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15
16 IN THE UNITED STATES DISTRICT COURT
17 FOR EASTERN DISTRICT OF CALIFORNIA

18 THE UNITED STATES OF AMERICA,

19 Plaintiff,

20 v.

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

25 Defendants.
26

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

Hon. John A. Mendez

BRIEF OF AMICI CURIAE
THE CALIFORNIA PARTNERSHIP TO
END DOMESTIC VIOLENCE AND THE
COALITION FOR HUMANE
IMMIGRANT RIGHTS

Date: June 5, 2018

Time: 1:30 p.m.

Dept: Courtroom 6, 14th Floor

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1 Faced with a wall of Supreme Court precedent guaranteeing California the prerogative to
2 decide whether its own agents will assist in federal deportation efforts, the government offers a
3 series of unfounded and outlandish arguments in support of its claims against the Values Act.¹
4 PI Reply 10-23, Dkt. 171. It posits, almost in passing, that States can only arrest and prosecute
5 noncitizens *for state criminal offenses* if Congress decides to allow it—that Congress could
6 essentially outlaw state criminal law enforcement as it has existed throughout our country’s
7 history. That breathtaking claim to unlimited federal dominance is anathema to our system of
8 dual sovereignty. Alternatively, it contends that Congress can issue any commands it wants to
9 the States so long as the commands relate to information. No court has ever accepted that
10 sweeping assertion, which cannot be squared with the Constitution’s prohibition on federal
11 control of state government. At least where, as here, forced “information sharing” is integral to
12 the daily operation of a federal regulatory program, Congress cannot destroy state officials’
13 accountability to their own electorate and force them to participate.

14
15 Thus, because this case is about California’s clear prerogative to opt out of assisting with
16 deportations, the preemption principles the government invokes have no application.

17 But even if Congress could require States to share release dates and addresses, it has not
18 done so. The government attempts to rewrite the Immigration and Nationality Act (INA),
19 warping provisions that expressly protect States’ choices into supposed commands. But the
20 INA’s consistent, explicit solicitude for States’ independence does not carry some secret
21 intention to conscript their officers. To the contrary, the one narrow provision where Congress
22 *did* seek to limit States’ choices, 8 U.S.C. § 1373, is powerful evidence that, beyond its terms,
23 Congress intended States to make their own decisions. The government thus falls far short of
24 showing, as it must, that an intent to preempt the Values Act is “unmistakably clear in the
25 language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

26
27
28 ¹ Amici the California Partnership to End Domestic Violence and the Coalition for Humane
Immigrant Rights submit this brief in defense of the California Values Act pursuant to the
Court’s Order of June 5, Dkt. 164, at 12.

1 **I. Congress Cannot Preempt California’s Choice Not to Help Administer the**
2 **Federal Deportation Scheme.**

3 1. The Constitution gives Congress “the power to regulate individuals, not States.”
4 *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018) (quoting *New York v.*
5 *United States*, 505 U.S. 144, 166 (1992)). That principle is fatal to both of the federal
6 government’s preemption claims (express and implied). As *Murphy* held, Congress may not
7 “issue orders directly to the States,” *id.* at 1475, including orders to “refrain from enacting state
8 law,” *id.* at 1478. That is exactly what 8 U.S.C. § 1373 does: It orders States not to enact
9 policies that withhold their own agents’ enforcement assistance. The government’s obstacle
10 preemption claim suffers the same defect, because if accepted, it would effectively order States
11 to refrain from enacting laws regulating their own agents. “A more direct affront to state
12 sovereignty is not easy to imagine.” *Id.*; *Philadelphia v. Sessions*, 2018 WL 2725503, at *31-33
13 (E.D. Pa. 2018) (holding that § 1373 is unconstitutional under *Murphy*).

14 *Murphy* is the latest in a long line of Supreme Court cases making absolutely clear that
15 the Constitution guarantees States the ability to “decline to administer [a] federal program.” *New*
16 *York*, 505 U.S. at 176-77 ; see *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 587
17 (2012) (Tenth Amendment ensures that States “may choose not to participate” in a federal
18 program); *Printz v. United States*, 521 U.S. 898, 909-10 (1997) (States may “refuse[] to comply
19 with [a] request” to help administer federal law). Congress cannot interfere with this choice:
20 States must retain the “prerogative to reject Congress’s desired policy, not merely in theory but
21 in fact.” *NFIB*, 567 U.S. at 581. The government’s preemption theories would eliminate this
22 “critical alternative.” *New York*, 505 U.S. at 176-77.

23 Where, as here, the State exercises its anti-commandeering prerogative, there can be no
24 preemption. Like the law in *Murphy*, § 1373 “does not confer any federal rights on private
25 actors” or “impose any federal restrictions on private actors.” *Id.* at 1481. Instead, it regulates
26 only the States’ own agents, by prohibiting them from opting out of the deportation system.
27 Congress has no power to enact such a prohibition, either explicitly or implicitly. Nor does the
28 state law in this case confer rights or impose restrictions on private actors; it too regulates only

1 the States' own agents. *Compare id.* at 1480 (valid obstacle preemption where State "impose[s]
2 a duty" on private actors that conflicts with private actors' federal rights or duties).

3 The government ignores these holdings almost entirely. It complains repeatedly that the
4 Values Act "obstructs" immigration enforcement, Reply Br. 11, 13, 14, 15, 17, 25, but it does not
5 and cannot deny that what it calls "obstruction" is simply the State's decision to limit its *own*
6 participation in the federal deportation scheme²—a choice that is "essential" to the
7 "[p]reservation of the States as independent political entities," *Printz*, 521 U.S. at 919-19, and a
8 "quintessential attribute of sovereignty," *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). The
9 government's complaint about California's decision to opt out would have applied equally to the
10 sheriffs in *Printz* and the States in *NFIB*.³

11 The government fails to meaningfully grapple with the accountability concerns at the
12 heart of these cases. *See NFIB*, 567 U.S. at 578; *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at
13 169. Accountability requires "elected state officials" to "regulate in accordance with the views
14 of the local electorate," including, crucially, by withdrawing from federal programs when the
15 "State's citizens view federal policy as sufficiently contrary to local interests"—exactly as
16 California's citizens have chosen. *Id.* at 168-69. Yet the government believes it can deny
17 California's citizens that choice and force them to volunteer their officers' assistance.⁴

18
19
20
21 ² The challenged provisions of the Values Act only apply to "California law enforcement
22 agenc[ies]." Cal. Gov't Code §§ 7284.4(a), 7284.6(a). Both state and local officers are "state
23 officers" for purposes of the Tenth Amendment. *Printz*, 521 U.S. at 905, 930-31. The
24 government does not claim otherwise.

25 ³ The government's reliance on a 25-year-old California Attorney General opinion is misplaced,
26 PI Reply 1, 16, as it predates *Printz* (applying anti-commandeering to state and local officers),
27 *NFIB*, *Arizona*, and *Murphy*. And because it interpreted *federal* as opposed to state law, it is
28 entitled to "no special weight." *United States v. Gomez*, 911 F.2d 219, 221 n.2 (9th Cir. 1990).
Nor can the government draw any support from the subsequent 2014 "Bulletin," PI Reply 1, 16,
which is cursory, ambiguous, and contained no relevant analysis.

⁴ The government tries to minimize these accountability concerns by claiming that "the Federal
Government retains full responsibility and accountability for its [immigration] actions." PI
Reply 18. But *Printz* rejected a similar argument, citing major accountability problems even
where States were only given "discrete, ministerial tasks" within a program administered
principally by the federal government. 521 U.S. at 929-30.

1 The government also cannot dispute that this suit seeks to override California’s
2 “distribution of power among its own agents.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S.
3 247, 263 (2011) (Kennedy, J., concurring). California law places control over state and local
4 police in the hands of the State Legislature, which exercised that power in enacting the Values
5 Act. *See* Cal. Const. art. IV, § 1; *Baggett v. Gates*, 32 Cal.3d 128, 139 n.15 (1982). According
6 to the government, however, Congress has displaced that arrangement and instead required the
7 Legislature to delegate immigration enforcement decisions to thousands of line-level officers,
8 who may now choose for themselves whether and when to help DHS deport state residents. But
9 Congress cannot “displace a State’s allocation of governmental power” in this way. *Alden v.*
10 *Maine*, 527 U.S. 706, 752 (1999); *see also Stewart*, 563 U.S. at 263 (Kennedy, J., concurring)
11 (States “need not empower their officers” to participate in a federal scheme); Dkt. 73-2, at 5-6, 9.
12 The government fails to explain why it thinks Congress can make such an extreme “incursion
13 into state sovereignty.” *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996).

14
15 2. The government’s attempts to distinguish *Murphy* are deeply unpersuasive.

16 First, it claims *Murphy* is inapplicable here because the commands the government
17 purports to identify are “part of” a federal “scheme regulating” private parties (the INA), which
18 *Murphy* lacked. PI Reply 20-21. But *Printz* forecloses any suggestion that direct orders to States
19 are permissible as “part of” a broader federal scheme. The invalid directive in *Printz* was
20 attached to a broader federal scheme that regulated private handgun purchases. 521 U.S. at 902-
21 03. The Court still invalidated the provision that dictated how state officers had to participate in
22 the scheme’s information-gathering efforts. Those “same principles” applied in *Murphy* and
23 apply here. 138 S. Ct. at 1477; *see also Galarza v. Szalczyk*, 745 F.3d 634, 644 (3d Cir. 2014)
24 (applying anti-commandeering in the INA context).

25 Straining to support this argument, the government suggests that *Murphy* approved of an
26 earlier preemption provision because it was “part of” a federal scheme “regulating air carriers.”
27 PI Reply 21. But that is not remotely what *Murphy* said. *Murphy* explains that the airline
28 provision is valid because it effectively “confers on private entities (*i.e.*, covered carriers) a

1 federal right to engage in certain conduct” free from state regulation. 138 S. Ct. at 1480.
2 Likewise, preemption of state alien registration laws is permissible not because it is “part of” a
3 federal registration scheme, but because it gives private actors “a federal right to be free from
4 any [state] registration requirements.” *Id.* at 1481. Here, in stark contrast, the government’s
5 preemption theories would impose *no* private rights or restrictions.

6
7 Second, the government makes the puzzling assertion that § 1373 is permissible because
8 it “evenhandedly regulates an activity in which both States and private actors engage.” PI Reply
9 21 (quoting *Murphy*, 138 S. Ct. at 1478). But § 1373 applies only to “a Federal, State, or local
10 government entity or official.” 8 U.S.C. § 1373(a). It imposes no restrictions on private actors at
11 all, including those who know about a person’s citizenship or immigration status. Nor is it
12 somehow rendered generally applicable by the INA’s “registration rules” for noncitizens and
13 employers. PI Reply 21; *see Printz*, 521 U.S. at 902-03, 932 & n.17 (holding that provision was
14 not generally applicable even though the Brady Act imposed related, but different, requirements
15 on handgun buyers and sellers). To the extent “there is no private analog” for Congress to
16 regulate evenhandedly, PI Reply 22, that only confirms the commandeering problem. *See Printz*,
17 521 U.S. at 932 n.17 (striking down statute where “extension of th[e] statute to private citizens”
18 was “impossible”). By contrast, the law upheld in *South Carolina v. Baker*, 485 U.S. 505, 514
19 (1988), “treat[ed] state bonds *the same* as private bonds.” *Murphy*, 138 S. Ct. at 1478 (emphasis
20 added). And the law upheld in *Reno v. Condon*, 528 U.S. 141, 151 (2000), “applied *equally* to
21 state and private actors,” regulating their dissemination of the *same* driver data. *Murphy*, 138 S.
22 Ct. at 1479 (emphasis added).

23 Third, grasping at straws in the aftermath of *Murphy*, the government offers a startling
24 new assertion: that the orders it seeks to issue to the States are just conditions “for continued
25 state activity in an otherwise pre-emptible field.” PI Reply 22-23 (quoting *FERC*, 456 U.S. at
26 769, and *Hodel v. Va. Surface Mining & Recl. Ass’n*, 452 U.S. 264, 288 (1981)). Without
27 specifying what “field” it means, the government appears to argue that Congress can demand
28

1 whatever deportation assistance it wants, because it could have simply ordered States not to
2 arrest, prosecute, or imprison noncitizens who violate their criminal laws. MTD Opp. 13.

3 Every facet of this argument—which the government did not make in its opening brief—
4 is wrong. As *Murphy* explains, under a valid “cooperative federalism” arrangement of this sort,
5 Congress “comprehensively regulate[s]” the activity at issue, and then offers States “the choice
6 of either implementing the federal scheme or else yielding to” federal administration. 138 S. Ct.
7 at 1479 (quoting *Hodel*, 452 U.S. at 288). Nothing of the sort is even possible here. The
8 government’s premise—that Congress could flatly prohibit States from arresting and prosecuting
9 all (possible) noncitizens—is utterly at odds with our constitutional system, which gives States
10 “primary authority for defining and enforcing the criminal law.” *United States v. Lopez*, 514
11 U.S. 549, 561 n.3 (1995) (citations omitted); see *Bond v. United States*, 134 S. Ct. 2077, 2089
12 (2014). Indeed, Congress lacks the power to punish ordinary crimes—much less occupy that
13 field altogether. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) (“The Constitution
14 withholds from Congress a plenary police power.”) (quotation marks and alteration omitted); see
15 also *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (rejecting the notion that “every state enactment
16 which in any way deals with aliens is a regulation of immigration”). Congress simply could not
17 make the “unprecedented incursion into the criminal jurisdiction of the States” of barring the
18 States from enforcing their criminal laws against a large segment their residents. *McDonnell v.*
19 *United States*, 136 S. Ct. 2355, 2374 (2016) (citation omitted).⁵ The government offers no
20 reasoning to support this stunning assertion.

21
22 In any event, the government is wrong that it can conscript the States simply by
23 imagining a broad hypothetical statute Congress *might have* passed. *New York*, for instance,
24 struck down a statute even though “Congress could, if it wished, pre-empt state radioactive waste
25 regulation” altogether. 505 U.S. at 160. And it did so over Justice White’s dissent, which made

26
27 ⁵ The government’s suggestion that Congress could authorize DHS to forcibly pluck inmates out
28 of state prisons, PI Reply 22, is likewise inconsistent with federalism principles. That possibility
is also irrelevant, because it would not constitute congressional occupation of any “field,” so
Hodel would have no application.

1 the same argument the government presses here. *See id.* at 204 (White, J., concurring in part and
 2 dissenting in part). Likewise, in *NFIB*, Congress’s ability to preempt state healthcare laws did
 3 not allow it to command state participation. By contrast, in *Hodel*, Congress actually *had*
 4 “comprehensively regulated” the relevant field, and in *FERC*, Congress simply asked States to
 5 “to consider” federal standards, which they were free to disregard. *Murphy*, 138 S. Ct. at 1479.⁶

6
 7 3. The government maintains that Congress can compel the States to help administer
 8 immigration law, as long as the help involves sharing information. PI Reply 18-20. It claims
 9 that it order States to produce any information about their residents, any time, for any purpose, as
 10 often as it wants. That is wrong. *Printz* left open the possibility that *some* kinds of information
 11 sharing *might* fall outside the anti-commandeering rule—specifically, information that does not
 12 entail “the actual administration of a federal program.” *Printz*, 521 U.S. at 918. The Court thus
 13 declined to resolve whether “purely ministerial reporting requirements” are constitutional. *Id.* at
 14 936 (O’Connor, J., concurring). But there is no question that forced information sharing, where
 15 it facilitates the on-the-ground, day-to-day administration of a federal program, runs afoul of the
 16 anti-commandeering rule. Indeed, *Printz* itself invalidated a law because it required state
 17 officers “to provide information that belongs to the State.” *Id.* at 932 n.17.⁷

18 Here, the information the government seeks would clearly facilitate the “administration
 19 of a federal program.” *Printz*, 521 U.S. at 918. The challenged provisions address whether state
 20 officers can make physical transfers of custody and otherwise help DHS identify, locate, and
 21

22 ⁶ The government cites ambiguous language in *FERC* that Congress can issue commands in a
 23 field that is “pre-emptible.” PI Reply 23. Whatever *FERC* meant by that, *New York* made clear
 24 that Congress cannot issue direct commands to States simply because it could have, but did not,
 25 regulate private conduct. And *Murphy* counseled against applying *FERC* beyond its facts—
 26 asking States to “consider” standards—highlighting that “*FERC* was decided well before our
 27 decisions in *New York* and *Printz*.” 138 S. Ct. at 1479.

28 ⁷ The government suggests that *Reno v. Condon* established a Tenth Amendment carve-out for
 information mandates. PI Reply 18, 22. It is mistaken. *Condon* upheld a “generally applicable
 law,” 518 U.S. at 150-51, because the law “evenhandedly regulate[d] an activity in which both
 States and private actors engage[d],” *Murphy*, 138 S. Ct. at 1478-79 (“That principle formed the
 basis for the Court’s decision . . .”). The Court did not announce any rule about information
 mandates, or even identify any mandate to send information to federal agents. *See Philadelphia*,
 2018 WL 2725503, at *32 (rejecting the government’s identical argument about *Condon*).

1 arrest noncitizens. The government itself stresses the operational impact of these actions:
2 Transfer, release dates, and addresses help DHS “locate, detain, prosecute, and remove aliens,”
3 PI Mem. 33; they increase its “ability to identify and apprehend removable aliens,” *id.* at 35; and
4 they facilitate “ICE’s efforts to take these aliens into custody for removal purposes,” *id.*

5 That kind of conscription simply cannot be squared with anti-commandeering law. The
6 Constitution reflects a “fundamental structural decision” to *entirely* “withhold from Congress the
7 power to issue orders directly to the States,” a principle that leaves no room for systematic
8 demands for information. *Murphy*, 138 S. Ct. at 1475. Indeed, when Congress “compels the
9 States” to help administer a program, “it blurs the lines of political accountability” *regardless* of
10 what form the involvement takes. *NFIB*, 567 U.S. at 678. Whether state officers are placing the
11 handcuffs or helping DHS do so, residents understand that their government is funneling people
12 to the deportation system. Indeed, California’s experience makes clear that when state officials
13 pave the way for deportations—including by sending information about state residents to DHS—
14 they incur serious political and financial costs. *See Group Rallies Against Deportation in Front*
15 *of Alameda County Building*, Mercury News, Nov. 19, 2015, <https://bayareane.ws/2wbh6o4>;
16 Dkt. 73-2, at 7 & n.7, 10; Cal. Gov’t Code 7284.2.

17
18 The government asserts that Congress “frequently calls on states to share relevant
19 information,” PI Reply 19, but none of its examples remotely resembles a system of state officers
20 performing daily services for immigration agents. Many of the purported requirements it cites
21 impose no obligations at all; States are free to decline to participate.⁸ Others are in reality
22 funding conditions, not direct orders.⁹ Yet others serve academic and record-keeping goals.

23
24 ⁸ *See, e.g.*, 54 Stat. 401 (1940) (directing federal government to collect data, without imposing
25 any state or local obligation); 17 Stat. 466 (1873) (same); 42 U.S.C. § 11133(b) (state medical
26 boards can opt out of reporting and be replaced by another agency); 42 U.S.C. § 14072(g)(4)
(repealed sex offender reporting requirement that States could avoid entirely by choosing not to
implement a qualifying registration program); Pub. L. No. 91-452, § 806 (“does not require
states to provide any information,” *Philadelphia*, 2018 WL 2725503, at *33 n.10).

27 ⁹ *See, e.g., Printz*, 521 U.S. at 936 (O’Connor, J., concurring) (explaining that 23 U.S.C. § 402
28 “condition[s] States’ receipt of federal funds for highway safety program on compliance with
federal requirements”); 20 U.S.C. § 4013 (information submitted as part of application for
federal funds, *see id.* § 4014).

1 These are “purely ministerial” because they do not facilitate the federal government’s on-the-
 2 ground implementation of any federal regulatory program. *Printz*, 521 U.S. at 936 (O’Connor,
 3 J., concurring).¹⁰ As a result, they do not force state officials to “tak[e] the blame” for the
 4 “defects” of any federal program. *Id.* at 930. The information in this case is clearly different.¹¹

5 Finally, the government suggests that a sweeping exception for information mandates
 6 “makes sense,” because subpoenas involve information too. PI Reply 19. That is a nonsequitur.
 7 Of course States, like everyone else, must comply with judicial subpoenas and other court orders.
 8 *See Standley v. DOJ*, 835 F.2d 216, 218 (9th Cir. 1987) (“A grand jury is an arm of the judicial
 9 branch of government.”). In fact, the Supremacy Clause “presupposes” as much. *New York*, 505
 10 U.S. at 179. But “[t]he Constitution contains no analogous grant of authority to Congress.” *Id.*
 11 The government also suggests that it can issue administrative subpoenas to States, so it must be
 12 able to demand systematic information sharing. PI Reply 19-20. But it offers no reason to think
 13 an agency could lawfully use subpoenas to conscript States to participate in the ongoing
 14 administration of a federal program, in a manner analogous to its preemption theories.¹²

15
 16 The Court should reject the suggestion that information mandates are categorically
 17 exempt from the anti-commandeering rule—something no court has ever held.

18 ¹⁰ *See* 34 U.S.C. § 41307 (statistical data regarding missing children); 15 U.S.C. § 2224
 19 (information collected for FEMA publication). The few cases upholding reporting requirements
 20 have all addressed these kinds of purely ministerial duties to “forward[] . . . information to a
 21 federal data bank.” *Freilich v. Upper Chesapeake Health*, 313 F.3d 205, 214 (4th Cir. 2002); *see*
 22 *United States v. Brown*, 2007 WL 4372829, at *5 (S.D.N.Y. Dec. 12, 2007) (requirement to
 forward information to “a national database”). In contrast to this case, 52 U.S.C. § 20701 *et*
seq.—which addresses records about federal elections—is an exercise of Congress’s “unique”
 Elections Clause authority. *Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (en banc),
aff’d, 570 U.S. 1 (2013).

23 ¹¹ In any event, all of these statutes were enacted before *Printz* established that anti-
 24 commandeering applied to state executive officers. Notably, the statute *Murphy* struck down
 25 was passed in 1992, Pub. L. No. 102–559, during the same period when Congress enacted many
 of the statutes the government cites here. Congress’s decision to enact a handful of information-
 sharing statutes in the “few decades” before *Printz* is simply not “probative” of their
 constitutionality. *Printz*, 521 U.S. at 917-18.

26 ¹² The cursory analysis of *In re Tax Liabilities of Does*, 2011 WL 6302284, at *4 (E.D. Cal. Dec.
 27 15, 2011), issued *ex parte*, does not address any of the anti-commandeering cases. In any event,
 it addressed a one-time enforcement operation rather than an ongoing, indefinite reliance on state
 28 officers to effectuate a federal program. And *Oregon Prescription Drug Monitoring Program v.*
DEA, 860 F.3d 1228, 1236 (9th Cir. 2017), addressed no Tenth Amendment argument at all.

1 **II. Even If It Could, Congress Has Not Preempted the Values Act.**

2 Even if Congress could bar states from opting out of the deportation regime, Congress
3 would have to make that intention “unmistakably clear in the language of the statute.” *Gregory*,
4 501 U.S. at 460. The government does not dispute that *Gregory* applies to its preemption
5 theories. *See* Dkt. 73-2, at 16. To satisfy *Gregory*, the government’s interpretation “must be
6 plain to anyone reading the Act.” *Id.* at 467. Where *Gregory* applies, it is typically “fatal.”
7 *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004).

8 **A. The United States Barely Defends Its Interpretation of 8 U.S.C. § 1373.**

9 The government does not explain why its broad reading of § 1373 is not just plausible,
10 but “unmistakably clear in the language of the statute.” 501 U.S. at 460. That omission is
11 striking, but not surprising. As multiple courts have now held, the government’s present
12 interpretation “is simply impossible to square with the statutory text.” *Philadelphia*, 2018 WL
13 2725503, at *33-35; *Steinle v. San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017).

14 The government offers little in response. It does not deny that its interpretation of § 1373
15 is virtually limitless, Cal. PI Opp. 13-14; Dkt. 112, at 4-7. It ignores the many statutes showing
16 that Congress knows how to refer to information beyond citizenship and immigration status
17 when it wants to, Cal. PI Opp. 12 & n.11; Dkt. 112, at 13-14. It does not address the many failed
18 efforts to expand § 1373 to reach the information it seeks through this lawsuit, Dkt. 112, at 14.
19 And it has no response to *Roach v. Mail Handlers Ben. Plan*, 298 F.3d 847, 850 (9th Cir. 2002)
20 (interpreting “relate to” narrowly to preserve “the historic police powers of the States”).¹³

21 **B. Implied Preemption Is Foreclosed by *Gregory*.**

22 Even if Congress could preempt a State from opting out of a federal program, it would
23 have to do so explicitly. This is a dispositive basis to reject the obstacle preemption claim.
24

25 ¹³ Unlike *Roach*, *Appling* did not involve preemption, and it had not occasion to consider the
26 impact of *Gregory*. PI Reply 16 (citing *Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215
27 (S. Ct. June 4, 2018)). *Appling* is also consistent with California’s argument that § 1373 extends
28 beyond a person’s technical immigration status to include items that “indicate” a person’s status,
Appling, slip op. at 9—a narrow set of information such as verbal admissions, copies of
immigration documents, and the like. *See* Cal. PI Opp. 12-13; Dkt. 112, at 9; Dkt. 73-2, at 15.
In all events, *Appling* did not endorse any limitless interpretation like the government’s.

1 Implied preemption in this context would violate the rule that federal intrusions into core
 2 state prerogatives require “unmistakably clear” textual statements. *Gregory*, 501 U.S. at 460.
 3 Congress must be “explicit” if it wants to “readjust the balance of state and national authority.”
 4 *Bond*, 134 S. Ct. at 2089 (quotation marks and alteration omitted). That principle forecloses the
 5 argument that Congress can *silently*, through implication only, “alter[] the State’s governmental
 6 structure” and preempt States from exercising fundamental sovereign rights, like declining to
 7 help administer a federal program. *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).
 8 Courts do “not simply infer this sort of congressional intrusion.” *Id.* Indeed, *Gregory* usually
 9 forecloses applying even an *express* requirement to a core state function. Where Congress has
 10 made *no* preemptive statement at all—as the government’s implied preemption theory
 11 assumes—there is no assurance that Congress “has in fact faced” the gravity of interfering with
 12 the “substantial sovereign powers” of the States. *Gregory*, 501 U.S. at 461 (citation omitted).
 13

14 The government has not even mentioned *Gregory*. It has not found a single case
 15 imposing obstacle preemption where *Gregory* applied. And it certainly has not found a case
 16 applying obstacle preemption to a State’s policy limiting its own agents’ participation in a
 17 federal program.¹⁴ The Court should refuse to take that unprecedented step.

18 **C. Even If It Could, Congress Has Not Impliedly Preempted the Values Act.**

19 Even if it could preempt the Values Act through implication only, Congress has not made
 20 any such intention “clear and manifest.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

21 1. The government has entirely ignored a dispositive reason to reject its implied
 22 preemption claim: Congress has already determined what it deemed to be the proper scope of
 23 preemption in § 1373. Cal. PI Opp. 22. An express preemption statute like § 1373 is “powerful
 24 evidence” against implied preemption, because it shows that Congress has already decided which
 25

26 ¹⁴ For instance, *Gregory* did not apply to the preemption claims in *Arizona v. United States*, 567
 27 U.S. 387 (2012), because none of the challenged statutes exercised a State’s fundamental
 28 prerogatives to structure its government or limit its participation in a federal program. Just the
 opposite: The Court struck down three state laws that invaded *federal* prerogatives by enacting
 the State’s “own immigration policy.” *Id.* at 408; *see id.* at 403 (alien registration requirement);
id. at 406-07 (alien employment prohibition); *id.* at 410 (authority to arrest immigrants).

1 state laws “posed an obstacle to its objectives.” *Wyeth*, 555 U.S. at 574-75 (rejecting obstacle
 2 preemption on this basis). Fully cognizant of DHS’s statutory duties, Congress chose only to
 3 preempt state policies that limit the sharing of “citizenship or immigration status” information. 8
 4 U.S.C. § 1373(a). And Congress has consistently refused to go further, rejecting numerous
 5 proposals to expand § 1373.¹⁵ The case for *implied* preemption is therefore “particularly weak”
 6 here. *Wyeth*, 555 U.S. at 575 (quotation marks omitted). Whatever its constitutionality, *see*
 7 *supra*, § 1373’s intentional narrowness “creates a ‘reasonable inference’ that Congress did not
 8 intend to preempt state . . . laws that do not fall within [its] scope.” *Atay v. Cty. of Maui*, 842
 9 F.3d 688, 704 (9th Cir. 2016) (quoting *Freightliner Co. v. Myrick*, 514 U.S. 280, 288 (1995)).¹⁶

10
 11 Moreover, the government’s obstacle preemption claim would render § 1373 entirely
 12 unnecessary. If it were really true that the INA *already* implicitly preempted state policies that
 13 “restrict[] state and local officials . . . from cooperating” with DHS, PI Mem. 25, there would
 14 have been no need to enact § 1373, which singles out a small subset of those same policies for
 15 preemption. The government’s theory thus “would render statutory text superfluous.” *Clark v.*
 16 *Rameker*, 134 S. Ct. 2242, 2249 (2014). It makes no attempt to justify that result.

17 2. The statutes the government invokes confirm just how weak its obstacle preemption
 18 claim is. Its brief relies exclusively on statutes that direct DHS—but not the States—to detain
 19 and remove noncitizens after their release from criminal custody. *E.g.*, 8 U.S.C. §§ 1226(c)(1),
 20 1231(a)(2), 1231(a)(4), 1357(d). Its basic theory is that DHS’s job would be easier if California
 21 volunteered its own resources to help DHS, and so the INA implicitly requires California to offer
 22 that assistance.¹⁷ *See, e.g.*, PI Mem. 35-36 (state assistance saves DHS “time and resources”); PI

23
 24 ¹⁵ *See, e.g.*, H.R. 2964, 114 Cong. § 5 (2015); H.R. 2278, 113 Cong. § 114 (2013).

25 ¹⁶ While § 1373 does not “foreclose[]” implied preemption principles, *Geier v. Am. Honda Motor*
 26 *Co.*, 529 U.S. 861, 872-73 (2000), it is strong evidence against implied preemption 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).

27 ¹⁷ The government also criticizes an *exception* in the Values Act that allows transfers when DHS
 28 obtains a judicial warrant. PI Reply 14; *see* Cal. Gov’t Code § 7284.6(a)(4). But that provision
 simply conditions the *State’s* participation, which the State is free to withhold completely. If it
 can decline altogether, surely it can also identify the circumstances in which it will participate.

1 Reply 13 (state assistance means “minimal effort by federal officials”). Those assertions are
2 plainly insufficient to overcome the presumption against preemption. “The Supreme Court has
3 warned that obstacle preemption analysis does ‘not justify a freewheeling judicial inquiry into
4 whether a state statute is in tension with federal objectives.’” *Atay*, 842 F.3d at 704.

5 None of the statutes remotely supports preemption. For instance, § 1357(d) directs DHS
6 to “take custody of the alien” after state criminal custody ends, and is the only place the INA
7 mentions notification of release dates. *See Arizona*, 567 U.S. at 410 (explaining that § 1357(d)
8 allows States to “respond[] to requests for information about when an alien will be released”).
9 Critically, § 1357(d) lets *States* decide whether to “request[]” this form of cooperation. 8 U.S.C.
10 § 1357(d)(3). Thus, the INA explicitly leaves notification of release dates to States’ discretion.

11 Deference to States’ choices is echoed in numerous other provisions throughout the INA,
12 which explicitly allow States to limit their participation in the deportation scheme. *See, e.g., id.*
13 § 1357(g)(1) (allowing participation “to the extent consistent with State and local law”); *id.* §
14 1252c(a) (similar); *id.* § 1103(a)(10) (participation only “with the consent of” state officials); *id.*
15 § 1226(d)(3) (federal “assistance” at the “request” of a State). These cooperative provisions
16 “undermine[] any inference of interference with Congress’s method.” *Chinatown Neighborhood*
17 *Ass’n v. Harris*, 794 F.3d 1136, 1143 (9th Cir. 2015) (rejecting obstacle preemption where “the
18 federal scheme is cooperative” and invites States to make their own choices).

19 Next, the government relies heavily on 8 U.S.C. § 1231(a)(4), which prohibits removal
20 while a noncitizen is serving a criminal sentence. PI Reply 12-13; PI Mem. 24; MTD Opp. 11,
21 13. But § 1231(a)(4) serves to *protect* States’ criminal justice systems from federal interference,
22 in recognition of the States’ paramount authority over “the punishment of local criminal
23 activity.” *Bond*, 134 S. Ct. at 2089. It exudes deference to the States, which are empowered to
24 decide whether earlier removal is “in the best interest of the State.” 8 U.S.C. § 1231(a)(4)(B)(ii).
25 The government’s theory would turn Congress’s solicitude on its head.

26 Section 1231(a)(1) works the same way, directing DHS to pursue removal after criminal
27 custody ends. 8 U.S.C. § 1231(a)(1)(B)(iii). Its function is to protect, not conscript, state criminal
28

1 justice systems. And it only imposes obligations on DHS, not the States. Moreover, even by its
 2 terms it bears no relationship to most (if not all) releases from state detention: In virtually all
 3 cases, a person’s “release date from state or local criminal custody” can only “trigger” the 90-day
 4 removal period (PI Mem. 24) when the person received a final removal order while in state
 5 custody. *Id.* § 1231(a)(1)(B). Yet that rarely, if ever, happens in California jails. *See DOJ, Inst.*
 6 *Hearing Prog.*, at 2 (2018) (showing no California jails with an in-custody removal program),
 7 <https://bit.ly/2rfubHM>. The government itself has produced *no* evidence that there is *anyone* in
 8 California jails subject to the Values Act whose release date triggers a 90-day removal period.

9
 10 Similarly, § 1226(c) simply provides for DHS—not the States—to detain certain
 11 noncitizens when they are released from criminal custody. The Values Act, of course, leaves
 12 DHS free to arrest, detain, and remove noncitizens, just without certain assistance from
 13 California. The government argues that without state aid, some people will not be arrested by
 14 DHS immediately upon release. PI Mem. 24, 27. But even if that happens, and DHS does not
 15 arrest them until later, the only possible consequence is that they become eligible for a bond
 16 hearing.¹⁸ *See Preap v. Johnson*, 831 F.3d 1193, 1206 (9th Cir. 2016), *cert. granted*, 138 S. Ct.
 17 1279; 8 U.S.C. § 1226(a) (providing bond hearings). The possibility of a bond hearing in some
 18 cases is a slender reed on which to base the government’s preemption challenge.¹⁹

19 **III. The Values Act Does Not Violate Intergovernmental Immunity.**

20 The immunity doctrine cannot, consistent with the Tenth Amendment, prevent a State
 21 from choosing not to administer a federal program. That would wipe out States’ most essential
 22 Tenth Amendment prerogative, and it would do so *automatically*, without any indication of

23
 24 ¹⁸ The government disputes even that much. On appeal in *Preap*, it argues that mandatory
 25 detention applies “regardless of when the arrest occurred,” U.S. Br., *Nielsen v. Preap*, No. 16-
 1363, at 9 (June 2018), in which case the Values Act would *never* impact mandatory detention.

26 ¹⁹ Even that connection is minimal. Noncitizens are only subject to mandatory detention under §
 27 1226(c) if they have committed an enumerated crime, and the exceptions in the Values Act allow
 28 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”) (citation omitted).

1 preemptive intent from Congress. Unsurprisingly, the government cannot find a single case that
2 applies the immunity doctrine to a State’s decision to opt out of a federal program.

3 The government argues that the Values Act violates intergovernmental immunity because
4 it “treat[s] federal immigration officials worse than other entities.” PI Mem. 31. But that is true
5 every time a State exercises its anti-commandeering prerogative. After *Printz*, for example, a
6 sheriff who refused Brady Act background checks would be treating ATF officials worse than
7 others who asked for background checks. If the government were right, Congress could force
8 States to administer programs simply by seeking assistance of the same sort that States provide
9 to other entities. That does not square with *Printz*, *New York*, *NFIB*, or the “prerogative to reject
10 Congress’s desired policy” that they recognize. *NFIB*, 567 U.S. at 581; Dkt. 73-2, at 23-24.

11 Even if immunity could apply here, it would not bar the Values Act. First, Congress
12 retains “the primary role” in resolving immunity questions. *North Dakota v. United States*, 495
13 U.S. 423, 435 (1990) (plurality op.). And Congress has thoroughly addressed States’ role in the
14 deportation scheme. *See, e.g.*, 8 U.S.C. §§ 1373, 1357(d), 1357(g). Where “Congress has made
15 its assessment of the federal interest” and allows the States leeway, its “action sufficiently
16 qualifies the intergovernmental immunity of the United States to permit the state to make the
17 distinction it has.” *United States v. Lewis Cty.*, 175 F.3d 671, 676 (9th Cir. 1999). Second, there
18 are “significant differences” between immigration enforcement and criminal enforcement. *Davis*
19 *v. Michigan Dep’t of Treasury*, 489 U.S. 803, 816 (1989) (discrimination permissible under these
20 circumstances). Immigration enforcement instills fear and destroys cooperation with state
21 residents in a way that finds no parallel in ordinary law enforcement. Cal. Gov’t Code § 7284.2
22 (listing its unique harms). Accordingly, the State’s decision to treat immigration differently
23 would be fully “justified” even if intergovernmental immunity applied. *Davis*, 489 U.S. at 816
24 (citation omitted).
25

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2018, I electronically filed the foregoing Brief of Amici Curiae with the Clerk for the United States District Court for the Eastern District of California by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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