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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
ANNA CELIA HOWARD
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075

KURT R. HILBERT
Counsel of Record
THE HILBERT LAW FIRM, LLC
205 Norcross St.
Roswell, GA 30075
(770) 551-9310
khilbert@hilbertlaw.com

Counsel for Amicus Curiae

November 22, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE[1]

Amicus Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise. SLF drafts legislative models, educates the public on key policy issues, and litigates often before both state and federal courts. Sanctuary jurisdictions raise critical constitutional issues that implicate federal, state, and local governments. While the public harms caused by sanctuary jurisdictions cannot be overstated, the legal harms are just as great. Sanctuary jurisdictions, by definition, violate federal law. Specifically, federal law bans state and local governments from prohibiting or restricting law enforcement or other government officials from sending or receiving information from the federal government on the citizenship or immigration status, lawful or unlawful, of any individual. Allowing sanctuary jurisdictions to violate federal law upsets the delicate balance of power struck by our Constitution, undermines congressional intent, and opens the floodgate for states to disregard future federal law.

[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; amicus alone funded its preparation and submission. See Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

The federal government has long been the arbiter and enforcer of immigration issues in our country. Among other duties, the federal government inspects, investigates, arrests, and detains illegal immigrants. To do so effectively, it relies on the aid of state and local law enforcement, which are encouraged to share information about immigrants. Thus, state cooperation is critical to the successful enforcement of federal immigration law.

State laws like California SB 54 disrupt this federal scheme by prohibiting state and local law enforcement from sharing necessary information with federal law enforcement. Not only is this prohibition expressly preempted by the language of 8 U.S.C. § 1373, Pet. 21-24, but it also conflicts with our government's need for uniformity. Uniformity is particularly crucial when dealing with foreign governments, which cannot be expected to adapt to a different immigration policy for each of our fifty states. This is why our federal government enacted comprehensive immigration laws that demand full cooperation from our state and local governments. Furthermore, our nation has entered into treaties with other countries, like Mexico, which also require information sharing, depend on consistency, and are superior to state laws. These principles demonstrate how federal law preempts the challenged provisions of SB 54, and thus California's attempt to circumvent federal immigration laws cannot survive.

Amicus strongly urges this Court to address these issues now, without any further delay. If the challenged provisions of SB 54 survive preemption, it would no doubt open the door for other like-minded states to obstruct the lawful removal of illegal aliens and upend the entire federal immigration scheme.

ARGUMENT

I. The challenged provisions of SB 54 are conflict preempted.

The Constitution mandates, and courts routinely find, state laws preempted "when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (internal citations omitted); *see also* U.S. Const. art. VI, cl. 2; *Arizona v. United States*, 567 U.S. 387, 399-400 (2012). Of course, what constitutes a "sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Here, ignoring these principles, the Ninth Circuit wrongly upheld the district court's finding that a state can, under the guise of the Tenth Amendment, knowingly obstruct and even cripple the federal government's immigration inquiry and enforcement system. Rather than construing Congress's full purposes and

objectives, the lower courts interpreted federal law which requires information sharing in a complex, comprehensive scheme of immigration enforcement in the narrowest way possible. In doing so, they found that sharing immigration information has no cognizable relation to overall immigration enforcement.

But the opposite is true—in the comprehensive scheme of immigration enforcement, standing aside equates to standing in the way. In fact, prohibiting information sharing cannot be construed in any way other than a direct impediment to the federal government's immigration enforcement efforts. The lower courts' interpretation of the federal immigration statutes ignores this Court's teaching in *Arizona* and *Hines* that Congress intended for courts to interpret immigration laws, especially those related to enforcement, broadly because they commingle issues of foreign relations and federalism. *Compare* Pet'r App. 41a-42a, *with Arizona*, 567 U.S. at 394, *and Hines*, 312 U.S. at 395.

In the challenged provisions of SB 54, California targeted uniquely federal areas of interest, deliberately frustrating congressional purposes and profoundly affecting international relations. Upholding those provisions gives California the unfettered right to impede federal immigration officers. According to the district court, a state can evade federal immigration laws if it fears setting precedent where "obstacle preemption could be used [by the federal government] to commandeer state resources and subvert Tenth Amendment principles." Pet'r App. 91a-92a. This is all

despite the lower courts' per se dismissal of the harms that result from the release of criminal illegal aliens into our society as an insignificant "frustration" of federal immigration enforcement. *Id.* at 34a.

This is improper and cannot stand. States cannot assert their sovereignty over the federal government concerning any part of the process of immigration enforcement. *Crosby*, 530 U.S. at 373 (2000). This Court has repeatedly struck down state laws with similar conflicting effects. *See*, *e.g.*, *Arizona*, 567 U.S. at 399*; Boyle v. United Tech. Corp.*, 487 U.S. 500, 504-05 (1988); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). The challenged provisions are thus conflict preempted because they stand as an obstacle to the accomplishment of the *full* purposes and objective of Congress's comprehensive immigration scheme and in particular 8 U.S.C. § 1373.

A. The challenged provisions of SB 54 undermine the federal immigration scheme.

"Federal governance of immigration . . . is extensive and complex." *Arizona*, 567 U.S. at 395. This Court has repeatedly affirmed that the federal government has "broad, undoubted power over [both] immigration and alien status." *Id.*; *Hines*, 312 U.S. at 62 (finding federal government has plenary and exclusive "power over immigration, naturalization, and deportation"); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (holding that "any policy toward aliens" exclusively resides with the federal government). This

power derives from Congress's constitutional "power [t]o establish an uniform Rule of Naturalization" and "its inherent power as sovereign to control and conduct relations with foreign nations." *Arizona*, 567 U.S. at 395; *see also* U.S. Const. art. I, § 8, cl. 4.

The power to set immigration policy and pass laws related to the classification of aliens resides with the federal government, not the states. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Exercising its authority, Congress passed laws governing the entry, presence, status, identification, documentation, and removal of aliens. *See*, *e.g.*, Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*.; Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. Pursuant to these laws, the executive branch is responsible for inspecting, investigating, arresting, detaining, and removing aliens who are generally suspected of being, or found to be, unlawfully in the United States. *See*, *e.g.*, 8 U.S.C. §§ 1225-1228. They also give the federal government control over registration and documentary proof for entry, reentry, and removal. *Id*. at §§ 1182, 1301-1306. And they require the U.S. Attorney General to take custody of certain categories of criminal aliens upon their release from federal, state, or local law enforcement agencies. *See id*. at §§ 1182, 1231, 1357.

Information sharing is essential to carrying out congressional intent and mandates with respect to enforcement of federal immigration laws. So much so that Congress "encouraged the sharing of information about possible immigration violations" which inevitably touches enforcement and operations. *Arizona*, 567

U.S. at 411-12 (quoting 8 U.S.C. § 1357(g)(10)(A)). This cooperation is so important that in 8 U.S.C. § 1373, Congress foreclosed state and local laws that "prohibit, or in any way restrict" information sharing. And in 8 U.S.C. § 1644, Congress forbade state and local governments from prohibiting or in any way restricting "sending to or receiving from the Immigration Naturalization Service information regarding the immigration status, lawful or unlawful," of an alien in the United States. Examples of cooperation include "allow[ing] federal immigration officials to gain access to detainees held in state facilities" and state officials "responding to requests for information about when an alien will be released from their custody." *Arizona*, 567 U.S. at 410. Without this information sharing, the federal government cannot satisfy its obligation to maintain immigration information which is crucial to immigration enforcement.[2]

Congress designed the statutory scheme to promote transparency, information sharing, and federal control of information, not the hindrance of it. Congress's comprehensive immigration scheme strongly suggests that, to permit operational success in both process and enforcement, the information Congress contemplated when passing 8 U.S.C. § 1373 includes information sharing about "citizenship" and "immigration status." Thus, when construing 8 U.S.C. § 1373

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[2] *See* 8 C.F.R. § 236.6 (explaining that information regarding aliens "shall be under the control of [DHS] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders").

under the two identified categories in *Arizona*, namely the entire subject of "immigration" and the more limiting determination of "alien status," Congress's intent becomes clearer. The phrase "citizenship or immigration status," 8 U.S.C. § 1373(a), and the more limited phrase "immigration status," 8 U.S.C. § 1373(b), are significant. Read together, they show that Congress intended to give the federal government complete authority over both the subject of and enforcement of "immigration" as well as the determination of "alien status" in the statute whether lawful or unlawful.

B. The challenged provisions of SB 54 are preempted by federal immigration statutes.

Although states may enact limited policies to assist the federal government in carrying out the provisions laid out in statutes like 8 U.S.C. § 1373, they cannot hinder it, as California attempts to do. Sharing critical immigration information is necessary to promote a unified, cohesive government. This rings particularly true when it comes to immigration enforcement. It defies common sense to permit each and every state to carry out immigration laws independently and without uniformity.

Uniformity in the execution and accomplishment of federal immigration law and congressional objectives concerning citizens and lawful aliens with foreign relations must be a paramount consideration.[3]

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[3] It is well-settled that "state employees may be required to perform federal obligations, such as registering young adults for

Arizona, 567 U.S. at 397. By refusing to provide the requested and required information to federal authorities, California interrupts this consistent scheme and sets precedent for other opportunities to ignore federal jurisdiction. Moreover, state disruptions of federal law enforcement obstruct foreign relations. Foreign governments cannot be expected to learn the intricacies of immigration laws across all fifty United States, but that is exactly what SB 54 suggests they do.

1. Congress preempted the challenged provisions of SB 54. 8 U.S.C. § 1101 *et seq.*; 8 U.S.C. § 1324a. The Ninth Circuit's limited interpretation of 8 U.S.C. § 1373(a) that "status of aliens" only means categorization of aliens ignores this Court's precedent. *See Arizona*, 567 U.S. at 394 (mandating a broad construction of both the subject of and enforcement of "immigration" *and* "the status of aliens"). The Ninth Circuit focused on a narrowed definition of alien "status" with no Supreme Court precedent to support its analysis.[4] Indeed,

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the draft, 40 Stat. 80-81, creating state emergency response commissions designed to manage the release of hazardous substances, 42 U.S.C. §§ 11001, 11003, collecting and reporting data on underground storage tanks that may pose an environmental hazard, § 6991a, and reporting traffic fatalities, 23 U.S.C. § 402(a), and missing children, 42 U.S.C. § 5779(a), to a federal agency." *Printz v. U.S.*, 521 U.S. 898, 955 (1997); *see also* The Federalist No. 36, at 235 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (stating that "the United States . . . will make use of the State officers and State regulations for collecting" certain taxes).

[4] Pet'r App. 41a-43a ("[T]he phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual' is naturally understood as a reference to a person's legal classification under federal law . . . the plain meaning of

it ignored the more comprehensive discussion in *Arizona* where the broad subject of "immigration," including enforcement, international law, and foreign relations, is exclusively federal and extends far beyond pure alien classification. In doing so, the Ninth Circuit created a judicially divined balancing test on only the "alien status" prong. *See* Pet'r App. 34a. In doing so, it reasoned that allocation of state resources was a higher state interest than fundamental constitutional protections of United States citizens and lawful aliens, including the inherent duty to protect life and liberty. The analysis is not only wrong; it offends the Bill of Rights, foreign relations, and constitutionally assured privileges and immunities from state tyranny.

2. The Ninth Circuit's opinion also paves the way for state and local law enforcement to carte blanche disregard federal authority by inaction and mere refusal to share information. *See* Pet'r App. 35a-39a. The Ninth Circuit promoted the creation of a "sovereign right of first refusal," even if it "frustrates" federal enforcement efforts. *Id*. 37(a). It also rejected the legislative history, suggesting that "information regarding" immigration status did not include "presence, whereabouts, or activities."[5] *See id*. 35a, 38a. This interpretation only serves to obstruct and frustrate federal

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Section 1373 limits its reach to information strictly pertaining to immigration status . . . and does not include information like release dates and addresses.") (quoting Dist. Ct. Op., Pet'r App. 87a).

[5] H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 2649, 2771.

immigration officer functions in the overall federal scheme.

"Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government." *Arizona*, 567 U.S. at 409. But federal law permits state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). And this Court has repeatedly held that "Congress has encouraged the sharing of information about possible immigration violations [under 8 U.S.C. § 1357(g)(10)(A) and 8 U.S.C. § 1373(c)]." *Arizona*, 567 U.S. at 412.

Although "the federal scheme . . . leaves room for a policy requiring state officials to contact ICE as a routine matter," this does not logically translate to a state's unilateral refusal to provide information about citizenship and alien status to federal immigration authorities. *Arizona*, 567 U.S. at 413 (emphasis added). Courts cannot and should not read 8 U.S.C. § 1373 in a vacuum. The information sought under 8 U.S.C. §§ 1373(a), (b), and (c), which California refuses to share, cannot reasonably be classified as "routine matters." Instead, the information sought is critical to determine "citizenship" and "immigration status" of detained and imprisoned aliens that can be a threat to U.S. citizens and legal aliens alike.

Congress intended for the registration and sharing of immigration information to be a "single integrated and all-embracing system[.]" *Hines*, 312 U.S. at 74. After all, federal law mandates "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" under the verification procedure established by Congress. 8 U.S.C. § 1373(c). Sharing release dates, alien status, immigration status, and registration information touches on foreign relations and federal requirements to determine immigration status, and therefore does not allow states to "curtail or complement" federal law. *Hines*, 312 U.S. at 66.[6]

The challenged provisions of SB 54 specifically prohibit providing information to federal authorities with "release dates or other information." Failure to share this information with the federal government can and has resulted in the release of dangerous criminals without oversight. States cannot undermine the federal immigration system by flooding the public with potential criminals without notifying the federal government. The lower courts acknowledged that such uncontrolled and clandestine releases place federal and local law enforcement, and the public at large, at risk of harm. Again, U.S. citizens and legal aliens seeking

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[6] "Pre-emption analysis should not be a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." *Arizona*, 567 U.S. at 437-40 (Thomas, J., concurring in part and dissenting in part) (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in judgment)).

full protection of our country's laws share this risk of harm. Such dire risks fall far outside the "routine matter" designation discussed in *Arizona* and create "other [perhaps unintended] consequences that are adverse to federal law and its objectives." *Arizona*, 567 U.S. at 414.

This is not the first time California has tried to undermine federal immigration laws. In *Takahashi v. Fish & Game Comm'n*, California passed a statute prohibiting the issuance of fishing licenses to persons ineligible for citizenship. 334 U.S. 410, 416 (1948). The Court struck down the law under the Fourteenth Amendment, finding that it conflicted with the federal government's power to determine when to admit, naturalize, and permit aliens to reside in the United States. *Id.* at 418-20. The Court reasoned that "'[t]he authority to control immigration . . . is vested solely in the Federal Government.'" *Id.* at 417 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)). And "[u]nder the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states." *Id.* at 419.

Thus, the challenged provisions of SB 54 stand in strict opposition to federal and international concerns. The only perceived goal of the challenged laws – protect California's allocation of resources – does not meet the special burden needed to overcome the protections afforded by the Constitution to our citizens and legal aliens, especially our law enforcement. It logically

follows that the challenged provisions of SB 54 stand as an absolute obstacle to the accomplishment and execution of the federal immigration operational scheme and its governing laws, and are therefore conflict preempted.

II. Federal treaty law preempts the challenged provisions of SB 54.

The challenged provisions of SB 54 are also conflict preempted by federal treaty laws regarding immigration, which enjoy the same status as federal statutes as "the supreme law of the land." U.S. Const. art. VI, cl. 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). "Treaties [are] made . . . under the Authority of the United States" and with the "Advice and Consent of the Senate." U.S. Const. art. VI, cl. 2; art. II, § 2, cl. 2. This Court has consistently held that federal treaties preempt conflicting state laws. *See*, *e.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1015 (2019) (holding a state law that burdens or conflicts with a treaty-protected right is conflict preempted by the treaty); *see also El Al Israel Airlines v. Tseng*, 525 U.S. 155, 176 (1999) (finding Warsaw Convention Treaty preempts state law personal injury claims); *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (No. 4,366) (CC SC 1823) (finding an 1815 treaty with Great Britain preempted a state law authorizing the seizure of certain persons at ports).

But "[a] treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way." *Ware v. Hylton*,

3 U.S. 199, 236-37 (1796). This is because "[i]t is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide." *Id.* "Such treaties are binding within a state. A rule established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States." *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid [and regulate] the entrance of foreigners within its dominions[.]" *Ekiu v. United States*, 142 U.S. 651, 659 (1892). There are multiple international treaties reflecting this which require information sharing and mandatory communication with federal and international authorities. International treaties touching federal immigration law require that inconsistent local, municipal and state laws, regulations, and policies be nullified. *Ware v. Hylton*, 3 U.S. at 236-37. The compendium of international treaties must be construed *in pari materia* with federal immigration laws. As such, federal immigration treaties preempt SB 54.

For example, the U.S.-Mexico Treaty preempts California's laws.[7] The territorial application of the

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[7] Extradition Treaty, Mexico-U.S., arts. I, IX, Jan. 25, 1980, 31 U.S.T. 5059. ("Extradition shall take place, subject to this

U.S.-Mexico Treaty specifies that it "shall include all the territory under the jurisdiction of that Contracting Party." Extradition Treaty, Mexico-U.S., at art. IV, § 1. The Parties are the "Government of the United States of America" and the "Government of the United Mexican States" – not a State. *Id.* at Preamble. It requires for extradition, "The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location" and permits similar information for "provisional arrests." *Id.* at art. X, § 1(e), art. XI, § 1. It allows for simple detainment for up to "60 days" after evaluating if there has been an extraditable offense as defined therein. *Id.* at art. XI, § 3. "On receipt of such a request, the requested Party shall take the necessary steps to secure the arrest of the person claimed." *Id.* at § 2. The "request for extradition shall be processed in accordance with the legislation of the requested Party." *Id.* at art. XIII, § 1.

Thus, when state laws relate to matters of international rights and obligations, the United States inherently possesses all the powers of a sovereign. And when such a law conflicts with an international necessity or concern, the treaty power may be exercised, even though it may invade rights ordinarily reserved to the States.

Treaty. . . . Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so. . . . ").

The Ninth Circuit wrongly ignored any preemptive effect that the U.S.-Mexico Treaty, or any other treaty, has on the challenged provisions of SB 54. The challenged provisions of SB 54 authorize inaction, nonresponsiveness, and lack of participation involving information and release to federal immigration authorities – even for criminal extradition. They also directly encroach on the ability to fulfill and perform the treaty. The U.S.-Mexico Treaty and other treaties conflict preempt the challenged provisions of SB 54.

CONCLUSION

The challenged provisions of SB 54 impede, inhibit, and hinder the federal government's enforcement of our country's federal immigration laws. For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

KIMBERLY S. HERMANN
ANNA CELIA HOWARD
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075

KURT R. HILBERT
Counsel of Record
THE HILBERT LAW FIRM, LLC
205 Norcross St.
Roswell, GA 30075
(770) 551-9310
khilbert@hilbertlaw.com

Counsel for Amicus Curiae

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