official capacity as Suffolk County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; CHELSEA COLLABORATIVE, INC.,

Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTEW T. ALBENCE, in his official capacity as Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Acting Field Office Director of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD WOLF, in his official capacity as Acting Secretary of United States Department of Homeland Security,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 19-cv-11003

The Hon. Indira Talwani

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, I state that *amicus curiae* Immigration Reform Law Institute has no parent corporation and does not issue stock.

Dated: January 31, 2020

Respectfully submitted,

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

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 lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed numerous amicus curiae briefs in a wide range of venues and jurisdiction, from the Board of Immigration Appeals to the United States Supreme Court. *See, e.g., Estrada v. State of Rhode Island*, No. 09-1149, Brief of Amicus Curiae National Fraternal Order of Police, Supporting Defendants-Appellees (1st Cir., July 14, 2009).

Defendant-Appellants consent to the filing of this *amicus curiae* brief. Plaintiff-Appellees do not oppose 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.

SUMMARY OF ARGUMENT

The District Court incorrectly relied on a purported common law privilege to issue an injunction that restrained U.S. Immigration and Customs Enforcement ("ICE") from making civil arrests in courthouses in the State of Massachusetts, and even from arresting individuals who are attending court there or traveling to and

from those courthouses. The Supremacy Clause of the U.S. Constitution, however, bars the alleged Massachusetts common law state privilege; extended as far as the district court extended it, the privilege conflicts with federal law and is preempted. The power to make law that conflicts with federal law is prohibited to the states by the Supremacy Clause. Thus, refusing to give effect to the alleged privilege would not offend the principles of federalism or commandeer Massachusetts state resources in contravention of the Tenth Amendment to the U.S. Constitution.

State common law that interferes with federal arrests in state courthouses would violate the Supremacy Clause in three ways. First, any Massachusetts state common law that hinders or blocks ICE from making arrests in courthouses would frustrate congressional purposes, and be obstacle-preempted under the Supremacy Clause. Second, any attempt by state court personnel to prevent ICE, whether by legal process or force, from entering courthouses, or from arresting aliens inside, would present the specter of direct conflict between state and federal officers—a specter that is foreclosed by the Supremacy Clause. Third, state common law that prevents courthouse arrests by ICE often would compel court personnel to harbor illegal aliens, in violation of 8 U.S.C. § 1324, making it impossible for those personnel to obey both federal and state regulations.

Accordingly, the District Court wrongfully enjoined ICE from making civil arrests in Massachusetts. This Court, therefore, should reverse the decision of the

District Court, vacate the preliminary injunction entered in favor of Plaintiffs-Appellees, and remand this action to the District Court.

ARGUMENT

I. THE BASIS OF THE PRELIMINARY INJUNCTION

The District Court issued a preliminary injunction on Count I of the Complaint, which alleged that, in light of a state and federal common law privilege against courthouse arrests, ICE's Directive No. 11072.1 (the "Directive") violates the Administrative Procedure Act, 5 U.S.C. § 706(2), and the Immigration and Nationality Act, 8 U.S.C. §§ 1226(a), 1357(a). *Ryan et al. v. U.S. Immigration and Customs Enforcement et al.*, 382 F. Supp. 3d 142, 161 (D. Mass. June 20, 2019), Defendants-Appellants' Addendum, A029. The District Court enjoined the Defendants-Appellants from implementing ICE Directive 11072.1 in the entirety of Massachusetts and "from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse." *Id.* The preliminary injunction, however, does not apply to the "civil arrests of individuals who are brought to the courthouse in state or federal custody, and does not enjoin criminal arrests." A003.

The District Court's decision was predicated on the existence and application of a common law privilege against civil arrests of court attendees. A020-A021. Relying on that alleged privilege, the District Court stated that:

> the court finds that Plaintiffs have a strong likelihood of success on the merits of their claim that Courthouse Civil Arrest Directive exceeds the authority granted to ICE by the Congress in the civil arrest provisions of the INA and should be invalidated pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

A025.

In issuing the injunction, the District Court did not properly consider or apply the Supremacy Clause, which bars the claims that Plaintiffs-Appellees asserted below. The injunction unlawfully gives effect to an alleged state common law privilege that nullifies federal law.

II. FEDERAL LAW PREEMPTS THE DISTRICT COURT'S EXTENSION OF THE STATE COMMON LAW PRIVILEGE

According to the Supremacy Clause, 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 the Supremacy 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)).

Well-established law holds that 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).

As the Supreme Court has stated "[i]f 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). Courts decide what constitutes an unconstitutional impediment to federal law "by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

The District Court premised its preliminary injunction on an alleged federal common law privilege and an alleged Massachusetts state common law privilege. There is no federal common law, however, and as Defendants-Appellants have shown, no federal "common law" privilege exists that would thwart federal immigration law or ICE's civil arrests.

If the Massachusetts state common law privilege were applied as far as the District Court's ruling, it would be impossible for federal and state law to co-exist

without a conflict. As a result, Massachusetts state law would be preempted under the Supremacy Clause.

A. The State Common Law Privilege Frustrates Congressional Intent

Underlying the doctrine of obstacle preemption is the necessity of cooperation between state and federal sovereignties so the federal system can 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) (holding 8 U.S.C. § 1373 constitutional).

"[C]onsultation between federal and state officials is an important feature of the immigration system." *Arizona*, 567 U.S. at 411. For example, in passing the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which includes 8 U.S.C. § 1373, Congress intended unimpeded communication among federal, state, and local governments in sharing immigration status information, as well as unobstructed cooperation in ascertaining the whereabouts of illegal aliens.

P.L. 104-208, Div. C (1996), 8 U.S.C. § 1373. The Senate Judiciary Committee Report accompanying IIRIRA makes this general intent clear:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration- related information by State and Local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, at 19-20 (1996) (emphasis added), *quoted in City of New York*, 179 F.3d at 32-33. Thus, in drafting § 1373, Congress intended a cooperative effort among local, state, and federal law enforcement to enforce immigration law.

Other federal immigration law further underscores Congressional intent. Shortly before enacting IIRIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996) ("PRWORA"). Entitled "Communication between State and local government agencies and Immigration and Naturalization Service," PRWORA Section 434 is nearly identical to § 1373. 8 U.S.C. § 1644 (Forbidding any prohibition or restriction on the ability of state or local governments to send to or receive from the federal government information about the immigration status, lawful or unlawful, of an alien in the United States.) Going further than the Senate Judiciary Committee Report accompanying IIRIRA, in the Conference Report accompanying PRWORA, Congress expressed that its intent in passing Section 434 was to bar *any* restriction on local police in their communications with ICE.

> The scope includes the *whereabouts* of illegal aliens, which obviously includes notice of their release from detention. The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien or *the presence, whereabouts, or activities of illegal aliens*. It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS.
>
> The conferees intend to give State and local officials the authority to communicate with the INS regarding *the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.* The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that *illegal aliens do not have the right to remain in the United States undetected and unapprehended*.

H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *quoted in City of New York*, 179 F.3d at 32 (emphases added).

Another federal statute also has the purpose of fostering cooperation in immigration enforcement. In 8 U.S.C. § 1357, Congress made clear that no agreement is needed for state and local officers or employees "to communicate with [federal immigration authorities] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(A). Likewise, Congress has refused to require any formal agreement for state and local officers or employees to "cooperate with [federal immigration authorities] in the identification, apprehension, detention,

or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B).

Individually, and taken together, these statutes underscore that preventing ICE from making civil arrests in courthouses (or while individuals travel to and from courts) would frustrate Congress's compelling interest in fostering state-federal cooperation in immigration law enforcement.

Furthermore, quite apart from these statutes, and quite apart from the congressional purpose of cooperation itself, another purpose of Congress in the INA is that illegal aliens and certain criminal aliens be apprehended by ICE and placed into removal proceedings. By blocking federal officers from achieving this purpose, any purported Massachusetts state common law privilege would stand as an obstacle to it, and be barred by the Supremacy Clause.

Because the alleged privilege as applied here is preempted, the power to make it is prohibited to the states by the Constitution. *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."). That power is thus not reserved to the states according to the Tenth Amendment: "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 (emphasis added).

B. A State Common Law Privilege Prohibiting ICE From Making Civil Arrests Would Lead To Conflict Between State And Federal Officers

Extended as far as the District Court extended it, the alleged state privilege would pit federal and state law enforcement officers against each other. For example, if Massachusetts relied on its state common law to prevent ICE from making arrests in state courthouses, and if court officers tried to enforce that policy by forcibly preventing ICE officers from entering Massachusetts courthouses, or forcibly preventing ICE officers from taking custody of aliens once inside, armed confrontations between state and federal officers, or attempts by each to place the other under arrest, would be the inevitable result. Needless to say, such a scenario would violate the Supremacy Clause, as the Supreme Court decided well over a century ago in a case in which California arrested a federal marshal for killing a man while protecting a U.S. Supreme Court Justice:

> "If, when thus acting, and within the scope of their authority, [federal] officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. *The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in*

> *obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government.* And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, *and the exercise of acknowledged federal power arrested*. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; *obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.*"

In re Neagle, 135 U.S. 1, 61-62 (1890) (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)) (emphases added). *See generally* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2236-37 (2003) (discussing *Neagle*).

It follows that, under the Supremacy Clause, a State or state officers may never use force or legal process to block federal officers from performing their federal law enforcement duties by assuming custody of removable aliens. Accordingly, the Supremacy Clause prohibits the common law of Massachusetts from intervening to prevent ICE from arresting aliens while they attend court or are traveling to and from courts.

C. Extending The Privilege To Prohibit Civil Arrests Would Compel Law Enforcement To Commit Harboring

The end effect of applying Massachusetts state common law would result in the illegal harboring of aliens. The anti-harboring provisions of the Immigration and Nationality Act ("INA") 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 . . . .

INA § 274(a), 8 U.S.C. § 1324(a). 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 not only to state court officers and personnel, but also to courts, which, under the INA's definition, are organizations and thus persons. By preventing ICE agents from entering courthouses, or stopping them from arresting aliens once inside, the preliminary injunction would compel court officers to "conceal[], harbor[], or shield[] from detection" aliens in "any place, including any building" (or to attempt to do so) in violation of the anti-harboring statute. 8 U.S.C. § 1324(a)(1)(a)(iii). For example, if ICE agents arrived at or entered a courthouse to assume custody of an illegal alien, and court officers either refused them entry or refused to allow them to assume custody, the court officers would be preventing the alien from being taken out of the courthouse, and thus "harbor[ing]" the alien "in . . . a[] building." Accordingly, barring ICE from making arrests in courthouses based on Massachusetts state common law would coerce court officers to violate the federal anti-harboring statute, and thus violate the Supremacy Clause by making compliance with both federal law and alleged Massachusetts common law impossible.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order issued by the District Court, vacate the preliminary injunction, and remand the action.

Dated: January 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the foregoing amicus 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 3,251 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 2016 in Times New Roman 14-point font.

Dated: January 31, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and such service will be accomplished by the CM/ECF system.

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