IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, Defendants.	1:19-cv-08876 (JSR)

BRIEF OF PROFESSOR NIKOLAS BOWIE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

Nikolas Bowie is a historian and an assistant professor of law at Harvard Law School, where he teaches and writes about federal constitutional law, state constitutional law, and local government law. He has an interest in the sound development of this body of law.

ARGUMENT

In a case like this, involving the division of authority between federal and state governments, the Tenth Amendment and Article I of the Constitution "are mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992). "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 157. As discussed in an *amicus* brief filed earlier in this litigation (Dkt. 37), New York's argument that the federal government has violated the Tenth Amendment is another way of stating that the federal government is exercising power beyond what Article I allows. New York is correct: even if this Court concludes that the Immigration and Nationality Act cannot be read to authorize civil arrests in and around state courthouses in light of the common-law privilege against such disruptive arrests, the Act also cannot be read to authorize such arrests because Article I doesn't give Congress such an unnecessary and improper power.

1. The first *amicus* brief explains in detail why the Constitution doesn't empower the federal government to regulate immigration in a manner that disrupts proceedings in state courthouses or interferes with a state's duty to provide access to its courts. In short: Congress's power to regulate immigration domestically is grounded in the Necessary and Proper Clause. *See Fong Yue Ting v. United States*, 149 U.S. 698, 707–13 (1893). Although that clause gives Congress varied and broad powers, *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421

(1819), these powers are far more limited when Congress legislates domestically than when it legislates at or beyond the border, *see Keller v. United States*, 213 U.S. 138, 148 (1909). At the border, Congress is "clothed . . . with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States." *The Lottery Case*, 188 U.S. 321, 373 (1903). But when Congress legislates domestically, it must consider the powers reserved to the states by the Tenth Amendment: "The laws which would be necessary and proper in the one case would not be necessary or proper in the other." *Id.*

Over the last decade, when the Supreme Court has surveyed the outer limits of Congress's implied powers to legislate domestically, it has asked whether a particular power would be "necessary and proper" for exercising an enumerated power. The Court has considered an implied power *unnecessary* when it would be "too attenuated" from an enumerated power, and *improper* when it would "invade state sovereignty or otherwise improperly limit the scope of 'powers that remain with the States.'" *United States v. Comstock*, 560 U.S. 126, 144–46 (2010); *see NFIB v. Sebelius*, 567 U.S. 519, 559–60 (2012). In light of the federal government's literal invasion of New York's sovereign courthouses—where federal agents conduct warrantless arrests of immigrants in a manner that disrupts state courthouse proceedings and interferes with New York's duty to provide access to its courts—no necessary and proper statute could confer upon the federal government the authority it claims. Nor could this Court infer such authority from a statute that lacks an "unmistakably clear" statement that Congress has intended to alter the "usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

2. An additional reason confirms the impropriety of the federal government's alleged power to conduct warrantless courthouse arrests: such a power would violate the same federalism concerns that underly the Supreme Court's anticommandeering doctrine.

Over the past two centuries, the Supreme Court has repeatedly held that Congress lacks the power to "commandeer" state governments by requiring them to "enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161. For example, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Supreme Court declared that states could prohibit their officers from "act[ing] under" the Fugitive Slave Act of 1793. *Id.* at 561. On the basis of this decision, several states passed "personal liberty laws" prohibiting state officials from making state courthouses or state facilities available for the enforcement of the Fugitive Slave Act. *See, e.g.*, 1843 Mass. Acts 33. The Supreme Court subsequently confirmed that Congress lacks the power to compel states to enforce its own legislation. *New York*, 505 U.S. at 161.

In recent years, the Supreme Court has explained that the anticommandeering doctrine vindicates three valuable principles of federalism—all of which are implicated by this case. First, federalism "divides authority between federal and state governments" to "protect[] individuals" and reduce the "risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181. Here, by contrast, the federal government has sought to condense state and federal power into one. In April 2019, for instance, federal prosecutors indicted Judge Shelley Joseph, a Massachusetts judge, for allegedly interfering with an ICE arrest outside her own courtroom. See Indictment, *United States v. Joseph*, No. 19-cr-10141 (D. Mass. Apr. 25, 2019). Where courthouse arrests are accompanied by a requirement that state judges assist the federal government, state and federal authority is no longer divided in a way that protects individuals from tyranny and abuse.

Second, federalism increases political accountability by ensuring that "[v]oters who like or dislike the effects of [a] regulation know who to credit or blame." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018). These lines of accountability are blurred when state courthouses and state facilities become associated with an increased risk of federal immigration arrest and detention. Bystanders observing immigration arrests both in and around courthouses have struggled to identify ICE agents as federal officers rather than state officers. Compl. ¶ 81. And the Manhattan district attorney has reported that he has to work "twice as hard to assure immigrants that [his] office is a safe place to report crime without fear of getting deported." Compl. ¶ 96.

Finally, federalism prevents the federal government from "shift[ing] the cost of regulation" to the states. *Murphy*, 138 S. Ct. at 1477. Here, the federal government has transgressed that obstacle by purposefully taking advantage of the money that New York spends both on screening people for weapons and other contraband, *see* U.S. Immigration & Customs Enf't, Directive No. 11072.1, Civil Immigration Enforcement Actions Inside Courthouses 1 (2018), and on identifying and locating noncitizens. The ICE Directive makes clear that "[c]ivil immigration enforcement actions inside courthouses should . . . be conducted in collaboration with court security staff, and utilize the court building's non-public entrances and exits." *Id.* And as the Complaint highlights, ICE agents can "identif[y] [non-citizens] in the court room" and "follow . . . [them] out of the . . . Courthouse" to make arrests. Compl. ¶71.

In *New York v. United States*, the Supreme Court invoked these three principles to hold that Congress lacked the power to "commandeer" states into enforcing a federal regulatory program. 505 U.S. at 161. But the three principles also animate every other federalism doctrine, from the "clear statement" rule of *Gregory v. Ashcroft*, 501 U.S. at 460–61, to the interpretation of the

Necessary and Proper Clause that considers "whether essential attributes of state sovereignty are compromised by the assertion of federal power." *NFIB*, 567 U.S. at 559–60 (quoting *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring in judgment)). "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*, 505 U. S. 144, 181 (1992) (internal quotation marks omitted). Federalism secures these same liberties to noncitizens too, as "there is in the Constitution no grant to Congress of the police power." *Keller*, 213 U.S. at 148.

CONCLUSION

For these reasons, the plaintiff's motion for summary judgment should be granted.

Dated: March 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the Court's CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished via CM/ECF system.

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