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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his official capacity; and XAVIER BECERRA, Attorney General of California, in his official capacity,

Defendants.

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

Hon. John A. Mendez

[PROPOSED] OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OF INTERVENOR-DEFENDANTS THE CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE AND THE COALITION FOR HUMANE IMMIGRANT RIGHTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Constitution

State Statutes

Legislative History

Other Authorities

INTRODUCTION

The California Values Act limits the assistance the State will provide to federal immigration officials, by directing state officers not to help arrest certain immigrants.[1] The United States, however, seeks to force California to let its officers facilitate deportations, arguing that Congress can and has taken that choice away from the People of California and their elected representatives. That is wrong. The Tenth Amendment guarantees States the choice whether to help administer a federal program like the deportation system. And even if Congress could take that choice away, it has nowhere made the unmistakably clear statement that would be required to preempt the Values Act. To the contrary, Congress has taken pains to ensure that States generally remain free to limit their own participation in the federal immigration scheme.

The injunction the United States requests would be devastating to residents and local service providers across California, gravely undermining immigrant communities' trust in police and local government. The California Partnership to End Domestic Violence ("Partnership") and Coalition for Humane Immigrant Rights ("CHIRLA") therefore seek to defend the Values Act on behalf of themselves and their members, which include thousands of individuals and hundreds of organizations that serve immigrants and their families. The Court should deny the preliminary injunction motion and dismiss the claims against the Values Act. *See* Proposed Mot. to Dismiss.

BACKGROUND

A. The Costs of State Participation in Immigration Enforcement.

The Immigration and Nationality Act ("INA") charges the Department of Homeland Security ("DHS") with responsibility for enforcing federal immigration law. 8 U.S.C. §

[1] Both state and local officers are "state officers" for purposes of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 905, 930-31 (1997); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 682 (1978) (municipalities are "state instrumentalities").

1103(a)(1). The INA also "specifies limited circumstances" in which States can voluntarily choose to lend their assistance. *Arizona v. United States*, 567 U.S. 387, 408 (2012).

State participation in this scheme imposes a number of costs on state residents. To keep track of federal requests and arrange for custody transfers, state officers must divert limited time, energy, and jail space away from pressing local needs. Any mistakes the federal government makes can lead to steep financial liability for state and local taxpayers.[2] State participation in deportations also instills fear and deters residents from accessing critical public services like police, healthcare, and education, straining relationships between States and their constituents. Cal. Gov't Code § 7284.2(c) (legislative findings). When state residents understand that their own police are helping enforce immigration law, many will not come forward to report crimes or serve as witnesses, which decreases public safety for all residents. *See* Mot. to Intervene, at 3-4.

Recent federal practices have intensified these problems. Over the last year, immigration enforcement has grown more indiscriminate, as DHS has rescinded policies that had set priorities for enforcement.[3] DHS has also stripped protections from a number of particularly vulnerable groups of immigrants, who often have lived in the United States for many years and have deeply rooted lives here.[4] The human consequences of these practices have been devastating.[5]

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[2] For instance, DHS has mistakenly asked States to help detain hundreds of U.S. citizens in recent years. *See, e.g.*, Eyder Peralta, *You Say You're an American, but What If You Had to Prove It or Be Deported?*, NPR, Dec. 22, 2016 (documenting "693 U.S. citizens [who] were held in local jails on federal [immigration] detainers"), https://n.pr/2rQlgQ8.

[3] *See* Michael D. Shear, *New Trump Deportation Rules Allow Far More Expulsions*, NY Times, Feb 21, 2017, https://nyti.ms/2ljmRZ7; Tal Kopan, *ICE Director: Undocumented Immigrants "Should Be Afraid"*, CNN, June 16, 2017, https://cnn.it/2rhJOyA.

[4] *See* Dep't of Homeland Sec., *Memorandum on Rescission of DACA*, Sept. 5, 2017, https://bit.ly/2eZuPmG; DHS, *Termination of TPS for Haiti*, 83 Fed. Reg. 2648 (Jan. 18, 2018); DHS, *Termination of TPS for El Salvador*, 83 Fed. Reg. 2654 (Jan. 18, 2018); DHS, *Termination of TPS for Nicaragua*, 82 Fed. Reg. 59636 (Dec. 15, 2017).

[5] *See, e.g.*, Fwd.us, *Human Consequences of the Interior Immigration Enforcement Executive Orders* (collecting individual accounts), http://www.fwd.us/consequences.

B. The Values Act.

California responded to these problems by enacting the Values Act, S.B. 54 (Oct. 5, 2017), which passed with large majorities in both houses of its Legislature. Cal. Gov't Code § 7284.2(a)-(f) (describing the Act's goals). The United States challenges two parts in particular. First, the Values Act provides that "California law enforcement agencies shall not . . . [t]ransfer an individual to immigration authorities" unless certain exceptions apply. Cal. Gov't Code § 7284.6(a)(4). The transfer provision means that the State generally will not "facilitate the transfer of an individual in its custody to ICE" after state-law custody ends. *Id.* §§ 7284.6(a)(4), 7284.4(e), 7283(g). Second, the Values Act provides that California law enforcement will not facilitate civil immigration arrests either by "[p]roviding information regarding a person's release date," *id.* § 7284.6(a)(1)(C), or by notifying DHS of "the individual's home address or work address," unless the information is publicly available, *id.* § 7284.6(a)(1)(D).

The Values Act contains numerous exceptions. The challenged provisions do not apply to the State's Department of Corrections and Rehabilitation. *Id.* § 7284.4(a). The Act allows state officers to share a person's release date with DHS or facilitate transfer if the person has been convicted of an enumerated list of crimes, *id.* § 7282.5(a)(1), (2), (3)(A)-(AE), (5), or if the person "is a current registrant on the California Sex and Arson Registry," *id.* § 7282.5(a)(4). And it allows officers to share release dates if a person is being prosecuted for "a serious or violent felony" for which a magistrate has made a probable cause finding. *Id.* § 7282.5(b).

C. The Intervenor-Defendants.

The Partnership is a statewide nonprofit organization whose members include hundreds of individuals, domestic violence shelters, legal service providers, and local government entities. Moore Decl. ¶ 2-3, 6-8 (describing the Partnership's mission and activities). Its members serve thousands of immigrants and their communities across the State, and they rely on the trust that

the Values Act was designed to foster. *Id.* ¶ 6, 9; Cal. Gov't Code § 7284.2(b)-(f). CHIRLA is a nonprofit organization with immigrant and allied members throughout the State. Salas Decl. ¶ 2-6. Its members' ability to access police protection other critical public services would be severely harmed by an injunction. *Id.* ¶ 7-11. *See* Mot. to Intervene, at 2-4.

ARGUMENT

To obtain a preliminary injunction, the United States must establish that it is likely to prevail on the merits, that it faces irreparable harm, and that the balance of equities and public interest weigh in favor of the injunction. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

I. The United States Is Not Likely to Prevail on the Merits.

The federal government may not force California to help enforce immigration law. Any attempt to do so would violate California's constitutional prerogative to decline to help administer federal programs. But the Court need not even reach that question, because Congress has not sought to preempt the Values Act, either expressly or by implication. The Court should reject the government's unprecedented attempt to deny the People of California the choice of whether their own government will help deport its residents.

A. The Tenth Amendment Guarantees States the Ability to Opt Out of Federal Programs and Structure Their Own Governments.

States are "independent political entities" who "represent and remain accountable to [their] own citizens." *Printz*, 521 U.S. at 919-20. Their independence is central to our constitutional system: "The Framers concluded that allocation of powers between the National Government and the States enhances freedom . . . by protecting the people" from the arbitrary action of either government. *Bond v. United States*, 564 U.S. 211, 221-22 (2011). Accordingly, "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties

that derive from the diffusion of sovereign power." *Nat'l Fed. of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 536 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

To preserve those liberties, the Constitution denies "Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162, 166. Three specific principles flow from this general prohibition against federal control of state government. Each one independently dooms the government's challenge to the Values Act.

First, the federal government cannot commandeer States to help enforce federal schemes. This means that, even when Congress wants the States' assistance, it must give them the "critical alternative" of "declin[ing] to administer the federal program." *New York*, 505 U.S. at 176-77; *see Printz*, 521 U.S. at 909-10 (when Congress asks for help, States may "refuse[] to comply with the request"); *NFIB*, 567 U.S. at 587 (States "may choose not to participate" in a federal program). Congress can still *encourage* States to lend their assistance by offering incentives—for instance, by requiring compliance with federal standards as a condition of federal funds (within certain limits), *New York*, 505 U.S. at 167, or as a condition of "continued state activity in an otherwise pre-emptible field," *FERC v. Mississippi*, 456 U.S. 742, 769 (1982); *see New York*, 505 U.S. at 168 (explaining that "either of these methods" still preserves States' ability to opt out).[6] But States must retain the "prerogative to reject Congress's desired policy, not merely in theory but in fact." *NFIB*, 567 U.S. at 581 (quotation marks omitted).

Second, and independently, the federal government cannot "displace a State's allocation of governmental power and responsibility." *Alden v. Maine*, 527 U.S. 706, 752 (1999). A State's ability to choose how it distributes authority among its officers is key to its independence: A "State defines itself as a sovereign" through "the structure of its government." *Gregory v.*

[6] Congress may also regulate States through its power to enforce the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 2, and through its ability to create causes of action that state courts must hear, *see Printz*, 521 U.S. at 929, but neither is at issue in this case.

Ashcroft, 501 U.S. 452, 460 (1991). Accordingly, Congress may not interfere with a State's prerogative "to control the distribution of power among its own agents." *Va. Office for Protection & Advocacy v. Stewart (VOPA)*, 563 U.S. 247, 263 (2011) (Kennedy, J., concurring); *id.* at 264 (States "need not empower their officers" to participate in a federal scheme).

Third, even where Congress *can* regulate a core state function directly—for instance, through a "generally applicable law" that "regulate[s] state activities in the same manner as private conduct," *Ohio v. United States*, 849 F.3d 313, 322 (6th Cir. 2017)—it still "must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation marks omitted); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (under *Gregory*, a narrow interpretation prevails over one that "that leaves [the statute's] outer boundaries ambiguous"). To satisfy *Gregory*, the government's interpretation "must be plain to anyone reading the Act." 501 U.S. at 467.

B. The Tenth Amendment Forecloses the Government's Preemption Claims.

Any attempt to preempt States from declining to administer a federal program would violate the principles described in Part I.A: It would deny States the prerogative to decline that *New York*, *Printz*, and *NFIB* guarantee; and it would reassign that prerogative from the State's elected representatives to its unelected employees. These constitutional doubts provide ample reason to reject the government's express (Part I.C) and implied (Part I.D) preemption claims. *See Nw. Austin MUD v. Holder*, 557 U.S. 193, 205 (2009) ("[T]he Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

1. Congress cannot preempt States from doing precisely what the Tenth Amendment authorizes: "declin[ing] to administer" immigration law. *New York*, 505 U.S. at 177. Through the Values Act, California has made a statewide decision not to help DHS agents arrest and deport certain noncitizen residents. California's prerogative to make that decision is "essential"

to the "[p]reservation of the States as independent political entities," *Printz*, 521 U.S. at 919, and a "quintessential attribute of sovereignty," *FERC*, 456 U.S. at 761. Indeed, the "whole point" of the anti-commandeering rule is that States *must* be able to "reject" a federal policy and "decline to participate" in its enforcement. *NFIB*, 567 U.S. at 587.

Preempting the State's ability to opt out of immigration enforcement would, moreover, undermine "the political accountability key to our federal system." *NFIB*, 567 U.S. at 578; *see Printz*, 521 U.S. at 930 (relying on accountability rationale); *New York*, 505 U.S. at 169 (same). Accountability relies on "elected public officials" being able to "regulate in accordance with the views of the local electorate," including, crucially, by withdrawing from federal programs when the "State's citizens view federal policy as sufficiently contrary to local interests." *New York*, 505 U.S. at 168-69. California's residents have decided that facilitating deportations is often "contrary to local interests," and they "would prefer their government to devote its attention and resources" to ordinary law enforcement. *Id*. Yet preemption of the Values Act would leave California's elected representatives unable to oblige. Salas Decl. ¶ 12. Instead, they would have to allow every state officer to help administer immigration law. This would put them "in the position of taking the blame" for the "burdensomeness" and "defects" of federal immigration enforcement, *Printz*, 521 U.S. at 930—something that happened often prior to the Values Act.[7]

The government contends otherwise, arguing that Congress can preempt California from limiting its involvement in the deportation system. Thus, under the government's view, even if the State's residents—acting through their Legislature—would rather "decline to administer the federal [deportation] program," *New York*, 505 U.S. at 168, 177, they must nonetheless authorize

[7] *See, e.g.*, Maddie Oatman, *Secure Governor, Insecure Communities*, Mother Jones, Nov. 4, 2010, https://bit.ly/2wd6Qvp; *Group Rallies Against Deportation of Immigrants in Front of Alameda County Building*, Mercury News, Nov. 19, 2015, https://bayareane.ws/2wbh6o4; Leslie Rojas, *LAPD Chief on Secure Communities: "It Tends to Cause a Divide,"* KPCC, June 3, 2011, https://bit.ly/2I8sA07.

all public employees to help administer it. *But see Printz*, 521 U.S. at 931 (rejecting the idea that "the Federal Government cannot control the State, but can control all of its officers"). That view simply cannot be squared with the Tenth Amendment's guarantee that States must be able to "decline to participate" in federal programs. *NFIB*, 567 U.S. at 587; *see Printz*, 521 U.S. at 933 (holding that sheriffs could refuse to conduct federal background checks); *id.* at 934 n.18 (noting state laws that prohibited sheriffs "from taking on these federal responsibilities").

It makes no difference that the statute the government principally invokes, 8 U.S.C. § 1373; *see infra* Part I.C, is framed as a prohibition, rather than a command.[8] *New York* made clear that prohibitions can violate the principle that Congress may not "require the States to govern according to Congress's instructions." 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 564, 565 (1911), which struck down a federal statute providing that a State's capitol "shall not be changed"). And the Supreme Court definitively rejected such formalism in *NFIB*, where the invalid statute did not issue any *command* to the States; it simply authorized the government to withhold Medicaid funds if States did not participate in the Medicaid expansion. 567 U.S. at 585. Nonetheless, the Court explained that States must retain "a legitimate choice" about whether to participate in a federal program, so that their elected officials "can fairly be held politically accountable for" their choice. *Id*. at 578. The Medicaid expansion violated that rule because it left States' elected officials "no real choice" to opt out of the program. *Id.* at 587. The Court emphasized that States' prerogative to decline must be maintained "not merely in theory but in fact." *Id.* at 581.

[8] Section 1373(a) provides that a "government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Notably, the government itself describes § 1373 as an affirmative command, explaining that States "are *required* to allow" cooperation with DHS. PI Mem. 24 (emphasis added).

Even apart from the anti-commandeering rule, Congress cannot "displace a State's allocation of governmental power and responsibility." *Alden*, 527 U.S. at 752; *see id.* (Congress could not interfere with a State's decision to assign "the payment of debts" to "the political branches, rather than the courts"). California law places control over state and local police in the hands of the Legislature, which exercised that authority in enacting the Values Act. *See* Cal. Const. art. IV, § 1; *Baggett v. Gates*, 32 Cal.3d 128, 139 n.15 (1982). Applying § 1373, or the INA more generally, to preempt the Values Act would displace this arrangement by forcing the State to place immigration-enforcement decisions in the hands of every individual officer, who could then choose for himself whether to help DHS carry out deportations.

Congress may not "dictate the internal operations of state government" in that way. *Mass. v. HHS*, 682 F.3d 1, 12 (1st Cir. 2012); *see Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) ("[S]tate sovereignty . . . surely encompasses the right to set the duties of office for state-created officials."). If it could do that, Congress could (despite *NFIB*) require States to let their insurance commissioners decide for themselves whether to accept the Medicaid expansion or create Affordable Care Act exchanges—taking the choice out of the hands of the people's elected representatives. Or it could (despite *Printz*) require States to let each individual sheriff's deputy decide whether to conduct federal background checks. But Congress does not have authority "to control the distribution of power among [a State's] own agents," especially power over such a fundamental decision as whether to exercise the State's anti-commandeering prerogative. *VOPA*, 563 U.S. at 263 (Kennedy, J., concurring).[9]

[9] While *Alden* and *VOPA* involved challenges brought under the Eleventh Amendment, their underlying rationales—rejecting federal control over a State's internal distribution of authority—apply in the Tenth Amendment context as well. *Cf. Gregory*, 501 U.S. at 460-61 (explaining that Eleventh Amendment clear-statement rule applied in Tenth Amendment context).

2. The federal government has elsewhere argued that Congress can compel the States to help administer immigration law, as long as the States' role involves sharing information. That is incorrect. *Printz* left open the possibility that *some* kinds of information sharing *might* fall outside the anti-commandeering rule—specifically, information sharing that does *not* entail participation in "the actual administration of a federal program." *Printz*, 521 U.S. at 918. The Court thus declined to resolve whether "purely ministerial reporting requirements" are constitutional. *Id.* at 936 (O'Connor, J., concurring). But there is no question that forced information sharing, where it facilitates the concrete, day-to-day administration of a federal program, violates the anti-commandeering rule. Indeed, *Printz* itself invalidated a law because it required state officers "to provide information that belongs to the State." *Id.* at 932 n.17.[10]

When Congress "compels the States" to help administer a program, or leaves the States unable to decline, "it blurs the lines of political accountability" *regardless* of what form the involvement takes. *NFIB*, 567 U.S. at 678. Whether local officers are placing the handcuffs or helping DHS do so, residents understand that their government is funneling people to the deportation system. Moore Decl. ¶ 9-20; Salas Decl. ¶ 7, 11. Forced information sharing can thus cause the precise harms the Tenth Amendment seeks to prevent. *See Printz*, 521 U.S. at 930 ("absorb the costs," "bear the brunt of public disapproval"); Cal. Gov. Code § 7284.2(b)-(d).

Here, the information the government seeks would clearly facilitate the "administration of a federal program." *Printz*, 521 U.S. at 918. The challenged Values Act provisions address whether state officers can arrange for physical transfers of custody and otherwise help DHS

[10] The government has claimed, in other litigation, that *Reno v. Condon*, 528 U.S. 141 (2000), recognized a Tenth Amendment carve-out for information mandates. Not so. The Court in *Condon* upheld a "generally applicable" law because it regulated States' economic activities alongside equivalent private activity. *Id.* at 150-51; *see South Carolina v. Baker*, 485 U.S. 505, 515 (1988); *Ohio*, 849 F.3d at 322 (explaining *Baker*). The Court did not announce any rule about information mandates, nor did it even identify any mandate to send information to the federal government in the statutory scheme at issue.

locate and arrest noncitizens. The government itself stresses the operational impact of these actions: Transfer, release dates, and addresses help DHS "locate, detain, prosecute, and remove aliens," PI Mem. 33; they increase "the United States' ability to identify and apprehend removable aliens," PI Mem. 35; and they facilitate "ICE's efforts to take these aliens into custody for removal purposes," which saves ICE "time and resources," PI Mem. 35-36.

By contrast, some federal reporting requirements serve only academic and record-keeping goals. *See, e.g.*, *Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (citing former version of 34 U.S.C. § 41307 (statistical data regarding missing children)); 42 U.S.C. § 11133(a) (peer review data bank). These are "purely ministerial," *id.*, because they do not facilitate the federal government's on-the-ground implementation of any federal regulatory program. As a result, they do not force state officials to "tak[e] the blame" for the "defects" of a federal program. *Id.* at 930.[11] The information in this case is clearly different. The Court should reject any suggestion that information mandates are categorically exempt from the anti-commandeering rule—something no court has ever held.

3. The government also relies on the Second Circuit's decision upholding § 1373 in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999); PI Mem. 27. As explained below, Part I.C, the Court need not address § 1373's constitutionality because the Values Act is consistent with that statute. But in any event, the *City of New York* opinion is both incorrect and inapposite.

City of New York was wrong when decided. The Second Circuit did not address § 1373's forcible restructuring of state authority, *supra* Part I.A, even though the Supreme Court had already made clear that "the structure of [a State's] government" defines its very existence "as a

[11] The few cases upholding reporting requirements have all involved these kinds of purely ministerial duties to "forward[] . . . information to a federal data bank." *Freilich v. Upper Chesapeake Health*, 313 F.3d 205, 214 (4th Cir. 2002); *see U.S. v. Brown*, 2007 WL 4372829, at *5 (S.D.N.Y. Dec. 12, 2007) (requirement to forward information to "a national database").

sovereign." *Gregory*, 501 U.S. at 460. And the Second Circuit assumed that § 1373's constitutionality depended on the relative strength of the federal and state interests. *City of New York*, 179 F. 3d at 35 (federal), 37 (state). But the Supreme Court had already emphatically rejected that kind of balancing in the anti-commandeering context. *See Printz*, 521 U.S. at 932 ("[A] 'balancing' analysis is inappropriate" where "the whole *object* of the law is to direct the functioning of the state executive."); *New York*, 505 U.S. at 178 (the rule applies "[n]o matter how powerful the federal interest involved").

Since then, its rationale has been even more decisively rejected. *City of New York* started from the premise that States had some obligation to offer their employees' "voluntary cooperation" to federal officials. 179 F.3d at 35. But that premise—for which the court cited no authority—conflicts the Supreme Court's confirmation in *NFIB* that States have the "prerogative to reject Congress's desired policy, not merely in theory but in fact." 567 U.S. at 581. In addition, *City of New York* reasoned that § 1373 could not violate the Tenth Amendment because it did "not directly compel states or localities to require or prohibit anything." 179 F.3d at 35. But *New York* and *Coyle* indicated that prohibitions can also improperly regulate States, and *NFIB* subsequently settled once and for all that Congress cannot force States to participate in federal regulatory programs either through "direct commands" *or* "indirectly." 567 U.S. at 578.

In any event, *City of New York* involved a restriction on sharing *immigration status*, which § 1373 squarely prohibits. 179 F.3d at 31; *see* Part I.C. Limitations on transfer and notification were not before the court, so it had no occasion to consider how *Gregory* and constitutional avoidance would apply to the policies at issue here. For all these reasons, *City of New York* does not provide a basis for granting the requested injunction.

C. The Values Act Is Not Preempted by 8 U.S.C. § 1373.

The Court need not reach the constitutional questions above, because § 1373 does not apply to the Values Act. *See Nw. Austin*, 557 U.S. at 205. The government contends that § 1373 requires States to let their officers send DHS people's release dates and addresses. PI Mem. 27-29. Its interpretation can only prevail if it is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. But § 1373's language only prohibits restrictions on sharing "information regarding . . . citizenship or immigration status." 8 U.S.C. § 1373(a). The statute's plain text simply does not encompass release dates or addresses. *See Steinle v. San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017) ("[N]o plausible reading of 'information regarding . . . citizenship or immigration status' encompasses [a] release date.").

The government's novel effort to expand § 1373 falters at every turn. For starters, neither a release date nor an address demonstrates a person's citizenship or immigration status. A person's citizenship and status are the same regardless of which day she walks out of jail. And her address does not indicate whether she is a citizen, or whether she currently has lawful permission to remain in the United States. *Cf.* 8 U.S.C. § 1101(a)(15)(A)-(V) (listing immigration statuses). The text of § 1373 cannot bear the government's position: Information that does not indicate people's citizenship or status cannot be considered "information regarding the[ir] citizenship or immigration status." 8 U.S.C. § 1373(a); *see Biggs v. Credit Collections*, 2007 WL 4034997, at *4 & n.3 (W.D.Ok. Nov. 15, 2007) (the phrase "information regarding a debt" does not include information "that do[es] not impart . . . information about a debt").

The government does not appear to dispute that a release date cannot indicate a person's citizenship or immigration status.[12] But it argues that a person's address could, theoretically, be

[12] The government points out that a person generally cannot be removed while they are in criminal custody, *see* PI Mem. 28-29 (citing 8 U.S.C. § 1231(a)(4)), but that does not somehow give the person a lawful immigration status.

"relevant" to their immigration status in some circumstances. PI Mem. 29. In none of its examples, however, would a person's address demonstrate his or her immigration status. For instance, an address does not indicate the length of a person's "continuous presence," "whether the alien has been granted work authorization," or whether the person "inten[ds] not to abandon his or her foreign residence." *Id*. The government's examples are connected "only peripherally, if at all," to a person's immigration status. *Farr v. US West, Inc.*, 58 F.3d 1361, 1366 (9th Cir. 1995), *abrogated on other grounds as recognized in Bowles v. Reade*, 198 F.3d 752, 759 (9th Cir. 1999). Under those circumstances, "it would defy common sense" to conclude that addresses qualify as information regarding immigration status. *Id*.

To shoehorn release dates and addresses into § 1373, the government is forced to advance an interpretation without limit. It suggests that § 1373 reaches every piece of information that could conceivably, in *some* circumstance, bear on a noncitizen's "presence," his future "intent," or whether his activities "violate[] the terms" of his admission. PI Mem. 29. It is difficult to imagine what would fall outside of those categories. A person's medical records could reveal an inaccuracy in his visa application; his school records could show how long he has remained in the United States; the addresses of his family and friends could show his possible whereabouts.

The government's argument disregards the specific words Congress chose to cabin § 1373's scope: "citizenship or immigration status." If it wanted § 1373 to reach *all* information about immigrants, "Congress could easily have said so." *Kucana v. Holder*, 558 U.S. 233, 248 (2010). Indeed, in the same bill that enacted § 1373, Congress referred to "any information which relates to an alien." 8 U.S.C. § 1367(a)(2); *see* Pub. L. 104-208, Div. C, Title VI, §§ 384, 642, 110 Stat. 3009 (1996). And in other INA provisions, Congress explicitly named the precise pieces of information the government now seeks to import into § 1373: "information regarding the name and *address* of the alien," 8 U.S.C. § 1360(c)(2), "information concerning the alien's

whereabouts and *activities*," 8 U.S.C. § 1184(k)(3)(A), and "information . . . regarding the purposes and *intentions* of the applicant," 8 U.S.C. § 1225(a)(5) (emphases added); *compare* PI Mem. 28 (arguing that § 1373 reaches a noncitizen's "address," "intent," "presence"). Congress clearly "knows how" to refer to this information when it wants to, but it chose not to in § 1373. *Jama v. ICE*, 543 U.S. 335, 341 (2005).[13]

The government highlights that § 1373 covers information "regarding" a person's citizenship and immigration status. PI Mem. 28-29. But that is a perfectly natural way to identify the indicia of citizenship and immigration status that local police are likely to encounter—like passports, visas, and green cards. Section 1373's language thus accounts for the fact that local police will rarely have conclusive knowledge of a person's "technical immigration status," PI Mem. 28, unlike federal officials who have access to numerous immigration databases, *cf.* 8 U.S.C. § 1373(c) (requiring *federal* officials to verify the actual "citizenship or immigration status of any individual"). Thus, for example, a person's admission that he crossed the border illegally would be information "regarding" both citizenship and immigration status, even though it conclusively establishes neither.[14]

[13] The government invokes § 1373's legislative history, PI Mem. 27-28, but that cannot "trump[] the plain text of the statute" or *Gregory*'s requirement of a clear textual statement. *Powers v. Wells Fargo Bank NA*, 439 F.3d 1043, 1045 (9th Cir. 2006); *PN v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1171 (9th Cir. 2007). And in any case, § 1373's legislative history is at best "ambiguous" and therefore not reliable. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). For instance, a committee report states that the motivation for a nearly-identical provision was to address local policies that "prevent[] local officials from disclosing the immigration status of individuals to INS." H.R. Conf. Rep. No. 104-725, at 390-31 (1996) (addressing 8 U.S.C. § 1644). And Congress simultaneously *rejected* proposals that would have required States to share an immigrant's "name, address, and other identifying information." *See, e.g.*, H.R.1157, § 308 (Mar. 8, 1995). *See* Dep't of Justice, Office of Legal Counsel, *Relationship Between IIRIRA and Statutory Requirement for Confidentiality of Census Information* (May 18, 1999) (observing that for § 1373, "there is little in the way of legislative history that illuminates its scope").

[14] The person might still be a derivative U.S. citizen, 8 U.S.C. § 1401(c)-(d), (g), or have been granted asylum, 8 U.S.C. § 1158(a)(1). The government briefly suggests that the Act could bar the sharing of a person's oral statement that "they are illegally in the United States." PI Mem. 29. But the Act's savings clause forecloses that interpretation. Cal. Gov't Code § 7284.6(e).

The text and context of § 1373 thus provide ample reason to reject the government's expansive position. But if doubt remained, *Gregory* compels the less intrusive interpretation. *Supra* Part I.A. Section 1373 triggers the *Gregory* rule with particular force both for the reasons in Part I.B and because it regulates the duties of state police, who "perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *see Foley v. Connelie*, 435 U.S. 291, 296-97 (1978) (applying *Sugarman* to state police). Under *Gregory*, § 1373 cannot apply to release dates or addresses "unless Congress has made it clear that [they] are included"—it "must be plain to anyone reading the Act." 501 U.S. at 467. The government's position clearly fails that standard: It is not "unmistakably clear in the language of the statute." *Id*. at 460. Accordingly, "*Gregory*'s answer is—do not construe the statute to reach so far." *City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999).

D. The Values Act Is Not Impliedly Preempted.

Unable to rely on any clear statement from Congress, the government advances the sweeping and novel theory that California is *impliedly* preempted from declining to administer immigration law. This claim fails as well. First, as explained in Part I.B, Congress cannot preempt a State from opting out of a federal regulatory program—whether expressly or impliedly. Second, even if it could, Congress could not take that grave step silently, through implication only. Part I.D.1. Third, Congress has not shown an intention to impliedly preempt the Values Act sufficient to overcome the general presumption against preemption. Part I.D.2.

1. The Values Act Cannot Be Subject to Implied Preemption.

Even if Congress could preempt a State from opting out of a federal program, it would have to do so *explicitly*. This is a dispositive basis to reject the obstacle preemption claim.

Implied preemption in this context would violate the rule that federal intrusions into core state prerogatives require "unmistakably clear" textual statements. *Gregory*, 501 U.S. 460.

Congress must be "explicit" if it wants to "readjust the balance of state and national authority." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quotation marks and alteration omitted); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (requiring "explicit" statement to displace state land title law). That principle forecloses the argument that Congress can *silently*, through implication only, "alter[] the State's governmental structure" and preempt States from exercising fundamental sovereign rights, like declining a federal program. *City of Abilene*, 164 F.3d at 52. Courts do "not simply *infer* this sort of congressional intrusion." *Id.* (emphasis added). Where Congress has made no explicit statement of preemptive intent—as the government's implied preemption theory assumes—there is no assurance that Congress "has in fact faced" the gravity of interfering with the "substantial sovereign powers" of the States. *Gregory*, 501 U.S. at 461 (quotation marks omitted).

Moreover, the government's obstacle preemption claim cannot be squared with the Supreme Court's anti-commandeering cases, because it would eliminate States' prerogative to opt out of every federal scheme that invites state participation.

For instance, in *Printz*, the Brady Act relied on States to conduct background checks during the initial stage of the statute's gun-control scheme. 521 U.S. at 903-04, 931-32 (scheme was "most efficiently administered" with the help of local law enforcement). Nonetheless, the Supreme Court held that law enforcement officers could refuse to spend time conducting federal background checks, even though that meant the Brady Act could not function as Congress intended. Under the government's theory, however, the sheriffs in *Printz* were impliedly preempted from refusing those background checks, because the statute "presume[d]" that they would provide such assistance. PI Mem. 24.

The same was true in *NFIB*. In the Affordable Care Act, Congress "assumed that every State would participate in the Medicaid expansion." *NFIB*, 567 U.S. at 587. Indeed, under that

scheme, Congress's goal of expanding Medicaid *could not* be realized without the help of States and their agencies. *Id.* at 541-42. Yet the Supreme Court held that States were nonetheless free "to reject Congress's desired policy" and decline to take part. *Id.* at 581. The government's theory, however, would preempt state policies declining to expand Medicaid, since those policies would "impede[]" HHS in administering Medicaid as Congress intended. PI Mem. 27.

It is therefore unsurprising that the government has not found a single case applying obstacle preemption to a State's policy limiting its own agents' participation in a federal program. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (private cause of action); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (same); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) (common-law property rule); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (law regulating noncitizens directly). The government's only other obstacle preemption cases are categorically different from this one. In *Arizona*, 567 U.S. 387, none of the challenged statutes exercised a State's constitutional prerogative to *limit* its participation in a federal program. Just the opposite: The Court in *Arizona* struck down three state laws that invaded *federal* prerogatives by regulating immigrants directly. *See id.* at 403 (registration requirement); *id.* at 406-07 (employment prohibition); *id.* at 410 (authority to arrest immigrants). The same was true in *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013). In other words, these cases involved State actions that were preempted because they involved *too much* state regulation of immigrants, which Congress is free to prohibit (whether expressly or impliedly). They did not involve the States' prerogative to opt out of federal deportation programs.

The government thus asks this Court to be the first to hold that a State can be impliedly preempted from exercising the prerogatives recognized in *New York*, *Printz*, and *NFIB*. The Court should refuse to take that unprecedented step.

2. Even If It Could, the INA Does Not Impliedly Preempt the Values Act.

Even if Congress could impliedly preempt States from declining to administer federal programs, it has not done so here. "In preemption 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.'" *Arizona*, 567 U.S. at 400. This presumption, like the other principles in this case, rests on "respect for the States as independent sovereigns in our federal system." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (quotation marks omitted).

The government argues that the Values Act is preempted because it "impedes the enforcement of the immigration laws" by denying DHS the use of California's employees and resources. PI Mem. 29, 27. To support its entitlement to those resources, the government cites statutes that direct DHS—but not the States—to detain and remove noncitizens after their release from criminal custody. *See, e.g.*, 8 U.S.C. §§ 1226(c)(1), 1231(a)(2), 1231(a)(4).

Those assertions cannot overcome the presumption against preemption. "The Supreme Court has warned that obstacle preemption analysis does 'not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Atay v. Cty. of Maui*, 842 F.3d 688, 704 (9th Cir. 2016). Even if the Tenth Amendment could allow preemption here, the Values Act is not preempted simply because DHS would find it more convenient if California chose to lend more assistance.

Far from overriding States' choices, Congress has made clear throughout the INA that it wanted any state participation to be *voluntary*. *See* 8 U.S.C. § 1357(g)(1) (providing for participation by "agreement"); *id.* § 1357(g)(9) (such "agreement" is not "require[d]"); *id.* § 1226(d)(3) (requiring federal "assistance" at the "request" of a State). Notably, this includes the INA provision that specifically addresses notification about release dates, which lets *States* decide whether to "request[]" this form of cooperation. 8 U.S.C. § 1357(d)(3); *see Arizona*, 567

U.S. at 410. Congress has also repeatedly confirmed that States may limit their officers' participation in immigration enforcement. *See id.* § 1357(g)(1) (allowing participation "to the extent consistent with State and local law"); *id.* § 1252c(a) (similar); *id.* § 1103(a)(10) (participation only "with the consent of" state officials). These provisions show that Congress intended to *preserve*, not preempt, States' choices about how much to participate. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1143 (9th Cir. 2015) (such provisions "undermine[] any inference of interference with Congress's method").

The one place where Congress did restrict States' options—§ 1373—weighs strongly against implied preemption, because it shows that Congress knew how to preempt policies that it thought "posed an obstacle to its objectives." *Wyeth*, 555 U.S. at 574-75 (relying on inapplicable express preemption clause as "powerful evidence" against implied preemption). Fully cognizant of immigration agents' statutory duties, Congress chose only to preempt state policies that limit the sharing of "citizenship or immigration status" information. 8 U.S.C. § 1373. Congress has consistently refused to go further, rejecting numerous proposals to expand § 1373.[15] Thus, whatever its constitutionality, § 1373's intentional narrowness "creates a 'reasonable inference' that Congress did not intend to preempt state . . . laws that do not fall within [its] scope." *Atay*, 842 F.3d at 704 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)).[16]

Moreover, the government's obstacle preemption claim would render § 1373 entirely unnecessary. If it were really true that the INA *already* implicitly preempted state policies that "restrict[] state and local officials . . . from cooperating" with DHS, PI Mem. 25, there would

[15] *See, e.g.*, H.R. 2964, 114 Cong., § 5 (2015); H.R. 2278, 113 Cong., § 114 (2013); H.R. 6789, 110th Cong., § 905 (2008).

[16] To be clear, § 1373 does not "foreclose[]" or place a "special burden" on implied preemption principles. *Geier*, 529 U.S. at 872-73. But it is strong evidence that Congress did not intend preemption here, because it shows that Congress "knew how" but did not "expressly forbid state laws" like the Values Act. *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 867 (9th Cir. 2009).

have been no need to enact § 1373, which singles out a small subset of those same policies for preemption. The government's theory thus fails for the additional reason that it "would render statutory text superfluous." *Clark v. Rameker*, 134 S. Ct. 2242, 2249 (2014).

In the face of this textual evidence against implied preemption, the removal statutes the government invokes utterly fail to make preemption clear and manifest. Section 1231(a)(4), for instance, simply prohibits removal while a noncitizen is serving a criminal sentence. PI Mem. 24. It serves to *protect* States' criminal justice systems from federal interference. *See Garcia v. San Antonio MTA*, 469 U.S. 528, 552-54 (1985) (explaining how Congress "ensures that laws that unduly burden the States will not be promulgated"). That protection cannot be turned on its head to force States to sacrifice their own policing goals in service of federal ends.

Likewise, 8 U.S.C. § 1231(a)(1) directs *federal* officers to remove people within 90 days of a final removal order. It says nothing about what *States* must do or not do. Moreover, it bears no relationship at all to the vast majority of releases from state custody: A person's "release date from state or local criminal custody" can "trigger" a 90-day removal period (PI Mem. 24) when the person receives a final removal order while in state custody. *Id.* § 1231(a)(1)(B)(iii). Yet that rarely, if ever, happens in California's local jails. *See* Dep't of Justice, *Institutional Hearing Program*, at 2, Jan. 2018, https://bit.ly/2rfubHM. In other words, there is essentially no one in jails subject to the Values Act whose release date triggers a 90-day removal period.

Similarly, § 1226(c)(1) simply directs DHS, not the States, to detain certain noncitizens once they complete their criminal sentences. The Values Act leaves DHS free to arrest, detain, and remove noncitizens, just without certain assistance from California—assistance the State has a constitutional prerogative to decline. The government argues that without state aid, some people will not be arrested by DHS upon release from criminal custody. PI Mem. 24, 27. But even if that happens, and DHS does not arrest them until later, the only consequence is that they

become eligible for a bond hearing. *See Preap v. Johnson*, 831 F.3d 1193, 1206 (9th Cir. 2016) (holding that *mandatory* detention only applies to people DHS arrests "promptly after their release from criminal custody"), *cert. granted*, 138 S.Ct. 1279. The possibility of a bond hearing in some cases is a slender reed on which to base the government's preemption argument.

Even that connection between the Values Act and § 1226(c) is minimal. Noncitizens are only subject to detention under § 1226(c) if they have committed an enumerated crime, and the Values Act's exceptions allow for transfer and notification based on long list of crimes. Cal. Gov't Code § 7282.5. The government's § 1226(c) argument therefore only applies to the narrow set of people who have committed crimes that trigger § 1226(c) but not a Values Act exception. Such occasional and hypothetical scenarios do not establish preemption. *See Harris*, 794 F.3d at 1142 (no preemption based on "the prospect of a 'modest impediment' to general federal purposes"). And in all events, they cannot justify the facial relief the government seeks. *See Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 & n.3 (9th Cir. 2008) (en banc) (no facial relief unless challenged provision is preempted under all circumstances).

A final flaw in the government's obstacle theory is that it lacks meaningful limits. For instance, the government fails to explain *who* it thinks is preempted from declining assistance—just policymakers, or also individual employees. *See* PI Mem. 24 ("The INA presumes that the United States will be made aware of the release date."). If each employee were preempted from declining to help DHS, the result would be indisputable commandeering: every time DHS asks for help, the state employee would be unable to say no. But if only policymakers were preempted, the exact same action—state employees not helping DHS—would be either preempted or not preempted depending entirely on who made the decision. Non-assistance chosen by employees would be allowed, while non-assistance chosen by policymakers would be

preempted. Nothing in § 1226 or § 1231 makes that result "clear and manifest." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Nor does the government explain *which* actions it thinks States are required to allow. Many forms of aid might help DHS arrest people after their release from state custody. If States were truly preempted from withholding anything that facilitates those arrests, States could be forced to let their officers make immigration arrests, give DHS jail space, and more. The government's reasoning would herald a remarkable intrusion into state criminal justice systems.

In sum, the government has not carried its heavy burden to overcome the presumption against preemption. Even if implied preemption were possible here, Congress instead chose to preserve States' discretion. Congress's directions to DHS do not require the States to help.

E. The Values Act Does Not Violate the Intergovernmental Immunity Doctrine.

The immunity doctrine cannot, consistent with the Tenth Amendment, prevent a State from choosing not to administer a federal program. That would wipe out States' most essential Tenth Amendment prerogative, and it would do so *automatically*, without any indication of preemptive intent from Congress. Unsurprisingly, the government has not cited a single case that applies the immunity doctrine to a State's decision to opt out of a federal program.

The government argues that the Values Act violates intergovernmental immunity because it "treat[s] federal immigration officials worse than other entities." PI Mem. 31. But that is true every time a State exercises its anti-commandeering prerogative. After *Printz*, for example, a sheriff who refused Brady Act background checks would be treating ATF officials worse than others who asked for background checks. If the government were right, Congress could force States to administer federal programs simply by seeking assistance of the same sort that States provide to other entities. That does not square with *Printz*, *New York*, *NFIB*, or the absolute "prerogative to reject Congress's desired policy" that they recognize. *NFIB*, 567 U.S. at 581.

At bottom, the government misses the limited purpose of intergovernmental immunity. The immunity doctrine is rooted in the understanding that "the power to tax" entails the "power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819). It therefore ensures that States do not "directly obstruct" federal activities, whether "through regulation or taxation." *North Dakota v. United States*, 495 U.S. 423, 437-38 & n.9 (1990) (plurality op.) (quotation marks omitted). But when a State decides not to administer a federal scheme—as California has done here—it is not *obstructing* that scheme; it is simply declining to contribute its own assistance. The State's prerogative to make that decision is equally rooted in our constitutional order. *See Printz*, 521 U.S. at 919-22. The Supreme Court has accordingly recognized that immunity must "protect *each* sovereign's governmental operations from undue interference by the other." *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 814 (1989) (emphasis added); *see also N. Dakota*, 495 U.S. at 435 (similar).[17]

II. The Government Faces No Irreparable Harm.

The government cannot establish irreparable harm. *See Caribbean Marine Servs. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (reversing preliminary injunction on this basis). First, the government waited a full five months after the Values Act's enactment to file this lawsuit, which "implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Second, the Values Act does not obstruct DHS's own operations; the agency remains free to arrest, detain, and deport. The Act only restricts how much assistance California will provide—assistance that the government has no right to demand. Third, the suggestion that the Act "severely impedes" the government's

[17] Even if the immunity doctrine could have some conceivable application here, there are "significant differences" between immigration enforcement and criminal enforcement. *Davis*, 489 U.S. at 816. Immigration enforcement instills fear and destroys cooperation with state residents in a way that finds no parallel in ordinary law enforcement. Cal. Gov't Code § 7284.2 (listing its unique harms). Under those circumstances, the State's decision to treat immigration differently would be fully "justified" even if immunity doctrine applied. *Davis*, 489 U.S. at 816.

ability to arrest "dangerous criminal aliens," PI Mem. 35, 36, is meritless; the Act carves out exceptions for a long list of criminal offenses. Cal. Gov't Code § 7282.5.

III. An Injunction Would Severely Harm Intervenor-Defendants and the Public.

An injunction would cause numerous injuries to Intervenor-Defendants, their members, and the public. As explained in the motion to intervene, an injunction would prevent domestic violence survivors and other crime victims from accessing critical public services, like police protection, education, and healthcare.[18] It would force the Partnership, its members, and CHIRLA to divert resources to outreach, education, and lobbying. Mot. to Intervene, at 10. And it would drive a wedge between California's residents and their elected officials. The People of California have determined that devoting their own resources to immigration enforcement harms their interests. Cal. Gov't Code § 7284.2. The Court should not enjoin that sovereign decision.

CONCLUSION

The Court should deny the motion for preliminary injunction.

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Respectfully submitted,

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[18] *See* Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police*, L.A.Times, Oct. 9, 2017, https://lat.ms/2gqsz93; Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear*, L.A.Times, Mar. 21, 2017, https://lat.ms/2nPwdva.

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