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18 **IN THE UNITED STATES DISTRICT COURT**
19 **EASTERN DISTRICT OF CALIFORNIA**

20 UNITED STATES OF AMERICA,
21 *Plaintiff,*

22 v.

23 STATE OF CALIFORNIA, *et al.,*
24 *Defendants.*

)
) **CASE No. 2:18-cv-00490-JAM-KJN**
)
) **MUNICIPALITIES & ELECTED**
) **OFFICIALS' AMICI CURIAE BRIEF**
)
) Complaint filed: March 6, 2018
) Honorable John A. Mendez
)

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IDENTITY AND INTEREST OF *AMICI CURIAE*

1
2 As set forth in more detail in the accompanying motion for leave to file, the *amici curiae*
3 identified in the Addendum to this brief are the California municipalities and elected officials. In
4 that capacity, *amici* are or represent political subdivisions of not only plaintiff United States but
5 also defendant California. To ensure the liberties guaranteed to them and to their constituents by
6 both the U.S. Constitution and the California Constitution, *amici* feel compelled to support the
7 federal sovereign over the state sovereign in this dispute over the state’s attempt not only to usurp
8 the federal government’s exclusive and plenary power over immigration, but also to restrict *amici*
9 and their constituents from supporting the federal government in the exercise of that power. For
10 these reasons, *amici* have direct and vital interests in the issues before this Court and thus submit
11 this *amici curiae* brief in support of the federal government’s motion for a preliminary injunction
12 and the accompanying memorandum of law (Fed. Memo., ECF #2-1).

13
14 **CONSTITUTIONAL BACKGROUND**

15 Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S.
16 CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and
17 conflict preemption. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). The latter two are species
18 of implied preemption, where: “field pre-emption may be understood as a species of conflict pre-
19 emption.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

20
21 Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration: the
22 “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v.*
23 *Bica*, 424 U.S. 351, 354 (1976). Although not every “state enactment which in any way deals with
24 aliens” constitutes “a regulation of immigration and thus [is] *per se* pre-empted by this
25 constitutional power,” *id.* at 355, state law is conflict-preempted when “it stands as an obstacle to
26 the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona v.*

1 *United States*, 567 U.S. 387, 406 (2012) (interior quotations omitted).

2 **STATUTORY BACKGROUND**

3 This litigation involves the interplay between the constitutional roles of federal and state
4 government generally and the interplay between federal immigration law and California’s recent
5 attempt to affect federal immigration enforcement under three California laws.

6 **Immigration and Naturalization Act**

7 Congress has set federal immigration policy in the Immigration and Naturalization Act, 8
8 U.S.C. §§1101-1537 (“INA”). As relevant here, two provisions bear special emphasis: the
9 prohibition against concealing, harboring, and shielding from detection illegal aliens, 8 U.S.C.
10 §1324(a)(1)(A), and the prohibition against restricting intergovernmental communication with
11 federal immigration officials, 8 U.S.C. §1373(a).
12

13 First, INA’s §274 prohibits knowingly or recklessly concealing, harboring, and shielding
14 from detection illegal aliens in furtherance of their continued violation of immigration laws, which
15 includes conspiracy and aiding-and-abetting liability. 8 U.S.C. §1324(a)(1)(A)(iii), (v). Under
16 §274(c), not only federal immigration agents but also “all other officers whose duty it is to enforce
17 criminal laws” may enforce §274. 8 U.S.C. §1324(c). The Senate version of §274(c) provided that
18 “all other officers *of the United States* whose duty it is to enforce criminal laws” could enforce
19 §274, but the Conference Committee struck “of the United States” to enable non-federal
20 enforcement. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (*citing* H.R. REP. NO.
21 82-1505 (Conf. Rep.), *as reprinted in* 1952 U.S.C.C.A.N. 1360, 1361) (emphasis added). In 1996,
22 Congress amended the Racketeer Influenced and Corrupt Organization Act (“RICO”) to add INA
23 §274 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996)
24 (enacting 18 U.S.C. §1961(1)(F)), thereby allowing enforcement not only by private parties but
25 also in state court. 18 U.S.C. §1964(c); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).
26

1 Section 1373 prohibits governmental interference with voluntary governmental reporting
2 to federal immigration officials regarding the citizenship or immigration status, lawful or unlawful,
3 of any individual, notwithstanding any other provision of federal, state, or local law. 8 U.S.C.
4 §1373(a). In addition to leaving a clear channel of intergovernmental communication open in
5 §1373(a), INA provides state and local roles in immigration enforcement in a variety of ways. For
6 example, under 8 U.S.C. §1357(g)(10)'s savings clause, the absence of state-federal enforcement
7 agreements under §1357(g) does not preclude state and local government's involving themselves
8 with immigration-related enforcement, including "otherwise to cooperate ... in the identification,
9 apprehension, detention or removal" of illegal aliens.
10

11 **Immigrant Worker Protection Act**

12 The Immigrant Worker Protection Act ("AB450") prohibits employers from voluntarily
13 cooperating with federal immigration officials. 2017 Cal. Stat. c. 492. Among other things, AB450
14 added §§7285.1 to .2 to Government Code to prohibit employers' "voluntary consent to an
15 immigration enforcement agent ... enter[ing] any nonpublic areas of a place of labor" without a
16 warrant, CAL. GOV'T CODE §7285.1(a), and "voluntary consent to an immigration enforcement
17 agent to access, review, or obtain the employer's employee records without a subpoena or judicial
18 warrant" or notice of inspection. CAL. GOV'T CODE §7285.2(a). AB450 also added §90.2 to the
19 Labor Code to require posting notice of any immigration-related inspections of I-9 forms or other
20 employment records within 72 hours of receiving a notice of the inspection. CAL. LABOR CODE
21 §90.2(a)(1). AB450's legislative history confirms that the bill was intended to reduce the risk of
22 deportation. Assembly Floor Analysis, Assembly Bill 450, at 3 (Cal. Sept. 13, 2017).
23

24 **Inspection and Review of Facilities Housing Federal Detainees under GOV'T CODE §12532**

25 Sections 6 and 12 of Assembly Bill 103 ("AB103") added Chapter 17.8 and §12532 to the
26 Government Code, respectively. 2017 Cal. Stat. c. 17, §§6, 12. Under §12532, state governmental

1 officials must review “detention facilities in which noncitizens are being housed or detained for
2 purposes of civil immigration proceedings in California,” CAL. GOV’T CODE §12532(a), and report
3 on the conditions of confinement, the standard of care and due process provided to detainees, and
4 the circumstances of the detainees’ apprehension and transfer to the facility. *Id.* §12532(b)(1).
5 Under Chapter 17.8, municipal government or law-enforcement agencies with no contract to house
6 adult or minor noncitizen detainees for civil-immigration purposes may not enter such contracts,
7 and municipal government or law-enforcement agencies with such contracts may not renew or
8 modify those contracts to expand the number of contract beds used in locked detention facilities.
9 CAL. GOV’T CODE §§7310-7311. AB103’s legislative history acknowledges its dual purposes to
10 provide state “oversight of locked facilities throughout the state that detain immigrants who may
11 be in the country without the proper documentation” and to “[establish] a moratorium on counties
12 entering into new contracts or expanding existing contracts to detain adult and child immigrants
13 in locked county facilities.” Senate Floor Analysis, Assembly Bill 103, at 1 (Cal. June 14, 2017).

14
15 **California Values Act**

16 Section 3 of Senate Bill 54 (“SB54”) added the “California Values Act” as Chapter 17.25
17 of the Government Code. 2017 Cal. Stat. c. 495, §3. This new law purports to restrict state and
18 local law enforcement from voluntarily cooperating with federal immigration efforts, such as
19 providing release dates or transferring detained individuals to immigration officials, detaining
20 individuals based on federal hold requests, providing individuals’ home or work addresses to
21 immigration officials, and making or intentionally participating in arrests based on civil
22 immigration warrants. CAL. GOV’T CODE §7284.6(a)(1)(A)-(E). SB54’s legislative history
23 acknowledges that the federal government relies on state and local police as “force multipliers” in
24 enforcing federal immigration law and that “the California Values Act ... will prevent state and
25 local law enforcement agencies from acting as agents of Immigration and Customs Enforcement.”
26

1 Assembly Floor Analysis, Senate Bill 54, at 8 (Cal. Sept. 15, 2017).

2 **ARGUMENT**

3 **I. CALIFORNIA’S ATTEMPTS TO PROTECT ILLEGAL ALIENS**
4 **IMPERMISSIBLY CONFLICT WITH FEDERAL IMMIGRATION LAW.**

5 As indicated, INA creates an elaborate scheme of state-federal cooperation for enforcing
6 immigration laws. *See, e.g.*, 8 U.S.C. §§1324(c), 1357(g), 1373(a). According to the *Arizona*
7 court — which was citing examples from the Department of Homeland Security in the prior
8 administration — state-federal cooperation under immigration law includes “situations where
9 States participate in a joint task force with federal officers, provide operational support in
10 executing a warrant, or *allow federal immigration officials to gain access to detainees held in state*
11 *facilities,*” as well as “*by responding to [federal] requests for information about when an alien*
12 *will be released from [state or local] custody.*” *Arizona*, 567 U.S. at 410 (emphasis added). When
13 a state deviates from the carefully calibrated state-federal enforcement scheme, the state poses “an
14 obstacle to the full purposes and objectives of Congress,” *id.*, triggering conflict preemption.
15

16 On the other hand, if the federal statutory scheme is elaborate enough, that scheme can
17 evidence a congressional intent to displace states from the entire field:

18 The intent to displace state law altogether can be inferred from a
19 framework of regulation so pervasive that Congress left no room for
20 the States to supplement it or where there is a federal interest so
21 dominant that the federal system will be assumed to preclude
22 enforcement of state laws on the same subject.

23 *Id.* at 399. As indicated, in *Arizona* and this Court’s precedents, INA is both conflict- and field-
24 preemptive of inconsistent state laws in the immigration area.

25 **A. AB450 — the Immigrant Worker Protection Act — is conflict and field**
26 **preempted.**

In purporting to prevent California employers from voluntarily working with federal
immigration officials (*e.g.*, without a warrant), AB450 runs afoul of not only INA but also the First

1 Amendment. Thus, AB450 is both preempted and unconstitutional.

2 Contacting and working with governmental enforcement authorities is protected First-
3 Amendment activity, *Hutchinson v. Bear Valley Cmty. Servs. Dist.*, 191 F. Supp. 3d 1117, 1125-
4 26 (E.D. Cal. 2016); *Kenne v. Stennis*, 230 Cal. App. 4th 953, 967 (Cal Ct. App. 2014) (collecting
5 cases), although *public* employees must meet the additional threshold that their petition or speech
6 activity implicates a “matter of public concern.” *Rendish v. City of Tacoma*, 123 F.3d 1216, 1221
7 (9th Cir. 1997); *Garcetti v. Ceballos*, 547 U.S. 410, 415-16 (2006). Here, the public-concern test
8 is readily met as to any public entities covered by AB450: “government employers have no
9 legitimate interest in covering up wrongdoing.” *Moran v. Washington*, 147 F.3d 839, 849 n.6 (9th
10 Cir. 1998) (citing *Johnson v. Multnomah Cty.*, 48 F.3d 420, 424-25 (9th Cir. 1995)). Quite simply,
11 California cannot constitutionally prohibit employers — whether public or private — from
12 cooperating with federal immigration officials about illegal aliens.
13

14 With respect to statutory conflict preemption, AB450 constitutes criminal concealing,
15 harboring, and shielding of illegal aliens, *see* Section II, *infra*, which makes the conflict-
16 preemption argument what golfers and the Seventh Circuit call a “gimme.” *United States v.*
17 *Hernandez*, 84 F.3d 931, 935 (7th Cir. 1996). Clearly, a state law that violates federal criminal law
18 is civilly preempted as “an obstacle to the full purposes and objectives of Congress.” *Arizona*, 567
19 U.S. at 410; *see also* Fed. Memo. at 11-12 (ECF #2-1) (1986 INA amendments intended to remove
20 unlawful employment as a magnet attracting illegal aliens to the United States). But that is not all.
21

22 On field preemption, this Circuit has gone further than the *Arizona* court in the particular
23 field of concealing, harboring, and shielding under §274: “in developing the scheme for prohibiting
24 and penalizing the harboring of aliens, Congress specifically considered the appropriate level of
25 involvement for the states,” and thus “[§274(c)] allows state and local law enforcement officials
26

1 to make arrests for violations.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1025 (9th Cir. 2013).
2 Based on the carefully calibrated evolutionary path of §274 over time and the detailed federal-state
3 enforcement relationship that §274 contemplates, this Circuit concluded that §274 preempts the
4 entire field of illegal-alien concealment, harboring, and shielding from detection. *Id.* at 1023-26.
5 Accordingly, INA leaves no room for California to withhold the INA-contemplated voluntary
6 participation of state and local law-enforcement officers with federal immigration authorities.

7 **B. AB103 §12 — enacting GOV’T CODE §12532 for state inspection of federal**
8 **detention of non-citizens — is conflict preempted.**

9 GOV’T CODE §12532 requires intrusive state oversight of federal immigration enforcement
10 and restricts the federal government’s access to detention facilities in California. A state lacks
11 authority for either action, given the exclusively federal nature of immigration enforcement under
12 the Constitution. *DeCanas*, 424 U.S.at 354. Thus, GOV’T CODE §12532 is conflict preempted.

13 As the United States explains (Fed. Memo. at 18-19, 22-23 (ECF #2-1)), INA contemplates
14 renting or leasing detention space, 8 U.S.C. §§1103(a)(11), 1231(g)(1)-(2), and federal regulations
15 prohibit the disclosure of information about federal detainees to California’s investigators:
16

17 No person, including any state or local government entity or any
18 privately operated detention facility, that houses, maintains,
19 provides services to, or otherwise holds any detainee on behalf of
20 the Service (whether by contract or otherwise), and no other person
21 who by virtue of any official or contractual relationship with such
person obtains information relating to any detainee, shall disclose or
otherwise permit to be made public the name of, or other
information relating to, such detainee.

22 8 C.F.R. §236.6. Insofar as the “[p]ower to regulate immigration is unquestionably exclusively a
23 federal power,” *DeCanas*, 424 U.S.at 354, these regulations were within the Attorney General’s
24 delegated authority and, as such, are just as preemptive as an act of Congress *vis-à-vis* an
25 inconsistent state law. *New York v. FERC*, 535 U.S. 1, 17-18 (2002). Because the regulation bars
26 disclosing information required by GOV’T CODE §12532, GOV’T CODE §12532 is preempted.

1 Similarly, AB103’s interference with the federal government’s access to detention
 2 facilities in California not only constitutes “an obstacle to the full purposes and objectives of
 3 Congress,” *Arizona*, 567 U.S. at 410, but also impermissibly discriminates against federal interests.
 4 *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (“state ... law is invalid ... if it
 5 regulates the United States directly or discriminates against the Federal Government or those with
 6 whom it deals) (internal quotations omitted); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842-43
 7 (9th Cir. 2014) (“state ... law discriminates against the federal government if it treats someone
 8 else better than it treats the government”) (internal quotations omitted); *United States v. County of*
 9 *Fresno*, 429 U.S. 452, 462-64 (1977) (burdens imposed on federal interests must be imposed
 10 equally on similarly situated constituents). GOV’T CODE §12532 fails these preemption tests.

11
 12 **C. SB54 — the California Values Act — is conflict preempted.**

13 In seeking to restrict state and local law-enforcement officers from voluntarily contacting
 14 federal immigration authorities, SB54 directly conflicts with — and is superseded by — §1373,
 15 which allows such contact “[n]otwithstanding any other provision of Federal, State, or local law.”
 16 8 U.S.C. §1373(a). Given the express congressional override of inconsistent state laws, this Court
 17 need not inquire into the degree or extent of SB54’s obstruction of federal law. The only
 18 question — answered in Section III, *infra* — is whether Congress had the authority to enact §1373
 19 in the first place. If §1373 is valid, SB54 falls under direct application of the Supremacy Clause.
 20

21 **D. The United States — not California and not municipal government — has the**
 22 **exclusive authority to litigate as *parens patriae* for the people of California.**

23 As California municipalities and elected officials, *amici* are caught in the middle of this
 24 state-federal battle over immigration policy. In this battle, the federal government has not only
 25 plenary authority to set immigration policy, *DeCanas*, 424 U.S. at 354, but also exclusive authority
 26 to litigate as *parens patriae* for *amici* and their constituents. *Alfred L. Snapp & Son v. Puerto Rico*

1 *ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). The California Legislature and elected state officials
 2 are free to name their bills the “California Values Act” and the like, but the national government
 3 and federal Constitution speak for Californians on matters of immigration. *Amici* do not question
 4 defendants’ standing to defend state law, *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986), but
 5 defendants do not speak for the People of California in this litigation.

6 **II. BY RESTRICTING PRIVATE EMPLOYERS’ AND MUNICIPAL**
 7 **GOVERNMENT’S COOPERATION WITH FEDERAL IMMIGRATION**
 8 **OFFICIALS, AB450 AND SB54 CRIMINALLY CONCEAL, HARBOR, OR**
 9 **SHIELD ILLEGAL ALIENS FROM DETECTION.**

10 Beyond conflict preemption, the avowed purpose of AB450 and SB54 to make it more
 11 difficult for the federal government to deport illegal aliens, which constitutes criminal concealing,
 12 harboring, or shielding from detection under INA §274(a)(1)(A).⁴ As this Circuit has made clear,
 13 “[t]he purpose of [§274] is to keep unauthorized aliens from entering *or remaining* in the country.”
 14 *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original). AB450
 15 and SB54 put municipalities in an untenable position between the demands of state law and federal
 16 law. The requested injunction is needed to protect Californians from their own state government.

17 As the Ninth Circuit explained in *Acosta de Evans*, 531 F.2d at 430 & n.3, Congress added
 18 the “shield from detection” prong as “an independent addition” in 1952, whereas “harbor” simply
 19 means “afford shelter to” (*i.e.*, without the evasion inherent in §274’s other two prongs). In *United*
 20 *States v. Aguilar*, 883 F.2d 662, 689 (9th Cir. 1989) (interior quotations omitted), *abrogated in*
 21 *part on other grounds*, *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002), this Circuit
 22 upheld a jury instruction classifying concealing or shielding as “conduct tending to directly or
 23 substantially facilitate an alien’s remaining in the United States unlawfully with the intent to
 24

25 ⁴ As indicated, the crime includes not only concealing, harboring, and shielding from
 26 detection, but also attempts, conspiracy, and aiding and abetting. 8 U.S.C. §1324(a)(1)(A)(iii), (v).

1 prevent detection by the Immigration and Naturalization Service.” Because the Legislature was
 2 acting to shield over 2 million illegal aliens at once, the Legislature had the required knowledge
 3 of the illegal aliens’ immigration status. *United States v. Bunker*, 532 F.2d 1262, 1264 (9th Cir.
 4 1976). The laws’ stated “*purpose of avoiding the aliens’ detection by immigration authorities ...*
 5 *is synonymous with having acted with necessary intent.*” *United States v. You*, 382 F.3d 958, 966
 6 (9th Cir. 2004) (interior quotations and alterations omitted, emphasis in original). In sum, AB450
 7 and SB54 criminally shield illegal aliens from detection in violation of §274.

8
 9 Even if one supports the Legislature’s charitable goals toward illegal aliens, the laws still
 10 are illegal because charitable ends do not excuse unlawful means: “The government’s interest in
 11 controlling immigration outweighs [the] purported religious interest” of religiously motivated
 12 sanctuary workers.⁵ *Aguilar*, 883 F.2d at 696. Just as the *Aguilar* sanctuary workers’ Bible
 13 counseled to “Render to Caesar the things that are Caesar’s,” Mark 12:17 (King James), our secular
 14 bible — the Constitution — counsels the Legislature to render to the federal Government the
 15 things — such as immigration policy — that are the federal Government’s.⁶

16
 17 Under §274’s plain terms, aiding and abetting is punished as the principal crime. 8 U.S.C.
 18 §1324(a)(1)(A)(v); *accord* 18 U.S.C. §2(a). To meet that standard, “a defendant must not just in

19
 20 ⁵ The word “sanctuary” is historically inaccurate, based more on fiction and other countries’
 21 traditions, *see, e.g.*, VICTOR HUGO, *THE HUNCHBACK OF NOTRE-DAME* 189 (Lowell Bair ed. &
 22 trans., Bantam Books 1956), than on legal doctrine. In a country, such as ours, that derives its
 23 common law from English common law, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654 (1834),
 24 sanctuary would not suffice for what California seeks to accomplish, and — in any event —
 25 England ended sanctuary for criminal and civil process in 1623 and 1723, respectively, before
 26 English common law feed into our common law. *Church Sanctuary for Illegal Aliens*, 7 Op. O.L.C.
 168, 168-69 & n.8 (1983). Significantly, even prior to its revocation, English common law allowed
 seeking sanctuary in a church, but only to choose between submitting to trial or confessing and
 leaving the country. *Id.* at 169 (*citing* 4 WILLIAM BLACKSTONE, *COMMENTARIES* *332-33).

⁶ By adding §274 to RICO’s list of predicate offenses, 18 U.S.C. §1961(1)(F), Congress
 signaled that it does not consider California’s actions here benign.

1 some sort associate himself with the venture ... but also participate in it as in something that he
2 wishes to bring about and seek by his action to make it succeed.” *Rosemond v. United States*, 134
3 S.Ct. 1240, 1251 n.10 (2014) (internal quotations omitted). By purporting to compel otherwise-
4 willing law-enforcement officers and employers to desist from aiding federal enforcement efforts,
5 both AB450 and SB54 seek to make illegal aliens’ evasion of federal authorities succeed. Aiding-
6 and-abetting liability requires neither “that the defendant was aware of every detail of the
7 impending crime ... nor that [the defendant] be present at, or personally participate in, committing
8 the substantive crime.” *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987). While “[m]ere
9 participation ... is not enough,” the Legislature that enacted AB450 and SB54 affirmatively
10 intended to thwart federal immigration efforts by shielding illegal aliens from the federal
11 government. *United States v. Ramos-Rascon*, 8 F.3d 704, 711 (9th Cir. 1993) (aiding-and-abetting
12 liability requires “that the defendant intentionally assisted in the venture’s illegal purpose”)
13 (internal quotations omitted). The Legislature here fully acknowledged its purpose to thwart
14 immigration enforcement and to reduce deportations. *See* Assembly Floor Analysis, SB54, at 8
15 (Cal. Sept. 15, 2017); Assembly Floor Analysis, AB450, at 3 (Cal. Sept. 13, 2017). That is more
16 than enough for aiding-and-abetting liability.
17

18 **III. 8 U.S.C. §1373 IS A VALID EXERCISE OF CONGRESSIONAL POWER.**

19 As indicated in Sections I.A and I.C, *supra*, AB450 and SB54 conflict with federal
20 immigration policy, including 8 U.S.C. §1373. For that section to preempt AB450 and SB54,
21 however, it must be a valid exercise of federal power. The Supreme Court has recognized two
22 distinct types of unconstitutionality: “laws for the accomplishment of objects not entrusted to the
23 government” and those “which are prohibited by the constitution.” *McCulloch v. Maryland*, 17
24 U.S. (4 Wheat.) 316, 423 (1819). Put another way, “a federal statute, in addition to *being*
25 *authorized* by Art. I, § 8, must also ‘*not [be] prohibited*’ by the Constitution.” *United States v.*
26

1 *Comstock*, 560 U.S. 126, 135 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations
 2 in *Comstock*, emphasis added). Anticipating the state’s argument that §1373 exceeds federal
 3 power, *amici* now endeavor to show that it does not.

4 **A. 8 U.S.C. §1373 does not commandeer the states.**

5 California might attempt to challenge 8 U.S.C. §1373(a) as “commandeering” under
 6 precedents that “involve attempts by Congress to direct states to perform certain functions,
 7 command state officers to administer federal regulatory programs, or to compel states to adopt
 8 specific legislation.” *Raich v. Gonzales*, 500 F.3d 850, 867 n.17 (9th Cir. 2007) (citing *Printz v.*
 9 *United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992)).⁷
 10 As explained in this section, federal immigration law’s allowance for a joint state and local role in
 11 immigration enforcement does not commandeer anyone.
 12

13 At the outset, commandeering analysis “begin[s] with the time-honored presumption that
 14 the [statute] is a constitutional exercise of legislative power.” *Reno v. Condon*, 528 U.S. 141, 148
 15 (2000) (internal quotations omitted). Further, commandeering analysis does not extend to federal
 16 regulation of private parties, such as private employers subject to AB450. *FERC v. Mississippi*,
 17 456 U.S. 742, 764 (1982); *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988).⁸ Finally, as its
 18 name suggests, commandeering analysis does not apply to *consensual* actions. *S. Cal. Edison Co.*
 19 *v. Lynch*, 307 F.3d 794, 808-09 (9th Cir. 2002). Thus, if *amici* or their law-enforcement agencies
 20 wish to cooperate with federal immigration efforts, federal immigration law does not
 21 “commandeer” that cooperation. Instead, it simply allows and protects that cooperation.
 22

23
 24 ⁷ Commandeering can occur under the Spending Clause, *Nat’l Fed’n of Indep. Businesses v.*
 25 *Sebelius*, 567 U.S. 519, 577-78 (2012), but this litigation does not concern funding conditions.

26 ⁸ As discussed in Section III.B, *infra*, purporting to restrict private parties’ ability to work
 with federal immigration violates the First Amendment right of petition.

1 With private and consensual cooperation with federal immigration authorities thus outside
2 the state’s potential “commandeering” claim, all that remains as potentially impermissible federal
3 commandeering is the allowance for *state* officers — *i.e.*, actual *state* employees — to work
4 voluntarily with federal immigration authorities, notwithstanding state law to the contrary. *See* 8
5 U.S.C. §1373(a) (applying “[n]otwithstanding any other provision of Federal, State, or local law”).
6 While *amici* respectfully submit that that question properly lies under the Necessary and Proper
7 Clause, see Section III.B, *infra*, it is clear that nothing in 8 U.S.C. §1373(a) violates the anti-
8 commandeering principles laid down in the *Printz-New York* line of cases.

9
10 In *New York*, the Supreme Court invalidated a federal law that required states to choose
11 either to regulate the disposal of radioactive waste by private parties according to federal guidelines
12 or to take title to the waste. *See New York*, 505 U.S. at 174-75. The Supreme Court rejected the
13 ability of Congress to direct the workings of state legislatures:

14 While Congress has substantial powers to govern ... directly,
15 including in areas of intimate concern to the States, the Constitution
16 has never been understood to confer upon Congress the ability to
require the States to govern according to Congress’ instructions.

17 *Id.* at 162. Nothing in §1373(a) directs California’s Legislature to enact anything.

18 Coming closer to this case — but not close enough to aid the state — *Printz* invalidated a
19 provision of federal law that *required* state and local law enforcement officers to conduct
20 background searches of prospective gun purchasers, something the court considered a backdoor
21 attempt to compel states to enact or enforce a federal regulatory program. *See Printz*, 521 U.S. at
22 904. In essence, *Printz* applied *New York* to a federal statute that directed state officers, in lieu of
23 directing the state legislature, which the Supreme Court found equally impermissible:

24 Congress cannot circumvent [*New York*] by conscripting the States’
25 officers directly. The Federal Government may neither issue
26 directives requiring the States to address particular problems, nor

1 command the States' officers, or those of their political
subdivisions, to administer or enforce a federal regulatory program.

2 *Id.* at 935. Again, nothing in §1373(a) directs state or local officers to do anything affirmatively.

3 In both *New York* and *Printz*, the challenged federal law impermissibly compelled state
4 action, on pain of a dire-enough consequence to constitute the commandeering of states or state
5 officers. With 8 U.S.C. §1373(a), INA does not *compel* California to do anything. Instead, INA
6 merely prohibits California from preventing state and local law-enforcement officers and public
7 and private employers from voluntarily cooperating with federal immigration authorities. To the
8 extent that that federal prohibition is inconsistent with state law, the Supremacy Clause makes
9 clear that the federal law prevails, U.S. CONST., art. VI, cl. 2, unless the federal law falls outside
10 the power of Congress to enact. *See* Section III.B, *infra*.

11
12 **B. 8 U.S.C. §1373 is a “necessary and proper” exercise of federal power over**
13 **immigration.**

14 In addition to its enumerated powers, Congress also has “broad authority,” *Comstock*, 560
15 U.S. at 136, under the Necessary and Proper Clause to “make all Laws which shall be necessary
16 and proper for carrying into Execution” Congress’s enumerated powers. U.S. CONST, art. I, §8, cl.
17 18. In addition to its enumerated powers, Congress “must also be entrusted with ample means for
18 their execution.” *McCulloch*, 17 U.S. (4 Wheat.) at 408. Under the Necessary and Proper Clause,
19 the question is “whether the statute constitutes a means that is rationally related to the
20 implementation of a constitutionally enumerated power.” *Comstock*, 560 U.S. at 134. Section 1373
21 falls comfortably within Congress’s necessary-and-proper authority, even assuming *arguendo* that
22 it is not within Congress’s plenary Article I power over immigration.

23
24 When Congress regulates pursuant to its enumerated powers, Congress — through the
25 Necessary and Proper Clause — “possesses every power needed to make that regulation effective.”
26 *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). The Clause “empowers

1 Congress to enact laws in effectuation of its enumerated powers that are not within its authority to
2 enact in isolation.” *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the
3 judgment). Thus, although the Constitution speaks of only a few crimes, and “nowhere speaks
4 explicitly about the creation of federal crimes beyond those” few, “Congress [has] broad authority
5 to create ... crimes” in support of its enumerated powers. *Comstock*, 560 U.S. at 135-36. California
6 cannot seriously dispute the federal authority to create the crime of concealing, harboring, and
7 shielding from detection illegal aliens as necessary and proper to federal control of immigration,
8 8 U.S.C. §1324(a)(1)(A), but the question of §1373’s necessity and propriety might arise.

9
10 As indicated, §1373 preempts state and local law that either prohibits or restricts inter-
11 governmental communication on any individual’s immigration status. 8 U.S.C. §1373(a). As
12 signaled in Section I.A, *supra*, §1373 protects the First Amendment right of petition with respect
13 to immigration issues; as signaled in Section II, *supra*, §1373 guards against criminal concealing,
14 harboring, and shielding from detection illegal aliens in violation of INA §274(a)(1)(A). Under the
15 circumstances, §1373 is rationally related to the enumerated powers of Congress over immigration.

16
17 Courts are deferential to Congress under the Necessary and Proper Clause on issues such
18 as necessity, efficacy, and the fit between the means chosen and the constitutional end. *Comstock*,
19 560 U.S. at 135 (Court’s alterations and interior quotations omitted). It suffices for a statute to be
20 “convenient ... or useful” or “conducive” to the exercise of an enumerated power. *McCulloch*, 17
21 U.S. (4 Wheat.) at 418; *accord Raich*, 545 U.S. at 33 (Scalia, J., concurring in the judgment). For
22 that reason, the United States is likely to prevail if California argues that Congress lacked authority
23 to enact §1373 under the Necessary and Proper Clause.

24 CONCLUSION

25 For the foregoing reasons, *amici* respectfully submit that this Court urgently should enjoin
26 the challenged provisions of AB450, AB103, and SB54.

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Respectfully submitted,

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