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12  
 13 **IN THE UNITED STATES DISTRICT COURT**  
 14 **EASTERN DISTRICT OF CALIFORNIA**

15 UNITED STATES OF AMERICA, )  
 16 *Plaintiff,* )  
 17 v. )  
 18 STATE OF CALIFORNIA, *et al.,* )  
 19 *Defendants.* )

**CASE No. 2:18-cv-00490-JAM-KJN**  
**MUNICIPALITIES & ELECTED**  
**OFFICIALS’ MOTION FOR LEAVE TO**  
**FILE *AMICI CURIAE* BRIEF IN SUPPORT**  
**OF PLAINTIFF’S OPPOSITION TO**  
**MOTION TO DISMISS**

) NO HEARING NOTICED

)  
 21 ) Complaint filed: March 6, 2018  
 22 ) Honorable John A. Mendez

23 The seven California municipalities and elected officials listed herein (collectively,  
 24 “Movants”) respectfully seek this Court’s leave to leave to file the accompanying *amici curiae*  
 25 brief in support of the federal plaintiff’s opposition (ECF #166) to the California state defendants’  
 26

MUNICIPALITIES & ELECTED OFFICIALS’ MOTION  
 FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

1 motion to dismiss (ECF #077). Movants' coalition previously filed an *amici* brief (ECF #057) in  
2 support of the federal plaintiff's motion for a preliminary injunction. The undersigned counsel  
3 have conferred with the parties' counsel, and the plaintiffs consent, but the defendants do not  
4 consent to filing on the *amici* brief,<sup>1</sup> but stipulated to the motion's being submitted without a  
5 hearing, upon the record and briefs, pursuant to Local Rule 230(g). Accordingly, Movants  
6 respectfully submit that a hearing would be unnecessary. A proposed Order is attached.

### 7 **INTRODUCTION**

8 Unlike the federal appellate rules, the Federal Rules of Civil Procedure do not provide for  
9 *amicus* briefs. This Court's rules contemplate *amicus* briefs, L.R. 5-133(h), as do this Court's  
10 Minute Orders dated March 12 and March 26, 2018, but the Court's rules do not expressly provide  
11 procedures unique to *amici* briefs. Accordingly, Movants seek this Court's leave pursuant to L.R.  
12 230(g), but rely on the related principles of appellate *amicus* procedure for guidance. Under those  
13 principles, this motion sets forth the prospective *amici* coalition's interest in these proceedings and  
14 the manners in which their *amici* brief will aid the Court.

### 15 **INTEREST AND IDENTITY OF AMICUS CURIAE**

16 The following California municipalities and elected officials respectfully seek this Court's  
17 leave to file the accompanying *amici* brief:  
18

- 19 • The City of Yorba Linda; the City of Escondido; the City of Aliso Viejo; the City of  
20 Glendora; and the City of Laguna Niguel.

21  
22  
23 <sup>1</sup> Specifically, the federal plaintiff "consent[s], contingent on [Movants'] filing this timely,  
24 meaning California would have a chance to respond, if it chose to, in its ... reply due June 13,"  
25 and "California does not consent to [Movants'] request" "[s]ince the deadlines for amicus briefs  
26 in support of either party has passed." Having withheld their consent, without indicating whether  
they will file an opposition to this motion, it is unclear what the defendants will do. Failure to  
respond can be taken as consent. *Brydges v. Lewis*, 18 F.3d 651, 652-53 (9th Cir. 1993).

- 1 • The Hon. Mike Spence, City of West Covina Councilman, and the Hon. Rebecca Jones,  
2 Vice-Mayor of the City of San Marcos, in their respective individual capacities.

3 In their respective capacities, *amici* are or represent political subdivisions of not only plaintiff  
4 United States but also defendant California. With two competing sovereigns at loggerheads on  
5 these issues, the current situation is untenable. Under the California Constitution, officials must  
6 “solemnly swear ... [to] support and defend the Constitution of the United States and the  
7 Constitution of the State of California,” CAL. CONST. art. XX, §3; *see also* CAL. GOV’T CODE  
8 §§1360, 36507, which is impossible when the two sovereigns impose conflicting commands.<sup>2</sup>  
9

10 To ensure the liberties guaranteed to them and to their constituents by both the U.S.  
11 Constitution and the California Constitution, *amici* feel compelled to support the federal sovereign  
12 over the state sovereign in this dispute. The challenged state laws attempt not only to usurp the  
13 federal government’s exclusive and plenary power over immigration, but also to restrict *amici* and  
14 their constituents from supporting the federal government in the exercise of that power. In addition  
15 to violating the federalist structure of the U.S. Constitution with respect to immigration policy —  
16 an exclusively *federal* concern, *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) — the challenged laws  
17 also purport to abridge the First amendment rights of free speech and petition, U.S. CONST. amend.  
18 I, cl. 3, 6. The “loss of First Amendment freedoms, for even minimal periods of time,  
19 unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373 (1976), which  
20 this Court should remedy expeditiously.  
21

22 Further, *amici* seek to protect their right to exercise their police power as they see fit: “Upon  
23

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24 <sup>2</sup> In pertinent part, GOV’T CODE §1360 provides that “before any officer enters on the duties  
25 of his or her office, he or she shall take and subscribe the oath or affirmation set forth in Section 3  
26 of Article XX of the Constitution of California,” and GOV’T CODE §36507 provides that “each city  
officer shall take and file with the city clerk the constitutional oath of office.”

1 the principle of self-defense, of paramount necessity, a community has the right to protect itself.”  
2 *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *Cty. of Plumas v. Wheeler*, 149 Cal. 758, 762  
3 (1906). Significantly, *amici* have grave concerns about the lawfulness of the challenged state laws,  
4 not only civilly as a matter of preemption, but also criminally as the unlawful concealment,  
5 harboring, or shielding from detection of illegal aliens under 8 U.S.C. §1324(a)(1)(A)(iii), (v).  
6 *Amici* thus urgently need judicial clarity on the permissible reach of the challenged laws.

7 Further, the recent Information Bulletin<sup>3</sup> entitled “Responsibilities of Law Enforcement  
8 Agencies Under [sic] the California Values Act, California TRUST Act, and the California  
9 TRUTH Act” issued by the California Department of Justice’s Division of Law Enforcement does  
10 nothing to ameliorate the concerns that *amici* raise here. First, an agency’s “written statement of  
11 policy that an agency intends to apply generally, that is unrelated to a specific case, and that  
12 predicts how the agency will decide future cases is essentially *legislative* in nature even if it merely  
13 *interprets* applicable law.” *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 18  
14 (Cal. 1998) (internal quotations omitted, emphasis in original). Second, agencies cannot lawfully  
15 issue such “house rules” without complying with the procedural requirements of the California  
16 Administrative Procedure Act, *see* CAL. GOV’T CODE § 11342.600 (defining regulation broadly as  
17 “every rule, regulation, order, or standard of general application or the amendment, supplement,  
18 or revision of any rule, regulation, order, or standard adopted by any state agency to implement,  
19 interpret, or make specific the law enforced or administered by it, or to govern its procedure”),  
20 which California’s Department of Justice did not do here. Third, the foregoing elemental  
21 protections apply every bit as much to enforcement polices as they do to more formal rule-like  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>3</sup> Available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/law\\_enforcement/dle-18-01.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/dle-18-01.pdf)  
(last visited June 8, 2018).

1 pronouncements. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 570-75 (Cal.  
2 1996). Finally, such *ultra vires* administrative constructions are not entitled to any deference in  
3 either California or federal courts. *See Peabody v. Time Warner Cable, Inc.*, 689 F.3d 1134, 1137  
4 (9th Cir. 2012). Under the foregoing blackletter, basic provisions of our representative democracy,  
5 the recent Information Bulletin is void *ab initio* and, as such, irrelevant here, except to signal that  
6 the California Department of Justice admits that the California Legislature overstepped its bounds.

7  
8 As explained in the accompanying *amici* brief, Movants concur with the Court’s finding  
9 that plaintiff’s motion for a preliminary injunction raises issues similar to defendants’ motion to  
10 dismiss, Minute Order (May 7, 2018) (ECF #079), and offer this brief only to address the impact  
11 of the Supreme Court’s subsequent decision in *Murphy v. NCAA*, 200 L.Ed.2d 854 (2018), on the  
12 commandeering and preemption issues raised in connection with 8 U.S.C. §1373.

13 For all of the foregoing reasons, movants have direct and vital interests in the issues  
14 presented before this Court, and respectfully request leave to file their accompanying brief in  
15 support of the federal government.

16  
17 **THIS MOTION IS TIMELY**

18 Although California’s email withholding its consent argues that “the deadlines for *amicus*  
19 briefs in support of either party has passed,” *see* note 1, *supra*, California is mistaken. The Court  
20 did not set a deadline for *amicus* briefs in support of either or neither party in connection with the  
21 motion to dismiss (ECF #077), and the only deadline that the Court set for *amicus* briefs in support  
22 of the federal plaintiff clearly concerned the plaintiff’s motion for a preliminary injunction, not  
23 *amicus* briefs in support of plaintiff’s opposition to California’s motion to dismiss.<sup>4</sup> The schedule  
24

25  
26 <sup>4</sup> See Minute Order (Mar. 12, 2018) (ECF #017) (“*amicus* briefs in support of Plaintiffs  
motion are due March 26, 2018”); Minute Order (Mar. 26, 2018) (ECF #034) (“*Amicus* briefs in

1 for defendants' motion to dismiss is silent on *amicus* briefs.<sup>5</sup> By filing this motion on June 8,  
2 Movants leave the defendants ample time to respond, should they wish to respond.<sup>6</sup> That said, the  
3 issues that Movants raise about the Necessary and Proper Clause, the criminal prohibition against  
4 harboring illegal aliens, and the First Amendment right to work with the federal government on  
5 these issues all were raised in Movants' initial *amici* brief (ECF #057), filed well before  
6 California's motion to dismiss (ECF #077), and California elected not to address those issues.

7  
8 **AUTHORITY TO FILE AMICUS BRIEF**

9 Motions under FED. R. APP. P. 29(b) must explain the movant's interest and "the reason  
10 why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the  
11 case." FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29  
12 explain that "[t]he amended rule [Rule 29(b)] ... requires that the motion state the relevance of the  
13 matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup.  
14 Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter  
15 not raised by the parties:

16 *An amicus curiae* brief which brings relevant matter to the attention  
17 of the Court that has not already been brought to its attention by the  
18 parties is of considerable help to the Court.

19 *Id.* (quoting Sup. Ct. R. 37.1). "Because the relevance of the matters asserted by an *amicus* is  
20 ordinarily the most compelling reason for granting leave to file, the Committee believes that it is  
21 helpful to explicitly require such a showing."

22  
23 support of Plaintiff's motion are now due April 6, 2018"); *see also* Minute Order (Mar. 29, 2018)  
(ECF #041) (concerning defendants' *amici*).

24 <sup>5</sup> Minute Order (May 7, 2018) (ECF #079).

25 <sup>6</sup> Movants' *amici* brief also conforms to the 5-page limit that this Court set for supplemental  
26 briefing on *Murphy*. Minute Order (May 22, 2018) (ECF #145).

1 As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the  
2 Third Circuit, “I think that our court would be well advised to grant motions for leave to file *amicus*  
3 briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly  
4 interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.”  
5 *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar  
6 and Jane B. Tigar, *Federal Appeals -- Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L.  
7 Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Now-Justice Alito  
8 quoted the Tigar treatise favorably for the statement that “[e]ven when the other side refuses to  
9 consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is  
10 timely and well-reasoned.” 293 F.3d at 133. As explained in the next section, the accompanying  
11 brief will aid this Court.  
12

### 13 FILING THE AMICI BRIEF WILL AID THE COURT

14 In addition to the *Murphy* issues pressed by the United States, Movants make several  
15 additional related arguments under *Murphy* that would aid this Court in deciding the issues  
16 presented here:

- 17 • **Illegality of Shielding and Harboring.** Movants distinguish *Murphy* first on the basis that  
18 immigration law makes it criminal to shield or harbor illegal aliens, whereas Congress in  
19 the *Murphy* statute did not criminalize sports gambling. *See Amici Br.* at 2-3.
- 20 • **Section 1373(a)’s Individual Protections.** Moreover, and disregarding how Congress  
21 framed 8 U.S.C. §1373, the statute protects the First Amendment petition rights of Movants  
22 and their constituents, thus falling within the ambit of laws allowed under *Murphy*. *See Amici*  
23 *Br.* at 2, 4-5.
- 24
- 25
- 26

- 1 • **Necessary and Proper Clause.** Movants then analyze the foregoing aspects of 8 U.S.C.  
2 §1373(a) under the Constitution’s Necessary and Proper Clause, U.S. CONST, art. I, §8, cl.  
3 18, to show how Section 1373 does not violate the tenets of federalism that the *Murphy*  
4 statute violated, *See Amici Br.* at 3-5.
- 5 • **Preemption Analysis.** Movants also analyze Section 1373 under the preemption analysis  
6 in *Murphy* to show that Section 1373’s protection of individual rights under the First  
7 Amendment distinguishes the Supreme Court’s analysis of the *Murphy* statute. *See Amici*  
8 *Br.* at 5.

9  
10 For the foregoing reasons, Movants respectfully submit that their *amici* brief would aid this Court’s  
11 analysis of the important issues presented here.

12 **CONCLUSION**

13 WHEREFORE, Movants respectfully request leave to file the accompanying *amici curiae*  
14 brief in support of the federal plaintiff’s opposition (ECF #166) to the California defendants’  
15 motion to dismiss (ECF #077).

16 Dated: June 8, 2018

Respectfully submitted,

18 /s/ Lawrence J. Joseph

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24 *Counsel for Prospective Amici Curiae*



**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on this 8th day of June, 2018, I electronically filed the foregoing  
3 motion for leave to file together with the accompanying *amici curiae* brief, with the Clerk of the  
4 Court for the United States District Court for the Eastern District of California by using the  
5 CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the  
6 CM/ECF system. Notice of this filing will be sent by mail to anyone unable to accept electronic  
7 filing as indicated on the Notice of Electronic filing. Parties may access this filing through the  
8 Court's CM/ECF System.  
9

10  
11 /s/ Lawrence J. Joseph  
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