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11 **UNITED STATES DISTRICT COURT**

12 **EASTERN DISTRICT OF CALIFORNIA**

13 UNITED STATES OF AMERICA,) Case No. CV 2:18-cv-490-JAM-KJN
)
14 Plaintiff,) LEGAL SERVICES PROVIDERS AMICI
) CURIAE BRIEF
15 vs)
) NO HEARING NOTICED
16 STATE OF CALIFORNIA, ET AL.,)
) Honorable John A. Mendez
17 Defendants.)

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I. INTRODUCTION

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2 The United States seeks to enjoin enforcement of certain provisions of California
3 law enacted through Assembly Bill 450, Assembly Bill 103, and Senate Bill 54
4 (“challenged California statutes”). The *Amici* will focus on the real life experiences of
5 their low-income clients as they navigate the intersection of the implementation by
6 California of the challenged statutes and by the Department of Homeland Security
7 (“DHS”) of federal law. Viewed through this lens, it becomes apparent that the
8 California statutes are not preempted by federal law, primarily because the California
9 statutes do not constitute legislation in a field that is exclusively occupied by the
10 federal government, does not conflict with federal laws, and do not stand as an obstacle
11 to the federal government’s enforcement of immigration law.
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14

II. INTEREST AND IDENTITY OF *AMICUS CURIAE*

15
16
17 *Amici* are the Center for Human Rights and Constitutional Law, the Legal Aid
18 Foundation of Los Angeles, the Legal Aid Society of Orange County, El Rescate, the
19 International Institute of Los Angeles, the Legal Aid Foundation of Santa Barbara
20 County, the Public Law Center, and La Raza Centro Legal. *Amici* are non-profit
21 programs providing free legal services to low-income California residents, including
22 immigrants. The proper resolution of this case is a matter of utmost concern to these
23 programs because of its impact on their clients, many of who are immigrants or U.S.
24 citizens with immigrant family members.
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26
27

1 employers’ “voluntary consent to an immigration enforcement agent ... enter[ing] any
2 nonpublic areas of a place of labor” without a warrant, Cal. Gov’t Code § 7285.1(a), or
3 “voluntary consent to ... access... employee records” without a subpoena, a judicial
4 warrant, or notice of inspection. Cal. Gov’t Code § 7285.2(a).
5

6 In *Amici’s* clients’ experiences, ICE requests and picks up copies of I-9 forms
7 and their attachments. These documents are not reviewed at the location of the
8 business but at ICE offices where databases are accessed to determine whether
9 employees whose I-9 forms are being reviewed are authorized to be employed, whether
10 false documents have been used to gain employment, and whether the employer has
11 properly completed the I-9 forms. AB 450 will not interfere with this process.
12

13 In *Amici’s* clients’ experiences, ICE always commences I-9 audits of employers
14 by serving a Notice of Inspection. Therefore, implementation of this provision of AB
15 450 will not deter ICE from conducting I-9 audits of *Amici’s* clients’ I-9 records in the
16 custody of their employers.
17

18 AB 450 also added § 90.2 to the Labor Code to require posting notice of any
19 immigration-related inspections of I-9 forms or other employment records within 72
20 hours of receiving a notice of the inspection. Cal. Labor Code §90.2(a)(1).
21

22 As required by 8 C.F.R. § 274a.2(b)(2)(ii), it is *Amici’s* clients’ experience that
23 ICE routinely provides a minimum of three days notice, and usually a few weeks
24 notice, to *Amici’s* clients’ employers, *before* conducting I-9 audits. As noted above, in
25 practice ICE almost always serves employers with a Notice of Inspection well before
26
27
28

1 the actual inspection takes place. Some of *Amici's* clients are already provided the type
2 of notices referred to in § 90.2. Many labor union contracts require such notices.

3
4 Employers very often advise *Amici's* clients of pending I-9 audits as the employers and
5 *Amici's* clients wish to review and update their I-9 forms prior to copying the I-9
6 forms and supporting documents to provide to ICE for its review. Indeed, providing
7
8 *Amici's* clients with notice of a pending I-9 audit gives them an opportunity to update
9 their I-9 records, facilitating and making more efficient ICE's audit.

10
11 Section 90.2 will not in any material way alter *Amici's* client's rights or
12 obligations – or their employers' rights and obligations – under federal law. *Amici* are
13 aware of no actions by DHS to implement any federal law, regulation, or policy
14 impacting their clients' actions or decisions that is prohibited or changed by what §
15
16 90.2 requires.

17
18 AB 450 prohibits *Amici's* clients' employers from "re-verifying the employment
19 eligibility of a current employee at a time or in a manner not required by specified
20 federal law." Cal Lab. Code § 1019.2(a). This state law will not interfere in any way
21 with ICE's I-9 functions. The law clearly remains that *Amici's* clients' employers shall
22 not: "Hire, or to recruit or refer for a fee, for employment in the United States an alien
23 knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with
24 respect to such employment ..." 8 U.S.C. § 1324a(1).
25

26
27 Under INA § 274A *Amici's* clients' employers are required to "attest ... on a
28 form ... that [they have] verified that the individual is not an unauthorized alien," by

1 examining certain documents designated by the DHS Secretary. INA § 274A (b)(1)(A).
2 If an *Amici* client provides a document that reasonably appears on its face to be
3 genuine, nothing in federal law *Amici* is aware of based on its clients' experiences
4 requires the employer to solicit the production of any other document from *Amici's*
5 clients. This is consistent with the terms of INA § 274A(b)(1)(A)(i)-(ii).
6

7
8 The INA requires *Amici's* clients' employers to retain verification forms and to
9 make them available for inspection by DHS officers. INA § 274(b)(3). Nothing in AB
10 450 changes this. *Amici's* clients' employers also retain verification documents for
11 three years after the date of recruiting or referral, in the case of hiring of an individual
12 three years after the date of such hiring, or one year after the date the individual's
13 employment is terminated, whichever is later. This is required by INA §
14 274(b)(3)(B)(i)-(ii) and 8 C.F.R. § 274a. Nothing in AB 450 changes this.
15

16
17 Upon employment authorization expiration, *Amici's* clients' employers who are
18 complying with federal law re-verify on the Form I-9 to reflect that *Amici's* clients are
19 still authorized to work in the United States. This is required by 8 C.F.R. §
20 274a2(b)(B)(d)(vii). *Amici's* clients' employers generally re-verify the document's
21 identification number and expiration date, on the Form I-9 and sign the attestation.
22 This practice is required by 8 C.F.R. § 274a.2(b)(B)(d)(vii). Nothing in AB450
23 changes this.
24

25
26 Under California Labor Code § 1019.2(a) (AB 450) no changes are made
27 regarding what documents *Amici's* clients' employers must review and attest to permit
28

1 gainful lawful employment. Rather AB 450 reinforces current federal regulations, the
2 United States Code, and established employer-employee protocols.

3
4 California Labor Code § 1019.2(a) does not nullify *Amici's* clients' employers'
5 duties to ensure lawful employment, or to comply with documentation review,
6 attestation, and documentation retention.

7
8 Under INA § 274A *Amici's* clients are still required to attest and establish that
9 they are citizens or nationals of the United States, immigrants lawfully admitted for
10 permanent residence, or immigrants authorized under the Act or by the Attorney
11 General to be hired, recruited, or referred for such employment. *Amici's* clients must
12 and do still comply with the documentation requirements set out at in INA §
13 274A(b)(1)-(2), and 8 C.F.R. § 274a.

14
15
16 From the perspective of *Amici's* clients' rights and obligations, AB 450 does not
17 conflict or interfere with the enforcement of federal statutes or rules as they regulate
18 *Amici's* clients' right to be employed and obligations upon being hired and while they
19 remain employed. In their interactions with the State and federal governments, *Amici's*
20 clients and their employers have rights that can be honored and obligations that can be
21 fulfilled created by state and federal laws that are not in conflict.

22
23
24 **2. When viewed from the perspective of how implementation and operation of**
25 **AB 103 and federal law impact low-income immigrants, AB 103 is not**
26 **federally preempted**

27 Sections 6 and 12 of Assembly Bill 103 (AB 103) added Chapter 17.8 and
28 §12532 to the Government Code, respectively. 2017 Cal. Stat. c. 17, §§6, 12. Under

1 §12532, state governmental officials must review “detention facilities in which
2 noncitizens are being housed or detained for purposes of civil immigration proceedings
3 in California,” California Government Code §12532(a), and report on the conditions of
4 confinement, the standard of care and due process provided to detainees, and the
5 circumstances of the detainees’ apprehension and transfer to the facility. *Id.*

6 §12532(b)(1). Under Chapter 17.8, municipal government or law-enforcement
7 agencies with no contract to house adult or minor noncitizen detainees for civil-
8 immigration purposes may not enter such contracts, and municipal government or law-
9 enforcement agencies with such contracts may not enter into new contracts to expand
10 the number of contract beds used in locked detention facilities. California Government
11 Code §§ 7310-7311.

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16 The relevant portion of § 12532 states the review of detention facilities shall
17 include, but not be limited to the following:

18 (A) A review of the conditions of confinement, (B) A review of the
19 standard of care and due process provided to the individuals ..., (C) A
20 review of the circumstances around their apprehension and transfer to
21 the facility.
22

23
24 California Government Code § 12532(b)(1)(A)-(C)

25 *Amici’s* clients housed in non-federal contracted facilities awaiting removal
26 proceedings will be in the functionally same position with regards to the federal
27

1 government's arrest, removal, and deportation determinations with or without the
2 enactment of CAL. California Government Code § 12532(b)(1)(A)-(C).

3
4 In *Arizona v. United States*, the Court held that States cannot make unilateral
5 determinations “about the removability of immigrants” wholly separate from federal
6 officials, and that any attempt to do so creates an obstacle to the full purpose and
7 objective of Congress. *Arizona v. United States*, 567 U.S. 387, 419 (2012).

8
9 California Government Code § 12532(b)(1) is not conflict preempted and does
10 not parallel section 6 of Arizona's law, purporting to allow state officials to decide that
11 an immigrant should be held for deportation, and then arrest the immigrant.

12
13 Unlike Arizona, California state officials are not engaging in a unilateral role to
14 override the federal government's detention of *Amici's* immigrant clients or
15 challenging the federal government's decision on removability. ICE already contracts
16 with for-profit companies and non-profit groups to detain *Amici's* clients in California
17 and may continue to do so.

18
19
20 Under AB 103 ICE agents currently possess the same authority to engage in the
21 arrest and detention of *Amici's* clients who are subject to arrest and detention under
22 federal law as they possessed prior to the enactment of AB 103. *Amici's* clients do not
23 have a greater or lesser defense to deportation under AB 103, or a greater or lesser
24 opportunity for release on bond.

25
26
27 *Amici's* clients who may be detained for ICE in California facilities may in the
28 long run benefit by having due process abuses curbed through the issuance of reports

1 contemplated by AB 103, but their basic rights and obligations under federal law will
2 remain unchanged. There is therefore no conflict between AB 103 and federal law.

3
4 **3. When viewed from the perspective of how implementation and operation of**
5 **SB 54 and federal law actually impact low-income immigrants, SB 54 is not**
6 **federally preempted**

7 Senate Bill 54 (“SB 54”), the California Values Act, in limited ways restricts
8 state and local law enforcement from voluntarily cooperating with federal agencies
9 with regards certain California immigrants. These include providing release dates
10 except in the cases of serious crimes, detaining individuals based on unconstitutional
11 federal hold requests, providing individuals’ home or work addresses to immigration
12 officials, and making or intentionally participating in arrests based on civil
13 immigration warrants. California Government Code §7284.6(a)(1)(A)-(E). None of
14 these requirements violate any existing federal laws with which *Amici’s* clients or their
15 police or jailers must comply.

16
17
18 Under 8 U.S.C. § 1373 entities or officials detaining *Amici’s* clients may not
19 prohibit or restrict the sending to or receiving from DHS, “information regarding the
20 citizenship or immigration status,” of any individual. 8 U.S.C. § 1373(a). Nothing in
21 SB 54 changes *Amici’s* clients’ rights or protections from such federally mandated
22 disclosures.
23

24
25 Under amended California Government Code § 7284.6(a)(1)(C), California law
26 enforcement agencies shall not use their resources to investigate, interrogate, detain,
27 detect, or arrest persons for immigration enforcement purposes, including providing
28

1 information regarding a person's release date unless that information is available to the
2 public, or is in response to a notification request from immigration authorities in
3 accordance with Section 7282.5. Responses are never required, but are permitted under
4 this subdivision, provided that they do not violate any local law or policy.
5

6 8 U.S.C. § 1373(a) does not address policies limiting other forms of information
7 sharing with DHS regarding *Amici's* clients. As before, *Amici's* clients' citizenship and
8 immigration status will still be shared with federal entities.
9

10 Pursuant to California Government Code § 7282.5, local law enforcement will
11 continue to provide, to the extent they currently do so, release dates of *Amici's* clients
12 in a wide range of circumstances involving all serious crimes against persons and
13 property. These crimes include virtually every serious crime any one may be convicted
14 of in California. Cities and police departments throughout California as a matter of
15 policy already provide less information to DHS than SB 54 contemplates. The level of
16 cooperation with ICE SB 54 allows is far more than the limited way in which federal
17 law requires cooperation as set forth in 8 U.S.C. § 1373 (local jurisdictions must
18 respond to requests for citizenship and immigration status of a named individual).
19
20
21

22 Before SB 54 was enacted, when *Amici's* clients were arrested and taken before
23 a magistrate on a charge involving a serious crime, and the magistrate made a finding
24 of probable cause, law enforcement officials could and sometimes would cooperate
25 with immigration officials. With the enactment of California Government Code §
26 7282.5(b), this will not change much for *Amici's* clients. Law enforcement officials
27
28

1 may and do continue to cooperate with immigration officials when an *Amici* client is
2 arrested and a probable cause determination is made by a judge or magistrate regarding
3 the commission of a serious crime.
4

5 8 U.S.C. §1373 does not mandate that local law enforcement officials provide
6 ICE information about *Amici*'s clients' release dates.
7

8 In a wide range of situations throughout California, both before and after the
9 enactment of SB 54, cities and counties and their law enforcement agencies have opted
10 for various levels of cooperation with ICE.¹
11

12
13
14 ¹ See e.g. *Santa Ana*: Ordinance No. NS-2908, Dec. 20, 2016, Sec. 6 (“No City
15 agency, department, officer, employee, or agent shall use City funds, resources,
16 facilities, property, equipment, or personnel to assist in the enforcement of federal
17 immigration law, unless such assistance is required by any valid and enforceable
18 federal or state law or is contractually obligated. Nothing in this Section shall prevent
19 the City, including any agency, department, officer, employee, or agent of the City,
20 from lawfully discharging his or her duties in compliance with and in response to a
21 lawfully issued judicial warrant or subpoena.”), at [http://voiceofoc.org/wp-
22 content/uploads/2017/01/Santa-Ana-sanctuary-city-ordinance-adopted.pdf](http://voiceofoc.org/wp-content/uploads/2017/01/Santa-Ana-sanctuary-city-ordinance-adopted.pdf); Oakland
23 City Council Resolution No. 87036, January 16, 2018: Clarifying And Reaffirming
24 Policy On Non-Cooperation With ICE, (“[T]he City of Oakland's policy is that: OPD
25 shall not provide law enforcement assistance, including traffic support, to ICE ,
26 including any subdivision of ICE, in any capacity, except to respond to a public safety
27 emergency”) available at [https://oakland.legistar.com/View.ashx?M=
28 F&ID=5761718&GUID=27F9C496-CDF9-4AAE-B0BC-DF2DB54D6DC9](https://oakland.legistar.com/View.ashx?M=F&ID=5761718&GUID=27F9C496-CDF9-4AAE-B0BC-DF2DB54D6DC9); San
Francisco Administrative Code §§12H-12I (Immigration Status and Civil Immigration
Detainers); Los Angeles: Executive Directive 20 (“The City will not assist or cooperate
with any effort by federal immigration agents to use public facilities or resources for
the purposes of enforcing federal civil immigration law.”), available
at [https://www.lamayor.org/sites/g/files/wph446/f/page/file/Exec.%20Dir.%20No.%20
20--Standing%20with%20Immigrants.pdf](https://www.lamayor.org/sites/g/files/wph446/f/page/file/Exec.%20Dir.%20No.%2020--Standing%20with%20Immigrants.pdf). All links last checked May 18, 2018.

1 At bottom, these local decisions are based on an assessment of the extent to
2 which greater cooperation with ICE *decreases* the reporting of serious crimes and
3 cooperation with law enforcement in prosecuting criminals. Studies show, for example,
4 that immigrant survivors of domestic violence and human trafficking overwhelmingly
5 (78%) are afraid to report crimes to the police given current immigration enforcement
6 policies and entanglement of local law enforcement and federal immigration
7 enforcement.² An April 2017 survey by the Luskin School of Public Affairs at UCLA
8 found that 80% of Latino residents said that contact with any government agency or
9 program increases the risk of deportation.³ Even before the recent surge in immigration
10 enforcement, a 2013 study found that more than 40% of Latinos surveyed in Los
11 Angeles were “less likely to volunteer information about crimes because they fear
12 getting caught in the web of immigration enforcement themselves or bringing
13 unwanted attention to their family or friends”—regardless of their immigration status.⁴

20
21 ² Asian Pacific Institute on Gender-Based Violence (APIGBV), et al., *2017 Advocate*
22 *and Legal Service Survey Regarding Immigrant Survivors*, June 1, 2017, at
23 <https://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf>.

24 ³ Mike McPhate: *California Today: Worries Over Deportation*, N.Y. TIMES, April 5,
25 2017, <https://www.nytimes.com/2017/04/05/us/california-today-worries-over-deportation.html>.

26
27 ⁴ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in*
28 *Immigration Enforcement*, Univ. Ill. at Chicago, 7 (May 2013),
https://greatcities.uic.edu/wpcontent/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

1 Based on their own localized law enforcement experiences, and numerous
2 studies that assess the drop in crime reporting as entanglement with ICE enforcement
3 increases, cities and counties throughout California (and the country) have made local
4 decisions on the extent to which they will become involved in ICE activities. SB 54
5 actually leaves local entities free to cooperate with ICE on matters impacting *Amici's*
6 clients to a far greater extent than required by federal law.
7

8
9 With regards accessing data about *Amici's* clients, with or without SB 54, ICE
10 has access to state and regional criminal justice networks and databases, including the
11 National Crime Information Center (NCIC), that allow law enforcement agencies to
12 identify individuals who have been arrested and convicted. NCIC is a Federal Bureau
13 of Investigation (FBI) database containing “an electronic clearinghouse of crime data
14 that can be tapped into by virtually every criminal justice agency nationwide, 24 hours
15 a day, 365 days a year.” National Crime Information Center (NCIC) (Federal Bureau
16 of Investigation), <https://www.fbi.gov/services/cjis/ncic>.⁵ Fingerprints of an *Amici*
17 client taken at booking on criminal charges are checked automatically against the FBI
18 and DHS databases. This biometric data is also sent to ICE. All wanted person’s
19 inquiries automatically will also be run through the Immigration Violators File (IVF).
20 If there’s a match, ICE is alerted.
21
22
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26 ⁵ NCIC serves more than 90,000 criminal justice and law enforcement agencies, along
27 with judges, prosecutors, corrections officers, court administrators, and a variety of
28 other criminal justice officials by providing information that can help apprehend
fugitives, locate missing persons, identify convicted sexual offenders, uncover
weapons used in crimes, locate and return stolen property, and more.

1 ICE may request release dates for *Amici* clients held in custody, but nothing in
2 federal law requires a local jurisdiction to respond to such a request. Most local
3 jurisdictions already provide release dates to ICE if a serious crime was involved and
4 nothing in SB 54 will change that.

5
6 SB 54 also provides that local authorities should not investigate, interrogate,
7 detain, detect, or arrest persons, including *Amici's* clients, “for immigration
8 enforcement purposes, including... Detaining an individual on the basis of a hold
9 request.” California Government Code § 7284.6(a)(1)(B). This provision of SB 54
10 does not interfere with the federal government’s ability to collect information
11 regarding the immigration and citizenship status of *Amici's* clients, the sole federally-
12 imposed requirement under 8 U.S.C. § 1373. Hold requests have repeatedly been found
13 unconstitutional by the federal courts and therefore *Amici* is unaware of any
14 jurisdiction in California that honored hold requests before SB 54 was enacted or
15 honors since it was enacted.⁶

16 17 18 19 20 **IV. CONCLUSION**

21 As discussed above, when the impact of the federal and relevant state laws on
22 California residents are carefully examined, it becomes clear that in the operation of
23 these laws, there is no conflict between the challenged California statutes, and federal
24 law. Implementation of AB 450, AB 103, and SB 54 is going forward without
25 violating any federal laws regarding immigration enforcement.

26
27
28 ⁶ See, e.g., *Duncan Roy et al. v. County of Los Angeles et. al*, 2018 U.S. Dist. LEXIS
27268 (C.D. Cal. 2018); see also *Arizona v. United States*, 132 S. Ct. 387 (2012).

1 If President Trump and Attorney General Jeffrey Sessions are unhappy with the
2 extent to which many states, counties and cities have taken steps to protect their
3 residents' safety and well-being by limiting cooperation with ICE's enforcement
4 activities, they should go to Congress and seek stronger federal laws requiring greater
5 cooperation by local jurisdictions with ICE's immigration enforcement actions.
6

7
8 The challenged California statutes provide a *floor* for local entities to follow in
9 their involvement with ICE enforcement operations. That floor is far *below* the ceiling
10 created by what federal law requires of local entities.
11

12 Instead of seeking a change in federal law, President Trump and Attorney
13 General Sessions have threatened local jurisdictions with funding cuts and in this case
14 are asking the Court to involve itself in a dispute they should take to Congress to
15 resolve.
16

17 The challenged California statutes serve to protect California immigrants
18 without violating or conflicting with any federal laws regarding the role local entities
19 must play in ICE enforcement functions. As long as ICE complies with the federal
20 laws that govern its functions, implementation of AB 450, AB 103, and SB 54 will in
21 no way interfere with ICE's achievement of its enforcement goals.
22

23
24 Dated: May 18, 2018

Respectfully submitted,

25 CENTER FOR HUMAN RIGHTS &
26 CONSTITUTIONAL LAW

Peter A. Schey

27 Carlos Holguín

/s/ Peter Schey

28 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I, Peter Schey, declare and say as follows:

I am over eighteen years of age and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, CA 90057, in said county and state.

On May 18, 2018, I electronically filed the following document(s):

- **LEGAL SERVICES PROVIDERS AMICI CURIAE BRIEF**

with the United States District Court, Eastern District of California by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*/s/ Peter Schey
Attorneys for Proposed Amici*