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VIA ECF

September 6, 2019

The Honorable Elizabeth A. Wolford
United States District Judge
United States District Court
for the Western District of New York
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614

Re: *Kearns v. Cuomo*, 19-cv-00902-EAW

Dear Judge Wolford:

On behalf of the New York Civil Liberties Union, I write in accordance with the Court's August 21, 2019 order, *see* Dkt. No. 29, to seek the Court's leave for the NYCLU to file an *amicus curiae* brief in support of the defendants in this matter. I attach the NYCLU's proposed brief.

This case presents a challenge to the State of New York's Driver's License Access and Privacy Act, which permits New Yorkers to obtain driver's licenses, irrespective of immigration status. The NYCLU's proposed brief supplements the defendants' submission on the limited issue of the unconstitutionality of the two immigration statutes invoked by the plaintiff, which are codified at Sections 1373 and 1644 of Title 8 of the United States Code.

Respectfully,

Christopher Dunn

c: All counsel (by ECF)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL P. KEARNS, in his official capacity as Clerk of the Court of Erie, New York, Plaintiff, vs. ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, LETITIA A. JAMES, in her official capacity as Attorney General of the State of New York, and MARK J.F. SCHROEDER, in his official capacity as Commissioner of the New York State Department of Motor Vehicles, Defendants.	Case No. 19-CV-902-EAW

BRIEF OF *AMICUS CURIAE* NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF THE DEFEENDANTS' MOTION TO DISMISS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae the New York Civil Liberties Union ("NYCLU") is a non-partisan, non-profit membership organization with approximately 190,000 members statewide and serves as the New York State affiliate of the American Civil Liberties Union ("ACLU"). The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Constitution. In furtherance of its mission, the NYCLU litigates, advocates, and educates on a wide range of constitutional issues impacting the rights of New Yorkers—citizens and non-citizens alike.

The NYCLU and ACLU have a particular, longstanding interest in the impact of federal immigration statutes on the intergovernmental balance of power. They frequently serve as counsel or *amici* in litigation to ensure that the nation's federal immigration enforcement system properly respects the constraints of federalism.[1] *See, e.g.*, *State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 233–37 (S.D.N.Y. 2018); *United States v. California*, 921 F.3d 865 (9th Cir. 2019); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014). Recently, in *State of New York v. Dep't of Justice*, which presents a challenge to the federal government's effort to condition grant awards on compliance with one of the same federal immigration statutes at issue in this case, the NYCLU and ACLU joined other organizations in submitting an amicus brief to the Second Circuit, and the Court requested that they participate in oral argument.

The constitutional principles at stake in this case are of central importance to the NYCLU and its mission. The NYCLU therefore submits this amicus brief on the limited issue of the facial

[1] The NYCLU is also counsel in another case pending in this Court concerning, *inter alia*, the constitutionality of certain provisions of federal immigration law. *See generally Abdi v. McAleenan*, No. 17-cv-721 (EJW) (W.D.N.Y. Aug. 21, 2017).

constitutionality of an immigration statute invoked by plaintiff, codified at Section 1373 of Title 8 of the United States Code.

INTRODUCTION

This lawsuit is an attempt by a county clerk to invalidate the Driver's License Access and Privacy Act (the "Driver's License Act"), a newly enacted state law by which the State of New York seeks to regulate the issuance of New York driver's licenses without regard to immigration status and to enhance data protections related to applicants' sensitive personal information. Among a host of other preemption claims under the Supremacy Clause, the plaintiff erroneously contends that certain confidentiality provisions of the Driver's License Act conflict with 8 U.S.C. §§ 1373 and 1644,[2] two federal statutes that prohibit state and local officials from restricting the exchange of information between their employees and the federal government.

As the State of New York amply sets forth in its brief, the plaintiff's claims fail because he lacks capacity and standing to bring this challenge, Mem. Supp. Defs.' Mot. Dismiss and Opp. Pl.'s Mot. Prelim. Inj. ("State's Mem.") 10–20, ECF No. 25; he fails to state an enforceable Supremacy Clause claim, *id*. at 20–22; there is no conflict between the Driver's License Act and Section 1373, *id.* at 31–33; and the information-sharing prohibitions in Section 1373 do not apply to the Driver's License Act, *id.* at 33–35.

Near the end of its submission, the State also briefly notes that, even if the Driver's License Act did implicate Section 1373, this federal statutes could not preclude the Driver's License Act because it is unconstitutional. *See id.* at 35–36. The NYCLU agrees with the State that this Court

[2] Section 1644 is virtually identical to Section 1373, except that it concerns the exchange of information between state and local governments and the federal authorities "regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644. Accordingly, Amicus' arguments herein as to the constitutionality of Section 1373 apply equally to this provision.

need not reach the ultimate question of whether Section 1373 is constitutional. *See* Defs.' Letter to Ct. 2, ECF No. 36.

Nonetheless, because it believes it might be useful to the Court, the NYCLU submits this brief to provide a fuller treatment of the constitutional issue the State notes. Simply put, Section 1373 does not—and could not—preempt the Driver's License Act because that federal statute violates the Tenth Amendment's anticommandeering doctrine, as established by a recent Supreme Court decision and as applied in subsequent lower court decisions uniformly finding that Section 1373 is unconstitutional.

ARGUMENT

I. SECTION 1373 VIOLATES THE TENTH AMENDMENT

Section 1373 provides, in relevant part:

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

8 U.S.C. § 1373(a). In short, Section 1373 "prohibits any 'government entity or official' from restricting any 'other government entity or official' from exchanging immigration status information" with federal immigration authorities. *State of New York*, 343 F. Supp. 3d at 233 (quoting *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 868 (N.D. Ill. 2018)).

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

As the Supreme Court explained in *Murphy v. Nat'l Collegiate Athletic Assoc.*, its Tenth Amendment decision from just last year, the Constitution reflects a "fundamental structural decision" to "withhold from Congress the power to issue orders directly to the States." 138 S. Ct. 1461, 1475 (2018). When the Federal Government attempts to force state and local jurisdictions to enact federal programs and policies, it impermissibly "commandeers" those governments in violation of the Tenth Amendment. *See generally id*.

Pursuant to the Tenth Amendment's anticommandeering doctrine, Congress cannot order States to enact or administer a regulatory program. *See New York*, 505 U.S. at 176–77; *Printz v. United States*, 521 U.S. 898, 909–10 (1997) (States may "refuse[] to comply with [a] request" to help administer federal law); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 587 (2012) (States may "choose not to participate" in a federal program). This power is "conspicuously absent" from the specific, enumerated powers the Constitution bestows upon Congress. *Murphy*, 138 S. Ct. at 1476.

The Supreme Court's decision in *Murphy* forecloses the plaintiff's effort to invoke Section 1373 here. *Murphy* concerned a challenge to the Professional and Amateur Sports Protection Act ("PASPA"), a federal law prohibiting states from legalizing sports gambling and from repealing existing state laws prohibiting it. *Murphy*, 138 S. Ct. at 1470–71. New Jersey challenged PASPA's prohibitions, arguing that they violated the anticommandeering doctrine. *Id*. at 1472. The government argued that that the law did not violate the doctrine because it merely prohibited state action and did not "affirmatively command it." *Id*. at 1478. The Supreme Court rejected this commandment-versus-prohibition distinction as "empty," finding "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id*. The Court highlighted the ease with which Congress could otherwise reframe a command to states as a

prohibition. *Id.* The Court therefore held that PASPA violated the anticommandeering doctrine notwithstanding the fact that, like Section 1373, it prohibited state action rather than commanding it. *Id*.

In the wake of *Murphy*, every district court in the country to consider a Tenth Amendment challenge to Section 1373 has done so in light of the Supreme Court's clear guidance in that case and found that the statute is unconstitutional. *See City of Los Angeles v. Sessions*, No. CV 18-7347-R, 2019 WL 1957966, at *4 (C.D. Cal. Feb. 15, 2019) (finding Sections 1373 and 1644 are "unconstitutional as applied to States and local governments under the Tenth Amendment's anti-commandeering principle"); *Oregon v. Trump*, No. 6:18-CV-01959-MC, 2019 WL 3716932, at *18 (D. Or. Aug. 7, 2019); *State of New York*, 343 F. Supp. 3d at 235–36 ("It necessarily follows that § 1373 is unconstitutional under the anticommandeering principles of the Tenth Amendment."), *appeal docketed,* No. 19-267, *and argued* June 18, 2019 (2d Cir.); *Chicago*, 321 F. Supp. 3d at 866–873; *Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018), *aff'd in part, vacated in part sub nom. City of Philadelphia v. Sessions*, 916 F.3d 276 (3d Cir. 2019); *see also United States v. California*, 314 F. Supp. 3d 1077, 1099 (E.D. Cal. 2018) (stating in dicta that "Section 1373 does just what Murphy proscribes: it tells States they may not prohibit (i.e., through legislation) the sharing of information regarding immigration status with the INS or other government entities"), *aff'd in part, rev'd in part and remanded*, 921 F.3d 865 (9th Cir. 2019).[3]

[3] While three circuit courts have rendered decisions in appeals of these district court decisions, none reached the issue of Section 1373's constitutionality. All three appellate courts affirmed the respective lower court decision on the threshold issue of whether Congress had empowered the Attorney General to place certain conditions (including compliance with Section 1373) on federal grants. *See United States v. California*, 921 F.3d 865 (9th Cir. 2019); *City of Philadelphia v. Sessions*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (stating, in dicta, "[t]he choice as to how to devote law enforcement resources—including whether or not to use such resources to aid in federal immigration efforts—would traditionally be one left to state and local authorities").

As these courts have found, Section 1373 violates the anticommandeering doctrine because it issues a "direct order" to state and local governments to refrain from enacting state law on a broad range of laws and policies. *See State of New York*, 343 F. Supp. 3d at 235 (citing *Murphy*, 138 S. Ct. at 1478). "Section 1373 unequivocally dictates what a state legislature may and may not do." *Id*. at 235 (citing *Murphy*, 138 S. Ct. at 1478); *see also Chicago*, 321 F. Supp. 3d at 869–70. The provision renders a state or local officials' otherwise lawful decision *not* to assist federal immigration authorities unlawful once it is codified as state law. *See California*, 921 F.3d at 890. This "is exactly what the anticommandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481 (2018).

The lower court's consensus that Section 1373 is unconstitutional follows from the three primary objectives of the anticommandeering doctrine that the Supreme Court identified in *Murphy* and other Tenth Amendment cases. First, the anticommandeering doctrine promotes a "healthy balance of power between the States and the Federal Government [that reduces] the risk of tyranny and abuse from either." *Id.* at 1477 (quoting *New York,* 505 U.S. at 181). The States' ability to opt out of federal programs ensures the "[p]reservation of the States as independent and autonomous political entities." *Printz*, 521 U.S. at 928.

Section 1373 erodes the protections inherent in the balance of power between the States and the Federal Government. *State of New York*, 343 F. Supp. 3d at 235 ("§ 1373 impinges on Plaintiffs' sovereign authority and their citizens' liberty to be regulated under their preferred state and local policies."). Under the specter of Section 1373, states are unable to make decisions concerning the use of state resources and the manner in which state officials carry out their duties. Section 1373 targets an authority at the heart of local government's functioning—the ability of state and local governments to regulate their internal affairs and to exercise their powers of self-

government over their officers and employees. *See Printz*, 521 U.S. at 931 ("To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. Indeed, it merits the description 'empty formalistic reasoning of the highest order.'" (citation omitted)). In effect, the statute requires states and local governments to permit their employees to expend government time and resources responding to requests for information from the Federal Government. *See Philadelphia*, 309 F. Supp. 3d at 327.

Here, the residents of New York do *not* "retain the ultimate decision as to whether or not the state will comply" with federal immigration requests. *New York*, 505 U.S. at 168. Section 1373 denies New York the "critical alternative" of "declin[ing] to administer" the federal immigration scheme. *Id*. at 177; *see also Chicago*, at 870 (finding Section 1373 "prevents Chicago from extricating itself from federal immigration enforcement"). Instead, Section 1373 requires New York "to submit control of [its] own officials' communications to the federal government and forego passing laws contrary to Section 1373." *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, at 950–51 (N.D. Cal. 2018), *judgment entered sub nom. California ex rel. Becerra v. Sessions*, No. 3:17-CV-04701-WHO, 2018 WL 6069940 (N.D. Cal. Nov. 20, 2018).

Second, the anticommandeering doctrine promotes political accountability by ensuring state and local officials can be responsive to their constituents. *Murphy*, 138 S. Ct. at 1477. "If a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred." *Id.* Section 1373 undermines political accountability because "the statute makes it difficult for citizens to distinguish between state and federal policy in the immigration context by barring states from adopting policies contrary to those preferred by the federal government." *State of New York*, 343 F. Supp. 3d at 235 (internal quotes omitted) (quoting *Chicago*, 321 F. Supp. 3d at 870). It creates the "appearance of a uniform federal/state/local

immigration enforcement policy indiscernible to [New York's] residents." *See San Francisco*, 349 F. Supp. 3d at 950–51.

A secondary but no less critical casualty to political accountability results from Section 1373's transfer of decision-making authority from state and local leaders to line-level employees. These leaders cannot be responsive to their constituents if they have limited control over the actions of their employees. *See Chicago*, 321 F. Supp. 3d at 870 ("The statute … forces states to allow their employees to participate in the federal scheme, shifting employee time—and thus corresponding costs—to federal initiatives and away from state policies.").

Third, the anticommandeering doctrine "prevents Congress from shifting the costs of regulation to the States," and thereby abdicating the responsibility of having to "weigh the expected benefits of the program against its costs." *Id.* Section 1373 "shifts a portion of immigration enforcement costs onto the States." *San Francisco,* 349 F. Supp. 3d at 952. The federal government benefits by expropriating information collected at state and local expense and "at no cost to itself." *See Printz*, 521 U.S. at 922.

The unconstitutionality of Section 1373 is highlighted by the plaintiff's effort to invoke it in this case. New York passed the Driver's License Act to improve road safety by ensuring that its residents, irrespective of immigration status, can safely and legally drive—an exercise of police powers in an area of traditional state concern well within the state's prerogative. On the plaintiff's theory, Section 1373 would require that New York permit its own employees to share the sensitive information entrusted to them pursuant to the Driver's License Act in their official capacity as state employees with federal immigration authorities. Pl.'s Mem. Supp. Prelim. Inj. (Pl.'s Mem.) 18–9, ECF No. 3-16. If Section 1373 applied to the information gathered by state officials pursuant

to the Driver's License Act—and, questions of constitutionality aside, it does not[4]—it would undermine the effectiveness of this law by deterring large groups of people from seeking its benefits and severely undermine New York's ability to exert control over its own employees and regulate its own citizens. It would effectively enlist state officials in federal immigration enforcement over the objection of the state. *See Murphy*, 138 S. Ct. 1461 (finding the Tenth Amendment denies Congress the power to conscript thousands of state officers into its regulatory machinery).

Even if provisions in New York's Driver's License Act had some effect on federal immigration enforcement, the "federal need for state information does not automatically free the federal government of the sometimes laborious requirement to acquire that information by constitutional means." *Chicago*, 321 F. Supp. 3d at 872. "Standing aside does not equate to standing in the way." *State of New York*, 343 F. Supp. 3d at 234–35 (quoting *California*, 314 F. Supp. 3d at 1105. Policies of non-cooperation with federal immigration enforcement "do[] not interfere in any way with the federal government's lawful pursuit of its civil immigration activities." *Chicago*, 321 F. Supp. 3d at 872. "Federal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities." *California*, 921 F.3d at 889.[5]

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[4] *See* State's Mem. 34–35.

[5] Neither of the two possible exceptions to the anticommandeering doctrine apply here. The anticommandeering doctrine does not apply where a statute "evenhandedly regulates an activity in which both States and private actors engage," as opposed to regulating activities undertaken exclusively by government entities. *Murphy*, 138 S. Ct. at 1478. Nor does it apply where Congress validly preempts state law through the Supremacy Clause. To be considered a preemption provision, the law "must represent the exercise of a power conferred on Congress by the Constitution," and therefore "must be best read as one that regulates private actors" because "the Constitution 'confers upon Congress the power to regulate individuals, not States.'" *Id.* at 1479 (quoting *New York*, 505 U.S. at 166). There can be no doubt that Section 1373 exclusively regulates "government entit[ies] or official[s]," targeting policies and communications between state and local "government entit[ies] and official[s]," 8 U.S.C. § 1373(a); *see San Francisco*, 349

Because Section 1373 is unconstitutional, it cannot support the plaintiff's preemption arguments. *See California*, 314 F. Supp. 3d at 1109 ("If Congress lacks the authority to direct state action in this manner, then preemption cannot and should not be used to achieve the same result.").

II. *CITY OF NEW YORK* DOES NOT SAVE SECTION 1373 FROM UNCONSTITUTIONALITY IN THE WAKE OF *MURPHY*

Without mentioning *Murphy*, the plaintiff urges this Court to follow the decades-old Second Circuit decision in *City of New York*. *See* Pl.'s Mem. 19, n.4. However, *City of New York* cannot save Section 1373 from invalidity under the Tenth Amendment's anticommandeering principle. Less than a year ago, in *New York v. Dep't of Justice*, a court in this Circuit expressly declined to follow *City of New York*'s anticommandeering analysis, finding that Section 1373 violates the Tenth Amendment. More than a mere "contraven[tion]" of binding precedent, *see* Pl.'s Mem. 19, n.4, *New York v. Dep't of Justice* reflects an emerging nationwide consensus "that *City of New York* cannot survive the Supreme Court's decision in *Murphy*." 343 F. Supp. 3d at 234. Nothing about Kearns's claims, which involve the same statutes and identical constitutional principles, calls on this Court to revive *City of New York* here.

In *City of New York*, the Second Circuit evaluated a facial Tenth Amendment challenge to Sections 1373 by distinguishing between federal laws that *command* state and local governments to act and those that *prohibit* them from doing so. *See* 179 F.3d at 35. While reaffirming the Tenth

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F. Supp. 3d at 949 (finding Section 1373 is not a preemption provision); *Philadelphia*, 309 F. Supp. 3d at 329 (same). Section 1373 requires cities "to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to." *See Printz*, 521 U.S. at 932 n.17. Section 1373 cannot therefore be considered a "preemption provision"; simply put, "it is no such thing." *State of New York* (rejecting argument that 1373 is a preemption provision) (internal quotations omitted) (quoting *Murphy* at 1479).

Amendment's role as a "shield" against the former, the court reasoned that invalidating the latter under the anticommandeering principle would impermissibly transform the Tenth Amendment into a "sword allowing states and localities to engage in passive resistance that frustrates federal programs." *Id.* *City of New York* involved a mayoral executive order that conflicted with Section 1373 by prohibiting City employees from sharing information regarding immigration status with federal immigration authorities. In rejecting the City's challenge, the Second Circuit reasoned that "[t]hese Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *Id.*

But the Supreme Court's decision in *Murphy*, some nineteen years after *City of New York*, repudiates this commandment-versus-prohibition distinction entirely. *See Murphy*, 138 S.Ct. at 1478. There, the respondents sought to defend the statute using the same distinction the Second Circuit found dispositive in *City of New York*, arguing that federal law runs afoul of the anticommandeering principle "only when Congress goes beyond precluding state action and affirmatively commands it." *Id.* (internal quotation marks and citations omitted). As discussed *supra*, the Court rejected this distinction as "empty." *Id.*

Every court that has considered the constitutionality of 1373 after *Murphy* has rejected or called into serious doubt the continuing vitality of *City of New York*. *See New York v. Dep't of Justice*, 343 F. Supp. 3d at 234 ("It is clear that *City of New York* cannot survive the Supreme Court's decision in *Murphy*."); *Chicago*, 321 F. Supp. 3d at 873 ("*Murphy*'s holding deprives *City of New York* of its central support . . . ."); *United States v. California*, 314 F. Supp. 3d at 1108 ("[T]he Supreme Court's holding in Murphy undercuts portions of the Second Circuit's reasoning [in *City of New York*] and calls its conclusion into question."). Notably, no court in the country

has concluded that the commandment-versus-prohibition on which *City of New York* relied can survive *Murphy*; and this Court should reject the plaintiff's invitation to become the first.

CONCLUSION

For the reasons stated above, Section 1373 attempts to commandeer state and local governments to assist in the administration of federal immigration law and is therefore unconstitutional. Consequently, even if the Driver's License Act implicated Section 1373, it could not provide any support for the plaintiff's preemption arguments.

Respectfully submitted,

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Dated: September 6, 2019
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