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

19 UNITED STATES OF AMERICA,
 20 *Plaintiff,*
 21 v.
 22 STATE OF CALIFORNIA, *et al.,*
 23 *Defendants.*

24)
 25) **CASE No. 2:18-cv-00490-JAM-KJN**
 26)
) **MUNICIPALITIES & ELECTED**
) **OFFICIALS' AMICI CURIAE BRIEF**
) **IN SUPPORT OF PLAINTIFF'S**
) **OPPOSITION TO MOTION TO**
) **DISMISS**

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

MUNICIPALITIES & ELECTED OFFICIALS' *AMICI CURIAE* BRIEF
 IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

As set forth in more detail in the accompanying motion for leave to file, the *amici curiae* identified in the Addendum are California municipalities and elected officials (“*Amici*”). In that capacity, *Amici* are or represent political subdivisions of not only plaintiff United States but also defendant California and feel compelled to support the federal sovereign over the state sovereign in this dispute over California’s attempt to usurp the federal government’s exclusive and plenary power over immigration and to deny *Amici* and their constituents their right to support the federal government in the exercise of that power. *Amici*’s coalition previously sought and was granted leave to file an *amici* brief (“*Amici* Memo.,” ECF #057) in support of the federal government’s motion for a preliminary injunction (ECF #002), but now file this *amici* brief in support of the federal government’s opposition (ECF #166) to the California defendants’ motion to dismiss (ECF #077) in order to address the impact of the subsequent Supreme Court decision in *Murphy v. NCAA*, 200 L.Ed.2d 854 (2018), on 8 U.S.C. §1373 (“Section 1373”).

ARGUMENT

At the outset, *amici* concur with the Court that the issues presented in California’s motion to dismiss overlap with the merits issues raised in the United States’ motion for a preliminary injunction. Minute Order (May 7, 2018) (ECF #079). Although a likelihood of prevailing on the merits is not the same as prevailing on the merits, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), preemption under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 (“INA”), and commandeering under the Tenth Amendment, U.S. CONST. amend. X, present purely legal issues that the Court will decide either in California’s favor for dismissal or in the United States’ favor in support of a preliminary injunction. In addressing the subsequent *Murphy* decision here, *Amici* incorporate by reference the following arguments from their prior *amici* filing:

- 1 • **First Amendment**. Not only private citizens but also state and local employees and
2 officials have a First Amendment right to work with federal immigration officials, which
3 the challenged California laws seek to infringe. *Amici* Memo. at 6, 12.
- 4 • **Shielding and Harboring**. In protecting illegal aliens from apprehension, the challenged
5 California laws violate INA’s criminal prohibition against concealing, harboring, or
6 shielding from detection under INA §274(a)(1)(A). *Id.* at 9-11.
- 7 • **Necessary and Proper**. Given the foregoing First Amendment and INA issues, Section
8 1373 would fall within Congress’s power under the Necessary and Proper Clause, U.S.
9 CONST, art. I, §8, cl. 18, even assuming *arguendo* that it exceeded Congress’s enumerated
10 powers. *Amici* Memo. at 14-15.
- 11 • **Field Preemption**. Circuit precedent holds that INA field preempts the issue of concealing,
12 harboring, and shielding illegal aliens, leaving California no room to act. *Id.* at 6-7.

13
14 With that background, *Amici* now explain why *Murphy* cannot aid California here.

15 **I. COMMANDEERING UNDER *MURPHY* IS INAPPOSITE TO SECTION 1373.**

16 In *Murphy*, the Supreme Court held that the Professional and Amateur Sports Protection
17 Act (“PASPA”) impermissibly commandeered New Jersey’s legislature by prohibiting repeal of
18 New Jersey’s prohibition against sports gambling. As the Court noted at the outset and the end of
19 its decision, “PASPA does not make sports gambling a federal crime,” and “Congress can regulate
20 sports gambling directly.” 200 L.Ed.2d at 866, 882 (Slip Op. 5, 31). Also, the object of PASPA’s
21 regulation was *state legislation*, not conduct, by purporting to prohibit New Jersey from repealing
22 its own *state-law* ban on sports gambling. 200 L.Ed.2d at 872-73 (Slip Op. 14-17); *id.* at 873
23 (Congress cannot “command a state government to enact *state* regulation”) (interior quotation
24 marks omitted, emphasis in original) (Slip Op. 16). Viewed in that light, PASPA and *Murphy* have
25
26

1 little to do with INA and Section 1373 because INA indeed makes it a federal crime to conceal,
2 harbor, or shield illegal aliens, 8 U.S.C. §1324(a)(1)(A)(iii), (v), and Section 1373 is indifferent to
3 the California’s Legislature’s *enactments*, regulating instead the *conduct* of California’s state and
4 local executive officers and entities:

5 *Notwithstanding any other provision of Federal, State, or local law,*
6 *a Federal, State, or local government entity or official may not*
7 *prohibit, or in any way restrict, any government entity or official*
8 *from sending to, or receiving from, the Immigration and*
Naturalization Service information regarding the citizenship or
immigration status, lawful or unlawful, of any individual.

9 8 U.S.C. §1373(a) (emphasis added). California’s Legislature remains free to legislate as it wishes,
10 but the laws that the Legislature enacts cannot authorize violation of federal law. In the gambling
11 context from *Murphy*, “[t]he nub of the matter [would be] that they aided and abetted if they
12 consciously were parties to the concealment of [illegal activity] in these gambling clubs.” *United*
13 *States v. Johnson*, 319 U.S. 503, 518 (1943). As signaled by the Supreme Court’s emphasizing
14 that Congress has not regulated sports gambling, *Murphy* would have come out differently if
15 PASPA — analogously to INA, here — had criminalized sports gambling and prohibited state and
16 local officers from aiding illegal activity by helping to shield or conceal it.

17
18 Simply, “[t]he anti-commandeering doctrine does not apply when Congress evenhandedly
19 regulates an activity in which both States and private actors engage.” *Murphy*, 200 L.Ed.2d at 875
20 (Slip Op. 20). As explained, INA’s prohibition on shielding illegal aliens from detection applies
21 equally to traffickers and church groups, and state officials are in no better a place than church
22 groups. *Amici Memo.* at 10 & n.5. All that Section 1373(a) does is provide a civil-law basis to
23 direct compliance with the criminal law, which is well within congressional power. Whether as
24 permissible regulation of immigration in its own right or as a necessary and proper extension of
25 that congressional power, *see* Section I.A, *supra*, Section 1373 provides a civil-law variant to the
26

1 extant — and *unchallenged* — criminal prohibition against shielding illegal aliens.

2 **A. Notwithstanding *Murphy*, Section 1373(a) remains a “Necessary and Proper”**
3 **application of powers entrusted to Congress.**

4 In their prior *amici* brief, *Amici* posited that “California cannot seriously dispute the federal
5 authority to create the crime of concealing, harboring, and shielding from detection illegal aliens
6 as necessary and proper to federal control of immigration.” *Amici* Memo. at 15. Now it is official:
7 California’s subsequent motion to dismiss indeed *did not* make that argument, which is a fatal
8 omission here. Even assuming *arguendo* that Congress could not enact Section 1373 *directly* under
9 its exclusive and plenary power over immigration, *DeCanas v. Bica*, 424 U.S. 351, 354 (1976),
10 the Necessary and Proper Clause *extends* those powers to include measures ““rationally related to
11 the implementation of a constitutionally enumerated power.”” *Amici* Memo. at 14 (*quoting United*
12 *States v. Comstock*, 560 U.S. 126, 134 (2010)). The Clause ““empowers Congress to enact laws in
13 effectuation of its enumerated powers that are not within its authority to enact in isolation.”” *Id.* at
14 14-15 (*quoting Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment)).
15 Thus, as long as it is both necessary and proper, Section 1373 falls with congressional powers.
16

17 **B. Section 1373(a) qualifies as “necessary” under the Necessary and Proper**
18 **Clause.**

19 As explained, Courts are deferential to Congress under the Necessary and Proper Clause
20 on issues such as necessity, efficacy, and the fit between the means chosen and the constitutional
21 end. *Amici* Memo. at 15 (*citing Comstock*, 560 U.S. at 135). Neither California nor its officials can
22 complain that Congress enacted Section 1373 as an alternative to having the Department of Justice
23 prosecute California officials. Indeed, California’s actions prove that Section 1373 is *necessary*.

24 **C. Section 1373(a) qualifies as “proper” under the Necessary and Proper Clause**
25 **because it does not violate any of the *Murphy* tenets of federalism.**

26 Nor is Section 1373 improper under the three tenets of federalism cited in *Murphy*, 200

1 L.Ed.2d at 874 (Slip Op. 17-18). First, Section 1373 reflects a healthy federal-state balance
2 consistent with the federal government’s exclusive power over immigration and avoiding “the risk
3 of tyranny and abuse” from California’s seeking to suppress First Amendment rights and evade
4 federalism by nullifying federal law. Second, Section 1373 does not blur authority, given both the
5 exclusivity of federal immigration authority and the voluntariness of any officer’s actions taken
6 under Section 1373. Third, Section 1373 does not shift any costs of immigration compliance, given
7 the unlawfulness of shielding aliens from detection and the voluntariness of any officer’s actions
8 taken under Section 1373. In sum, Section 1373 is a *proper* exercise of congressional power.
9

10 **II. INA’S PREEMPTIVE SCOPE SURVIVES *MURPHY*.**

11 *Murphy* posits that “every form of preemption is based on a federal law that regulates the
12 conduct of private actors, not the States,” 200 L.Ed.2d at 878 (Slip Op. 23-24), but did not have
13 occasion to tease out that private-actor-versus-State dichotomy to individual officers who are state
14 or local employees (*i.e.*, arguably neither “private actors” nor States). Since individual officers are
15 not sovereign States, they either qualify as “private actors” when exercising their First Amendment
16 right to contact the federal government under Section 1373 or there is a third category of actors to
17 consider. Either way, *Murphy* shows how to understand a statute’s true effect, “regardless of the
18 language sometimes used by Congress.” *Id.* Specifically, just as the INA in *Arizona v. United*
19 *States*, 567 U. S. 387, 401 (2012), could be reframed to confer individual rights, *Murphy*, 200
20 L.Ed.2d at 877-78 (Slip Op. 23), Section 1373 permissibly protects First Amendment rights,
21 protects state and local officers from inadvertently joining the Legislature’s unlawful scheme to
22 shield illegal aliens, and protects American workers from illegal aliens’ unlawful competition.
23

24 **CONCLUSION**

25 For the foregoing reasons, the Court should deny California’s motion to dismiss.
26

1 Dated: June 8, 2018

Respectfully submitted,

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) **ADDENDUM TO MUNICIPALITIES**
) **& ELECTED OFFICIALS' AMICI**
) **CURIAE BRIEF IN SUPPORT OF**
) **PLAINTIFF'S OPPOSITION TO**
) **MOTION TO DISMISS**

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

24 The following California municipalities and elected officials have joined the foregoing
25 *amici curiae* brief:
26

- The City of Yorba Linda; the City of Escondido; the City of Aliso Viejo; the City of Glendora; and the City of Laguna Niguel.
- The Hon. Mike Spence, City of West Covina Councilman, and the Hon. Rebecca Jones, Vice-Mayor of the City of San Marcos, in their respective individual capacities.

This list reflects that two members — the City of Laguna Niguel and the City of Glendora — have joined the *amici* coalition since the filing of the *amici* brief (ECF #057) in support of the United States’ motion for a preliminary injunction on April 6, 2018.

Dated: June 8, 2018

Respectfully submitted,

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