No. 18-16496

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

V.

STATE OF CALIFORNIA, *et al.*,
DEFENDANTS-APPELLEES.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

HOLLY M. JOHNSON
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 442-9890
holly.johnson@dc.gov

Additional counsel listed on signature page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington (collectively, "the *Amici* States") file this brief as *amici curiae* in support of the State of California under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. The *Amici* States have adopted different approaches to policing based on their own determinations about how to best meet the needs of their residents. Some have adopted, or are considering adopting, lawful policies designed to improve public safety by focusing local law enforcement on crime prevention rather than enforcing federal immigration law. These jurisdictions seek to build and maintain trust between their residents and law enforcement, thereby enhancing public safety for all.

The *Amici* States are concerned that the federal government's interpretation of immigration law impermissibly intrudes on the sovereign authority of states to regulate law enforcement, enhance public safety, and allocate their limited resources. This suit is the latest in the federal government's series of threats against states and political subdivisions that do not wish to devote local resources to federal civil immigration enforcement. By seeking to make an example of California, the federal government threatens the sovereign authority of all the *Amici* States.

Together, the *Amici* States seek to protect their prerogative—indeed, their responsibility—to enact and implement policies that promote public safety, prevent crime, and facilitate positive interactions between local law enforcement and all residents, regardless of immigration status. Of particular concern to the *Amici* States is the federal government's challenge to the California Values Act, Cal. Gov't Code § 7284 *et seq.*, also known as Senate Bill 54 ("SB 54"). That Act sets forth the circumstances in which state and local law enforcement agencies may participate in federal immigration enforcement activities. Regardless of whether the *Amici* States choose to adopt similar laws, they believe that SB 54 is an appropriate exercise of California's legislative judgment and does not conflict with the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, or 8 U.S.C. § 1373.

SUMMARY OF ARGUMENT

Jurisdictions across the nation have adopted laws or policies, based on the needs of their residents, that place lawful limits on the extent to which state and local law enforcement agencies may enforce federal civil immigration laws. Such limitations reflect local judgments about the policies and practices that are most effective for maintaining public safety and community health—values that lie at the core of the police power historically reserved for the states and often delegated to their local jurisdictions.

These laws—including the provisions of SB 54 challenged here—do not stand as an obstacle to the immigration enforcement scheme of the INA and Section 1373. The United States urges a broad interpretation of these federal statutes to support its claim, arguing that they implicitly require state and local law enforcement agencies to allow their employees to: (1) transfer state and local detainees to the custody of immigration officials; (2) provide the release dates of detainees to immigration officials; and (3) share with immigration officials personal information, including the home address, of any individual. But laws enacted under the states' historic police powers are implicitly preempted only if Congress demonstrated a clear and manifest intent to do so, and the United States cannot satisfy this heavy burden.

In any event, this Court should reject a broad reading of the INA and Section 1373 because it would result in unconstitutional commandeering. Even in areas where Congress is free to legislate, it cannot force a state or local jurisdiction to administer a federal statute. Requiring them to assist with immigration enforcement—or even barring them from precluding their employees from providing such assistance—would impose a significant burden. Not only would such a requirement directly commandeer state and local resources, but it would also blur the line of accountability for immigration enforcement, making law enforcement more expensive and damaging the fragile relationship between the

immigrant community and local government that is essential for the preservation of public safety.

ARGUMENT

I. SB 54 Does Not Stand As An Obstacle To The Implementation Of Federal Immigration Statutes.

Federal preemption of state law is implied when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The possibility of implied preemption, however, "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,'" for "such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). A "high threshold" must therefore "be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Id.*

SB 54 "prohibit[s] state and local law enforcement agencies . . . from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes." SB 54, Preamble. Three provisions are at issue here. *First*, SB 54 precludes the use of money or personnel to "[t]ransfer an individual to immigration authorities" unless the transfer is "authorized by a

judicial warrant or judicial probable cause determination" or the individual has been convicted of one of the myriad crimes identified in Cal. Gov't Code § 7282.5. Cal. Gov't Code § 7284.6(a)(4). Those crimes include "serious or violent" felonies or those "punishable by imprisonment in the state prison," misdemeanors in the past five years for a crime that is "punishable as either a misdemeanor or a felony," and felonies in the past 15 years for, among other offenses: assault, battery, sexual assault, child abuse, burglary, robbery, theft, embezzlement, driving under the influence, drug possession or distribution, unlawful weapon possession, obstruction of justice, bribery, and escape. Cal. Gov't Code § 7282.5. *Second*, SB 54 prohibits the use of money or personnel to "[p]rovid[e] information regarding a person's release date unless that information is available to the public" or the person has been convicted of a crime set forth in Section 7282.5. Cal. Gov't Code § 7284.6(a)(1)(C). *Third*, SB 54 prohibits the use of money or personnel to "[p]rovid[e] personal information . . . about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public." Cal. Gov't Code § 7284.6(a)(1)(D).

The United States argues that these provisions stand as an obstacle to immigration enforcement under the INA, which authorizes, and sometimes requires, federal detention of undocumented immigrants. United States Brief ("U.S. Br.") 17; *see* U.S. Br. 36-46 (citing 8 U.S.C. §§ 1226, 1231). But the

United States fails to satisfy the high threshold needed to establish that, by enacting legislation authorizing federal detention of undocumented immigrants, Congress meant to force the states to use their own money and personnel to assist immigration officials in the manner prohibited by SB 54.

A. Because laws like SB 54 are enacted under the states' historic police power, they are preempted only if that was the "clear and manifest purpose of Congress."

"What is a sufficient obstacle" for implied preemption "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149, 1159 (9th Cir. 2017) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). The analysis "begin[s] . . . with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"—an assumption that "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). "The very highest duty of the States, when they entered into the Union

under the Constitution, was to protect all persons within their boundaries in the enjoyment of the[] 'unalienable rights'" of "life and personal liberty." *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). State and local governments are in the best position to make judgments about how to allocate scarce resources to serve the particular public safety needs of their local communities. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."). "The promotion of safety of persons and property" is therefore "unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

SB 54 rests at the heart of this historic police power. California's legislature found that "[a] relationship of trust between [its] immigrant community and state and local agencies is central to the public safety" and that "[t]his trust is threatened when state and local agencies are entangled with federal immigration enforcement, with the result that immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school." Cal. Gov't Code § 7284.2(b), (c). These findings are entitled to deference, *cf. Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196 (1997), and in any event are supported by considerable evidence. "Immigrants, and especially undocumented immigrants, are highly vulnerable to violence, abuse, and

exploitation," and "this vulnerability is exacerbated by the political response to racialized anxiety and fear of immigrants." Marjorie Zatz et al., *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 Ann. Rev. L. & Soc. Sci. 141, 146-47 (2012).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). "Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). "For a nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential." Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1574 (1994); *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns" "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society."). It is therefore "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory*, 501

U.S. at 460 (internal quotation marks omitted)). "[W]hen legislation 'affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

B. The United States has not demonstrated that Congress clearly intended to override the historic right of state and local governments to decline to assist with immigration enforcement.

The United States has not met its high burden of demonstrating that preemption of state laws like SB 54 was a "clear and manifest purpose" of Congress. *Altria Grp.*, 555 U.S. at 77. The United States focuses on the INA's requirement "that state criminal custody will generally be completed before federal officials take custody for civil immigration purposes," and suggests that Congress offered this "allowance" to states with the understanding that they, in turn, would assist immigration officials after the prisoner has served his sentence. U.S. Br. 36-37, 41 (citing 8 U.S.C. §§ 1226(c), 1231(a)(4)(A)). But the United States offers no evidence that Congress viewed the deferral of immigration enforcement as a boon to the states or expected their reciprocal assistance; it is just as likely that Congress made a policy judgment that prioritized the administration of criminal justice over an undocumented immigrant's prompt removal.

Nor do the provisions of the INA that "anticipate[] [the states'] cooperation" lead to a conclusion that Congress intended it to be mandatory. U.S. Br. 41; *see,*

e.g., 8 U.S.C. § 1226(d)(1)(A) (requiring federal authorities to make immigration information available to state and local authorities); 8 U.S.C. § 1357(g) (authorizing federal officials to enter into agreements with local law enforcement agencies to engage in immigration enforcement). If anything, provisions encouraging *voluntary* cooperation indicate Congress's understanding that it should not, and indeed cannot, be mandated. *See Printz v. United States*, 521 U.S. 898, 917-18 (1997) (describing "almost two centuries of apparent congressional avoidance of the practice" of "requir[ing] the participation of state or local officials in implementing federal regulatory schemes"). The only provision that even suggests that the states must cooperate with immigration officials is Section 1373, and that explicit preemption narrowly applies only to the provision of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373. SB 54 specifically does not restrict or prohibit the sharing of such information. *See* Cal. Gov't Code § 7284.6(e).

Unable to demonstrate that Congress meant to require state and local cooperation, the United States re-casts California's decision to decline to participate in immigration enforcement as active obstruction. It argues that SB 54 "affirmatively restrict[s] the ability of otherwise-willing local and state officials" to assist with immigration enforcement. U.S. Br. 41. But a government can only act (or refuse to act) through the conduct of its employees, so *any* refusal to administer

a federal program is of course an "affirmative restrict[ion]" on its employees' discretion to do so. *See also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 677-78 (rejecting the argument that Congress can "forc[e] state employees to implement a federal program"). And the Supreme Court has reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *N. Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1119 (2015) (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

The United States also argues that, by "affirmatively asserting criminal custody" over an undocumented immigrant, California has "created" problems for immigration officials that "impair" their compliance with the INA. U.S. Br. 41-42. But a state's enforcement of its own criminal laws, unrelated to any immigration law, cannot reasonably be interpreted as affirmative obstruction of immigration enforcement. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."). Nor does the United States' argument make sense—all a state does by "asserting criminal custody" is incarcerate an individual for a designated period of time, after which he is released back to into the general public. The United States

has not explained how immigration officials are in any worse position after an undocumented immigrant has served his sentence than before he was arrested.

What is more, the United States seeks to overturn the challenged provisions of SB 54 in their entirety, even though its preemption claim narrowly rests on the INA's deferral of immigration enforcement during criminal incarceration. *See* U.S. Br. 36-46. SB 54, however, broadly precludes the transfer of *any* qualifying detainee, not just those who are incarcerated. Cal. Gov't Code § 7284.6(a)(4). Not everyone who is arrested is charged with a crime, and only a fraction of those who are charged will be convicted and sentenced to prison or jail. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* 22, 26 (Dec. 2013) (reporting that 66 percent of cases adjudicated in 2009 resulted in a conviction, and that only 75 percent of felony convictions and 56 percent of misdemeanor convictions led to incarceration).[1] And many who are incarcerated will have just been convicted of one of the crimes enumerated in Cal. Gov't Code § 7282.5, which exempts them from SB 54's ban on providing immigration authorities their release dates or transferring them to federal custody. Cal. Gov't Code § 7284.6(a)(4).

---

[1] *Available at* https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

SB 54's information-sharing prohibitions likewise extend beyond the interests on which the United States bases its preemption claim, barring the release of personal information of *any* individual, including informants, witnesses, and victims of criminal activity. Cal. Gov't Code § 7284.6(a)(1)(D). The United States nevertheless argues that this provision is preempted in its entirety by the same narrow provision in the INA, *see* U.S. Br. 40-41, even though the vast majority of individuals about whom state and local law enforcement collect personal information are not incarcerated undocumented immigrants who are subject to deportation proceedings. It is unreasonable to conclude that Congress, by prioritizing criminal incarceration over prompt removal of undocumented immigrants, intended to preempt the states from taking measures to protect the privacy of their residents.

The United States and the *amici curiae* states supporting it ("U.S. State *Amici*") also argue that SB 54's "judicial warrant requirement" conflicts with immigration officials' authority to detain undocumented immigrants under administrative warrants. U.S. Br. 19; *see* U.S. State *Amici* Br. 9-11. But SB 54 does not invalidate the lawfulness of detention under an administrative warrant, nor does it constrain what federal officials may do. California has simply declined to use *its* resources to enforce those federal laws, and with good reason given that federal appellate courts have held that it violates the Fourth Amendment for local

law enforcement officers to hold an individual beyond his or her normal release date "solely based on known or suspected civil violations of federal immigration law." *See, e.g.*, *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013).

C. States have reasonably exercised their historic police power to disentangle local law enforcement from federal immigration enforcement.

States like California have reasonably concluded that disentangling local law enforcement from federal immigration enforcement improves public safety and wellbeing. The "push to involve local police in federal immigration enforcement" began in the 1990s and "intensified after the September 11th terrorist attacks." Christopher Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. Rev. 1703, 1722 (2018). "By far, the most frequent and impassioned objection" to this new push "came from state and local police concerned their own effectiveness," who understood that "becoming players in the enforcement of immigration law would be bad police work, plain and simple." David Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 Rutgers L. J. 1, 37 (2006).

The Major Cities Chiefs Association, made up of chiefs and sheriffs from the 69 largest law enforcement agencies in the United States, issued a policy statement in 2006 declaring that "[i]mmigration enforcement by local police would

likely negatively effect and undermine the level of trust and cooperation between local police and immigrant communities." Major Cities Chiefs Association, *M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws By Local Police Agencies* ("MCC") 6 (adopted June 2006).[2] The Chiefs explained that local involvement would discourage both undocumented and legal immigrants from contacting or cooperating with the police for "fear that they themselves or undocumented family members or friends may become subject to immigration enforcement." *Id.* After all, immigrant populations "often consist[] of a mixture of legal and illegal residents," and legal immigrants who do not personally fear deportation "may have strong concerns about the other members of the household—perhaps their own parents." Harris, *supra*, at 39-40 (noting that, in 2005, 3.2 million American citizens lived in families in which the head of the household or a spouse was an undocumented immigrant). The Chiefs predicted that, "[w]ithout assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear," which would "result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants

---

[2] *Available at* https://www.majorcitieschiefs.com/pdf/news/MCC_Position_Statement.pdf.

in solving crimes or preventing future terroristic acts." MCC 6; *see also* Harris, *supra*, at 42 ("When fear of police makes pickings so easy, crime and criminals can saturate a neighborhood, making it unsafe not just for illegal immigrants, but for anyone who lives, works, or walks there.").

These predictions have proven accurate. A 2013 study conducted by the University of Illinois at Chicago found that "the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police," which "in turn, has led to a reduction in public safety." Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 18 (2013).[3] Forty-four percent of the surveyed subjects stated that they were "less likely to contact police officers if they have been the victim of a crime" or "to voluntarily offer information about crimes" "because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know." *Id.* at 5. And, as predicted, "this fear [wa]s not confined to immigrants; 28 percent of US-born Latinos expressed the same view." *Id.* at 6; *see also* Randy Capps et al., Migration Policy Inst., *Revving Up the Deportation Machinery: Enforcement and Pushback Under Trump* 67 (May 2018) ("[F]ears surrounding immigration enforcement extend not

[3] *Available at* https://www.policylink.org/sites/default/files/insecure_communities_report_final.pdf.

just to the 11 million unauthorized immigrants but also to the broader group of 17 million living with unauthorized immigrants, many of whom are U.S.-citizen children").[4] These same concerns prompted the President's Task Force on 21st Century Policing to recommend "[d]ecoup[ling] federal immigration enforcement from routine local policing for civil enforcement and nonserious crime," as it "is central to overall public safety" that "[l]aw enforcement agencies should build relationships based on trust with immigrant communities." The President's Task Force on 21st Century Policing, *Final Report* 18 (May 2015).[5]

In 2017, two independent studies found a reduction in crime in so-called "sanctuary" jurisdictions, which limit the participation of local law enforcement in immigration enforcement.[6] The Center for American Progress compared annual crime statistics of demographically matched counties and found that the "sanctuary" counties experienced an average of 35.5 fewer crimes per 10,000

---

[4] *Available at* https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback.

[5] *Available at* https://ric-zai-inc.com/Publications/cops-p311-pub.pdf.

[6] As one federal judge aptly noted, the phrase "sanctuary jurisdiction" is a misnomer. *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 610 (E.D. Pa. 2017), *appeal docketed* No. 18-1103 (3d Cir. Jan. 18, 2018). Neither California nor any of the *Amici* States provides "a sanctuary for anyone involved in criminal conduct, nor . . . a sanctuary as to any law enforcement investigation, prosecution, or imprisonment after having been found guilty of a crime." *Id.*; *accord City of Chicago v. Sessions*, 888 F.3d 272, 281 (7th Cir. 2018) (explaining that the term "'sanctuary'" cities or states is . . . commonly misunderstood").

people than "non-sanctuary" counties, with 65.4 crimes fewer per 10,000 people in large metropolitan counties. Tom Wong, *The Effects of Sanctuary Policies on Crime and the Economy* 6 (2017).[7] Sanctuary counties also had stronger local economies, with a $4,352.70 higher median household income and a 2.3 percent lower population living at or below the federal poverty line. *Id.* at 7-8.

A study conducted by the Center for Juvenile and Criminal Justice found that Caucasian residents of urban "sanctuary counties" were 33 percent less likely to die from all violent causes, 53 percent less likely to be the victim of homicide, and 62 percent less likely to die from gun violence than Caucasian residents of urban non-sanctuary counties. Mike Males, *White Residents of Urban Sanctuary Counties Are Safer from Deadly Violence than White Residents in Non-Sanctuary Counties* 2 (2017).[8] Although the difference was less pronounced for non-Caucasian residents, they too "generally have lower violent death rates in urban sanctuary counties than in non-sanctuary counties." *Id.*

Both studies were based on data from 2015, before then-candidate Donald Trump made immigration enforcement the cornerstone of his presidential campaign. *See, e.g.*, Tom LoBianco, *Donald Trump Promises 'Deportation Force'*

---

[7] *Available at* https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy.

[8] *Available at* http://www.cjcj.org/news/11875.

to Remove 11 Million, CNN (Nov. 12, 2015).[9] Then, days after he took office in 2017, President Trump issued two executive orders designed to "empower State and local law enforcement agencies across the country to perform the functions of an immigration officer," Exec. Order No. 13767 § 10, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017), and "ensure that [sanctuary] jurisdictions . . . are not eligible to receive Federal grants," Exec. Order No. 13768 § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017). And indeed, "[a]rrests jumped soon after the inauguration," Capps, *supra*, at 24, rising "roughly one-third in the first weeks of the Trump administration, largely driven by an increase in the number of non-criminals arrested," Tal Kopan, *Immigration Arrests Rise in the First Months of Trump Administration*, CNN (Apr. 17, 2017).[10]

"There is strong evidence that the harsh rhetoric employed by the President and his aides" and "the enforcement changes made to date on the ground" had "significant effects on the behavior of individuals." Sarah Pierce et al., Migration Policy Inst., *Immigration Under Trump: A Review of Policy Shifts in the Year*

---

[9] *Available at* https://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration/index.html.

[10] *Available at* https://www.cnn.com/2017/04/17/politics/immigration-arrests-rise/index.html.

Since the Election 6 (Dec. 2017).[11] "[A]s immigrant communities try to stay 'under the radar,' there have been reports of a dip in crime reporting, including on domestic violence; fewer applications for the public benefits for which immigrants or their U.S.-born children are entitled; and rising no-shows at health-care appointments." *Id.* The Houston Police Department reported "a 13 percent decrease in violent crime reporting by Hispanics . . . during the first three months of 2017," including a "43 percent drop in the number of Hispanics reporting rape and sexual assault." Lindsey Bever, *Hispanics 'Are Going Further into the Shadows' Amid Chilling Immigration Debate, Police Say*, Wash. Post (May 12, 2017).[12] The Los Angeles Police Department similarly reported "a nearly 10% decline in the reporting of spousal abuse and 25% decline in the reporting of rape," *id.*, leading it to conclude that "deportation fears may be preventing Hispanic members of the community from reporting when they are victimized," Lasch, *supra*, at 1762. The Salt Lake City Police Department received 12.9 percent fewer reports of criminal activity in Latino neighborhoods, compared to a 1.4 percent decline in reporting citywide." Capps, *supra*, at 69. The tip line for crime victims

---

[11] *Available at* https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts.

[12] *Available at* https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say.

run by the Nassau County, New York District Attorney's Office of Immigrant Affairs "typically receive[d] up to ten calls each week," but received "no calls" between December 2016 and May 2017. N.Y. State Office of the Attorney General, et al., *Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement: The Facts and The Laws* 17 (May 2017).[13] And "[t]he special victims investigations division in Montgomery County, Maryland, which has a significant immigrant population, received approximately one-half the volume of calls for sexual assault and domestic violence" in the first half of 2017 than it did in the first half of 2016. *Id.*

New fears of immigration enforcement have also affected public health, which has "historically been a matter of local, not federal, concern." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995). In early 2018, the Migrant Clinicians Network reported that 65 percent of the 91 health care providers it polled had seen a change in the previous year in immigrant or migrant patients' attitudes or feelings toward health care access, with most citing "an increase in fear among their patients that drives them to avoid care." Claire Hutkins Seda, Migrant Clinicians Network, *Taking a Pulse:*

---

[13] *Available at* https://oag.ca.gov/system/files/attachments/press_releases/setting_the_record_straight.pdf.

Clinician Poll on Migrant and Immigrant Patient Care (Mar. 14, 2018).[14] "In Los Angeles, a large community-based provider reported a 20 percent reduction in health-care visits in May 2017, by likely unauthorized immigrants." Capps, *supra*, at 69. "In Houston, local government respondents in March 2017 said fewer Latino immigrants were participating in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) as well as preventative check-ups and health screenings in public health clinics." *Id.* at 69-70. "Texas Children's Hospital also noted a drop in the number of low-income Latino patients," while several Houston clinics "reported a more than 50 percent drop in unauthorized [immigrant] patients" in late 2017. *Id.* at 70.

Under their traditional and historic police power, the States "have broad authority to enact legislation for the public good." *Bond*, 572 U.S. at 854. As discussed, many states have concluded, based on statistical studies, expert analysis, and anecdotal evidence, that public health and safety are best promoted through laws like SB 54, which prohibit local law enforcement from participating in certain aspects of federal immigration enforcement. To establish that these local laws are preempted by federal statute, the United States must demonstrate that this was a

---

[14] *Available at* https://www.migrantclinician.org/blog/2018/mar/taking-pulse-clinician-poll-migrant-and-immigrant-patient-care.html (last visited Nov. 13, 2018).

"clear and manifest purpose" of Congress. *Altria Grp.*, 555 U.S. at 77. The United States has not and indeed cannot satisfy this heavy burden.

II. Alternatively, The INA's Preemption Of SB 54 Would Amount To Unconstitutional Commandeering.

Even if the United States had offered support for its broad reading of the INA, its interpretation should be rejected because the INA would then unconstitutionally commandeer state resources. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 562 ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."). "The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). "Even modest forms of commandeering undermine federalism by undercutting a state's ability to pursue its own policies in whatever field the commandeered officials are responsible for." John McGinnis & Ilya Somin, *The Rehnquist Court: Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U.L. Rev. 89, 119 (2004). "It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935; *see also* Bernard Bell, *Sanctuary Cities, Government*

Records, and the Anti-Commandeering Doctrine, 69 Rutgers U. L. Rev. 1553, 1571 (2017) ("[T]he anti-commandeering doctrine establishes an absolute rule that permits no balancing.").

If the INA preempts SB 54 in the manner urged by the United States, it will create the very harms the anticommandeering rule aims to prevent. The rule "promotes political accountability" by making it clear to voters "who to credit or blame" for governmental action. *Murphy*, 138 S. Ct. at 1477; *see also New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated."). State and local governments often enact laws like SB 54 for this very reason—they are "concerned that their immigrant communities will go completely underground (cutting off contact with the police, health department, schools, and other government agencies) if the immigrants hear rumors that local governments may be cooperating with federal immigration enforcement," and these jurisdictions "want to strongly signal to these communities that they are not so cooperating." Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1380 (2006). If Congress bars these jurisdictions from refusing to assist with immigration enforcement, it effectively "force[s] [them] to advance objectionable . . . federal policies," and they "might be blamed by

constituents for helping federal authorities to enforce those policies." Robert Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. Pa. L. Rev. 103, 130 (2012); *see* Cal. Gov't Code § 7284.2(d) (legislative finding that "[e]ntangling state and local agencies with federal immigration enforcement programs . . . blurs the lines of accountability between local, state, and federal governments"). "[T]here is a real danger that citizens will denounce the [local] official for being complicit in federal law enforcement"—that "they will label the state official a snitch and not merely a stooge." Mikos, *supra*, at 130.

The INA would be unconstitutional even if all it required were that states allow their employees to decide for themselves whether to assist immigration officials. *See* U.S. Br. 41 (noting that, but for SB 54, "otherwise-willing local and state officials" would cooperate). "[I]t may seem more respectful of state sovereignty to merely prevent states and localities from interfering with individual public employees' decisions to provide such information," but "depriving a sovereign of the right to control its employees has implications beyond the state's loss of control over its confidential records; such an act severs the hierarchical relationship between senior agency officials and their subordinates." Bell, *supra*, at 1581. Indeed, "prohibiting states and municipalities' exercise of authority over their own employee's dissemination of information is a more serious intrusion than compelling the state to provide the information itself." *Id.* at 1589. And "rules

controlling dissemination of information [are] essential to ensuring that undocumented immigrants who interact with the government receive consistent and equal treatment," rather than having confidentiality "turn on the individual idiosyncrasies of relatively low-level line officials." *Id.* at 1583-84.

The anticommandeering rule also "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477; *see also Printz*, 521 U.S. at 930 ("[B]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes"). Preempting the challenged provisions of SB 54, however, would impose just such a burden on state and local governments. There are costs associated with transferring a detainee to the custody of immigration officials, such as, for example, assuring the continuity of his medical care during and after transport.[15]

---

[15] Indeed, a transferring facility's negligence in this regard can lead to litigation. *See, e.g.*, *Logue v. United States*, 412 U.S. 521, 532 (1973) (negligence claim arising out of arresting officer's failure to arrange constant surveillance of suicidal detainee after he was transferred from federal detention to county jail); *Coffey v. United States*, 906 F. Supp. 2d 1114, 1176 (D.N.M. 2012) (negligence claim arising out of sending facility's failure to transfer prisoner's medical information and property to receiving facility). Even if a lawsuit is unsuccessful, state and local governments must expend limited public resources in their defense.

Information sharing can also be costly. State and local governments "now gather massive quantities of information detailing the activities they regulate," including their interactions with the immigrant community. Mikos, *supra*, at 105. This information is a "critical aspect" of a state government's provision of public services. Bell, *supra*, at 1561 ("[G]athering information about regulated activity is essential to good governance[:] regulators need information to draft prudent regulations, to study their effects, and . . . to observe and enforce compliance." (quoting Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 Yale L.J. 1111, 1114-17 (1947)). "[A]t a minimum, [these] governments' dominion over their own records, like their dominion over their more tangible government property, flows from every government's inherent proprietary power to control its own resources and property." *Id.* at 1563.

More importantly, "the threat of commandeering" imposes additional costs by "mak[ing] it more difficult for states to gather information in the first instance." Mikos, *supra*, at 121. "When a government holds personal information regarding an individual and needs to offer assurances of confidentiality to obtain it, that government has a special need to keep such information confidential." Bell, *supra*, at 1575. This is especially true for law enforcement, which "frequently depend[s] on cooperation from private citizens—crime victims, witnesses, etc.," who "may be less forthcoming . . . if the information they give to state agents is turned over to

federal law enforcement." Mikos, *supra*, at 123; *see also* Bell, *supra*, at 1591 ("Potential sharing of information with federal immigration authorities is likely to lead to a significantly increased reluctance to share the information with state and local officials."). States must then "employ more government agents" "in order to inspect, investigate, interrogate, spy, etc.," which "forces them to absorb some of the financial costs of enforcing federal law that should be borne by the federal government instead." Mikos, *supra*, at 126, 160; *see also* Aaron Chalfin & Justin McCrary, *The Effect of Police on Crime: New Evidence from U.S. Cities, 1960-2010* 42, 45 (2018) (concluding that increasing the number of police officers decreases crime, and that this effect is more pronounced in cities suffering from high crime rates).[16] And states that do not, or cannot, expend those additional resources are forced to bear the costs associated with an increase in crime. *Id.* at 40-43 (discussing the negative impact of criminal activity on local residents' income); *see also* Wong, *supra*, at 7-8 (finding that "sanctuary" counties are associated with a statistically significant increase in their residents' income). "[S]pecial solicitude" is therefore "particularly appropriate" when the federal government's demand for state-held information "interferes with states' and

[16] *Available at* https://www.nber.org/papers/w18815.pdf.

localities' efforts to provide basic services pursuant to their policies." Bell, *supra*, at 1571.

The anticommandeering doctrine "serves as 'one of the Constitution's structural protections of liberty.'" *Murphy*, 138 S. Ct. at 1477 (quoting *Printz*, 521 U.S. at 921). "'[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'" *Id.* (quoting *New York*, 505 U.S. at 181-82). "For this reason, 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577 (quoting *New York*, 505 U.S. at 162). Laws like SB 54 take reasonable steps to disentangle local law enforcement from federal immigration enforcement, in order to preserve both tangible resources and the critically important relationship of trust between state and local governments and the immigrant communities they serve. The Constitution guarantees California and the *Amici* States that sovereign right.

CONCLUSION

The district court's denial of a preliminary injunction should be affirmed.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

HOLLY M. JOHNSON
Assistant Attorney General

Office of the Solicitor General
Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 727-6287 (phone)
(202) 730-1864 (fax)
loren.alikhan@dc.gov

November 2018

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
State of Delaware
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

GURBIR S. GREWAL
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

BARBARA D. UNDERWOOD
Attorney General
State of New York
120 Broadway
New York, NY 10271

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, NE
Salem, OR 97301

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF SERVICE

I certify that on November 13, 2018, electronic copies of this brief were served through the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served a copy of the foregoing through the CM/ECF system.

/s/ Loren L. AliKhan
Loren L. AliKhan

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-16496

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [6517] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Loren L. AliKhan

Date: Nov 13, 2018

("s/" plus typed name is acceptable for electronically-filed documents)