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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 2:18-cv-00490-JAM-KJN

BRIEF OF *AMICI CURIAE* ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, CRIMINAL LAW AND IMMIGRATION LAW SCHOLARS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

NO HEARING NOTICED

Complaint Filed: March 6, 2018

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The United States' challenge to the State of California's decision to disentangle its local criminal justice system from federal immigration enforcement presents a question of statutory construction that is easily answered at this stage of the litigation: Federal statutory law does not preempt Senate Bill 54 on its face. *Amici*, who are listed in Appendix A, are 83 scholars of administrative law, constitutional law, criminal law, and immigration law. They have an interest in the proper resolution of conflicts between federal immigration law and state law based upon application of fundamental principles of statutory construction and constitutional law. *Amici* submit this brief to address these fundamental principles and to explain their constitutional and historical foundations.

California's decision to disentangle its law enforcement resources from federal immigration enforcement does not threaten federal supremacy in matters of immigration policy. To the contrary, the Administration's efforts to entangle local criminal justice systems with immigration enforcement are historically anomalous and exceed its statutory and constitutional authority. For most of the Nation's history, state and local law enforcement played little to no role in the enforcement of federal immigration laws. In the modern era, Congress has authorized state and local officials to participate in enforcing immigration law in limited ways. But Congress has never *required* state and local governments to do so. Instead, where Congress has created a role for state and local jurisdictions to participate, Congress has consistently taken care to offer them a *choice*. In enacting SB 54, California has simply chosen to exercise that choice in the negative.

Nothing in federal statutory law preempts California's choice. The United States claims that because parts of SB 54 withhold assistance, they stand as an obstacle to federal immigration enforcement under the detention and removal provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1226 & 1231. *See* U.S. PI Mot. 23-27, 29-31 (discussing Cal. Gov't Code §§ 7284.6(a)(1)(C)-(D), (a)(4)). And the United States claims that parts of SB 54 directly conflict with 8 U.S.C. § 1373(a), even though

SB 54 contains a savings clause that expressly authorizes state and local officials to share information with federal immigration officials to the extent that Section 1373 limits state law. *See id.* at 27-28 (discussing Cal. Gov't Code §§ 7284.6(a)(1)(C) & (D)); *see also* Cal. Gov't Code § 7284.6(e) (savings clause). SB 54 need not, and indeed should not, be construed to stand as an obstacle to implementation of the INA or to conflict directly with 8 U.S.C. § 1373. The detention and removal provisions of the INA impose obligations on *federal* officials; they were not intended to disturb state and local authority over the allocation of state and local law enforcement resources. And Section 1373 and SB 54 would conflict on their face only if they are read without regard to SB 54's savings clause, the plain meaning of Section 1373's terms, and the serious constitutional questions that the United States' construction of Section 1373 would create, including those under the Supreme Court's recent decision in *Murphy v. NCAA*, No. 16-476, 2018 U.S. LEXIS 2805 (U.S. May 14, 2018), which reaffirmed the ban on federal commandeering of states.

At this stage, this Court should not construe SB 54 and federal law to conflict. Rather, where, as here, "[t]here is a basic uncertainty about what the law means and how it will be enforced," the Supreme Court has instructed that a court "should assume that 'the historic police powers of the States' are not superseded." *Arizona v. United States*, 567 U.S. 387, 400, 415 (2012) (internal citation omitted).

ARGUMENT

I. THE ADMINISTRATION'S EFFORTS TO FORCE THE ENTANGLEMENT OF LOCAL CRIMINAL JUSTICE SYSTEMS WITH IMMIGRATION ENFORCEMENT ARE HISTORICALLY ANOMALOUS AND CONSTITUTIONALLY SUSPECT

The United States argues that federal immigration law preempts SB 54 based on its view of the INA, which, it argues, "codifies the Executive Branch's constitutional and inherent authority" to arrest and detain undocumented individuals. U.S. PI Mot. 23. To the contrary, Congress has never granted the

Executive Branch such sweeping power to preempt state and local law. More specifically, Congress has never bestowed upon federal authorities an unchecked right to entangle local criminal justice systems with the Executive Branch's immigration enforcement in the ways that the United States now demands. Congress's approach through the INA has been to invite specific, limited cooperation from state and local governments, not to require it.[1]

Across most of United States history, at least after the enactment of the first federal immigration statutes in the late nineteenth century, there has been a sharp demarcation of spheres of responsibility for state and local law enforcement agencies, on the one hand, and federal immigration enforcement authorities, on the other. State and local law enforcement bore much of the responsibility for the administration of criminal laws. Indeed, "[t]he promotion of safety of persons and property [has been] unquestionably at the core of [the states'] police power" reserved by the Tenth Amendment. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Enforcement of immigration laws was reserved for federal officials. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. Rev. 1557, 1571–78 (2008) (describing court decisions distinguishing civil immigration enforcement from criminal enforcement and allocating the former exclusively to the federal government while recognizing the states' primary role in the latter); *Arizona*, at 409 (noting that immigration enforcement decisions "touch on foreign relations and must be made with one voice").

[1] *See* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy,* 74 Ohio St. L.J. 1105, 1120–21 (2013) (observing that notwithstanding federal efforts to enlist state and local officials in immigration enforcement, "immigration federalism . . . presumes some level of self-conscious, calibrated, and negotiated choice by states and localities concerning the extent to enmesh their law enforcement agencies with immigration policing activities.").

In the 1980s and 1990s, Congress enacted several anti-drug statutes that contained immigration-related provisions. For example, as part of the Anti-Drug Abuse Act of 1986, Congress enacted the Narcotics Traffickers Deportation Act, which expanded the categories of individuals who would be deported for controlled substance convictions. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207 (Oct. 27, 1986). The Anti-Drug Abuse Act of 1988 introduced the term "aggravated felony" and made the commission of such crimes grounds for deportation. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-43, 102 Stat. 4469-70 (Nov. 18, 1988). Around this time, Congress also introduced the first statutory mention of an immigration detainer. *See* Anti-Drug Abuse Act of 1986, *supra*, § 1751(d) (creating 8 U.S.C. § 1357(d)).[2]

These changes to federal law, however, were directed at federal authorities. Congress did not attempt to require states and local governments to assist the Executive Branch with carrying out its duties. In 1996, Congress added Section 287(g) to the INA, allowing the Attorney General to enter into written agreements with State or localities that *chose* to allow their officers to carry out the "function of an immigration officer." 8 U.S.C. § 1357(g). In addition, Congress authorized states and localities to permit their officers to make civil immigration arrests in certain narrow instances, *see* 8 U.S.C. § 1252c; 8 U.S.C. § 1103(a)(10), and to

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[2] Commentators have observed that policymakers are still struggling to disentangle immigration law from anti-crime legislation, an entanglement that reflected a myth of immigrant criminality "reimagin[ing] noncitizens as criminal deviants and security risks." César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. Rev. 1457, 1458 (2013); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827 (2007); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 Ohio St. L.J. 599, 637–42 (2015).

contract with the Attorney General to house federal immigration detainees if they desired, *see* 8 U.S.C. § 1103(a)(11)(A). Throughout, Congress never *required* states and localities to assist the federal government.

Nevertheless, after 9/11, the federal Executive Branch began to see state and local law enforcement agencies as a potential "force multiplier" for the enforcement of federal immigration law. The push to involve local criminal agencies in immigration enforcement became more insistent and the Executive Branch began to merge criminal justice concerns with immigration concerns in an attempt to enlist state and local officers in the federal immigration fight.[3] In 2002, for example, the Office of Legal Counsel reversed its previous view that state and local officers did not have "inherent authority" to enforce civil immigration laws, paving the way for more states and localities to lend their officers to the federal effort.[4] However, the 2002 opinion was later discredited by the Supreme Court's

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[3] *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws,* 6 U. Pa. J. Const. L. 1084, 1084-88 (2004) (describing the "federal effort to enlist, or even conscript, state and local police in routine immigration enforcement"); *see also* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism,* 44 Ariz. St. L.J. 1431, 1475 (2012) (explaining that linking of immigration and crime suggested that "states and cities could and should be part of the solution").

[4] Memorandum for the Att'y Gen., from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations* 8 (April 3, 2002); *cf.* Memorandum for Joseph R. Davis, Ass't Director, FBI, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989), https://www.scribd.com/document/24732201/DOJ-Memo-on-INS-Warrants-of-Deportation-in-Relation-to-NCIC-Wanted-Person-File-4-11-89; Memorandum for Assistantt U.S. Attorney, S.D. Cal., from Teresa Wynn Roseborough, Dep. Assistant Attorney General, Office of Legal Counsel, *Re: Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), https://www.justice.gov/file/20111/download.

decision in *Arizona.* In that case, the Supreme Court pointed to only three "limited circumstances" in which Congress had allowed State and local officers to make civil immigration arrests. *Arizona*, 567 U.S. at 408–09.[5] It held that Arizona's attempt (premised on the "inherent authority" argument) to authorize state and local participation beyond the "system Congress created" violated the Supremacy Clause. *Id.* at 408–10 (citations omitted).

The Executive Branch has also overreached in its attempt to leverage immigration detainers to enlist the participation of local jail officials in federal immigration enforcement. Before April 1997, the detainer form in use by federal immigration officials did not request detention at all. *See Vargas v. Swan*, 854 F.2d 1028, 1035 (7th Cir. 1988) (appendix showing Form I-247 in use from March 1983 to April 1997). In 1997, the Executive Branch changed the form, suddenly insisting that local jails receiving detainers were *required* to detain persons otherwise entitled to release. Form I-247 (Apr. 1997), *available at* http://bit.ly/2y7qVyS. The federal courts, however, have since held that Congress never authorized mandatory detainer compliance. *Galarza v. Szalczyk*, 745 F.3d 634, 641–45 (3d Cir. 2014).[6, 7]

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[5] The *Arizona* Court noted a fourth example of Congress authorizing State and local officers to perform immigration functions, which pertained to enforcement of *criminal* anti-harboring laws. 8 U.S.C. § 1324(c).

[6] The federal government's use of immigration detainers has resulted in widespread Fourth Amendment violations and violations of the INA. *See, e.g., Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D. R.I. 2014), *aff'd* 793 F.3d 208 (1st Cir. 2015) ("One needs to look no further than the detainer itself . . . The fact that an investigation had been initiated is not enough to establish probable cause because the Fourth Amendment does not permit seizures for mere investigations."); *Moreno v. Napolitano,* 213 F. Supp. 3d 999 (N.D. Ill. 2016) (holding federal detainer practices routinely exceeded immigration officers' arrest authority under the INA).

While the participation of state and local law enforcement officials in federal immigration efforts, including through the exchange of information and transfers from local jails, is no longer anomalous, states like California retain the authority to consider the consequences of entanglement with federal immigration enforcement and determine that it is in the best interests of their residents to opt out of participating in federal deportation efforts. The United States' bid to force California to participate in the current Administration's immigration enforcement plans should fare no better than previous instances of executive branch overreach. Congress has respected the distinct spheres of responsibility of the Federal government and the State and local governments. In all of its legislative enactments concerning civil immigration arrests and detention, Congress has refrained from coopting State and local governments. This Court should hold federal authorities to the same principle in this case.

[7] A third example of executive branch overreach has been the Trump Administration's attempts to attach immigration-related funding conditions to law enforcement grants. *See, e.g., Cnty. of Santa Clara v. Trump,* 250 F. Supp. 3d 497 (N.D. Cal. 2017), *reconsideration denied,* 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & Cty. of San Francisco v. Trump,* 17-16886, 2018 U.S. App. LEXIS 2391401847 (9th Cir. Jan. 4, 2018) (striking down executive order threatening defunding on grounds of, *inter alia,* separation of powers, Spending Clause violation, and violation of the Tenth Amendment); *City of Chicago v. Sessions,* — F.3d —, 2018 U.S. App. LEXIS 9862 (7th Cir. April 19, 2018) (affirming, on separation of powers grounds, district court's grant of nationwide injunction as to funding conditions imposed by Attorney General); *City of Philadelphia v. Sessions,* 280 F. Supp. 3d 579 (E.D. Pa. 2017) (issuing preliminary injunction as to funding conditions imposed by Attorney General on grounds, *inter alia,* that such conditions were arbitrary and capricious).

II. THE STATE'S DECISION TO DISENTANGLE ITS LOCAL CRIMINAL JUSTICE SYSTEM FROM FEDERAL IMMIGRATION ENFORCEMENT IS NOT PREEMPTED BY FEDERAL LAW

In *Arizona*, the Supreme Court explained that federal courts should not aggressively wield preemption as a scythe to facially preempt state law. *See* 567 U.S. at 400, 415. While state law cannot stand as an obstacle to the implementation of federal statutory law, "[i]n pre-emption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* at 400 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption against preemption has particular force where the federal government has brought a facial challenge to state law and "[t]here is a basic uncertainty about what the law means and how it will be enforced." *Id.* at 415. Construing 8 U.S.C. § 1373 and the INA to preempt SB 54 on its face would supersede the historic police powers of the states and unnecessarily raise serious constitutional questions under the Tenth Amendment. To avoid these constitutional problems, this Court should decline the United States' invitation to enter a preliminary injunction against SB 54.

A. Federal Law Should Not be Construed to Facially Preempt State Law Where Doing So Would Supersede the Historic Police Powers of the States and Raise Serious Constitutional Questions

In an era where Congress sets the metes and bounds of federal regulation, statutory interpretation has become a safeguard of federalism. When construing federal statutes, federal courts presume that "Congress legislates against the backdrop of certain unexpressed presumptions," including "those grounded in the relationship between the Federal Government and the States." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (internal quotation marks omitted). Construing federal statutes in light of these presumptions is crucial to preserving federalism "inasmuch as [the Supreme] Court . . . has left primarily to the political process the protection of the States against intrusive

exercises of Congress' Commerce Clause powers." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).[8]

Several background presumptions regarding the federal system have long informed statutory construction. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This amendment reserves police powers to the states, including over matters of local criminal justice. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000). It also reflects a structural principle that prohibits the federal government from commandeering state legislatures and executive officials or coercing them to implement federal law. *See NFIB v. Sebelius*, 567 U.S. 519, 576 (2012); *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 175-76 (1992). When construing statutes, federal courts seek to preserve the states' reserved authority. As the Supreme Court has put it, "Congress does not cavalierly pre-empt" state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Instead, out of respect for "the States [as] independent sovereigns in our federal system," courts should presume that federal law does not preempt state law "'unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice*, 331

[8] Today, Congress plays the primary role in deciding whether federal law displaces state law. *See North Dakota v. United States*, 495 U.S. 423, 435 (1990) ("[T]he Court has . . . adopted a functional approach to claims of governmental immunity, accommodating the full range of each sovereign's legislative authority and *respectful of the primary role of Congress* in resolving conflicts between National and State Government.") (emphasis added). For this reason, doctrines of implied intergovernmental immunity necessarily play a lesser role where federal statutory law governs conflicts between the states and the federal government. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum. L. Rev. 1, 57 (2011) ("Much of the resultant doctrine of federal intergovernmental immunity has been cut back over time, with such concerns now addressed largely under the aegis of preemption."). Questions of federal-state conflict are answered today primarily by reference to Congress's intent, not by judicial elaboration of the implications of the Supremacy Clause. *Id.*

U.S. at 230); *see also Arizona*, 567 U.S. at 400. And rather than adopt a construction that would raise serious constitutional concerns, federal courts will seek to avoid a conflict between federal and state law—particularly where, as here, the United States challenges state law as preempted on its face. *See Arizona*, 567 U.S. at 415; *cf. Murphy*, 2018 U.S. LEXIS 2805, at *23–24 (explaining that canon of constitutional avoidance does not apply where any plausible interpretation would still violate Tenth Amendment commandeering ban).

B. Neither 8 U.S.C. § 1373 Nor the INA Should Be Construed To Preempt SB 54

The United States seeks to enjoin several provisions of SB 54, specifically those that prohibit state and local officers from (i) providing notification of inmate release dates in some instances, *see* Cal. Gov't Code. § 7284.6(a)(1)(C); (ii) releasing individual's "personal information," including their home and work address, *see id.* § 7284.6(a)(1)(D); and (iii) "transferring" individuals to federal immigration officials in some instances, *id.* § 7284(a)(4). According to the United States, Congress preempted these provisions on their face through 8 U.S.C. § 1373 and 8 U.S.C. §§ 1226 & 1231. But Section 1373 plainly does not *require* states and localities to assist in immigration enforcement and Sections 1226 and 1231 are detention and removal statutes that impose obligations exclusively on *federal* officials. Neither Section 1373 nor the detention and removal provisions of the INA should be construed to preempt SB 54. Doing so would supersede the historic police powers of the states and raise serious constitutional questions under the Tenth Amendment.

The United States places great weight upon 8 U.S.C. § 1373, arguing that it directly conflicts with SB 54. U.S. PI Mot. 27. Section 1373 provides, "[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from [federal immigration

authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). Adopting a breathtakingly broad interpretation of this statute, one that would effectively prevent states and localities from declining to share any and all information the federal Executive deems relevant to any "immigration status issue[]," the United States argues that Section 1373 preempts SB 54 on its face. *See* U.S. PI Mot. 28-29. This argument fails for two reasons.

First, construing 8 U.S.C. § 1373 as the United States now does is simply implausible. Its statutory construction should be rejected on that basis alone. *See Arizona*, 567 U.S. at 400 (explaining that courts should presume state law is not preempted on its face when it is plausible to construe statutory law to avoid conflict). SB 54's savings clause expressly authorizes state and local officials to share information with federal immigration officials where such authorization is actually required by 8 U.S.C. § 1373. *See* Cal. Gov't Code § 7284(e). Even without the savings clause, moreover, SB 54 would not stand as an obstacle to implementation of Section 1373. Contrary to the United States' current construction, Section 1373 plainly reaches no further than to preempt state or local prohibitions on the sharing of "information regarding . . . **citizenship or immigration status**." (emphasis added). As a federal district court has held, there is "no plausible reading" of this statute that would "encompass[] the release date of an undocumented inmate," much less an individual's home or work address or anything else the federal Executive deems possibly relevant to immigration status. *Steinle v. City & Cnty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017). Section 1373 cannot plausibly be read to preempt facially SB 54's prohibition on the sharing of an individual's "personal information," including a home or work address, Cal. Gov't § 7284(a)(1)(D); nor can it be read to preempt the other challenged provisions of SB 54 on their face.

Reading Section 1373 and SB 54 together in this way avoids a statutory construction that would supersede California's careful exercise of its core police powers.

California's legislature determined that SB 54 would improve public safety by promoting cooperation between police and local communities. *See* Cal. Opp. 2. This determination is not only reasonable,[9] it is also well within the core of the State's prerogative over matters of local criminal justice. As the Supreme Court has put it, 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 the vindication of its victims." *Morrison*, 529 U.S. at 618.

Second, construing Section 1373 to preempt SB 54 on its face would raise serious constitutional questions under structural principles reflected in the Tenth Amendment. As the Supreme Court recently reaffirmed in *Murphy*, the Constitution "withhold[s] from Congress the power to issue orders directly to the States." 2018 U.S. LEXIS 2805, at *24. The United States' interpretation of Section 1373 would deny states and localities the ability to supervise their officials and could cripple their ability to "regulate in accordance with the views of the local electorate," in violation of the constitutional ban on commandeering. *See New York*, 505 U.S. at 169. In particular, this interpretation of Section 1373 would deny states and localities the prerogative to decline "to provide information that belongs to the State and is available to [state and local officials] only in their official capacity."[10] *Printz*, 521 U.S. at 932 n.17 (striking down federal statute with information-sharing provision); *cf. Murphy*, 2018 U.S. LEXIS 2805, at *30 (holding that

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[9] *See, e.g.*, Tom Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Nat'l Immigration Law Ctr. (Jan. 26, 2017) (finding that "[c]rime is . . . significantly lower in sanctuary counties compared to nonsanctuary counties"), *available at* https://perma.cc/B57Q-XGTE.

[10] *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103, 159-64 (2012) (arguing that information-sharing statutes such as Section 1373 violate anti-commandeering principle of *Printz*); *see also* Kalhan, *supra* note 1, 74 Ohio St. L.J. at 1159-62 (arguing the positive benefits of "information federalism").

Congress can no more "prohibit[] a State from enacting new laws" than it can "compel a State to enact legislation," because the "basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event").[11] *See* Cal. Gov't Code § 7284(a)(1)(C)-(D); *id.* § 7284(e). The United States' demands for additional information sharing could easily lead to the diversion of the resources of several full-time employees in a large police force or corrections agency. Denying states the authority to adopt reasonable and targeted policies to disentangle local criminal justice systems from federal immigration enforcement in this way would diminish political accountability and would shift regulatory burdens to the states. This forced entanglement of local criminal justice and federal immigration enforcement would, in turn, inflict the very harms that the Supreme Court's anti-commandeering prohibition is designed to prevent. *See Murphy*, 2018 U.S. LEXIS 2805, at *28–29 (explaining potential harms that anti-commandeering rule addresses).

The United States' fallback argument is even further off the mark. It argues that 8 U.S.C. §§ 1226 and 1231 preempt SB 54 on their face on the theory that those provisions impliedly require states and localities to assist in federal immigration enforcement after an individual is released from local criminal custody. U.S. PI Mot. 25-27, 29-31. But Sections 1226 and 1231 plainly do no such thing. Congress enacted Section 1226(c)(1) in 1996, directing the Attorney General to take certain noncitizens into custody, in response to what it perceived to be a "wholesale failure *by the INS*" to remove deportable noncitizens who had been convicted of criminal offenses by "fail[ing] to detain those [noncitizens] during their deportation proceedings." *Demore v. Kim*, 538

[11] Because California has sought to protect only information that has not been shared with the public, the State has not adopted a "policy of no-voluntary-cooperation that does not protect confidential information generally." *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999) (declining to strike down Section 1373 on its face but explaining that City's Tenth Amendment concerns were "not insubstantial").

U.S. 510, 518-21 (2003) (emphasis added). Congress directed that noncitizens taken into federal custody and placed in removal proceedings upon release from criminal custody are to be mandatorily detained, whereas those apprehended after returning to the community for some time or under other circumstances are to be detained at the discretion of immigration authorities. *Compare* 8 U.S.C. § 1226(c) *with id.* § 1226(a). Section 1231(a)(1)(B), which the United States also cites, requires federal immigration authorities to act quickly to remove a noncitizen at the conclusion of removal proceedings. If an order of removal becomes final while a noncitizen is still confined in criminal custody, then the removal period does not begin to run until after the noncitizen is released. *Id.* § 1231(a)(1)(B)(i)-(iii). The upshot is that sections 1226 and 1231 impose obligations on *federal* officials, but were not intended to disturb the prerogative of state and local officials to decide whether they would voluntarily cooperate with requests from federal immigration authorities. Indeed, if they were intended to command the participation of states and localities, they would run afoul of the Tenth Amendment. *See Murphy*, 2018 U.S. LEXIS 2805, at *28–29; *Galarza*, 745 F. 3d at 644–45 (relying on *New York* and *Printz* to find that construing "a federal detainer filed with a state or local [law enforcement agency] [as] a command . . . would violate the anti-commandeering doctrine of the Tenth Amendment."); *Id.* at 641 (noting that Congress did not "authorize federal officials to command state or local officials to detain suspected aliens subject to removal").

While the United States suggests that *Arizona* requires the Court to find a conflict between SB 54 and federal law, the Supreme Court's holding in that case requires just the opposite. *Arizona* concerned a state's attempt to entangle its criminal enforcement system with the enforcement of federal immigration law. *See* 567 U.S. at 406-10. Here, by contrast, California has decided with SB 54 to disentangle its local criminal justice apparatus from federal immigration enforcement. The question is whether federal statutory law preempts that decision on its face. And, as *Arizona* instructs, a federal court

answering that question must presume that state law is not preempted unless Congress has clearly indicated otherwise. *See id.* at 400. Because Congress has not clearly required state and local officials to accede to the Trump Administration's demands, which themselves raise serious constitutional questions under the Tenth Amendment, this Court should conclude that SB 54 is not preempted.

CONCLUSION

For these reasons, *amici* urge the Court to deny the United States' motion for a preliminary injunction because it has not shown a likelihood of success on the merits of its challenge to SB 54.

Dated: May 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I electronically filed the foregoing Motion of Administrative Law, Constitutional Law, Criminal Law and Immigration Law Scholars for Leave to File an *Amici Curiae* Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Kevin A. Calia
Kevin A. Calia
Attorney for *Amici Curiae*