IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NEW JERSEY; PHILIP D. MURPHY, in his Official Capacity as Governor of New Jersey; GURBIR S. GREWAL, in his Official Capacity as Attorney General of New Jersey, Defendants.	**No. 20-cv-1364-FLW-TJB** Motion Date: July 20, 2020

[PROPOSED] BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Executive and Legislative Materials

Other

INTRODUCTION AND INTEREST OF *AMICI* STATES

The District of Columbia and the States of California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington (collectively, "*Amici* States") file this brief as *amici curiae* in support of the defendants' motion to dismiss the complaint. Millions of immigrants, both legal and undocumented, call *Amici* States home. Immigrant communities play an important role not just in civic and economic life, but also in the criminal justice system, where their trust and cooperation are vital to ensuring public safety. With the paramount goal of promoting public safety for all residents, *Amici* States have adopted different approaches to policing based on state and local needs, enforcement priorities, and available resources.

For example, the States of California, Connecticut, Illinois, Massachusetts, New Mexico, New York, Oregon, Vermont, and Washington have enacted or are considering enacting laws that limit state and local law enforcement officers' involvement with federal immigration enforcement. *See* Nat'l Conference of State Legislatures, *Sanctuary Policy FAQ* (June 20, 2019).[1] Likewise, the Council of the District of Columbia is currently considering a bill that would limit District officials from cooperating with federal immigration agencies absent a judicial warrant or order. B23-501, 23rd Council (D.C. 2019). These measures reflect the considered

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[1] *Available at* https://tinyurl.com/ncsl-faq.

judgment of state lawmakers, who have reasonably determined that the "erosion of trust" that occurs when state and local police officers engage in federal immigration enforcement "makes the entire community more vulnerable because people are fearful of reporting crimes, coming out as witnesses, or reporting domestic violence abuses." Silva Mathema, Ctr. for Am. Progress, *Keeping Families Together* 6 (Mar. 16, 2017);[2] *see* S.B. 54, 2017-2018 Reg. Sess. § 3(b), (c) (Cal. 2017) (finding that the "trust between California's immigrant community and state and local agencies" is "threatened when state and local agencies are entangled with federal immigration enforcement").

So, too, New Jersey determined that disentangling state and local law enforcement from federal immigration enforcement would best serve the needs of its residents. N.J. Attorney General Law Enforcement Directive No. 2018-6, at 2 (revised Sept. 27, 2019) ("Directive") (stating that the Directive "seeks to ensure effective policing, protect the safety of all New Jersey residents, and ensure that limited state, county, and local law enforcement resources are directed towards enforcing the criminal laws of this state").[3]

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[2] *Available at* https://tinyurl.com/keep-families.

[3] Because the Attorney General of New Jersey "is the highest law enforcement officer in the State" and "is charged with adopting guidelines, directives and policies that bind local police departments," courts in this district have determined that directives like the one here "carr[y] the force of law" and "compel[] local police

By challenging New Jersey's authority to implement the Directive, this lawsuit threatens the sovereign interests of all *Amici* States. Specifically, *Amici* States rely on their historic police powers to implement policies that maintain trust, facilitate cooperation, and protect all residents by promoting positive relationships between law enforcement officers and the communities they serve. Recent studies confirm that there are public safety and economic benefits to disentangling local law enforcement from federal immigration enforcement. Thus, the Directive is an appropriate exercise of New Jersey's sovereign authority and does not conflict with the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, or any other federal law. Further, any interpretation of federal law that would require New Jersey law enforcement officers to assist with federal immigration enforcement in ways limited by the Directive would violate the anticommandeering rule of the Tenth Amendment. Based on these concerns, *Amici* States offer their perspective here in order to protect their sovereign authority to prescribe law enforcement policies that best serve their residents.

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departments to conform to [their] standards." *D.O. v. Borden*, 804 F. Supp. 2d 210, 217 (D.N.J. 2011) (internal quotation marks omitted).

ARGUMENT

I. The Directive Does Not Stand As An Obstacle To The Implementation Of Federal Immigration Law.

Under the doctrine of obstacle preemption, federal law impliedly preempts state law when the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The possibility of implied preemption, however, "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," for "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion) (internal quotation marks omitted). Rather, courts impose a "high threshold" for "a state law [] to be preempted for conflicting with the purposes of a federal Act." *Id.* (internal quotation marks omitted).

In this case, the United States contends that federal law preempts two provisions of the Directive. First, the Directive instructs that, subject to certain exceptions, "no state, county, or local law enforcement agency shall provide" "notice of a detained individual's upcoming release from custody" to "federal immigration authorities when the sole purpose of that assistance is to enforce federal civil immigration law." Directive § II.B.5. Second, the Directive provides that

> State, county, and local law enforcement agencies and officials shall promptly notify a detained individual, in writing and in a language the individual can understand, when federal civil immigration authorities request:
>
> 1. To interview the detainee.
> 2. To be notified of the detainee's upcoming release from custody.
> 3. To continue detaining the detainee past the time he or she would otherwise be eligible for release.

Directive § VI.A (citations omitted). The United States asserts that these provisions obstruct federal immigration enforcement in New Jersey because they "prohibit[] or restrict[] basic cooperation with federal officials." Compl. ¶ 28. But the United States fails to meet the high threshold necessary to establish that Congress intended to require state and local law enforcement agencies to assist federal immigration officials in the manner prohibited by the Directive.

A. Federal law preempts laws like the Directive only if that was the "clear and manifest purpose" of Congress.

Where obstacle preemption is at issue, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). In our federalist system of concurrent state and federal sovereignty, "there is a strong presumption against preemption in areas of the law that States have traditionally occupied." *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016). "For that reason, all preemption cases 'start

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Since the States "entered into the Union," their "highest duty" has been "to protect all persons within their boundaries in the enjoyment of the[] unalienable rights" of "life and personal liberty." *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (internal quotation marks omitted). It follows that state and local governments are in the best position to determine how to allocate limited resources to best serve the public safety needs of their communities. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 334 (3d Cir. 2009) ("Health and safety issues have traditionally fallen within the province of state regulation."). Thus, "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

In this way, the Directive falls squarely within New Jersey's historic police power. *See, e.g.*, *City of Chicago v. Barr*, Nos. 18-2885, 19-3290, 2020 WL

3037242, at *6 (7th Cir. June 4, 2020) ("Chicago, in deciding that its law enforcement needs would be better met if its undocumented residents could report crimes and communicate with its police force without fear of immigration consequences, is exercising its police power—an area of power long recognized as resting with the states."). New Jersey Attorney General Grewal determined that the federal government's increasing reliance on state and local law enforcement agencies to enforce federal immigration law "presents significant challenges to New Jersey's law enforcement officers, who have worked hard to build trust with [the] state's large and diverse immigrant communities." Directive at 1. For example, the Directive explains, "individuals are less likely to report a crime if they fear that the responding officer will turn them over to immigration authorities." *Id.* "This fear," in turn, "makes it more difficult for officers to solve crimes and bring suspects to justice, putting all New Jerseyans at risk." *Id.*

Substantial evidence supports these findings. Broadly, "[i]mmigrants, and especially undocumented immigrants, are highly vulnerable to violence, abuse, and exploitation." Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 Ann. Rev. L. & Soc. Sci. 141, 146-47 (2012). Immigrant communities "often consist[] of a mixture of legal and illegal residents," such that legal immigrants who do not personally fear deportation "may have strong concerns about the other members of the household—perhaps their own parents."

David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 Rutgers L.J. 1, 39-40 (2006). Indeed, a 2010-2014 survey found that about 8.2 million U.S. citizens were living in the same household as at least one undocumented family member. Mathema, *supra*, at 2. Consequently, the "[f]ailure to maintain trust and open lines of communication" between law enforcement and the communities they serve "results in an unwillingness to cooperate or share information." Danyelle Solomon et al., Ctr. for Am. Progress, *The Negative Consequences of Entangling Local Policing and Immigration Enforcement* 3 (Mar. 21, 2017).[4] Empirical evidence confirms that residents of immigrant communities "are less likely to communicate with law enforcement if they believe officers will question their immigration status or that of people they know." *Id.*; *see infra* pp. 15-17.

Federalism, the Supreme Court has explained, "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). Because "50 different States[,] instead of one national sovereign," control the police power, "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567

[4] *Available at* https://tinyurl.com/negative-conseq.

U.S. 519, 536 (2012). In a "nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential." Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1574 (1994); *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society . . . ."). For these reasons, "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory*, 501 U.S. at 460).

B. The United States has not demonstrated Congress' "clear and manifest purpose" to override the historic right of state and local governments to limit their assistance with federal immigration enforcement.

The United States has not met the high threshold of demonstrating that Congress' "clear and manifest purpose," *Sikkelee*, 822 F.3d at 687, was to preempt state laws like the Directive. Although the United States asserts several arguments for preemption, none of them has merit.

First, the United States submits that the Directive conflicts with federal law because the INA "contemplates that removable aliens who violate state law will be taken into state custody and complete their state sentences before being detained" by federal immigration authorities, Compl. ¶ 29 (citing 8 U.S.C. §§ 1226(c),

1231(a)(4)), but the Directive prohibits state and local authorities from notifying federal immigration authorities when a detained individual will be released from custody, Directive § II.B.5. However, "the various statutory provisions to which the United States points direct *federal* activities, not those of state or local governments." *United States v. California*, 921 F.3d 865, 887 (9th Cir. 2019) (holding that the INA did not preempt a California law limiting state and local law enforcement officers' cooperation with federal immigration authorities), *cert. denied*, No. 19-532, 2020 WL 3146844 (June 15, 2020). Indeed, "nothing in the federal regulatory scheme requir[es] States to alert federal agents before releasing a state or local inmate." *Id.* (internal quotation marks omitted). Nor is there any evidence that, by deferring federal immigration enforcement until after completion of a state sentence, Congress intended to require the States' reciprocal assistance. By prohibiting state and local officers from communicating release date information, the Directive does nothing to obstruct federal immigration authorities' ability to detain individuals formerly held in state or local custody. Federal immigration authorities maintain the ability to determine release dates by consulting publicly available information, such as the New Jersey Department of Corrections' inmate search page.[5]

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[5] *See* N.J. Dep't of Corrections, Offender Search Form, https://tinyurl.com/nj-doc-search (last visited June 23, 2020).

Similarly, the United States contends that the Directive "further conflicts with federal law by forbidding state, county, and local law enforcement officials from communicating with federal immigration officials about transfers of detained aliens to federal custody." Compl. ¶ 30. The United States also alleges that the Directive's notification requirements "serve to alert aliens" that immigration officials "may be interested in detaining them," thereby "thwarting DHS's ability to take such aliens into custody." Compl. ¶ 32. However, the United States does not identify any requirement imposed by federal law with which these provisions conflict. In fact, the notification requirements are consistent with the Department of Homeland Security's ("DHS") own requirement that a law enforcement agency provide notice to a detainee that DHS "intends to assume custody" after he "otherwise would be released." Dep't of Homeland Security, Form I-247A, at 2 (Mar. 2017).[6] Because "it is a state's historic police power—not preemption—that we must assume, unless clearly superseded by federal statute," the United States has not made the requisite showing for obstacle preemption. *California*, 921 F.3d at 887.

Nor do the provisions of the INA that authorize state cooperation with federal immigration enforcement demonstrate that Congress intended for such cooperation to be mandatory. *See, e.g.*, 8 U.S.C. § 1357(g)(10)(B) (authorizing a State or

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6 *Available at* https://tinyurl.com/dhs-i-247a.

political subdivision "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"); *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018) ("Section 1357 does not require cooperation at all."). If anything, provisions that permit voluntary state cooperation underscore Congress' understanding that such cooperation should not, and indeed cannot, be mandated. *See Printz v. United States*, 521 U.S. 898, 917-18 (1997) (recognizing "two centuries of apparent congressional avoidance of the practice" of "requir[ing] the participation of state or local officials in implementing federal regulatory schemes"); *California*, 921 F.3d at 891 (reasoning that "the federal government was free to *expect* as much [cooperation with federal immigration authorities] as it wanted, but it could not *require* California's cooperation without running afoul of the Tenth Amendment").

The United States repeatedly asserts that the Directive makes it more "difficult and dangerous" for federal officers to arrest individuals for civil immigration offenses. Compl. ¶¶ 31-32. But "that would be the case *regardless* of" the Directive, since New Jersey "would still retain the ability to 'decline to administer the federal program.'" *California*, 921 F.3d at 889 (quoting *New York*, 505 U.S. at 177). As the Ninth Circuit held, "[f]ederal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities." *Id.* Consequently, although the Directive "may well frustrate the government's immigration

enforcement efforts," "that frustration is permissible" because New Jersey "has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts." *Id.* at 890-91; *see infra*, pp. 21-26.

C. States like New Jersey have reasonably exercised their historic police powers to disentangle local law enforcement from federal immigration enforcement.

States like New Jersey have reasonably concluded that disentangling local law enforcement from federal immigration enforcement improves public health and safety. On this record, the Court should not presume lightly that Congress intended to preempt states' well-reasoned, empirically based decisions governing law enforcement activities. *See, e.g.*, *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 545 (1979) (plurality opinion) (explaining that "a State's power to fashion its own policy . . . is not to be denied on the basis of speculation about the unexpressed intent of Congress").

"The push to involve local police in federal immigration enforcement" emerged in the 1990s and "intensified after the September 11th terrorist attacks." Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. Rev. 1703, 1722 (2018). "By far, the most frequent and impassioned objection" to this new push "came from state and local police concerned [about] their own effectiveness." Harris, *supra*, at 37. Police officers "wanted no part of immigration

enforcement because they knew that taking on this task would undermine their ability to keep the public safe." *Id.*

In 2006, a group of police chiefs and sheriffs from the 69 largest law enforcement agencies in the United States issued a statement warning that "[i]mmigration enforcement by local police would likely negatively [a]ffect and undermine the level of trust and cooperation between local police and immigrant communities." Major Cities Chiefs Ass'n, *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 6 (June 2006).[7] The police chiefs reasoned that local involvement in federal immigration enforcement would discourage both legal and undocumented immigrants from contacting or cooperating with the police for "fear that they themselves or undocumented family members or friends may become subject to immigration enforcement." *Id.* Further, the police chiefs cautioned that "[w]ithout assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear." *Id.* These changes would "result in increased crime against immigrants and[,] in the broader community, create a class

[7] *Available at* https://tinyurl.com/MCC-rec.

of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts." *Id.*

Over time, these predictions have proven accurate. A 2013 study by the University of Illinois at Chicago found that "the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police," which, "in turn, has led to a reduction in public safety." Nik Theodore, Dep't of Urban Planning & Pol'y, Univ. of Ill. at Chi., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 18 (2013).[8] Forty-four percent of survey respondents stated that they were "less likely to contact police officers if they have been the victim of a crime" or "to voluntarily offer information about crimes" "because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know." *Id.* at 6. As predicted, "this fear [wa]s not confined to immigrants; 28 percent of US-born Latinos expressed the same view." *Id.*

Further, as immigration arrests in 2017 "soared by 30 percent from the 2016 fiscal year," a national survey of police officers correspondingly "reported the most dramatic drop in outreach from and cooperation with immigrant and limited English

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[8] *Available at* https://tinyurl.com/insecure-comm.

proficiency [] communities over the past year." ACLU, *Freezing Out Justice* 1 (2018).[9] Specifically, police officers "reported that immigrants were less likely in 2017 than in 2016 to be willing to make police reports," "help in investigations," or "work with prosecutors." *Id.* As a result, law enforcement officials reported that crimes such as domestic violence, human trafficking, and sexual assault "have become more difficult to investigate." *Id.* Further, police officers reported that this "lack of trust and cooperation" had adverse impacts on "their ability to protect crime survivors" and on "officer safety." *Id.*

These trends have also played out in jurisdictions across the country with large immigrant populations, which have seen a steep drop in crime reporting over the past several years. In the first three months of 2017, the Houston Police Department reported "a 13 percent decrease in violent crime reporting by Hispanics," including a "43 percent drop in the number of Hispanics reporting rape and sexual assault." Lindsey Bever, *Hispanics 'Are Going Further into the Shadows' Amid Chilling Immigration Debate, Police Say*, Wash. Post (May 12, 2017).[10] Similarly, the Los Angeles Police Department reported "a nearly 10 percent drop from [2016] in the reporting of spousal abuse and a 25 percent drop in the reporting of rape." *Id.* The department concluded that "deportation fears may be preventing Hispanic members

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9 *Available at* https://tinyurl.com/freezing-out (download report).

10 *Available at* https://tinyurl.com/further-shadows.

of the community from reporting when they are victimized." Lasch et al., *supra*, at 1762 (internal quotation marks omitted). From January through May 2017, relative to the same period in 2016, the Salt Lake City Police Department "received 12.9 percent fewer reports of criminal activity in Latino neighborhoods," as compared with only 1.4 percent fewer reports citywide. Randy Capps et al., Migration Pol'y Inst., *Revving Up the Deportation Machinery: Enforcement and Pushback Under Trump* 69 (May 2018).[11]

Local prosecutors' offices likewise reported significant reductions in crime reporting by immigrants. Between December 2016 and May 2017, the Nassau County, New York District's Attorney's Office of Immigrant Affairs, which "typically receive[d] up to ten calls each week" to its tip line for crime victims, "received no calls." N.Y. State Office of the Attorney General et al., *Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement: The Facts and The Laws* 17 (May 2017).[12] Similarly, the Montgomery County, Maryland special victims investigations division, "which has a significant immigrant population, received approximately one-half the volume of calls for sexual assault and domestic violence" in the first half of 2017 as it did in the same period in 2016. *Id.*

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11 *Available at* https://preview.tinyurl.com/revving-up (download report).

12 *Available at* https://tinyurl.com/record-straight.

New fears about immigration enforcement have also affected public health, as immigrants have been reluctant to enroll in healthcare programs and to seek treatment when they are sick. *See, e.g.*, Alexia Elejalde-Ruiz, *Fear, Anxiety, Apprehension: Immigrants Fear Doctor Visits Could Leave Them Vulnerable to Deportation*, Chi. Trib. (Feb. 22, 2018);[13] Kelli Kennedy, *Deportation Fears Have Legal Immigrants Avoiding Health Care*, Assoc. Press (Jan. 21, 2018).[14] For example, the Migrant Clinicians Network reported that 65 percent of health care providers surveyed saw a change in 2017 "in immigrant or migrant patients' attitudes . . . toward health care access," with most providers citing "an increase in fear among their patients that drives them to avoid care." Claire Hutkins Seda, *Taking a Pulse: Clinician Poll on Migrant and Immigrant Patient Care*, Migrant Clinicians Network (Mar. 14, 2018).[15] Similarly, "[i]n Los Angeles, a large community-based provider reported a 20 percent reduction in health-care visits in May 2017, by likely unauthorized immigrants." Capps et al., *supra*, at 69. In Houston, local governments indicated that "fewer Latino immigrants were participating in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) as well as preventive check-ups and health screenings in public

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13 *Available at* https://tinyurl.com/fear-doctor-visits.

14 *Available at* https://tinyurl.com/avoiding-health-care.

15 *Available at* https://tinyurl.com/taking-pulse.

health clinics." *Id.* at 69-70. Further, "Texas Children's Hospital also noted a drop in the number of low-income Latino patients," while several Houston clinics "reported a more than 50 percent drop in unauthorized [immigrant] patients" in late 2017. *Id.* at 70.

By contrast, several recent studies have found that jurisdictions that limit local law enforcement officers' assistance with federal immigration enforcement confer benefits on their communities, such as lower crime rates than jurisdictions without such laws. The Center for American Progress compared annual crime statistics of demographically matched counties and found that the welcoming counties experienced an average of 35.5 fewer crimes per 10,000 people than non-welcoming counties. Tom K. Wong, Ctr. for Am. Progress, *The Effects of Sanctuary Policies on Crime and the Economy* 6 (Jan. 26, 2017).[16] The most pronounced difference was in large central metropolitan counties, which experienced 65.4 fewer crimes per 10,000 people than comparable counties that do not limit assistance with federal immigration enforcement. *Id.* Similarly, a study by the Center on Juvenile and Criminal Justice found that white residents of urban welcoming counties were "33 percent less likely to die from [] violent causes, 53 percent less likely to be a victim of homicide, and 62 percent less likely to die from gun violence than white residents

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16 *Available at* https://tinyurl.com/effects-crime-econ (download PDF).

of" urban non-welcoming counties. Mike Males, Ctr. on Juvenile & Crim. Justice, *White Residents of Urban Sanctuary Counties are Safer from Deadly Violence than White Residents in Non-Sanctuary Counties* 2 (Dec. 2017).[17] Likewise, non-white residents "generally ha[d] lower violent death rates" in urban welcoming counties than in urban non-welcoming counties. *Id.*

There is also evidence that jurisdictions that limit local law enforcement officers' assistance with federal immigration enforcement have stronger economies than jurisdictions without such laws. The Center for American Progress found that "the labor force participation rate is, on average 2.5 percent higher" and "the unemployment rate is, on average, 1.1 percent lower" in welcoming counties than in non-welcoming counties. Wong, *supra*, at 8, 10. The study also found that the "median household income is, on average, $4,352.70 higher" and that the percentage of people living "at or below the federal poverty line is, on average, 2.3 percent lower" in welcoming counties than in non-welcoming counties. *Id.* at 7-8.

Under their traditional and historic police power, the States "have broad authority to enact legislation for the public good." *Bond*, 572 U.S. at 854. Many states have concluded, based on empirical studies, expert analysis, and anecdotal evidence, that laws like the Directive promote public health and safety. In this case,

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[17] *Available at* https://tinyurl.com/cjcj-report.

the United States has not met the "high threshold" needed to establish that Congress' "clear and manifest purpose" was to preempt such local laws.

II. Alternatively, Interpreting The INA To Preempt The Directive Would Amount To Unconstitutional Commandeering.

Even if the INA could be read to preempt the Directive, such an interpretation "runs directly afoul of the Tenth Amendment and the anticommandeering rule." *California*, 921 F.3d at 888; *see Galarza v. Szalcyzk*, 745 F.3d 634, 645 (3d Cir. 2014) (concluding that immigration detainers should not be interpreted as mandatory orders to local law enforcement officials because of the "potential constitutional problem" with such interpretation). The anticommandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Commandeering, even in "modest forms," "undermine[s] federalism by undercutting a state's ability to pursue its own policies." John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 119 (2004). Accordingly, the anticommandeering doctrine "establishes an absolute rule that permits no balancing." Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 Rutgers U. L. Rev. 1553, 1572 (2017); *see Printz*, 521 U.S. at 935 (stating that "no case-by-case weighing of the burdens or benefits is necessary" for a commandeering challenge). The Supreme Court has

made clear that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935.

If the INA preempts the Directive in the way contemplated by the United States, it will create the very harms the anticommandeering rule aims to prevent. The rule "promotes political accountability" by making it clear to voters "who[m] to credit or blame" for governmental action. *Murphy*, 138 S. Ct. at 1477; *see New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated."). Indeed, state and local governments often enact laws like the Directive specifically because they "want to signal" to their "local constituencies that they are not working together [with the federal government] to the same end of immigration law enforcement." Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1380 (2006) (internal quotation marks omitted).

Like other jurisdictions, New Jersey expressed this exact concern in the Directive, reasoning that "state, county, and local law enforcement officers" should "be mindful that providing assistance above and beyond" the requirements imposed by law "threatens to blur the distinctions between state and federal actors and between federal immigration law and state criminal law." Directive at 1-2; *see* S.B. 54 § 3(d) ("Entangling state and local agencies with federal immigration

enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments."). If Congress prohibits these jurisdictions from limiting their assistance with immigration enforcement, it effectively forces them "to advance objectionable . . . federal policies," and "there is a real danger that citizens will denounce the [state] official for being complicit in federal law enforcement." Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. Pa. L. Rev. 103, 130 (2012).

The anticommandeering rule also "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477; *see Printz*, 521 U.S. at 930 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."). Preempting the challenged provisions of the Directive, however, would impose just such a burden on state and local governments. *See, e.g.*, *Galarza*, 745 F.3d at 644 (reasoning that "the command to detain federal prisoners at state expense is exactly the type of command that has historically disrupted our system of federalism"). "States and localities assume the costs of federal immigration policy when," for example, they enforce detainers, transfer detainees to the custody of immigration officials, and defend against litigation arising out of wrongful detentions. Kate Evans, *Immigration Detainers, Local Discretion, and State Law's*

Historical Constraints, 84 Brook. L. Rev. 1085, 1105 (2019); *see* Solomon et al., *supra*, at 5 (observing that the "proliferation" of policies limiting local law enforcement officers' assistance with federal immigration enforcement "can be traced, in part, to a growing body of lawsuits that have resulted in court judgments and hefty settlements").

Information sharing can also be costly. State and local governments "gather massive quantities of information detailing the activities they regulate," including their interactions with immigrant communities. Mikos, *supra*, at 105. This information-gathering is "essential to good governance" because "regulators need information to draft prudent regulations, to study their effects, and . . . to observe and enforce compliance." Bell, *supra*, at 1561 (internal quotation marks omitted). Yet the "threat of commandeering" imposes additional costs by "mak[ing] it more difficult for states to gather information in the first instance." Mikos, *supra*, at 121. "When a government holds personal information regarding an individual and needs to offer assurances of confidentiality to obtain it, that government has a special need to keep such information confidential." Bell, *supra*, at 1575. This need is particularly acute for law enforcement, which "frequently depend[s] on cooperation from private citizens—crime victims, witnesses, etc.," who "may be less forthcoming . . . if the information they give to state agents is turned over to federal law enforcement." Mikos, *supra*, at 123; *see* Bell, *supra*, at 1591 ("Potential sharing

of information with federal immigration authorities is likely to lead to a significantly increased reluctance to share the information with state and local officials.").

When immigrants are less willing to share information, states must "employ more government agents" to investigate, which "forces them to absorb some of the financial costs of enforcing federal law that should be borne by the federal government instead." Mikos, *supra*, at 126, 160. States that do not, or cannot, expend those additional resources must bear the costs associated with a rise in crime. Aaron Chalfin & Justin McCrary, *The Effect of Police on Crime: New Evidence from U.S. Cities, 1960-2010*, at 42 (Nat'l Bureau of Econ. Research, Working Paper No. 18815, 2013) (estimating that crime costs residents of high-crime cities anywhere from 5 to 34 percent of their annual income);[18] *see* Wong, *supra*, at 7-8 (finding that median household income is statistically significantly higher in welcoming counties). Thus, "special solicitude is particularly appropriate" when the federal government's demand for state-held information "interferes with states' and localities' efforts to provide basic services pursuant to their policies." Bell, *supra*, at 1571.

By striking a "healthy balance of power between the States and the Federal Government," the anticommandeering rule reduces "the risk of tyranny and abuse

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[18] *Available at* https://tinyurl.com/effect-police-crime.

from either front." *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 181-82). To that end, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577 (quoting *New York*, 505 U.S. at 162); *see Galarza*, 745 F.3d at 644 ("As in *New York* and *Printz*, immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme."). Laws like the Directive take reasonable steps to disentangle local law enforcement from federal immigration enforcement in order to conserve resources and preserve the trust between state and local governments and the immigrant communities they serve. The Constitution guarantees New Jersey and *Amici* States the sovereign "right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts." *California*, 921 F.3d at 891.

CONCLUSION

The Court should grant the defendants' motion to dismiss.

Respectfully submitted,

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