No. 19-532

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In allowing the challenged provisions of California Senate Bill No. 54 (SB 54) to remain in effect, the court of appeals acknowledged that they "frustrate" and "obstruct[]" federal immigration enforcement, Pet. App. 34a, 36a, 39a, and reflect a "cho[ic]e to discriminate against" the United States, *id.* at 40a. California does not dispute that basic thrust of SB 54. The State instead contends, as the Ninth Circuit held, that enjoining SB 54 as preempted would result in impermissible commandeering. That position seriously misunderstands both federal immigration law and the Tenth Amendment. Federal immigration law does not compel California to participate in its enforcement. It merely preempts state regulation of aliens in a way that conflicts with federal regulation of those aliens. And the Tenth Amendment's shield against commandeering does not provide a sword to obstruct federal enforcement or discriminate against the United States, as SB 54 concededly does.

The decision of the court of appeals for the Nation's largest circuit to permit such a law in the Nation's most populous State is highly "consequential," as California itself acknowledges, Br. in Opp. 25, and knowledgeable and experienced amici confirm, see, *e.g.*, National Sheriffs Ass'n Amicus Br. 5, 8; California Municipalities & Elected Officials Amici Br. 12. This Court granted certiorari on a similar issue in a similar posture in *Arizona* v. *United States*, 567 U.S. 387 (2012). The Court's review is at least as warranted here.

A. The Court Of Appeals Erred On Multiple Exceptionally Important Questions Of Federal Law

In affirming the district court's decision not to enjoin the challenged provisions of SB 54, the court of appeals committed serious legal errors on questions of conflict preemption, intergovernmental immunity, express preemption, and commandeering. Each of those errors would independently warrant this Court's review; taken together, the basis for certiorari is compelling.

1. As explained in the petition (at 14-19), the challenged provisions of SB 54, Cal. Gov't Code § 7284.6(a)(1)(C)-(D) and (4) (West 2019), are conflict-preempted because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in structuring the system of federal immigration enforcement, *Arizona*, 567 U.S. at 399 (citation omitted). Congress prescribed an "extensive and complex" framework for the detention and removal of aliens, including aliens in state criminal custody. *Id.* at 395. Of particular relevance here, Congress directed that certain criminal aliens must be taken into immigration custody when "released" from state criminal custody, 8 U.S.C. 1226(c); see *Nielsen* v. *Preap*, 139 S. Ct. 954, 963 (2019), and that certain aliens released

from state criminal custody must be detained and removed from the United States within 90 days of their release, see 8 U.S.C. 1231(a)(1)(A), (2), and (4)(A). The challenged provisions of SB 54 obstruct compliance with those directives by shielding covered aliens from federal custody upon release and denying federal immigration officials critical information about aliens' identities and release dates. As a result, federal immigration officials must "'in effect, stake out a jail and seek to make a public arrest,'" which "'generally require[s] five officers and present[s] risks to the arresting officer and the general public.'" Pet. App. 33a. The court of appeals thus repeatedly recognized that SB 54 results in the "frustration" and "obstruction" of federal law, *id.* at 34a, 36a, 39a—precisely what the Supremacy Clause prohibits, see *Arizona*, 567 U.S. at 399.

Rather than disputing the Ninth Circuit's recognition that SB 54 frustrates and obstructs federal immigration enforcement, California contends that SB 54 lacks such a purpose. The State suggests that the law was designed to "address concerns [about] undue entanglement with immigration enforcement," Br. in Opp. 1, and to "'protect the safety, well-being, and constitutional rights of the people of California,'" *id.* at 12 (citation omitted). That assertion is both irrelevant and unpersuasive. It is irrelevant because "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause," even if "the state legislature in passing its law had some purpose in mind other than one of frustration." *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971). And it is unpersuasive because the mechanism California selected to purportedly avoid "entanglement" and "'protect'" its people, Br. in Opp. 1, 12 (citation omitted), frustrates

and obstructs the enforcement of federal law by shielding aliens in its custody from federal immigration authorities, see Pet. App. 34a, 36a, 39a.

Attempting to minimize the scope of its obstruction, California emphasizes that SB 54 allows state officials "to communicate release dates and to transfer individuals for immigration enforcement purposes in a range of circumstances, including when an individual's criminal history indicates that he poses a risk to public safety," while restricting those steps in "other circumstances." Br. in Opp. 11; see *id.* at 25 (further elaborating on SB 54's detailed restrictions and exceptions). But the State's description of its custom-designed scheme only underscores that California has done what the Supremacy Clause forbids—adopt "its own * * * policy" to govern aliens in state custody facing detention and removal by the federal government, in conflict with the different approach "specified" by Congress. *Arizona*, 567 U.S. at 396, 408; see, *e.g.*, *National Meat Ass'n* v. *Harris*, 565 U.S. 452, 460 (2012) (explaining that a California statute that "substitutes a new regulatory scheme for the one" Congress designed was preempted).

California relies heavily on the premise (Br. in Opp. 13) that federal immigration law does not "compel" state cooperation in immigration enforcement. But that is undisputed; the United States does not seek to compel California to enforce federal law. Pet. 25. Rather, SB 54 conflicts with federal law by interfering with federal immigration authorities' ability to obtain custody so that the federal authorities may enforce federal law. SB thus regulates aliens in a way that obstructs Congress's regulation of those same aliens, by imposing numerous restrictions and requirements that Congress did not impose—*i.e.*, permitting transfers only of aliens

that California deems sufficiently dangerous, and requiring judicial rather than administrative warrants, see Pet. 17-18.

California's observation (Br. in Opp. 1, 2, 5, 7, 10-12, 15) that SB 54 operates through an allocation of the State's resources does not rehabilitate the law's central defect. As the State concedes (*id.* at 20), the state laws found preempted in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), and *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986), similarly operated by allocating state resources in a particular way—a way that conflicted with federal law. See Pet. 27. SB 54 has the same flaw. Indeed, as noted in the petition (at 26), it is unimaginable that this Court would countenance a state law that "simply defines the circumstances in which the State will use its own resources," Br. in Opp. 12, if the effect of that law was to similarly obstruct federal enforcement of, for example, environmental or labor laws regulating private parties. California has no response.

Finally, conflict preemption follows *a fortiori* from this Court's decision in *Arizona*. See Pet. 18-19. SB 54, unlike the state law in *Arizona*, does not even purport to pursue "the same aim as federal law." 567 U.S. at 402. At a minimum, this Court's grant of certiorari in *Arizona* demonstrates that review is at least as warranted here.

2. Certiorari is also warranted because SB 54 violates the United States' intergovernmental immunity. This issue comes to the Court in a particularly clear posture. The parties agree that the intergovernmental-immunity doctrine "prohibits States from * * * 'discriminat[ing] against the Federal Government or those with whom it deals.'" Br. in Opp. 22 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990) (plurality

opinion) (brackets in original); see Pet. 20. And the parties do not dispute that SB 54 discriminates against the federal government by restricting transfers to and information-sharing with federal immigration authorities, and *only* federal immigration authorities. Indeed, the court of appeals acknowledged California's "cho[ic]e to discriminate against federal immigration authorities," Pet. App. 40a, and California does not deny that SB 54 embodies such a choice. The State's only response (Br. in Opp. 22-23) is that the Tenth Amendment permits that discrimination. As explained elsewhere, see pp. 8-11, *infra*; Pet. 24-31, that understanding of the Tenth Amendment is mistaken. But in any event, California's tacit concession that SB 54 discriminates against the federal government confirms the need for this Court's review.

3. California also fails to refute the argument that SB 54's information-sharing restrictions are expressly preempted by 8 U.S.C. 1373(a) because they prohibit state and local officials from sharing with the federal government "information regarding the citizenship or immigration status * * * of any individual." See Pet. 21-23. The State first suggests (Br. in Opp. 15) that SB 54 does not violate Section 1373(a) because SB 54 contains an exception to its restrictions that parallels Section 1373(a). But neither of the courts below accepted that circular argument, see Pet. App. 40a-41a, 84a-85a, which simply raises the question whether 8 U.S.C. 1373(a)'s reference to "information regarding the citizenship or immigration status * * * of any individual," encompasses the release-date and other personal information about an alien that SB 54 expressly forbids state officials from sharing with federal authorities enforcing federal immigration law. California, moreover, never disputes the central premise of the United States' textual argument:

that release dates and other personal information covered by SB 54 are at the very least "information *regarding* citizenship or immigration status," *ibid.* (emphasis added), given that federal immigration law (1) directs detention and/or removal from the United States upon a criminal alien's "release[]" from state custody, 8 U.S.C. 1226(c); see 8 U.S.C. 1231(a)(1)(A), (B)(iii), (4)(A); and (2) makes various other issues of citizenship or immigration status dependent on information covered by SB 54, such as an alien's work address or authorization, see Pet. 23. Indeed, California disregards that its own Attorney General interpreted Section 1373(a) to cover information such as release dates as recently as 2014. See Pet. 5.

California cites (Br. in Opp. 16) other immigration statutes that it suggests sweep more broadly, but those say nothing about the scope of Section 1373(a). The State also suggests (*id.* at 16-17) that the Court should disregard precedent recognizing that "regarding" is a word of breadth, see *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1759-1760 (2018), as well as the canon teaching that Congress's selective decision to include "regarding" in Section 1373(a) but not in Section 1373(c) should be given meaning, see *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The State provides no sound basis for ignoring those principles. And its theory (Br. in Opp. 16) that Section 1373(a), unlike Section 1373(c), includes "regarding" because non-federal officials lack access to official immigration or citizenship records only underscores that Congress wrote Section 1373(a) to encompass the kind of information at issue here, which non-federal officials *do* have. Indeed, California effectively concedes (*id.* at 17 n.6) that the legislative history supports the government's reading, see Pet. 22.

4. Ultimately, California (like the Ninth Circuit) rests its argument almost entirely on the view that SB 54 can obstruct federal law enforcement and discriminate against the United States because the Tenth Amendment vests the State with the power to make such a "choice." Pet. App. 37a; see Br. in Opp. 18-21. That position is both profoundly consequential and profoundly wrong.

As California explains, the Tenth Amendment's anti-commandeering principle generally provides that "the federal government may not compel state officials to enforce or administer a federal regulatory program," or to enact (or not enact) particular laws. Br. in Opp. 18; see, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1478 (2018); *Printz* v. *United States*, 521 U.S. 898, 925 (1997). Even assuming that principle applies with full force in the immigration context, California fails to identify any federal statute that compels it to enforce federal law. Nor does the government contend that any federal statute compels the State to do so. Rather, as discussed, the basis for this suit is that the Supremacy Clause bars enforcement of SB 54 because it regulates aliens in ways that conflict with Congress's regulation of those same aliens, and frustrates the ability of federal authorities to obtain custody of those aliens so that *federal* authorities may enforce federal law. See pp. 4-5, *supra*. The federal laws at issue here are thus nothing like the express commands to state legislatures or officials at issue in *Murphy* and *Printz*. That distinction forecloses the State's position; with no compulsion to enforce federal law, there is no commandeering. See Pet. 24-28.

The State suggests that a finding that SB 54 is preempted would nevertheless violate the anti-commandeering doctrine because it would allow the federal government to "dictate[] what a state legislature may

and may not do." Br. in Opp. 18 (quoting *Murphy*, 138 S. Ct. at 1478) (brackets in original). But that position badly overreads *Murphy* and would effectively eviscerate the doctrine of conflict preemption. The Court in *Murphy* took pains to avoid such a misunderstanding, explaining that "shorthand" descriptions of preemption —*e.g.*, that "'Congress has forbidden the State to take'" a particular action in exercising its legislative power to regulate private parties—should not be mistaken for commandeering. 138 S. Ct. at 1480 (citation omitted). Indeed, one example *Murphy* gave of valid federal preemption was "[t]he Court's decision in *Arizona*," which held that a state statute was preempted because it conflicted with "federal law that regulates the conduct of private actors"—the provisions of federal immigration law regulating the detention and removal of aliens at issue here. *Id.* at 1481.

California also misunderstands (Br. in Opp. 21-22) the government's contention that the implied federal prohibition on state obstruction of federal immigration enforcement is permissible as a condition of the State's voluntary choice to subject aliens to its own criminal-justice system. See Pet. 28-29. California asserts that the government's position is "remarkable" because "'[t]he *States* possess primary authority for defining and enforcing the criminal law.'" Br. in Opp. 21 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)) (brackets in original). Whatever the merits of that proposition outside the context of foreign nationals, it is beyond dispute that the United States has "*exclusive*[]" control over "*any policy* toward aliens." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (emphases added); see, *e.g.*, *Arizona*, 567 U.S. at 394; *Hines* v. *Davidowitz*, 312 U.S. 52, 62 (1941). The federal government accordingly could, if it chose, preempt States from enforcing

their criminal laws against aliens and instead pursue immediate federal detention or removal. See, *e.g.*, *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714 (1893) (explaining the exclusive federal power to "expel aliens * * * or to permit them to remain"); see also *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (similar). That Congress instead decided to adopt a more cooperative policy under which States can choose to subject criminal aliens to their own criminal-justice systems before the aliens' detention and removal by the federal government, see 8 U.S.C. 1226(c), 1231(a)(4)(A), does not authorize States to adopt policies that frustrate the scheme the federal government selected. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-290 (1981). Nor does the fact that federal law imposes this condition on States' criminal regulation of aliens implicitly, rather than explicitly, make it any less binding. California's attempt to have it both ways is "remarkable," Br. in Opp. 21—and wrong.

Finally, California fails to explain how the anti-commandeering doctrine could require invalidating SB 54's information-sharing provisions given that this "Court has implied the existence of a Tenth Amendment exception for reporting requirements." Pet. App. 38a; see *Printz*, 521 U.S. at 917-918. The State's only argument (Br. in Opp. 21-22) is that SB 54's information-sharing provisions apply only to governmental actors. But the same was true of the paradigmatic example of a presumably permissible information-sharing requirement identified in Justice O'Connor's concurrence in *Printz*: that "*state and local law enforcement agencies* * * * report cases of missing children to the Department of Justice." 521 U.S. at 936 (emphasis added) (citing 42 U.S.C. 5779(a) (1994)). That California's position, upheld by the Ninth Circuit, would seemingly call

into question the constitutional validity of such statutes underscores the need for this Court's review.

B. The Question Presented Warrants This Court's Review

There is no real dispute that the issues in this case are exceptionally important. California concedes that the question presented is "consequential," Br. in Opp. 25, and knowledgeable and experienced amici emphasize both the legal and practical stakes, see p. 2, *supra*. As explained above and in the petition, the Ninth Circuit's reasoning is wrong. At a minimum, such a significant decision should not stand without this Court's review. As noted, this Court granted certiorari on a similar question in a similar posture in *Arizona*, even though there was no circuit conflict and even though the Court ultimately affirmed in substantial part. See Pet. 32-33. If anything, review is even more appropriate here because of the presence of the Tenth Amendment issue—a constitutional ruling on which the Ninth Circuit's reasoning departs from the most analogous decision by another court of appeals, see *City of New York* v. *United States*, 179 F.3d 29, 33-35 (2d Cir. 1999), cert. denied, 528 U.S. 1115 (2000); Pet. 33-34. California suggests (Br. in Opp. 24) that the Second Circuit's decision in that case does not survive *Murphy*. But that assertion —which directly calls into question the constitutionality of a federal statute—only further highlights the exceptional importance of the question presented and the evident need for this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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