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

BRIEF *AMICI CURIAE* OF CALIFORNIA MUNICIPALITIES AND ELECTED OFFICIALS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether provisions of California law that, with certain limited exceptions, prohibit state law-enforcement officials from providing federal immigration authorities with release dates and other information about individuals subject to federal immigration enforcement, and restrict the transfer of aliens in state custody to federal immigration custody, are preempted by federal law or barred by intergovernmental immunity.

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INTEREST OF *AMICI CURIAE*

Amici curiae are the California municipalities and elected officials identified in the addendum (collectively, "*Amici*").[1] *Amici* are — or represent — political subdivisions of both the United States and California. Under the California Constitution, officials must "solemnly swear … [to] support and defend the Constitution of the United States and the Constitution of the State of California," CAL. CONST. art. XX, §3; *cf.* CAL. GOV'T CODE §§1360, 36507, which is impossible when the two sovereigns impose conflicting commands. To ensure the liberties that

[1] *Amici* file this brief with all parties' written consent, with more than 10 days' written notice. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amici* and their counsel — contributed monetarily to preparing or submitting the brief.

both the federal and state constitutions guarantee, *Amici* support the federal sovereign here and ask this Court to referee the two sovereigns' conflicting commands.

STATEMENT OF THE CASE

The United States (the "Government") sued the State of California and state officials (collectively, "California") to enjoin three so-called sanctuary laws that purport to restrict cooperation with federal immigration-enforcement efforts and to impede those efforts. The three laws are: the Immigrant Worker Protection Act ("AB450"), 2017 Cal. Stat. c. 492; sections 6 and 12 of Assembly Bill 103 ("AB103"), 2017 Cal. Stat. c. 17, §§6, 12; and section 3 of Senate Bill 54 ("SB54"). 2017 Cal. Stat. c. 495, §3 ("California Values Act"). Although the petition challenges only SB54, all three sanctuary laws provide context.

The popular term "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 our legal tradition. For a country that derives its common law from English common law, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654 (1834), "sanctuary" is improper for two reasons.

First, England ended sanctuary for criminal and civil process in 1623 and 1723, respectively, 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). As such, this Nation has no common-law sanctuary tradition.

Second, the term does not correctly describe what California has done. Even before revoking sanctuary,

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 federal Constitution.

Constitutional Background

Federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. There are 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. United States*, 567 U.S. 387, 406 (2012) (interior quotation marks omitted).

Statutory Background

AB450 prohibits employers' voluntary cooperation with federal immigration officials. Among other things, AB450 added §§7285.1 to .2 to the Government Code to prohibit employers' "voluntary consent to an immigration enforcement agent … enter[ing] any nonpublic areas of a place of labor" without a warrant, CAL. GOV'T CODE §7285.1(a), and voluntary access to employee records without a warrant, subpoena, or

notice of inspection. CAL. GOV'T CODE §7285.2(a). AB450 also added §90.2 to the Labor Code to require posting notice of any immigration-related inspections of I-9 forms or other employment records within 72 hours of receiving an inspection notice. CAL. LABOR CODE §90.2(a)(1). AB450's legislative history confirms that the bill was intended to reduce the risk of deportation. Assembly Floor Analysis, Assembly Bill 450, at 3 (Cal. Sept. 13, 2017).

AB103 added Chapter 17.8 and §12532 to the Government Code. Under §12532, state governmental officials must review "detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California," CAL. GOV'T CODE §12532(a), and report on the conditions of confinement, the standard of care and due process provided to detainees, and the circumstances of the detainees' apprehension and transfer to the facility. *Id.* §12532(b)(1). Under Chapter 17.8, municipal government or law-enforcement agencies with no contract to house adult or minor noncitizen detainees for civil-immigration purposes may not enter such contracts, and municipal government or law-enforcement agencies with such contracts may not renew or modify those contracts to expand the number of contract beds used in locked detention facilities. CAL. GOV'T CODE §§7310-7311. AB103's legislative history acknowledges its dual purposes to provide state "oversight of locked facilities throughout the state that detain immigrants who may be in the country without the proper documentation" and to "[establish] a moratorium on counties entering into new contracts or expanding existing contracts to detain adult and child immigrants in locked county

facilities." Senate Floor Analysis, Assembly Bill 103, at 1 (Cal. June 14, 2017).

SB54 purports to restrict state and local law enforcement from voluntarily cooperating with federal immigration efforts, such as providing release dates or transferring detained individuals to immigration officials, detaining individuals based on federal hold requests, providing individuals' home or work addresses to immigration officials, and making or intentionally participating in arrests based on civil immigration warrants. CAL. GOV'T CODE §7284.6(a)(1)(A)-(E). SB54's legislative history acknowledges that the federal government relies on state and local police as "force multipliers" in enforcing federal immigration law and that "the California Values Act … will prevent state and local law enforcement agencies from acting as agents of Immigration and Customs Enforcement." Assembly Floor Analysis, Senate Bill 54, at 8 (Cal. Sept. 15, 2017).

The sanctuary laws' lawfulness hinges primarily on two provisions of the Immigration and Naturaization 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 Organizations Act ("RICO") to add §1324 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996); 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 inter-governmental 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.

Litigation Background

The district court denied the Government's motion for a preliminary injunction with respect to SB54, and the Ninth Circuit affirmed. In doing so, the Ninth Circuit acknowledged that SB54 "makes the jobs of federal immigration authorities more difficult," Pet. App. 31a, and more dangerous, id. 33a, but held that these impediments did not qualify as conflict preemption. Moreover, to the extent that SB54's impacts conflicted with federal law, the Ninth Circuit held that federal law must give way because the INA would violate the Tenth Amendment's anti-commandeering doctrine because states permissibly may "refrain from assisting with federal efforts." *Id.* at 39a. With respect to §1373(a), the Ninth Circuit limited that provision to address only an individual's classification under federal immigration law, not to information such as release dates. *Id.* at 41a.

SUMMARY OF ARGUMENT

Even without the contested §1373, California's sanctuary laws would be unlawful because they violate §1324's prohibition against shielding illegal aliens from detection (Section I.A). In order to prevail, then, California must show that §1324 and §1373 are unconstitutional. That California cannot do. Notwithstanding this Court's recent decision in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018), the INA continues to preempt California's inconsistent sanctuary policies, and nothing in §1373 commandeers California or any law-enforcement officers to do anything.

On preemption, the district court repeatedly relied on the presumption against preemption, which does not even apply to express-preemption statutes like §1373's "notwithstanding clause" (Sections II.A-II.B) or field-preemptive statutes like §1324 (Sections II.A, II.C). Regarding conflict preemption, laws that thwart federal enforcement by design and that constitute criminal shielding plainly are conflict preempted (Section II.D). *Murphy* demonstrates that even laws that appear to regulate 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.E).

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

ARGUMENT

I. EVEN WITHOUT §1373, SB54 WOULD BE UNLAWFUL.

Before turning to §1373, *Amici* first demonstrate that California's sanctuary laws generally and SB54 specifically violate §1324. Although the Government did not press this *argument* below, the argument concerns the contested *issue* of whether federal law preempts California's sanctuary laws. Accordingly, the Government can raise these arguments here, and could raise them on the merits, if this Court grants the petition. *Yee v. Escondido*, 503 U.S. 519, 534-35 (1992). Indeed, as shown in Section III, *infra*, this argument also rebuts California's and the Ninth Circuit's arguments under the Tenth Amendment.

A. SB54 intentionally shields illegal aliens from detection in violation of §1324.

The avowed purpose of SB54 is to make it more difficult for the federal government to deport illegal aliens, which constitutes criminal concealing, harboring, or shielding from detection under §1324(a)(1)(A).[2] As the Ninth Circuit had previously made clear, "[t]he purpose of [§1324] is to keep unauthorized aliens from entering *or remaining* in the country." *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original).

As the Ninth Circuit explained in *Acosta de Evans*, 531 F.2d at 430 & n.3, Congress added the "shield from detection" prong as "an independent

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[2] As indicated, the crime includes not only concealing, harboring, and shielding from detection, but also attempts, conspiracy, and aiding and abetting. 8 U.S.C. §1324(a)(1)(A)(iii), (v).

addition" in 1952, whereas "harbor" simply means "afford shelter to" (*i.e.*, without the evasion inherent in §1324's other two prongs). In *United States v. Aguilar*, 883 F.2d 662, 689 (9th Cir. 1989) (interior quotations omitted), *abrogated in part on other grounds*, *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002), the Ninth Circuit upheld a jury instruction classifying concealing or shielding as "conduct tending to directly or substantially facilitate an alien's remaining in the United States unlawfully with the intent to prevent detection by the Immigration and Naturalization Service." Because the Legislature was acting to shield over 2 million illegal aliens at once, the Legislature had the required knowledge of the illegal aliens' immigration status. *United States v. Bunker*, 532 F.2d 1262, 1264 (9th Cir. 1976). The laws' stated "*purpose of* avoiding the aliens' detection by immigration authorities … is synonymous with having acted with necessary *intent*." *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (interior quotations and alterations omitted, emphasis in original). In sum, SB54 criminally shields illegal aliens from detection in violation of §1324.

Even if one supported California's charitable goals toward illegal aliens, the sanctuary laws 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); *Aguilar*, 883 F.2d at 696 ("government's interest in controlling immigration outweighs [the] purported

religious interest" of sanctuary workers); *United States v. Merkt*, 794 F.2d 950, 955 (5th Cir. 1986) ("[e]nforcement of [§1324] cannot … brook exceptions for those who claim to obey a higher authority"). 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 — the Constitution — counsels California to render to the federal Government the things — such as immigration policy — that are the federal Government's.[3]

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). 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*, 572 U.S. 65, 81 n.10 (2014) (internal quotations omitted). By purporting to compel otherwise-willing law-enforcement officers to desist from aiding federal enforcement efforts, SB54 seeks to make illegal aliens' evasion of federal authorities succeed. Aiding-and-abetting liability requires neither "that the defendant was aware of every detail of the impending crime … nor that [the defendant] be present at, or personally participate in, committing the substantive crime." *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987). While "[m]ere participation … is not enough," the Legislature affirmatively intended SB54 to thwart

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[3] By adding §1324 to RICO's list of predicate offenses, 18 U.S.C. §1961(1)(F), Congress signaled that it does not consider California's actions here benign.

federal immigration efforts by shielding illegal aliens from the federal government. *United States v. Ramos-Rascon*, 8 F.3d 704, 711 (9th Cir. 1993) (aiding-and-abetting liability requires "that the defendant intentionally assisted in the venture's illegal purpose") (internal quotations omitted). The Legislature here fully acknowledged its purpose to thwart immigration enforcement and to reduce deportations. *See* Assembly Floor Analysis, SB54, at 8 (Cal. Sept. 15, 2017); Assembly Floor Analysis, AB450, at 3 (Cal. Sept. 13, 2017). That is more than enough for aiding-and-abetting liability.

B. This Court should grant review to protect California municipalities from conflicting state and federal mandates.

California's sanctuary laws put municipalities in an untenable position between conflicting state and federal law. *Amici* respectfully submit that this Court should grant the petition to resolve the extent to which state governments can command their citizens, officials, and municipalities to violate or even merely frustrate federal law.

II. FEDERAL IMMIGRATION LAW PREEMPTS THE SANCTUARY LAWS.

Misreading both §1373 and *Murphy*, the lower courts found that the INA either exceeds Congress's authority or allows California's sanctuary laws. In fact, the INA preempts California's sanctuary laws under express, conflict, and even arguably field preemption.

A. No presumption against preemption protects the sanctuary laws.

The district court relied on either a presumption against preemption or decisions that rely on that

presumption, *see* Pet. App. 55a-56a, which was error. 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 or field-preemptive statutes. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016) (express); *Aguayo v. U.S. Bank*, 653 F.3d 912, 921 (9th Cir. 2011) (field). No presumption protects SB54 from express or field preemption.

Even under conflict preemption, a presumption would not apply here. 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); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). Moreover, 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 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 for state spending). *Crosby* makes this point: Massachusetts obviously has discretion on *how to spend state funds*, but the Court analyzed the field of *Burma trade sanctions*, not state spending. *Id.* In the same way here, California and its municipalities have discretion over how to deploy their law-enforcement officers, but the field here is immigration policy.

B. §1373 expressly preempts the sanctuary laws.

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. *PG&E Co. v. Cal. ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 946 (9th Cir. 2003); *accord In re Fed.-Mogul Glob.*, 684 F.3d 355, 369 (3d Cir. 2012). Thus, §1373 applies by its terms to preempt any state or local law that interferes with communications under §1373. In seeking to restrict state and local law-enforcement officers from voluntarily contacting federal immigration authorities, SB54 directly conflicts with — and is superseded by — §1373. *See* 8 U.S.C. §1373(a). Given the express congressional override of inconsistent state laws, this Court need not inquire into the degree or extent of SB54's obstruction of federal law. The only question — answered in Section III, *infra* — is whether Congress had the authority to enact §1373 in the first place. If §1373 is valid, SB54 falls under direct application of the Supremacy Clause.

With no presumption against preemption for express-preemption statutes, *Franklin Cal. Tax-Free Tr.*, 136 S.Ct. at 1946, this Court must reject the facile alternate suggestion that the sanctuary laws comply with §1373 because the statute reaches only whether an individual is a citizen or alien, not information like the individual's release date. Pet. App. 41a. To the contrary, §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). Courts cannot read words out of statutes.

Second, while §1373(a)'s reach for an illegal alien's immigration status might not be unlimited, that reach certainly includes release dates because the INA prohibits removal proceedings until illegal aliens have served their state-law time. 8 U.S.C. §1231(a)(4)(A) ("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, California's prohibition against disclosing release dates violates §1373(a).

C. §1373 and §1324 field preempt the sanctuary laws.

On field preemption, the Ninth Circuit has gone further than *Arizona* for the field of concealing, harboring, and shielding under §1324: "in developing the scheme for prohibiting and penalizing the harboring of aliens, Congress specifically considered the appropriate level of involvement for the states," and thus "[§1324(c)] allows state and local law enforcement officials to make arrests for violations." *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, the Ninth Circuit previously has acknowledged that §1324 preempts the entire field of illegal-alien concealment, harboring, and shielding from detection. *Id.* at 1023-26. While *Valle del Sol* may

have erroneously extended field preemption, the same Circuit precedent that protects illegal immigration with field preemption should also burden illegal immigration with field preemption. *See Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941) (circuits must avoid intra-circuit splits). Where, as here, a circuit fails to apply circuit authority evenly, this Court should exercise its supervisory authority to ensure uniformity. *Id.*

D. §1373 and §1324 conflict preempt the sanctuary laws.

The 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 *Arizona* — which cited 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.

With respect to statutory conflict preemption, SB54 constitutes criminal concealing, harboring, and shielding of illegal aliens, *see* Section I.A, *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. Accordingly, if this Court reaches conflict preemption, it must find SB54 conflict preempted.

E. *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. State and local officers are neither "private actors" nor States when acting in their 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, either they qualify as "private actors" when contacting the federal government or they fall within a third category of actors that *Murphy* did not address.

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. Specifically, *Murphy* reframes the INA's alien-registration requirements in *Arizona*, 567 U.S. at 401, to confer *individual* rights: "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." *Murphy*, 138 S.Ct. at 1481. A similarly reframed

§1373 permissibly protects law-enforcement officers from unwillingly joining California's unlawful scheme to shield illegal aliens. Thus, nothing on preemption in *Murphy* saves California's laws from preemption.

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

As indicated in Sections I-II, *supra*, California's sanctuary laws conflict with and are preempted by federal immigration policy, including §1373. To preempt state law, however, §1373 must fit within Congress's power. Constitutional law recognizes 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.

Under the Tenth Amendment, impermissible commandeering can occur when Congress directs states to perform certain functions, commands state officers to administer 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 does not

commandeer anyone by allowing for a joint state and local role in immigration enforcement. Moreover, the Ninth Circuit's holding here conflicts directly with the Second Circuit's holding in *City of New York v. United States*, 179 F.3d 29, 35 (2nd Cir. 1999). *See* Pet. App. 100a ("*City of New York* holding is not binding on this Court") (district court decision). *Amici* respectfully submit that this Court should resolve the split in the circuits' resolution of this important issue of federalism and immigration authority.

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). 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 state and local law-enforcement 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 authorities thus outside a potential "commandeering" claim, all that remains as potentially impermissible federal commandeering is §1373's allowance for California officers — *i.e.*, actual *state* employees — to work voluntarily with federal immigration authorities, notwithstanding California's laws to the contrary. *See* 8 U.S.C. §1373(a) (applying "[n]*otwithstanding any other provision of Federal, State, or local law*"). While *Amici* respectfully submit that that question properly lies under the Necessary and Proper Clause, *see* Section III.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*, this 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. This Court rejected the ability of Congress to direct the workings of state legislatures:

> [T]he 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 California's Legislature to enact anything.

Coming closer to this case — but not close enough to aid California — *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 this Court found equally impermissible. *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), the INA does not *compel* California

to do anything. Instead, the INA merely prohibits California from preventing state and local law-enforcement officers from voluntarily cooperating with federal immigration authorities. To the extent that §1373's 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 III.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*, this 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 California's Legislature.

Rather, *notwithstanding* California's enactments, §1373 preempts anything inconsistent with §1373. *See* 8 U.S.C. §1373(a). California remains free to legislate as it wishes, but California's laws are unenforceable if they command violation of — or even merely *conflict* with — federal law. In the gambling context from *Murphy*, "[t]he nub of the matter [would be] that [the defendants] 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 this Court's emphasizing that Congress has not regulated sports gambling, *Murphy* would have come out differently if PASPA — analogously to the INA here and to illegal gambling in *Johnson* — had criminalized sports gambling and prohibited state and local governments or officers from aiding illegal gambling 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, *Aguilar*, 883 F.2d at 696, and state officials are in no better a place than church groups. In effect, §1373(a) merely provides 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, *compare* Section III.A, *supra with* Section III.C, *infra*, §1373 provides a civil-law variant to the

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 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. California 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 California'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 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 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. 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). California's failure to challenge federal authority to create the crime of concealing, harboring, and shielding from detection illegal aliens is a fatal omission. Even assuming *arguendo* that Congress could not enact §1373 *directly* under its plenary power over immigration, *DeCanas*, 424 U.S. at 354, the Necessary and Proper Clause *extends* that power to

include measures "rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 560 U.S. at 134. If §1373 is both necessary and proper, Congress would have authority to enact §1373 under the Necessary and Proper Clause, even if Congress lacked authority to do so as a direct regulation of immigration.

1. §1373(a) qualifies as "necessary."

As explained, courts defer to Congress under the Necessary and Proper Clause on issues of necessity, efficacy, and the fit between the means chosen and the constitutional end. *Comstock*, 560 U.S. at 135. Neither California nor its officials can complain that Congress enacted §1373 as an alternative to having the federal government *prosecute* California officials under §1324(c). Indeed, California's sanctuary laws prove that §1373 is *necessary*.

2. §1373(a) qualifies as "proper."

Nor is §1373 improper under the 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 avoids "the risk of tyranny and abuse" from California's seeking to evade federalism by nullifying federal immigration law. Second, §1373 does not blur authority, given the exclusivity of federal immigration authority and the voluntariness of any non-federal officer's action under §1373. Third, §1373 does not shift the costs of immigration compliance, given the unlawfulness of shielding aliens from detection and the voluntariness of any officer's actions under §1373. In sum, §1373 is a *proper* exercise of congressional power.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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APPENDIX

The California municipalities and elected officials joining the accompanying *amicus* brief include the following:

- The County of San Diego; the City of Aliso Viejo; the City of Laguna Niguel; the City of Mission Viejo; the City of Ridgecrest; the City of Santa Clarita; the City of San Jacinto; the City of Tehachapi; and the City of Vista; and
- The Hon. Jim Desmond, San Diego County Supervisor and former Mayor of the City of San Marcos; the Hon. Dean Grose, City of Los Alamitos Council Member; the Hon. David Harrington, City of Aliso Viejo Council Member; the Hon. Shelley Hasselbrink, City of Los Alamitos Council Member; and the Hon. Rebecca Jones, Mayor of the City of San Marcos, in their respective individual capacities.