97-6182

To be Argued by:
MARTIN J. SIEGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 97-6182

THE CITY OF NEW YORK, and
RUDOLPH GIULIANI, as Mayor of the City of New York,

Plaintiffs-Appellants,

— v. —

UNITED STATES OF AMERICA, and
JANET RENO, as Attorney General of the United States,

Defendants Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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THE CITY OF NEW YORK, and
RUDOLPH GIULIANI, as Mayor of the City of New York,
Plaintiffs-Appellants,

— *v.* —

UNITED STATES OF AMERICA, and
JANET RENO, as Attorney General of the United States,
Defendants-Appellees.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Plaintiffs The City of New York and Rudolph Giuliani (collectively, "the City") appeal from a judgment of the United States District Court for the Southern District of New York (Honorable John G. Koeltl, J.), entered on July 23, 1997 in accord with the court's July 18, 1997 Opinion and Order. Joint Appendix ("JA") 34-56. The decision is reported at 971 F. Supp. 789 (S.D.N.Y. 1997). The district court dismissed the City's claims that Section 434 of the federal Personal Responsibility and Work Opportunity Act of 1996 ("Section 434") and Section 642 of the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Section 642") violate the

Tenth Amendment and the Guarantee Clause. Sections 434 and 642 provide. that no state or locality may prohibit its agencies or employees from providing information regarding the immigration status of aliens to the Immigration and Naturalization Service ("INS") or other federal officials. The effect of the provisions is to set aside the City's Executive Order 124, which, with limited exceptions, prohibits City employees from sharing data regarding aliens with "federal immigration authorities."

The City's appeal makes little effort to conceal what is really simply a policy dispute with the United States. By enacting Sections 434 and 642, Congress expressed the national view that the voluntary sharing of information about aliens helps reduce illegal immigration. The City's view, embodied in Executive Order 124, is that local needs are best served by maintaining the confidentiality of immigration status data. The City therefore argues that Sections 434 and 642 are invalid simply because they force the City to end its preferred policy of confidentiality.

This Court should affirm the district court's decision. The City's central argument that Sections 434 and 642 are unconstitutional because they compel the City to change its confidentiality policy misconceives the relationship of the federal government to the states. Under the Supremacy Clause, Congress is permitted to set aside a state's law or policy in order to advance federal goals, as long as it acts pursuant to a constitutionally-delegated power and consistent with the Tenth Amendment.

In this case, Congress displaced Executive Order 124 under its plenary power over aliens, in an effort to curtail illegal immigration. Moreover, in enacting

Sections 434 and 642, Congress legislated in accord with the strictures of the Tenth Amendment, which only prohibits Congress from requiring states to enact or administer a federal program. Because Sections 434 and 642 do not require the City or its employees to enact any law or regulation, administer any federal program, take affirmative action of any kind, or even communicate with the INS, they do not offend the Tenth Amendment. Accordingly, Congress has displaced the City's confidentiality rule, which must therefore yield.

This Court should also affirm the district court's decision that Sections 434 and 642 are consistent with the Guarantee Clause. Even assuming that the Guarantee Clause confers justiciable rights, Sections 434 and 642 do not threaten to restructure the form of City government.

Issuer Presented for Review

1. Whether the district court correctly decided that Sections 434 and 642 are consistent with the Tenth Amendment because they do not compel the City to enact or administer a federal regulatory program.

2. Whether the district court correctly decided that Sections 434 and 642 are consistent with the Guarantee Clause because they do not deprive the City of a republican form of government.

Statement of the Case

A. Congress' Enactment of Sections 434 and 642

The Congressional enactments at issue here became law within a six-week span last year. In August 1996, Congress passed, and the President signed, the

Personal Responsibility and Work Opportunity Act of 1996. See Pub. L. No. 104-193, 110 Stat. 2105 (1996). The Act was intended to overhaul the welfare system, and Title IV established new rules governing the provision of federal and state benefits to legal and illegal aliens. See Conference Report, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 162-78 (1996). In general, Title IV reduces public assistance to aliens because, as Congress found, "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §§ 1601(1), (6).

Section 434 of the Act provides:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

8 U.S.C. § 1644. In the Conference Report accompanying the Act, Congress explained the purpose of Section 434:

> The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien or the presence,

> whereabouts, or activities of illegal aliens. It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS.
>
> The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens . . . . The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.

H.R. Conf. Rep. No. 725 at 383.

Congress enacted, and the President signed, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 on September 30, 1996. See Pub. L. No. 104-208, 110 Stat. 3009 (1996). The Act seeks to curb illegal immigration by, *inter alia*, increasing resources for border control and internal enforcement, stiffening penalties for alien smuggling and document fraud, and streamlining procedures governing detention and deportation of excludable aliens. Id. Concluding that "unlimited immigration . . . is a moral and practical impossibility," House Comm. on Judiciary, Immigration in the National Interest Act of 1995, H. R. Rep. No. 469, 104th Cong., 2d Sess. 110 (1996), and that current "U.S. immigration law is violated on a massive scale," Sen. Comm. on Judiciary, Immigration Control and Financial Responsibility Act of 1996, S. Rep. 249, 104th Cong., 2d Sess. 3 (1996), Congress resolved:

> If the United States is to have an immigration policy that is both fair and effective, the law and the commitment of those with the duty to apply or enforce it must be clear. There should be no confusion about the intent of Congress that U.S. immigration law be fully binding on all persons at or within the borders of this country. This is a nation governed by law, and the law includes, the immigration statutes and the regulations promulgated thereunder.
>
> Aliens who violate U.S. immigration law should be removed from this country as soon as possible.

S. Rep. 249 at 7. See also H. R. Rep. No. 469 at 110-11 (expressing need to "eliminate to the greatest possible extent special provisions and exceptions that detract from" immigration law enforcement).

Section 642 of the Act provides in pertinent part:

> (a) IN GENERAL. -- 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.
>
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. -- Notwithstanding any other provision of Federal, State, or local law, no person or agency may

> prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373.

As the Senate Judiciary Committee explained, Section 642:

> [p]rohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agenciesis consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 249 at 19-20.

B. The City's Executive Order 124

The City correctly claims that sections 434 and 642 nullify the City's Executive Order 124. That order, issued by Mayor Edward Koch in 1989, provides that "[n]o City officer or employee shall transmit information respecting any alien to federal immigration authorities." JA 20. There are three exceptions to this prohibition: when disclosure is "required by law," when the alien in question has given authorization, and when the alien is suspected of having committed a crime -- although if the alien suspect is also a crime victim, his or her status cannot be disclosed since information regarding crime victims may not be provided. *Id.* at 20-21. Executive Order 124 also requires City agencies to designate officials responsible for making case-by-case disclosure determinations, and bars individual employees from providing information themselves. *Id.* at *20.*

According to materials filed by the City as an addendum to its brief, Executive Order 124 codified a city-wide policy implemented by Mayor Koch in 1985, Appellant's Addendum ("Addendum") at 2-4. When Executive Order 124 was proposed in 1989, its accompanying "Statement of Basis and Purpose" explained that the measure was intended to encourage aliens "to make use of City services to which they are entitled by [City] law," in order to promote local crime control, health care, and education. *Id.* at 6. The Statement of Basis and Purpose correctly noted that "[f]ederal law places full responsibility for immigration control on the federal government. With limited exceptions, the City therefore has no legal obligation to report any alien to federal authorities." Id.

C. Proceedings in the District Court

The City filed its complaint on October 11, 1996. JA 6. The complaint alleges that the nullification of Executive Order 124 will cause aliens to forgo City services and thereby diminish local public safety, health and education. JA 10-15. The complaint alleges three causes of action: (1) that Sections 434 and 642 violate the Tenth Amendment by prohibiting the City from legislating or setting policy contrary to the challenged provisions, JA 15-16; (2) that Sections 434 and 642 violate the Tenth Amendment by interfering with "core functions of City government, including the ability of the City to exercise its police power to provide for public health and safety and to control its own workforce," JA 17; and (3) that Sections 434 and 642 violate the Guarantee Clause. JA 17-18. For relief, the City seeks a declaration that Sections 434 and 642 are unconstitutional and void, and an injunction proscribing their enforcement. JA 18. The Government answered the complaint on January 10, 1997, JA 23-26, after which the parties cross-moved for judgment on the pleadings under Fed. R. Civ. P. 12(c).

D. The District Court's Decision

The district court rendered its decision on the cross-motions on July 18, 1997. JA 34-54. Dismissing the City's complaint, the district court held that Sections 434 and 642 are consistent with both the Tenth Amendment and the Guarantee Clause. *Id.*

The district court first rejected the City's claim that the sections are constitutionally infirm because they interfere with City policymaking: "Congressional legislation is not unconstitutional merely because it displaces state policy choices in an area in which

Congress has the power to regulate." JA 45. The Court then held that the sections do not run afoul of the Supreme Court's recent holding in *Printz v. United States,* 117 S. Ct. 2365 (1997), that Congress may not constitutionally command state officers to execute federal law. See id. at 2383-84. As the district court concluded:

> In this case, Sections 434 and 642 do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy. Instead, they direct only that City officials and agencies be allowed, if they so choose, to share information with federal authorities. The statutes do not even require any City official to provide any information to federal authorities . . .
>
> They do not contravene the teaching of *Printz* that Congress cannot conscript state officers to carry out a federal regulatory program.

JA 45-47.

The district court likewise declined to strike down the sections on grounds that they diminish political accountability. JA 48. The court held that political accountability, "standing alone," provides no basis for invalidating federal statues that do not require state officers to execute federal law; "[o]therwise, Congressional statutes that appropriately preempted state law could be challenged on 'political accountability' grounds because state officials could be blamed for changing or not implementing their laws." *Id.* In any case, the district court held, the sections do not threaten political accountability because they do not require the City to enact legislation "for which it

could be blamed" or administer a federal program, and the City can clearly attribute its change in policy to Sections 434 and 642. JA 49.

The district court also rejected the City's argument, embodied in its second cause of action, that Sections 434 and 642 impermissibly interfere with core functions of City government. JA 50-53. Relying on the Supreme Court's decision in *Garcia v. Sun Antonio Metropolitan Authority, 469* U.S. 528, 549 (1985), the court held that Tenth Amendment claims do not turn on whether federal laws interfere with traditional local governmental functions, but on whether they require localities to enact or implement a federal regulatory program. JA 52-53. Because Sections 434 and 642 contain no such requirement, the court determined, they do not violate the Tenth Amendment. *Id.*

Finally, the district court upheld Sections 434 and 642 under the Guarantee Clause. JA 53-54. Recognizing that "the Supreme Court has traditionally found that claims brought under the Guarantee Clause present nonjusticiable political questions," the court held that the City failed to demonstrate that Sections 434 and 642 deprived it of a republican form of government. Id. Accordingly, the district court dismissed the City's complaint and entered judgment for the Government on July 23, 1997. JA 5, 56. This appeal followed.

SUMMARY OF ARGUMENT

The district court's decision is correct and should be affirmed. The City's primary argument is that Sections 434 and 642 violate the Constitution because they compel the City to change its policy of barring its employees from sharing information about aliens

with the INS. But Congress is permitted to displace state and local law and policy under the Supremacy Clause, as long as it acts pursuant to a constitutionally-delegated power and does not violate the Tenth Amendment. This is true even if the preempted local policy is thought by the municipality to be critical to its citizens' welfare, or essential to local sovereignty. In this case, Congress acted pursuant to its plenary power over aliens and concluded that the optional sharing of immigration status data best serves the national interest in curtailing illegal immigration. Moreover, Congress has complied with the Tenth Amendment., The City's policy must therefore give way. See Point I(B), *infru.*

Although the City focuses almost exclusively on its claimed sovereign power to make policy free from federal interference, the Tenth Amendment actually imposes a far narrower and more specific limitation on Congressional action. Under the Tenth Amendment, Congress may not force states to enact or administer a federal regulatory program. Sections 434 and 642 do not run afoul of this rule because they do not require the City or its employees to enact any legislation or regulation, administer a federal program, take any other affirmative action, or even report information to the INS. See Point I(C), *infra.* Further, the challenged provisions cannot violate the Tenth Amendment by trenching on essential City functions because the Supreme Court has clearly held that the "traditional governmental functions" test is no longer the yardstick by which Tenth Amendment claims are measured. See Point I(D), *infru.* Finally, Sections 434 and 642 do not offend the Tenth Amendment by diminishing political accountability. Congress preempted Executive Order 124 in full view of the public and will therefore be held accountable

for the City's change in policy. See Point I(D), *infru.* Likewise, Sections 434 and 642 do not require the City to enact any program or take any action that residents could mistake as being the product of City government. See Point I(D), *infra.*

This Court should also affirm the district court's decision to dismiss the City's claims under the Guarantee Clause. As the district court correctly recognized, the Guarantee Clause has never been held to confer justiciable rights. Moreover, even if claims under the Guarantee Clause are subject to judicial resolution, plaintiffs would have to show that the challenged federal law alters the form or structure of state or municipal government. In this case, the City has not alleged, nor could it demonstrate, that Sections 434 and 642 work a change in the structure of City government. See Point II, *infru.*

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED THE CITY'S TENTH AMENDMENT CLAIM BECAUSE SECTIONS 434 AND 642 WERE ENACTED PURSUANT TO A CONSTITUTIONALLY-DELEGATED POWER, AND DO NOT REQUIRE THE CITY TO ENACT OR ADMINISTER A FEDERAL PROGRAM

A. The Standard of Review

This Court reviews the district court's decision to dismiss the City's complaint under Fed. R. Civ. P. 12(c) *de novo. Sheppard v. Beerman, 94* F.3d 823, 827 (2d Cir. 1996). The Court is required to treat the factual allegations of the complaint as true, see *id.,* but matters outside of the pleadings may not be considered on appeal unless the district court considered

them below and converted the motion into one for summary judgment under Fed. R. Civ. P. 56. See *Kopec v. Coughlin,* *922* F.2d 152, 153 (2d Cir. 1991); *Ronzani v. Sanofi S.A.,* *899* F.2d 195, 196 (2d Cir. 1990); see *generally* Fed. R. Civ. P. 12(c); *Krinj v. Pogue Simone Real Estate Co.,* *896* F.2d 687, 689 (2d Cir. 1990) (discussing conversion of motions to dismiss).

In this case, the district court did not consider matters outside the pleadings or convert the cross-motions to dismiss into those for summary judgment. See JA 35-39. Thus, factual allegations presented in the City's brief that go beyond those set forth in the pleadings are not properly considered on appeal. See *Ronzani,* *899* F.2d at 196.* The sole issue in the district court was, and on appeal is, a legal one: whether Sections 434 and 642 are constitutional.

Lastly, because the City has raised a facial challenge to Sections 434 and 642, it bears a particularly "heavy burden" here: A "facial challenge to a

* For example, three pages of the City's brief simply quotes factual allegations contained in the Legal Aid Society's *amicus curiae* brief in the district court, see Appellants' Brief ("Br.") at 17-20, even though, the court denied the Society's motion to submit the affidavits and other materials on which those allegations were based. See JA 35-36 n.3. The City also presents as fact a 1989 City study on aliens' use of City services. Br. at 6. Likewise, in the guise of presenting the "documentary history" of Executive Order 124, the City reproduces the lengthy factual claims of Mayor Koch in 1985, and the Legal Aid Society in 1989. Br. 4-6, 10-11.

legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno, 481* U.S. *739, 745* (1987); *United States v.* Sage, *92* F.3d 101, 106 (2d Cir. 1996), *cert. denied,* 117 s. ct. 784 (1997).

B. Under the Supremacy Clause, Executive Order 124 Must Yield to Sections 434 and 642, Which Were Enacted Pursuant to Congress' Plenary Power Over Aliens

Sections 434 and 642 prohibit states and local governments from preventing their employees from voluntarily reporting immigration data. See pp. 4-7, *supra.* The sections therefore displace Executive Order 124 and have the effect of restoring the *status quo* that existed before Mayor Koch promulgated the confidentiality policy in 1985, when there was no rule on the subject. Following Congress' preemption of the City's confidentiality rule, City employees may contact the INS if, and only if, they choose to do so. The provisions do not compel City employees to report immigration information to the INS. As Congress explicitly acknowledged in explaining Section 434: "It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS." H.R. Conf. Rep. No. 725 at 383.

The Sections do, however, require the City to end its twelve-year-old rule of confidentiality. Thus, the City's first and central argument is that Sections 434 and 642 are unconstitutional because they interfere with local policy promulgated under the City's police powers. "The exercise of police powers to protect the . . . general welfare of the people is the chief

purpose of local government," the City argues, and it "exercised its sovereign power to make the policy choices embodied in Executive Order No. 124" accordingly. Br. at 27-28. Repeating its social policy arguments -- "[a]s a matter of public policy, undocumented aliens should not be discouraged from" using City services, Br. at 30 -- the City declares that "[n]othing is more important than public health, safety and well-being." Br. 31. It then asserts flatly:

> No matter how powerful the federal interest may be, the Constitution simply does not give Congress the authority to conduct its business in a fashion such as to inflict injury upon the public, or to obstruct the operations of municipal government directed at protecting the public.

Br. at 32; see *also id.* at 37 ("Congress does not have the power to issue mandates which obstruct the ability of State and local governments to preserve public order and to protect the health, safety and well-being of its residents").

The City's position evinces a fundamental misunderstanding of the proper relationship between the federal government and the states. While the Constitution maintains each in equipoise, "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." Gregory *v. Ashcroft*, 501 U.S. 452, 460 (1991). More specifically, Congress may explicitly preclude states from instituting particular rules or policies -- as it did here when it enacted Sections 434 and 642 and forbade states and localities

from restricting the voluntary exchange of immigration data. See, e.g., *Kelley v. United States,* 69 F.3d 1503, 1505 (10th Cir. 1995) (upholding 49 U.S.C. § 41713(b)(4), which provides that states "may not enact or enforce a law . . . related to a price, route, or service of an air carrier," under the Tenth Amendment), *cert. denied,* 116 S. Ct. 1566 (1996); 49 U.S.C. § 14501(a) ("No state . . . shall enact or enforce any law . . . relating to the scheduling of" interstate motor transportation). The question under the Supremacy Clause is simply: "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." *Burnett Bank v. Nelson,* 116 S. Ct. 1103, 1107 (1996); see also *Cipollone v. Liggett Group, Inc., 505* U.S. 504, 516 (1992).

The City is correct that Congress must act under a specific constitutional grant of power before its laws are binding on the states, and that only laws consistent with the Tenth Amendment may properly supersede state law. See Br. 33-34; see also *Printz,* 117 S. Ct. at 2379. Accordingly, the Government demonstrates below that Sections 434 and 642 comport with the Tenth Amendment because they do not compel the City to enact or administer a federal program. See Points I(B), I(C), *infru.* But as long as Congress acts under a specific constitutional power and refrains from commanding states to enact or enforce a federal program, the Supremacy Clause makes no exceptions. Congress may set aside state or municipal laws created in furtherance of state or local police powers. *Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.,* 452 U.S. 264, 291 (1981) (collecting cases); *see also Federal Energy Regulatory Commission v. Mississippi, 456* U.S. *742, 767* (1982) ("*FERC*").

Congress may also enact laws that allegedly "obstruct the operations of municipal government directed at protecting the public", Br. at 32, because federal power is "'superior to that of the States to provide for the welfare or necessities of their inhabitants."' *Maryland v. Wirz*, 392 U.S. 183, 196 (1968) (quoting *Sanitary District v. United States, 266* U.S. 405, 426 (1925)); *accord Oklahoma v. Atkinson Co.,* 313 U.S. 508, 534-35 (1941). As this Court has stated in the immigration law context, "the federal government may exercise its plenary powers even though the effects of such exercises of power may be onerous to the states." *Padavan v. United States, 82* F.3d 23, 26 (2d Cir. 1996).

In basing its appeal on the claimed illegitimacy of "congressionally-imposed displacement of the policy choices of the local electorate," then, the City turns the Supremacy Clause on its head. Br. at 45. It is backwards to claim that "policy decisions are to be carried out according to the dictates of local government rather than those of the federal government.' Br. at 46. Local policy must yield to that of the nation when the two conflict, not the other way around. Although preemptive "congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel, 452* US. at 290; see also *FERC,* 456 U.S. at 767. At bottom, national policy *is* local policy:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of

> Connecticut as if the act had emanated from its own legislature.

Testa v. Katt, 330 U.S. 386, 392 (1947) (quoting *Mondou v. New York, N.H. & H.R. Co., 223* U.S. 1, 57 (1912)); see also *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458* U.S. 141, 152-53 (1982) (citation omitted) (the "relative importance to the State of its own law is not material when there is a conflict").

In this case, there is no question that Congress "intend[ed] to exercise its constitutionally delegated authority to set aside the law[]" of the City. *Barnett Bank,* 116 S. Ct. at 1107. By explicitly prohibiting states and local governments from preventing their employees from voluntarily reporting immigration data, Sections 434 and 642 effectively displaced Executive Order 124 and the City's confidentiality policy. See, e.g., H. R. Rep. No. 469 at 110-11 (expressing need to "eliminate to the greatest possible extent special provisions and exceptions that detract from" immigration law enforcement). There is also no question that Sections 434 and 642 were enacted pursuant to Congress' plenary power over aliens in an effort to curtail illegal immigration.* Their legislative

* The City's contention that the Government is somehow precluded from arguing that Sections 434 and 642 were enacted pursuant to Congress' power over immigration because the Government's answer stated that the City's claims were "barred by the Supremacy Clause of the United States," JA 25, but made no reference to federal authority over aliens, see Br. at 33-34, is misguided. The City identifies no rule related to pleadings or motions requiring the Government to state in an answer the constitutional

histories make clear Congress' view that "illegal aliens do not have the right to remain in the United States undetected and unapprehended," H.R. Conf. Rep. No. 725 at 383, and that the "exchange of immigration-related information . . . is consistent with, and potentially of considerable assistance to . . . the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. 249 at 19-20.

Congress' power over aliens is virtually unrestricted; indeed, "[o]ver no conceivable subject is the legislative power of Congress more complete." *Reno v. Flores,* 507 U.S. 292, 305 (1993); *Fiallo v. Bell, 430* U.S. 787, 792 (1977). Likewise, regulating aliens "is not an equal and continuously existing concurrent power of state and nation." *Hines v. Davidowitz,* 312 U.S. 52, 68 (1941). As the Supreme Court has held:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See *Hines v. Davidowitz,* 312 U.S. 52, 66. Under the Constitution the states are granted no

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power under which a challenged federal statute was enacted, and, as the City notes, the Government indicated that Congress enacted the sections pursuant to the immigration power in its first brief below. See Br. at 34. In any event, the district court was permitted to rely on Congress' power over aliens in rendering its decision, and this Court can affirm on any ground. *See Shumway v. United Parcel Service, Inc.,* 118 F.3d 60, 63 (2d Cir. 1997).

> such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Tukahashi v. Fish Comm'n, 334 U.S. 410, 419 (1948); *see also Nyquist v. Mauclet,* 432 U.S. 1, 10 (1977) (matter "entrusted exclusively to the Federal Government, and a State has no power to interfere").

State rules that conflict with federal immigration policy are therefore routinely held to be preempted. *See, e.g., Toll v. Moreno,* 458 U.S. 1, 16 (1982) (striking down Maryland rule denying in-state tuition status to aliens because it "frustrate[d] . . . federal policies"); *Nyquist,* 432 U.S. at 10 (invalidating New York law denying state education aid to aliens); *Graham v. Richardson,* 403 U.S. 365, 380 (1971) (invalidating state limits on welfare benefits to aliens as "equat[ing] with the assertion of a right, inconsistent with federal policy, to deny entrance and abode" to aliens); *Tukahashi,* 334 U.S. at 419 (striking down California law restricting fishing licenses to citizens because states "can neither add to nor take from the conditions lawfully imposed' on alien residence). In all of these decisions, as here, federal preemption required state and local governments to change their policies toward aliens and alter the duties of employees overseeing the displaced state and local rules. Yet the preemption was upheld under the basis of Congress' plenary power over immigration and the Supremacy Clause.

This is particularly true of *Hines,* the case most similar to this one. In *Hines,* the Court considered a 1939 Pennsylvania statute establishing an elaborate

regulatory mechanism for the registration of aliens, including the provision of identity cards to aliens, and penalties for noncompliance. ***Id.*** at 59-60. One year later, Congress enacted a federal registration scheme. In deciding whether the state regulations could stand in light of the new federal law, the ***Hines*** Court observed that "the treatment of aliens, in whatever state they may be located, [is] a matter of national moment," not just local concern. ***Id.*** at 73. Requiring Pennsylvania's law to yield, the Court held:

> When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute . . .
>
> Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 62-63, 67.

Hence, in ***Hines,*** the Court upheld a federal law that, like Sections 434 and 642, displaced a preexisting state scheme governing the relationship of state and local employees to aliens. As a result of the displacement, Pennsylvania's policy was drastically altered, and the duties of those employees who registered aliens and enforced the state law were changed significantly. The opinion leaves little doubt that Congress could have accomplished the same end by legislation drafted in terms more similar to

Sections 434 and 642, such as "no state or municipality may direct its officials to register or request identification from aliens."

In sum, Supremacy Clause and immigration jurisprudence make clear that Congress may constitutionally supersede the City's nondisclosure rule, regardless of the perceived effect on local welfare or municipal policy, as long as it does not transgress the specific limits imposed by the Tenth Amendment. Congress determined that enabling the voluntary sharing of information about aliens furthers the national goal of immigration control. Because Executive Order 124 effectively undercuts "the force and effect" of federal immigration law, *Hines,* 312 U.S. at 63, and "assert[s] a right, inconsistent with federal policy" in the field, *Graham, 403* U.S. at 380, the Supremacy Clause requires it to yield. The City's argument that Sections 434 and 642 represent bad social policy should be raised before Congress rather than this Court.

C. Sections 434 and 642 Are Consistent With the Tenth Amendment

1. Sections 434 and 642 Do Not Violate the Tenth Amendment's Rule Against Compelled legislation or Program Administration

Although the City focuses primarily on the broad contention that Congress may not interfere with local policy, the Tenth Amendment imposes a far narrower and more specific limitation on federal action. Under the Tenth Amendment, Congress may not command states to enact or administer a federal regulatory program. Because Sections 434 and 642 do not require the City or its employees to legislate, regulate, participate in any federal regulatory scheme, or even

provide any information to the INS, they are fully consistent with the Tenth Amendment.

The parameters of the Tenth Amendment's restriction on Congressional lawmaking were set by two recent decisions of the Supreme Court: *Printz* and New *York v. United States, 505* U.S. 144 (1992). In the first of these, *New York,* the Supreme Court considered the Low-Level Radioactive Waste Policy Amendments Act of 1985, one provision of which required states to either pass legislation disposing of radioactive waste according to federal instructions, or take title to the waste directly and assume legal responsibility for it. See 505 U.S. at 174-77. This provision either worked "a congressionally compelled subsidy from state governments to radioactive waste producers," or required states to "implement legislation enacted by Congress." *Id.* at 175-76. Invalidating this portion of the Act, the Court concluded that Congress could not force state governments to solve the radioactive waste problem on its behalf by commanding them to adopt and implement federally-specified regulations. See *id.* at 175-77, 188. The challenged provision also impermissibly blurred the lines of state and federal political accountability, since local electorates would likely mistake state legislators as having originated the state take-title legislation themselves. *Id.* at 168-69, 182-83. Overall, New *York* held straightforwardly that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188.

At issue in *Printz* was the constitutionality of interim provisions of the Brady Handgun Violence Prevention Act (the "Brady Act") requiring state law enforcement officers to conduct background checks of gun buyers. Crucially, the Brady Act gave state

officers no choice but to carry out the background checks. See 117 S. Ct. at 2368-69. Thus, in describing the question at issue, the *Printz* Court observed at the outset that "[t]he petitioners here object to being *pressed* into *federal service* and contend that congressional action *compelling state officers to execute federal laws* is unconstitutional." *Id.* at 2369-70 (emphasis added). After reviewing the early understandings of the Framers, past Congressional action, and other Tenth Amendment cases, the Court agreed. Although the Brady Act did not compel state lawmaking, as did the provisions struck down in New *York*, it still transformed local sheriffs into "puppets of a ventriloquist Congress" and "dragooned" them "into administering federal law" in violation of New *York's* bar on the forced administration of federal programs. *Id.* at 2381 (citations and internal quotations omitted). As the *Printz* Court concluded:

> We held in New *York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 2384.

Under their plain terms, Sections 434 and 642 do not run afoul of the Tenth Amendment as explicated in *Printz* and New *York.* The teaching of *Printz* is that Congress may not demand the service of state

employees. The Brady Act's fatal flaw was that it "compell[ed] state officers to execute federal laws," 117 S. Ct. at 2369-70, or "impress[ed] into its service . . . the police officers of the 50 States," *id.* at 2378, or reduced state employees to "puppets of a ventriloquist Congress." *Id.* at 2381. However phrased, the gravamen of the Tenth Amendment offense is compulsion. Here, as noted above, Sections 434 and 642 do not require City employees to do anything. As the district court correctly found, the provisions "do not even require any City official to provide any information to federal authorities." JA 45. The City's claim that compulsion exists because the sections give it no "walk-away opportunity" misses the point. See Br. at 46. As long as Congress has not commandeered the City's employees, principles of federalism do not afford the City any right to "walk away" from properly preemptive federal law.

Put another way, Sections 434 and 642 do not violate the Tenth Amendment's rule against compulsion because Congress, in enacting the Sections, has opted for a means of soliciting the voluntary assistance of City employees. As the City correctly puts it, "the federal government *seeks* a direct exchange of information" Br. at 24, 41 (emphasis added), but Congress has not mandated one. Tenth Amendment decisions have consistently recognized that Congress is permitted to do what the City acknowledges it has done here: seek the optional aid of state officers. See New *York,* 505 U.S. at 168 (Congress may "encourage a State to conform to federal policy choices"); *FERC,* 456 U.S. at 766 ("valid federal enactments may have an effect on state policy -- and may, indeed, be designed to induce state action"); *Ponca Tribe of Oklahoma v. State of Oklahoma,* 37 F.3d 1422, 1434 (10th Cir. 1994) (upholding statute directing states to

negotiate with Indian tribes under Tenth Amendment as "reflect[ing] Congress' attempt to encourage, but not mandate, cooperative rulemaking between the Indian tribes and the states"), ***reversed on other grounds, Seminole Tribe of Florida v. Florida,*** 116 S. Ct. 1114 (1996). Accordingly, when Congress merely overrides a state or local rule and thereby enables local employees to voluntarily assist in federal law enforcement if they choose, the essential compulsion is absent.

For this reason, federal laws that do not require any affirmative action by state governments or employees have withstood constitutional challenge under the Tenth Amendment. In ***Kentucky*** *Div.,* ***Horsemen's Benevolent & Protective Ass'n, Inc.*** *v. Turfway* ***Park Racing Ass'n, Inc., 20*** F.3d 1406, 1415-16 (6th Cir. 1994), for example, the Sixth Circuit upheld the Interstate Horseracing Act of 1978, 15 U.S.C. § 3003 ***et seq.,*** which prohibits off-track betting on horseracing unless states consent:

> The Act, however, does not require a State to do ***anything*** when presented with a request for its consent to off-track betting. Under the Act, the State remains free to ignore such a request. It is true that the State's inaction will preserve the general federal prohibition of interstate off-track betting set forth in 15 U.S.C. § 3003, but that effect does not amount to "regulation" as that term was used by the Court in New ***York.*** The New ***York*** Court adhered to the common sense view that "regulation" is an affirmative act by the State.

Id. at 1415 (emphasis in original). Here too, Sections 434 and 642 do no violence to the Tenth Amendment because the provisions do not compel the City and its workers to "do anything" or perform any "affirmative act."

Similarly, in *Southeastern Pennsylvania Transportation Auth. v. Pennsylvania Public Utility Commit, 826* F. Supp. 1506, 1522 (E.D. Pa. 1993), *aff'd,* 27 F.3d 558 (3d Cir.) (table), *cert. denied,* 115 S. Ct. 318 (1994) ("*SEPTA*"), the court upheld federal legislation prohibiting states from regulating and taxing local commuter rail transportation authorities because the law "does not employ [Pennsylvania] as a regulatory agency -- i.e. does not compel the State to require or prohibit any acts -- but merely directs the States to refrain from engaging in a certain form of regulation deemed inconsistent with cognizable federal interests." *Id.* at 1519. The common rule of these cases, consistent with that applied in *Printz*, is that federal laws that do not compel any affirmative state action are constitutional. As such, Sections 434 and 642 should be upheld.*

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* The City may, of course, have to take affirmative steps to end its confidentiality policy, but that is the "inevitable consequence of [Congress] regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *South Carolina v. Baker, 485* U.S. 505, 514-15 (1987); *see also Strahan* v. *Coxe*, 127 F.3d 155, 170 (1st Cir. 1997) (rejecting Tenth Amendment challenge to an injunction

Just as Sections 434 and 642 comport with the teaching of *Printz*, they adhere to the rule in New Yorh that Congress may not command states to enact or administer federal programs. Indeed, Sections 434 and 642 do not provide for any regulatory program at all -- unlike the Brady Act or the provision at issue in New *York.* Instead, the sections simply preempt the City's blanket nondisclosure rule and restore the *status* quo as it existed before Mayor Koch's adoption of the confidentiality policy in 1985. While any voluntary reporting prompted by Sections 434 and 642 will be "potentially of considerable assistance" to federal authorities, S. Rep. No. 249 at 19-20, the management of federal immigration control remains an exclusively federal task. As was reported in Executive Order 124's "Statement of Basis and Purpose," federal law continues to "place[] full responsibility for immigration control on the federal government," Addendum at 6, even if isolated City employees choose to provide relevant data to the INS. Accordingly, the displacement of Executive Order 124 does not entail the administration of a federal program, and thus comports with the Tenth Amendment.

Indeed, there is compelling support for the proposition that even if Congress had *required* City employees to report immigration data to the INS, such a command would not amount to the forced

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ordering state to apply for permits and convene task force under the Endangered Species Act: "Here, the defendants are not being ordered to take positive steps with respect to advancing the goals of a federal regulatory scheme. Rather the court directed the defendants to find a means of bringing the commonwealths scheme into compliance with federal law").

administration of a federal program in violation of the Tenth Amendment. The *Printz* Court distinguished between federal laws that require state officers and agencies to report certain information to federal authorities, and those that actually compel state officers to carry out federal law. For example, the Missing Childrens' Assistance Act, 42 U.S.C. § 5771 et seq., requires state and local law enforcement agencies to report cases of missing children to the Department of Justice's National Crime Information Center. 42 U.S.C. § 5779. See also, e.g., 15 U.S.C. § 2645 (requiring state reporting as to local educational agencies); 20 U.S.C. § 4013 (requiring state reports on asbestos abatement). But as the Court observed, such statutes, "which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these" mandatory reporting statutes. *Id.* at 2376.

Like the majority, Justice O'Connor, in her concurring opinion, carefully reiterated that "the Court appropriately refrains from deciding -whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid." *Id.* at 2385 (citing Missing Children's Assistance Act). Justice O'Connor's pointed emphasis of this aspect of the *Printz* decision, in a concurrence of merely two paragraphs, is especially significant since the majority's decision commanded only five votes. Indeed, by calling mandatory reporting requirements "purely ministerial," *id.,* Justice O'Connor -- the author of New *York* and the crucial fifth vote in *Printz* --

strongly implies that even compulsory information-sharing is constitutional.

In light of this feature of the decision in *Printz,* it is all the more clear that Sections 434 and 642 do not offend the Tenth Amendment. As the district court rightly understood, "[i]n this case, Sections 434 and 642 are even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding [in *Printz*]. Sections 434 and 642 do not require any reporting by state and local officials." JA 47. Since *Printz* specifically disclaimed holding that mandatory reporting requirements violate the Tenth Amendment, it surely does not compel the invalidation of laws that merely enable ***voluntary*** reporting.

In sum, because Sections 434 and 642 do not require the City to enact or administer a federal regulatory program, or to take any affirmative action of any kind, they are constitutional and should be upheld.

2. Sections 434 and 642 Are Not Unconstitutional as Infringements on Essential City Functions or as Reductions of Political Accountability

Aside from its overall position that Sections 434 and 642 must fall because they are impediments to local policy, the City makes two more specific arguments under the Tenth Amendment. First, the City appears to argue that Sections 434 and 642 violate the Tenth Amendment because they interfere with essential governmental functions. Br. at 38-39, 42. Although the Supreme Court squarely abandoned the approach of invalidating federal laws if they infringe upon a state's "traditional governmental functions" in ***Garcia v. San Antonio Metropolitan Authority, 469***

U.S. *528,* 549 (1985), the City argues that New York and *Printz* somehow revived the traditional governmental functions test. See *id.;* JA 50-53.

The district court correctly rejected this contention, holding that Sections 434 and 642 are not invalid by virtue of affecting what the City deems to be "essential or "inalienable" functions or powers. Br. at 37. As the *Garcia* court held in overruling *National League of Cities v. Usery, 426* U.S. 833 (1976), the impossibility of consistently identifying the existence of a "traditional governmental function" made the standard unworkable. 469 U.S. at 538-541, 548. More deeply, the test was discarded because:

> neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Id. at 545-46.

Nothing in New *York* or *Printz* revived *National League of Cities.* Federal laws were struck down in

New *York* and *Printz* because Congress used the wrong *method* to address the problems of radioactive waste disposal and gun violence; rather than attack the problems directly, Congress required states to do so by enacting specified legislation or carrying out specified tasks. See, e.g., New *York, 505* U.S. at 188 ("While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them"). As the district court observed, both New *York* and *Printz* "relied upon the structural defects in the Congressional statutes at issue . . . without an analysis of whether the state functions affected were core functions of the states." JA 52-53. Accordingly, the district court correctly held that, in light of the Supreme Court's analysis in these two cases and in *Garcia,* "it would be inappropriate to resurrect a substantive Tenth Amendment analysis." JA 53.

Nor is there any basis for the City's suggestion that a substantive analysis of federal legislation is appropriate "when legislation is directed solely at states or local governments." Br. at 42. *Garcia* made no exception for legislation that only affects state or local government and not private parties. As the district court found, "the 'traditional governmental function' test does not survive in any form." JA 52. More fundamentally, the City is wrong to suggest that Congress may not "direct" legislation "solely at states or local governments." Congress does so under the Supremacy Clause whenever it specifically sets aside a state law, prohibits states from instituting certain rules, or bars a state from taking certain action at odds with federal policy. *See, e.g., South Carolina v. Baker, 485* U.S. at 511 (upholding law under Tenth Amendment that "directly regulated States by prohibiting

outright the issuance of bearer bonds"); *Kelley*, 69 F.3d at 1505 (upholding law providing that states "may not enact or enforce a law . . . related to a price, route, or service of an air carrier"); *Ponca Tribe of Oklahoma*, 37 F.3d at 1434 (upholding law "direct[ing] the state to negotiate" with Indian tribes); *SEPTA*, 826 F. Supp. at 1511, 1518-22 (upholding prohibition on state regulation and taxation of local commuter rail authorities). The City's arguments based on Garcia and the *National League of Cities* standard are without merit.

The City's second contention is that Sections 434 and 642 blur the lines of local and federal political accountability. See Br. at 46-48. According to the City, "[t]he elected officials of the City of New York will bear the brunt of public disapproval for the consequences of the federally-imposed policy, notwithstanding that Congress has stripped them of their ability to implement the policy embodied in Executive Order 124 according to the views of their constituents." Br. at 47. As an initial matter, the district court was right in holding that "political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way." JA 48. Neither New *York* nor *Printz* are based solely or even primarily on such a theory.

More important, if Congress' enactments were invalid for no other reason than that they caused state officials to "bear the brunt of public disapproval for the consequences of the federally-imposed policy" when the state would prefer a different policy, Br. at 47, Congress could never supersede state law under the Supremacy Clause. See JA 48 (If the City's view were correct, "statutes that appropriately preempted

state law could be challenged on 'political accountability' grounds because state officials could be blamed for changing or not implementing their laws"). As the New *York* Court noted, a state's policy "view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." 505 U.S. at 168. Here, Congress terminated the City's confidentiality rule in full view of the public, and Congress will suffer the consequences if City residents object to voluntary disclosure of immigration data. Because Congress clearly and publicly set Executive Order 124 aside, there is no merit to the City's claim that "the nexus" between alleged resultant social ills and Congress "will not be discernible to the voters." Br. at 47.

Sections 434 and 642 do not raise the political accountability questions at issue in New *York* and *Printz* in any case. The provisions invalidated in New *York* compromised political accountability because Congress required the states to enact a federally-directed regulation that state residents would naturally mistake as the product of state rather than federal legislators. See 505 U.S. at 168-69. The Brady Act blurred the lines of political accountability because Congress could take credit for solving gun-related violence even though states were financing the background checks, and because state officials would be blamed for mistakes in administration. *Printz*, 117 S. Ct. at 2382. Sections 434 and 642, however, do not require the City to enact or implement any legislation or regulation that City residents will mistake as being the product of City government.

Nor do they require City employees to report information to the INS against their will; because City employees themselves will decide whether or not to provide data to the INS, local residents will be correct to blame City workers directly when they err or if the residents simply disagree with information-sharing. See JA 49 ("there is no basis . . . to conclude that local officials will be blamed for the individual, voluntary decisions of City employees who provide information to federal authorities"). In other words, as the court below concluded, "the evils of the lack of political accountability identified in New York and *Printz* are not present in Sections 434 and 642." JA 48.

POINT II

THE DISTRICT COURT CORRECTLY DISMISSED THE CITY'S CLAIM UNDER THE GUARANTEE CLAUSE

The City also argues that Sections 434 and 642 transgress the Guarantee Clause for the same reason that they violate the Tenth Amendment: because they "alter basic local governmental policies, as embodied in Executive Order 124, and . . . replace them with Congress' policy choices." Br. at 49. This argument has no more persuasive force when asserted under the Guarantee Clause than it does under the Tenth Amendment. In both cases, the Supremacy Clause requires local policy to yield to that of the United States. See pp. 15-23, *supru.*

The Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. While the Supreme Court may ultimately sanction the judicial resolution of challenges to federal statutes under the Guarantee Clause, see New York, *505* U.S. at 183, it has not done so yet. *Id.* at

185-86. "The Supreme Court traditionally has held that claims brought under the Guarantee Clause are nonjusticiable political questions." *Padavan, 82* F.3d at 28. That is both because it is a "legislative duty to determine the political question involved in deciding whether a state government republican in form exists" and not a judicial one, *Pacific States Telephone & Telegraph Co. v. State of Oregon, 223* U.S. 118, 150 (1912), and because the clause contains no "'judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker v. Carr, 369* U.S. 186, 223 (1962); see *also City of Rome v. United States, 446* U.S. 156, 182 n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable"); *Colgrove v. Green, 328* U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts").

Assuming that a claim can be maintained under the Guarantee Clause at all, it is unclear what a plaintiff would have to prove to prevail. Ironically, the very member of the founding generation quoted in the City's brief -- John Adams -- "insisted that he 'never understood what the guarantee of republican government meant, and added: 'I believe no man ever did or ever will.'" *Risser v. Thompson, 930* F.2d 549, 553 (7th Cir. 1991) (quoting John Adams in William Wiecek, *The Guarantee* Clause *of the U.S. Constitution* 13 (1972)). At a minimum, a claimant must demonstrate a "realistic risk of altering the form or method of functioning" of state government. New *York,* 505 U.S. at 186; see also *Kelley,* 69 F.3d at 1511 (Clause reaches only "fundamental restructuring of the form of state governments"); *Risser, 930* F.2d at

553 (Clause reaches exchanging of republican for anti-republican constitutions). The City acknowledges this by quoting Professor Laurence Tribe's *American Constitutional* Law for the proposition that the Guarantee Clause may prohibit "federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves." Br. at 48-49 (emphasis in original) (quoting Laurence Tribe, *American Constitutional Law* § *5-23,* at 397 (2d ed. 1988)).

In this case, the City's complaint does not. allege, and the City does not claim on appeal, that Sections 434 and 642 work a structural alteration of its government. See JA 17-18; Br. at 49. Rather, the City simply reads the safeguards offered by the Guarantee Clause to be duplicative of those offered by the Tenth Amendment, and assumes that its claim under the latter makes out a claim under the former. Moreover, even if the City had alleged that its form is restructured by the challenged sections, the district court was still correct to dismiss the claim because Sections 434 and 642 do not affect, or even purport to reach, the form or structure of City government.

CONCLUSION

The order of the district court should be affirmed.

Dated: New York, New York
December 24, 1997

Respectfully submitted,

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MARTIN J. SIEGEL

BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa.*

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno,* 179 F.3d 29 (2d Cir. 1999).

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In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a $60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for $150 million, winning a $43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

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Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of Litigation, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

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Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas*. The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).

- *City of New York and Rudolph Giuliani v. United States and Janet Reno*. New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.

- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for $150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him $43 million in compensation. Case No. AAA 70 180 00648 02.

- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

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Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert,* summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).

- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).

- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala*. Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

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light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).

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