The Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 17-cv-00497RAJ

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS

NOTE ON MOTION CALENDAR:
June 30, 2017

I. INTRODUCTION

The City of Seattle ("the City") claims that Executive Order No. 13768 financially coerces the City into changing its policies in violation of the Spending Clause. Complaint ¶¶ 8, 199-21. These policies, however, are in violation of both federal statutory law and the U.S. Constitution. Therefore, the City has no right to pursue them, and its claims should be dismissed.

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The policy the City fears it will be coerced into abandoning due to financial pressure from the federal government is set forth in Seattle Municipal Code § 4.18.015(A), which forbids City officers and employees to "inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person." This provision violates, and is preempted by, a constitutional federal statute, 8 U.S.C. § 1373. Even apart from § 1373, it is unconstitutional because it interferes with a wider federal program and works to thwart congressional objectives. Because the City's claim is premised on an unlawful and unconstitutional policy, it should be dismissed.

II. ARGUMENT

A. The City's Policy Conflicts With 8 U.S.C. § 1373, And Is Otherwise Preempted By Federal Law

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. National Foreign Trade Council,* 530 U.S. 363, 372 (2000)); *see Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.").

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 (3rd 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). Courts must utilize their judgment to determine what constitutes an unconstitutional impediment to federal law, and that judgment is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

8 U.S.C. § 1373 reads, in relevant part, as follows:

> **Communication between government agencies and the Immigration and Naturalization Service**
> (a) In general. 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.
> (b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
> (2) Maintaining such information.
> (3) Exchanging such information with any other Federal, State, or local government entity.

The City's policy of non-inquiry into immigration status is codified as follows:

> **Inquiries into immigration status.**
> A. Notwithstanding Seattle Municipal Code Section 4.18.010, unless otherwise required by law or by court order, no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.
> B. Seattle Police officers are exempt from the limitations imposed by subsection

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> A, above, with respect to a person whom the officer has reasonable suspicion to believe: (1) has previously been deported from the United States; (2) is again present in the United States; and (3) is committing or has committed a felony criminal-law violation.

Seattle Municipal Code § 4.18.015.

This provision violates § 1373. Officials clearly are "restrict[ed]" from both "sending" and "receiving" immigration status information under § 1373(a) because § 4.18.015 bars them from inquiring about such information. The bar on officials' asking individuals about their immigration status drastically restricts the amount of such information these officials can send to the federal government, and the bar on these officials' asking the federal government for immigration status information drastically restricts the amount of such information they can receive from the federal government. In addition, § 1373(b) provides that "no . . . agency may prohibit, or in any way restrict, a . . . local government entity from . . . requesting . . . [information about the immigration status of any person] from[] the Immigration and Naturalization Service." Manifestly, a city cannot act apart from its officials or employees. Thus, by restricting city officials and employees from requesting such information from the Immigration and Naturalization Service (now the Department of Homeland Security, Immigration and Customs Enforcement Division ("ICE")), § 4.18.015 restricts the City itself (a local government entity) from requesting such information.

Apart from these obvious conflicts, § 4.18.015 is preempted by § 1373 because it works to thwart congressional objectives. As the Supreme Court has recognized, "consultation between federal and state officials is an important feature of the immigration system." *Arizona,* 567 U.S. at 411. In crafting § 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. The Senate Judiciary Committee

Report accompanying the bill for the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), of which § 1373 is a part, makes this 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); *see also City of New York v. United States,* 179 F.3d 29, 32-33 (2nd Cir.1999). Thus, in drafting § 1373, Congress intended a cooperative effort among local, state, and federal law enforcement to enforce immigration law, and also intended the "acquisition" of immigration-related information to be a key component of that effort.

A review of additional federal immigration provisions further underscores this intent. Shortly before enacting IIRAIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Entitled "Communication between State and local government agencies and Immigration and Naturalization Service," Section 434 of this law, now 8 U.S.C. § 1644, is nearly identical to § 1373. This provision of PRWORA forbids any prohibitions or restrictions 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. As in the Senate Judiciary Committee Report accompanying IIRAIRA, in the Conference Report accompanying PRWORA, Congress made clear its intent in passing Section 434: to authorize state and local officials to communicate with federal immigration officials regarding the presence of illegal aliens, and to underscore that illegal aliens had no right to remain in the country without detection. In pertinent part, the Conference Report reads:

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> *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.* . . . 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. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771 (emphasis added); *see also City of New York,* 179 F.3d at 32.

Furthermore, also as a part of IIRAIRA, Congress enacted 8 U.S.C. § 1357(g). In this provision, 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." § 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." § 1357(g)(10)(B). This statute, too, evinces Congress's intent that there be unimpeded communication about immigration status between the federal government and state and local governments.

Section 4.18.015 also thwarts the "natural effect" (*Savage*, 225 U.S. at 533) of § 1373, which is the communication of immigration-related information for enforcement purposes, and disrupts the balance established by Congress between federal and state and local governments. In *Lozano v. City of Hazleton,* 724 F.3d 297 (3rd Cir. 2013), the City of Hazleton, Pennsylvania, enacted a set of ordinances to assist with immigration enforcement. One of the two ordinances, the Illegal Immigration Relief Act Ordinance ("IIRAO"), prohibited the knowing employment of unauthorized aliens and provided for sanctions against employers that violated this prohibition. *Id*. at 301. Among the IIRAO's provisions was a "safe harbor" that would shield employers from

these sanctions as long as the employer used the federal E-Verify program to verify the work authorization status of its employees. *Id*. The Court in *Lozano* held that the IIRAO was conflict preempted because it contained "substantially fewer procedural protections than [federal law]." *Id*. at 312. The Court found this undermined "the delicate balance Congress erected for enforcing the prohibition on hiring unauthorized aliens" and "the express congressional objective of minimizing undue burdens on, and harassment of, employers." *Id*. at 312-13.

Similarly, by prohibiting City employees and officers from inquiring or engaging in activities to ascertain the immigration status of individuals, § 4.18.015 undermines the delicate balance Congress erected for communication between federal, state, and local governments about immigration status, and thwarts the express congressional objective of cooperation in acquiring and sharing immigration-related information. Under *Savage* and *Lozano,* therefore, § 4.18.015 is preempted.

B. 8 U.S.C. § 1373 Does Not Violate the Tenth Amendment

Section 1373 is constitutional under the Tenth Amendment. Indeed, contrary to the City's claim, it comports with the Tenth Amendment even if it necessitates action by the City or City officials. *See* Complaint ¶¶ 108-18. The seminal cases protecting the states from federal commandeering, under the Tenth Amendment, are *New York v. United States,* 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). In *New York,* the Court took up a statute that required states to enact legislation to take possession and dispose of nuclear waste produced in their state. In *Printz,* the Court considered the Brady Act, which required state employees to do background checks of firearm purchasers. The Court ruled that both of these two kinds of federal imperatives constituted commandeering in violation of the Tenth Amendment. *New York,* 505 U.S. at 158; *Printz,* 521 U.S. at 935.

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Relevantly here, however, the Supreme Court has carved out a safe harbor for federal law controlling state activity when such law regulates information flow in or affecting a domain of federal authority. In this realm, the Court has ruled favorably for federal law both mandating state actions and prohibiting state actions. *See also City of New York,* 179 F.3d at 33-35 (distinguishing *New York* and *Printz* and rejecting a Tenth Amendment challenge to § 1373).

In *Reno v. Condon*, 528 U.S. 141 (2000), the Court considered a suit by the State of South Carolina enjoining enforcement of the Driver's Privacy Protection Act of 1994 ("the DPPA"), 18 U.S.C. §§ 2721-25. The DPPA forbade state department of motor vehicles personnel from disclosing the personal information of drivers for most purposes, though in some circumstances it mandated such disclosure. 18 U.S.C. § 2721. In a unanimous decision, the Court held that the DPPA was consistent with the federalism required by the Tenth Amendment, despite the heavy resource expenditure states needed to make to enforce the Act, and even states' need to pass laws to comply with it. *Condon,* 528 U.S. at 150-151.

The Court distinguished the federal legislation in *Condon* from that in *Printz* and *New York.* The statute in *Condon* regulated state activities, and the legislation required and man hours employed were a byproduct. *Condon,* 528 U.S. at 150-151. By contrast, the statute in *Printz* directly required state employers to fulfill a federal law enforcement function, and the statute in *New York* directly commanded state legislative initiatives and expenditures to dispose of property (waste). As the Court held:

> [T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 151.

In affirming the validity of the DPPA, the Court noted that the statute *requires* the disclosure of certain information:

> The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions. For example, the DPPA requires disclosure of personal information for use in connection with matters of motor vehicle or driver safety and theft, to carry out the purposes of [federal statutes].

Id. at 145 (internal quotation marks and ellipses omitted). The Court explained: "'[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'" *Id.* at 150-51 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). *Cf. Arizona v. United States*, 567 U.S. 387, 412-13 (holding that an Arizona law making verification of immigration status by local officials mandatory was not preempted by federal immigration law because 8 U.S.C. § 1644 (a provision with wording almost identical to that of § 1373), the constitutionality of which the Court did not question, encouraged the sharing of such information).

Indeed, finding § 1373 unconstitutional under the Tenth Amendment would mark something of a revolution in Tenth Amendment jurisprudence. For example, the Crime Control Act of 1990 compels states to report missing children and prohibits them from allowing their state law enforcement agencies to delay or delete missing child reports. The Crime Control Act uses language analogous to that of §1373:

> **State requirements**
> Each State reporting under the provisions of this title shall –
> (1) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the observance of any waiting period before accepting a missing child or unidentified person report;
> (2) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the removal of a missing person entry from its State law enforcement system or the National Crime Information Center computer database based solely on the age of the person;

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> (3) provide that each such report and all necessary and available information, which, with respect to each missing child report, shall include – (A) the name, date of birth, sex, race, height, weight, and eye and hair color of the child;(B) a recent photograph of the child, if available;(C) the date and location of the last known contact with the child; and(D) the category under which the child is reported missing; is entered within 2 hours of receipt into the State law enforcement system and the National Crime Information Center computer networks and made available to the Missing Children Information Clearinghouse within the State or other agency designated within the State to receive such reports . . .

42 U.S.C. § 5780.

If §1373 violates the Tenth Amendment, 42 U.S.C. § 5780 does, too, as does any other federal law requiring states to adhere to federal information-sharing requirements.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Dated: June 15, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Richard M. Stephens