

AMERICAN CIVIL LIBERTIES UNION  
OF NEW JERSEY FOUNDATION

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

UNITED STATES OF AMERICA,

*Plaintiff,*

- against -

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 the  
State of New Jersey,

*Defendants.*

Civil Action No.:

3:20-CV-1364-FLW-TJB

**[PROPOSED] BRIEF OF 41 COMMUNITY ORGANIZATIONS AS *AMICI  
CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## INTEREST OF AMICI CURIAE

Proposed *amici curiae* are 41 organizations that represent or advocate on behalf of a wide range of New Jersey communities, including immigrant communities, women, religious communities, law enforcement professionals, parents, youth, survivors of domestic violence and sexual assault, HIV-positive individuals, workers, individuals identifying as LGBTQ+, and survivors of detention and isolated confinement. *Amici* are united in their strong belief that the Immigrant Trust Directive is a lawful policy that benefits all New Jerseyans.

## INTRODUCTION

When Attorney General Gurbir S. Grewal issued the Immigrant Trust Directive in 2018, he recognized a truth that *amici* and the communities they represent have long understood: all New Jerseyans are safer when the State uses its limited resources to keep our communities safe, rather than helping the federal government deport people. This is especially true now, when New Jerseyans are simultaneously facing a deadly pandemic and grappling with issues fundamental to the role of police in our communities, including transparency, accountability, and systemic racism. Below, drawing on both individual experiences and collective data, *amici* explain why this policy is so critical to the safety and well-being of our residents.

Turning to the legal theories advanced by the federal government, not only are its preemption claims contrary to the statutory text, but they are foreclosed by the basic principles of federalism enshrined in the United States Constitution. The United States' intergovernmental immunity argument is likewise unsupported. New Jersey is a sovereign state with its own democratically elected government, laws, and law enforcement entities. Any federal statute that would prevent the New Jersey Attorney General from issuing the Immigrant Trust Directive, thus forcing this State to use its own resources to implement federal programs that interfere with state policy goals, would violate the Tenth Amendment's prohibition on federal commandeering of state authority and resources.

## ARGUMENT

### **I. The Immigrant Trust Directive Promotes Public Safety, Health, and Well-Being for All New Jerseyans.**

New Jersey is a state of immigrants. Nearly one in four New Jerseyans was born abroad, and one in every six state residents was born in the United States with at least one immigrant parent.<sup>1</sup> In 2016, nearly five hundred thousand people in New Jersey were undocumented, while more than 600,000 New Jerseyans lived with an undocumented family member between 2010 and 2014. *Id.* No system

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<sup>1</sup> American Immigration Council, *Immigrants in New Jersey* (June 2020), available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_new\\_jersey.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_new_jersey.pdf).

intended to promote public safety in our state can afford to ignore the needs and experiences of immigrant communities.

As advocates for diverse communities across New Jersey, *amici* have learned that when state and local officers engage in or support federal immigration enforcement, this strongly discourages immigrants and their loved ones from engaging with police and other government services. *See infra* §§ I(A)-(B). This threatens the safety and health of *all* New Jerseyans: local law enforcement agencies cannot prevent or investigate acts of violence when individuals do not feel safe seeking their assistance; individuals suffer abuse silently when they do not feel they can trust social services agencies intended to help them; and public health management cannot be effective when families fear that accessing public health services will lead to deportation and separation. State and local collaboration with federal immigration enforcement also burdens New Jersey budgets, while opening the door to racial discrimination and chilling the exercise of First Amendment rights. *See infra* §§ I(C)-(D). Law Enforcement Directive No. 2018-6, commonly known as the Immigrant Trust Directive (“the Directive”), was designed to protect public safety by minimizing this fear and mistrust. The Directive aims to accomplish this by drawing clear lines “between state, county, and local law enforcement officers, who are responsible for enforcing *state criminal law*, and federal immigration authorities, who enforce *federal civil*

*immigration law.*” State of New Jersey, Attorney General Law Enforcement Directive No. 2018-6 v2.0 (hereinafter “Dir. No. 2018-6”), at 1 (emphasis in original).<sup>2</sup>

Prior to the Immigrant Trust Directive, the lines between local law enforcement and federal immigration authorities were blurred because New Jersey permitted state and local law enforcement agencies to provide substantial assistance to Immigration and Customs Enforcement (“ICE”). For instance, New Jersey officers could ask many individuals about their immigration status. Indeed, when conducting an arrest for any indictable offense they were *required* to do so, and to notify ICE if they found “reason to believe” the person was unlawfully present in the United States. *See* State of New Jersey, Attorney General Law Enforcement Directive No. 2007-3.<sup>3</sup> There was also no bar on New Jersey officers honoring ICE requests, known as “detainers,” to hold individuals in state prisons or local jails beyond their otherwise-applicable release times. Likewise, there were no limitations on localities allowing ICE officers to access their facilities and other resources, nor on their ability to share New Jerseyans’ personally identifiable information with ICE.

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<sup>2</sup> Available at [https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6\\_v2.pdf](https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf).

<sup>3</sup> Available at [https://www.nj.gov/oag/dcj/agguide/directives/dir-le\\_dir-2007-3.pdf](https://www.nj.gov/oag/dcj/agguide/directives/dir-le_dir-2007-3.pdf). The Immigrant Trust Directive repealed and superseded Directive 2007-3. Dir. No. 2018-6 at 3.

With the Immigrant Trust Directive, Attorney General Grewal created a greater distinction between the roles of New Jersey’s law enforcement agencies and federal immigration authorities. Under the Directive, New Jersey officers generally may not inquire about immigration status unless doing so is necessary and relevant to an ongoing criminal investigation. Dir. No. 2018-6 § II(A)(2). They are limited in their ability to honor detainers, although the Directive still permits this practice for individuals charged with certain crimes. *Id.* § II(B)(6). The Directive also requires that ICE will generally not be permitted to access non-public state and local property or equipment, or to interview people in state or local custody without their consent. *Id.* §§ (II)(B)(3)–(4). With limited exceptions, the Directive requires New Jersey officers not to share individuals’ release dates and personally identifiable information with ICE, *id.* § II(B)(2), (5), but it expressly does not “restrict, prohibit, or in any way prevent” any officer from “[s]ending to, maintaining, or receiving from federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” *Id.* § II(C)(10) (citing 8 U.S.C. §§ 1373, 1644).

Thus, while the Immigrant Trust Directive still allows for some cooperation with ICE, particularly with regard to people convicted of certain crimes, it instructs New Jersey law enforcement officers to focus their efforts and resources on enforcing state and local law, rather than assisting ICE. Attorney General Grewal

made this change in an effort to “protect the safety of all New Jersey residents.” *Id.* at 2. Moreover, although the Directive addresses law enforcement agencies, its positive effects radiate far beyond policing because immigrant communities’ fear of local law enforcement also influences their willingness to trust other government services. *See infra* § I(B). For the reasons that follow, the Directive is a lawful and necessary policy to advance public safety and public health.

**A. The Immigrant Trust Directive Allows Immigrant New Jerseyans to Interact with Local Law Enforcement Without Constant Fear of Immigration Consequences.**

Mixing local law enforcement with federal immigration enforcement destroys trust between immigrant communities and local authorities. The Immigrant Trust Directive is a critical step toward empowering New Jerseyans to go about their daily lives – to complete simple tasks such as driving their kids to school, shopping, or visiting a doctor – without fear that an interaction with law enforcement could lead to permanent separation from their loved ones. It also allows New Jerseyans in need to seek protection or support from other state and local agencies without fear of deportation.

When the state allows ICE to direct law enforcement, even routine traffic stops can result in serious immigration consequences. For example, in June 2018 –

the same month advocates sued Newark for elevated lead levels in its water supply<sup>4</sup> – Daniel Castro’s fiancée asked him to pick up bottled water she needed to prepare their nine-month-old’s formula.<sup>5</sup> Daniel, a 28-year-old Newark resident with no criminal history who had lived in the United States since fleeing political violence in Nicaragua as a teenager, sat in the passenger seat while his fiancée’s father drove them home. After his fiancée’s father made an illegal U-turn, Newark Police officers pulled the two men over and asked for their identification. *See id.* Daniel’s interaction with the criminal justice system should have ended there, since the Newark Police did not charge him with any offense. Instead, Newark Police detained him based solely upon his immigration status. Without issuing any charges, the police turned him over to ICE custody, where he was detained and separated from his fiancée and U.S. citizen son. *See id.*

Blending local police work with immigration enforcement can also discourage survivors of intimate partner violence or sexual abuse from seeking help out of fear

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<sup>4</sup> *See, e.g.,* Marisa Iati, *Toxic Lead, Scared Parents and Simmering Anger: A Month Inside a City Without Clean Water*, Washington Post (Oct. 3, 2019), <https://www.washingtonpost.com/climate-environment/2019/10/03/toxic-lead-scared-parents-simmering-anger-month-inside-city-without-clean-water/>.

<sup>5</sup> Thomas E. Franklin, *Despite Newark’s Sanctuary City Status, Undocumented City Resident Turned Over to ICE*, TAP into Newark (Aug. 9, 2018), available at <https://www.tapinto.net/towns/newark/sections/government/articles/despite-newarks-sanctuary-city-status-undocumen>; *see also Newark Police Turn Over Undocumented Immigrant to ICE*, WNYC News (Aug. 12, 2018), available at <https://www.wnyc.org/story/newark-police-turn-over-undocumented-immigrant-ice/>.

that ICE will become involved. Experiences of New Jersey's immigrant communities prior to the Directive place this fear in context. In February 2018 in Passaic County, for example, police officers responded to a report of a domestic dispute involving a pregnant woman and her husband. The resulting interaction brought the woman to the attention of immigration authorities, and after being detained by local law enforcement for two days, she was transferred to federal immigration custody at the Essex County Correctional Facility. The woman suffered a miscarriage of her pregnancy shortly after she was released.<sup>6</sup>

When local officers are involved in immigration enforcement, undocumented residents also feel unable to contact the authorities to report crimes or serve as witnesses, out of fear that they will be deported. One mother living in Elizabeth, for example, contacted *amicus* Make the Road New Jersey prior to implementation of the Directive with an urgent problem: someone was threatening to kidnap her child. She asked whether it was safe for her to call the police, since she was undocumented.<sup>7</sup> This mother's crisis emphasizes how seriously many members of immigrant communities fear cooperation between local law enforcement and federal immigration enforcement – a fear so strong that a mother feels she must choose

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<sup>6</sup> Telephone Interview with Lauren Herman, Supervising Attorney, Make the Road New Jersey (Dec. 17, 2019). Case notes are on file with *amicus* Make the Road New Jersey.

<sup>7</sup> *Id.*

between reporting a threat against her child and protecting her family from deportation.

The data bear out these observations. One study conducted in four counties across the United States found that Latinos, regardless of immigration status, reported being less likely to volunteer information about crimes because they feared attracting unwanted law enforcement attention to their family or friends.<sup>8</sup> Seventy percent of undocumented respondents and 44 percent of Latino respondents, across all immigration statuses, reported that they would be less likely to communicate with law enforcement if they were victims of a crime out of fear that local officers would question their immigration status or the status of people they know. *Id.* at 5. Another study showed that in places with policies that allow for, or in some cases require, state or local immigration enforcement,<sup>9</sup> the rate of petitions submitted under the Violence Against Women Act – which creates a pathway for immigrant survivors of

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<sup>8</sup> Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 17, University of Illinois at Chicago (May 2013), available at [https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure\\_Communities\\_Report\\_FINAL.pdf](https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf).

<sup>9</sup> The study characterized these policies to include cooperative agreements between local or state law enforcement and federal immigration authorities, as well as state-wide omnibus immigration laws and employment verification mandates. See Catalina Amuedo-Dorantes and Esther Arenas-Arroyo, *Police Trust and Domestic Violence: Evidence from Immigration Policies*, IZA Institute of Labor Economics (Oct. 2019) at 8-10, 13-14, available at <http://ftp.iza.org/dp12721.pdf>.

domestic violence to leave abusive relationships and independently apply for lawful permanent resident status – decreased.<sup>10</sup>

Similarly, a 2017 national survey of prosecutors revealed that recent intensity in federal immigration enforcement and anti-immigrant sentiment resulted in decreased cooperation with law enforcement by immigrant victims of crimes, especially survivors of domestic violence, child abuse, and sexual assault.<sup>11</sup> In a 2019 survey of advocates across the country who represent immigrant victims of domestic and sexual violence, 76 percent of advocates reported that their immigrant survivor clients had concerns about contacting the police, and around 60 percent of advocates reported that their agencies observed an increase in immigration-related questions from clients.<sup>12</sup> In the same survey, 52 percent of advocates reported working with survivors who elected to drop their civil or criminal cases against a perpetrator out of fear. *Id.*

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<sup>10</sup> See Catalina Amuedo-Dorantes and Esther Arenas-Arroyo, *Police Trust and Domestic Violence: Evidence from Immigration Policies*, IZA Institute of Labor Economics (Oct. 2019) at 27, available at <http://ftp.iza.org/dp12721.pdf>.

<sup>11</sup> See Rafaela Rodrigues et al., *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* at 71-73, National Immigrant Women's Advocacy Project (May 3, 2018), available at <http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>.

<sup>12</sup> Tahirih Justice Center, *Survey of Advocates Reveals Immigrant Survivors Fear Reporting Violence*, (June 4, 2019), available at <https://www.tahirih.org/news/survey-of-advocates-reveals-immigrant-survivors-fear-reporting-violence/>.

The experiences of other localities are instructive. When Texas debated SB4, a law that required local law enforcement agencies to engage in immigration enforcement, Houston's police chief reported a 43 percent decrease in sexual assaults reported by Hispanic communities compared to the same time the previous year. City of Houston Complaint in Intervention and Declaration of Art Acevedo at 17, 51-52, *City of El Cenizo v. Texas*, No. 5:17-CV-00404-OLG (W.D. Tex. June 30, 2017), ECF No. 139. Although reports by non-Hispanic victims of rape and violent crime increased, reporting in Hispanic communities for violent crime dropped by 13 percent during the same period. *Id.* at ¶ 52. Shortly after an undocumented woman was arrested by ICE at a courthouse in El Paso, where she sought a protective order against an abusive partner, the city saw a 12 percent decrease in the number of people seeking protective orders.<sup>13</sup>

Without the Immigrant Trust Directive, New Jersey's immigrant communities would continue to fear that interactions with law enforcement – ranging from routine traffic stops to efforts to protect oneself from domestic violence – could result in deportations and family separations. The Directive thus allows immigrants and their families to live in greater security, and promotes public safety for all New Jerseyans.

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<sup>13</sup> Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, *The Guardian* (Mar. 23, 2017), available at <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

**B. The Directive Promotes Immigrant Communities’ Trust of Social Services and Health Programs, Improving Public Health.**

Immigrant communities’ level of trust in local law enforcement also affects how comfortable non-citizens are seeking help from other public services, including health care providers. The deep-rooted fear of deportation not only deters individuals who are themselves non-citizens from accessing social services, but discourages family members of non-citizens from seeking or accepting public services that are essential to health, education, and well-being.

For example, Karol Ruiz, an attorney in New Jersey who was undocumented as a child, has recounted how this fear prevented her from seeking protection from ongoing childhood sexual abuse. When Child Protective Services visited her family’s home, she did not report the abuse, “fearing that [her] family would be deported.”<sup>14</sup> If the Immigrant Trust Directive had existed when she was a child, Ms. Ruiz writes, she would have asked for help. *Id.* Now, she can advise her clients about the protections offered by the Directive. One of her young clients suffering sexual abuse, for example, refused to cooperate with mental health providers, “fearing deportation consequences for her mother.” *Id.* After Ms. Ruiz

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<sup>14</sup> Karol Ruiz, *To End Hate in N.J. We Can’t Ignore Policies that Support Immigrant Communities*, NJ.com (Aug. 18, 2019), available at <https://www.nj.com/opinion/2019/08/to-end-hate-in-nj-we-cant-ignore-policies-that-support-immigrant-communities.html>.

explained how the Directive could protect her mother, her client sought the help she needed. *Id.*

Local collaboration with federal immigration enforcement especially affects access to healthcare, in part due to historical alignment between public health officials and immigration authorities.<sup>15</sup> Researchers have found that immigrants are more reluctant to seek medical treatment when local law enforcement coordinate with federal immigration authorities, as discussed below, and that immigrants fear sharing their personal information with doctors, healthcare administrators, and other public service providers.<sup>16</sup>

Analyzing the effects of ICE's controversial Secure Communities program, which expanded collaborative immigration enforcement by local officers and ICE, a 2018 study observed a "trickle-down effect" on Latino individuals' trust toward "government-provided health information."<sup>17</sup> "U.S.-born and immigrant Latinos

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<sup>15</sup> See, e.g., Francisco Pedraza et al., *Cautious Citizenship: The Detering Effect of Immigration Issue Salience on Health Care Use and Bureaucratic Interactions Among Latino US Citizens*, 42 J. of Health Pol., Pol'y and Law 925, 930-36 (2017), available at <https://read.dukeupress.edu/jhpl/article/42/5/925/131418/Cautious-Citizenship-The-Detering-Effect-of> (reviewing historical examples of public health officials associating themselves with immigration authorities).

<sup>16</sup> See, e.g., Alexia Elejalde-Ruiz, *Fear, Anxiety, Apprehension: Immigrants Fear Doctor Visits Could Leave Them Vulnerable to Deportation*, Chicago Tribune (Feb. 22, 2018), available at <https://www.chicagotribune.com/business/ct-biz-immigration-fears-hurt-health-care-access-0225-story.html>.

<sup>17</sup> Vanessa Cruz Nichols et al., *Spillover Effects: Immigrant Policing and Government Skepticism in Matters of Health for Latinos*, 78 Public Admin Rev. 432, 440 (May/June 2018).

who live in counties where immigration policing under the [Secure Communities] program is the most intense are less likely to trust health information from government agencies than their Latino counterparts living in counties with lower levels of immigrant policing.” *Id.* Although Secure Communities was designed to be an immigration enforcement policy, it had “spillover effects” on public health policy, threatening public health in areas of heightened immigration enforcement.

Arizona’s infamous SB 1070 had a similar effect. The “show me your papers” law made it a state crime to be without immigration documents on one’s person and expanded local police power to question and detain persons suspected to be without lawful status. Health providers reported a drop in routine care including doctor visits, vaccinations, HIV education, and prenatal care as a result of the law.<sup>18</sup> Providers “noted dramatic changes in clinic intake and service use,” and public health services likewise observed a “definite change” that they attributed to fear of deportation. *Id.* The study even revealed immigrants’ reluctance to travel outside their neighborhoods for healthier food, as well as parents’ reluctance to allow their children to exercise outside their homes. *Id.* at 1251.

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<sup>18</sup> Lisa J. Hardy et al., *A Call for Further Research on the Impact of State-Level Immigration Policies on Public Health*, 102 Am. J. of Public Health 1250, 1252 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3477996/pdf/AJPH.2011.300541.pdf>.

A survey of healthcare providers and advocates in a Massachusetts city with a high immigrant population similarly revealed how fear of immigration arrests or deportations interrupted necessary medical care. After a large and highly-publicized raid in a nearby Massachusetts immigrant community, more than forty percent of surveyed medical providers included in the analysis indicated that the fear of immigration consequences had a negative impact on their immigrant patients, including interrupted healthcare.<sup>19</sup>

Immigrants' fear of engaging with healthcare providers not only negatively impacts individual health, it also presents an especially salient public health challenge during the COVID-19 pandemic, an extraordinary public health crisis in the state of New Jersey. As of June 24, 2020, the state reported 169,892 cases and 12,995 deaths from the virus.<sup>20</sup> New Jersey has experienced the third most confirmed cases and the second most deaths in the country from COVID-19.<sup>21</sup>

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<sup>19</sup> Karen Hacker et al., *Provider's Perspectives on the Impact of Immigration and Customs Enforcement (ICE) Activity on Immigrant Health*, 23 J. Health Care Poor Underserved 651, 655 (May 2012), available at <https://muse.jhu.edu/article/474046/pdf> (reporting missed well-child visits, reluctance to share true identities and personal information, and compulsion to remain "on the move" to evade ICE, thereby preventing long-term treatment).

<sup>20</sup> "New Jersey COVID-19 Dashboard," NJ Health (June 24, 2020), [https://www.nj.gov/health/cd/topics/covid2019\\_dashboard.shtml](https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml).

<sup>21</sup> "CDC COVID Data Tracker," Centers for Disease Control and Prevention (June 25, 2020), <https://www.cdc.gov/covid-data-tracker/#cases>.

To effectively combat the coronavirus, the public will need to trust that they can engage with public health authorities and health providers. Indeed, the World Health Organization’s guidance emphasizes the need to “maintain and build public trust in public health authorities before, during and after” a pandemic.<sup>22</sup> Affected countries must pay special attention to the “barriers affecting [the] willingness or ability to comply” with recommended protective measures. *Id.*

Fortunately, the Immigrant Trust Directive draws clear distinctions between immigration enforcement and New Jersey’s state and local officers, helping New Jersey to protect not only community safety, but also public health.<sup>23</sup>

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<sup>22</sup> World Health Organization, *Pandemic Influenza Preparedness and Response: A WHO Guidance Document* (2009), available at <https://www.ncbi.nlm.nih.gov/books/NBK143063/>.

<sup>23</sup> Evidence also suggests that fear of local authorities’ engagement in immigration enforcement can lead to avoidance of other public services and activities beyond health care. In one study, adults in immigrant families – including both individuals who are themselves foreign-born and individuals who live with foreign-born family – reported extensive avoidance of public services “in which they could be asked or bothered about citizenship status.” One in six adults reported that they or a family member avoided at least one routine life activity in 2018 due to immigration fears. Specifically, immigrants reported that fear of deportation prevented them from engaging in the following routine activities: driving a car (9.9% reported avoiding); talking to the police (8.3%); visiting public places like parks and libraries (7.8%); visiting a doctor or a health clinic (6.3%); and talking with school employees (4.7%). Hispanic adults in immigrant families were significantly more likely than their white counterparts to abstain. Families that include undocumented people were even more cautious: one in every three adults in families where at least one member of the household was not a lawful permanent resident or citizen reported that they or a family member avoided at least one routine activity. Hamutal Bernstein et al., *Adults in Immigrant Families Report Avoiding Routine Activities Because of Immigration Concerns* (July 2019),

**C. The Immigrant Trust Directive Helps to Prevent Discriminatory Over-Policing of Immigrant Populations and Conserves New Jersey's Limited Resources.**

Another way that local collaboration with immigration enforcement authorities erodes trust with immigrant communities is by increasing racial discrimination and over-policing. In jurisdictions with cooperative agreements with ICE, police arrests reflect racial profiling and an overemphasis on arrests for minor violations rather than more serious, violent crimes.

For example, in Davidson County, Tennessee, arrests of foreign-born individuals reached their highest level in over a decade shortly after a cooperative program with ICE was implemented.<sup>24</sup> The “vast majority” of individuals processed under the cooperative agreement were charged with non-violent misdemeanors, like driving without a license, trespassing, or fishing without a license. *Id.* at 6.

Arizona's Maricopa County, which has long assisted ICE to carry out immigration enforcement, provides another prime example. Latino drivers in Maricopa County were four to nine times more likely to be stopped by Maricopa

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available at [https://www.urban.org/sites/default/files/publication/100626/2019.07.22\\_immigrants\\_avoiding\\_activities\\_final\\_v2\\_1.pdf](https://www.urban.org/sites/default/files/publication/100626/2019.07.22_immigrants_avoiding_activities_final_v2_1.pdf).

<sup>24</sup> ACLU of Tennessee, *Consequences & Costs: Lessons Learned from Davidson County, Tennessee's Jail Model 287(g) Program* at 11 (Dec. 2012), available at <https://www.aclu-tn.org/wp-content/uploads/2015/01/287gF.pdf> [hereinafter “ACLU of Tennessee, *Consequences & Costs*”].

officers than non-Latino drivers.<sup>25</sup> The county's discriminatory practices were so extreme that they prompted an investigation by the Department of Justice, which concluded that Maricopa County engaged in unlawful profiling and discriminatory jail policies against persons with limited English speaking skills. *Id.*

Similarly, one statistical analysis of arrests in Frederick County, Maryland, sought to test the hypothesis that the implementation of a cooperative agreement with ICE would lead to racial profiling of members of the Hispanic community in that jurisdiction. The analysis concluded that there had been "a significantly higher number of arrests of Hispanics by the Sheriff's Office than would have occurred in [the agreement's] absence, indicating that attention was focused toward the Hispanic community as a result of the program."<sup>26</sup> Recently, a woman who was arrested by the Frederick County (MD) Sheriff's Office after it entered into its agreement with ICE obtained a settlement of \$100,000 in a lawsuit that included allegations of racial profiling and unlawful discrimination.<sup>27</sup>

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<sup>25</sup> See Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, Maricopa County Sheriff's Office Investigative Findings Announcement (Dec. 15, 2011), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-thomas-e-perez-speaks-maricopa-county-sheriff-s-office>.

<sup>26</sup> Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, J. Migration and Human Security (Aug. 8, 2018), available at <https://journals.sagepub.com/doi/10.1177/233150241700500305>.

<sup>27</sup> See Associated Press, *Salvadoran Woman Wins \$100K in Wrongful Arrest Lawsuit*, Wash. Post (June 18, 2020), <https://www.washingtonpost.com/local/salvadoran-woman-wins-100k-in-wrongful-arrest-lawsuit/2020/06/18/9098873e-b173-11ea-98b5->

Another important way in which the Directive protects New Jerseyans is by ensuring that the State’s limited resources go toward local services and public safety, rather than assisting the federal government with immigration enforcement.

For instance, cooperation with ICE “detainer” requests – the mechanism through which ICE asks local law enforcement to hold people for up to 48 hours beyond their otherwise applicable release time – can be extremely costly. Indeed, ICE detainers diverted millions of dollars from New Jersey’s coffers before Attorney General Grewal introduced the Immigrant Trust Directive. Between 2007 and 2017, New Jersey paid at least \$12 million, and possibly far more, to honor ICE’s requests.<sup>28</sup>

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279a6479a1e4\_story.html; Third Amended Compl., ECF No. 150, *Orellana Santos v. Frederick Cty. Bd. Of Commissioners*, Civ. No. 09-CV-2978 (D. Md. Sept. 25, 2015).

<sup>28</sup> Erika Nava, *Working with ICE: A Costly Choice for New Jersey*, New Jersey Policy Perspective (Nov. 2018), available at <http://www.njpp.org/wp-content/uploads/2018/11/NJPP-Working-With-ICE-Report-FINAL.pdf>. Detainer holds not only expend state and local resources, but present a cost to families and businesses. In the same ten-year period, New Jersey immigrants detained pursuant to a hold issued by ICE “have foregone \$5 million in lost wages,” in addition to the costs that employers must bear due to employee turnover and the emotional costs of prolonged detention. *Id.* Furthermore, local law enforcement agencies have been responsible for tens of thousands of dollars in damages and legal fees after losing lawsuits challenging detention based on ICE detainer requests. *See, e.g.*, Alexandra Forter Sirota, *Local Communities Face High Costs of Federal Immigration Enforcement*, North Carolina Justice Center, at 5 (Apr. 16, 2019), available at <https://www.ncjustice.org/publications/local-communities-face-high-costs-of-federal-immigration-enforcement/> (collecting recent cases in which individuals unlawfully held pursuant to an ICE detainer subsequently won tens to hundreds of thousands of dollars); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014)

In addition to monetary costs, state and local law enforcement agencies devote staff time to enforcing immigration law, rather than keeping the community safe. For instance, Maricopa County's aggressive immigration enforcement initiatives reportedly resulted in the sheriff's failure to investigate at least thirty violent crimes over a year.<sup>29</sup> Data also suggests that cooperative agreements with ICE can lead to a focus on punishing immigrants for minor offenses at the expense of investigating more serious crimes. For example, Tennessee's Davidson County witnessed a 15 percent increase in arrests of foreign-born residents for minor offenses after implementing its agreement with ICE, while arrests of foreign-born residents for more severe offenses decreased by 21 percent.<sup>30</sup>

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(holding that Lehigh County could be liable for the plaintiff's detention due to ICE detainer request). After adopting a cooperative agreement with ICE, Prince William County spent \$3.1 million to install cameras and monitor footage in 250 police cars to defend against allegations of racial profiling. Audrey Singer et al., *Immigrants, Politics, and Local Response in Suburban Washington*, Brookings Institution at 16 (Feb. 2009), available at [https://www.brookings.edu/wp-content/uploads/2016/06/0225\\_immigration\\_singer.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf).

<sup>29</sup> Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* at 27, Police Foundation (April 2009), available at <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf>.

<sup>30</sup> ACLU of Tennessee, *Consequences & Costs* at 6.

**D. The Immigrant Trust Directive Protects Individuals’ Constitutional Right to Peacefully Assemble Without Fear That Local Police Will Turn Protestors Over to Immigration Authorities**

Following a string of widely publicized police killings of people of color, immigrant communities have joined numerous other New Jersey communities to protest police brutality and systemic racism. *See* American Friends Service Committee, *Black Lives Matter: Solidarity Letter from the Immigrant Justice Movement* (June 4, 2020) (signed by several New Jersey-based organizations).<sup>31</sup> The participation of immigrants and their loved ones in this and numerous other public discussions is valuable to New Jersey’s efforts to make progress on issues of justice and equality.<sup>32</sup> But if the Immigrant Trust Directive were not in place and local police were free to cooperate with ICE, there would likely be an increased chilling effect on the voices of immigrant communities. Such chilling would harm both

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<sup>31</sup> Available at <https://www.afsc.org/document/black-lives-matter-solidarity-letter-immigrant-justice-movement>.

<sup>32</sup> Attorney General Grewal has recognized the importance of hearing from *all* New Jerseyans when addressing matters of police reform. The Attorney General recently announced that as part of his efforts to revise New Jersey’s Use of Force Policy for law enforcement, his office will hold listening sessions in all of New Jersey’s 21 counties, with the goal of “engaging residents across New Jersey,” including “those that have had negative experiences with law enforcement officers.” As Attorney General Grewal put it, “The Use of Force Policy affects everyone, and so everyone should have the opportunity to weigh in on its revisions.” Press Release, Office of the Attorney General of the State of New Jersey, AG Grewal Outlines Process for Revising New Jersey’s Use of Force Policy (June 12, 2020), <https://www.nj.gov/oag/newsreleases20/pr20200612a.html>.

immigrants who might fear to exercise their rights, and society-at-large, which would lose the benefit of immigrants' valuable contributions to public discourse.

In May, the unlawful killing of George Floyd by police officers in Minneapolis returned the nation's attention to the long history of racism and violence entrenched in American policing. Mr. Floyd's killing sparked protests across the United States, drawing individuals of all backgrounds, including undocumented individuals and recipients of Deferred Action for Childhood Arrivals ("DACA"), to publicly exercise their First Amendment rights. Unfortunately, the choice to engage in peaceful protest has led to adverse immigration consequences for some immigrants. These incidents demonstrate why local cooperation with ICE can lead to deep fear in immigrant communities, and chill participation in peaceful expression.

Johan Montes Cuevas is a twenty-two-year-old with temporary protection under the DACA program. After leaving a peaceful protest in Phoenix, Arizona, with his three friends, Mr. Cuevas and his friends were sitting in traffic when they were pulled out of their car by police officers, arrested, and charged with rioting. The Phoenix Police Department has decided to collaborate with ICE, and when Mr. Cuevas was released from jail the following morning, ICE agents were waiting to take him into custody. He was detained and is fighting both his unfounded criminal

charges and his immigration case.<sup>33</sup> Other DACA recipients were also arrested and handed over to ICE, including a young activist who was serving as a legal observer at the protest.<sup>34</sup>

The right to protest is not reserved for U.S. citizens – non-citizens, including undocumented individuals, have the same First Amendment rights. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 147-48 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”). Without the Immigrant Trust Directive, the contributions of immigrant communities to public discourse would be stifled, and New Jersey would lose the benefit of learning about the perspective and opinions of immigrants on important issues.

## **II. No Federal Law Validly Preempts the Immigrant Trust Directive.**

*Amici*'s concern with protecting New Jersey's choice to adopt the Immigrant Trust Directive is consistent with a core principle of federalism: that the federal government may not commandeer the governments of the States by forcing them to adopt particular policies or to enforce policies the federal government has adopted.

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<sup>33</sup> Fernanda Echavarri, *He Went to a Black Lives Matter Protest in Phoenix – and Ended Up in ICE Custody*, Mother Jones (June 11, 2020), available at <https://www.motherjones.com/anti-racism-police-protest/2020/06/undocumented-daca-george-floyd-protest-phoenix-ice/>.

<sup>34</sup> *See* Javier Arce, *For Immigrants Who Want to Show Solidarity, Is it Safe to Go Out and Protest?*, AZ Central (June 4, 2020), available at <https://www.azcentral.com/story/news/politics/immigration/2020/06/04/undocumented-immigrants-show-solidarity-protests-floyd-put-themselves-risk-daca/3138593001/>.

In its complaint, the United States alleges that federal law preempts portions of the Immigrant Trust Directive. This claim relies on the notion that because the federal government exclusively controls immigration – that is, controls when non-citizens may enter or must leave the United States – New Jersey is obligated to deploy its limited law enforcement resources in a way that maximally supports the federal government’s immigration policies. This is an extreme and erroneous view of the authority of the federal government over the States.

Rather, just as the federal government has exclusive authority to pass immigration laws, it also bears the responsibility of enforcing them. States may *choose* to assist the federal government with immigration enforcement if they wish. But to the extent established by the Immigrant Trust Directive, New Jersey has chosen not to do so. Although the federal government may have preferred it if the State of New Jersey had decided otherwise, the United States Constitution is clear that New Jersey has every right to decide the extent of its own assistance.

**A. Valid Preemption Schemes Regulate Private Actors, Not States, and the Anti-Commandeering Doctrine Strictly Limits the Federal Government’s Ability to Force States to Implement Federal Policies.**

When the Framers crafted the U.S. Constitution, they created a system of dual sovereignty. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Under this system, both the federal government and the States elect their own legislatures, create their own policies, and enforce their own laws. The Framers believed this dual system

would result in more liberty, as the two levels of government – state and federal – would keep each other in check, preventing either from running roughshod over the rights of the people. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991).

Fundamental to this system and the liberty it helps to guarantee are two constitutional concepts: the principle of preemption enshrined in the Supremacy Clause, and the principle of anti-commandeering enshrined in both the Tenth Amendment and the Constitution’s basic structure. *See Murphy*, 138 S. Ct. at 1475-77. These two principles set the outer boundaries of what the state and federal governments may do in relation to one another, and keep the dual system in balance. The principle of preemption means that, simply put, where federal and state laws regulating private individuals clash, federal law wins out. Although there are various types of preemption, “all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.” *Murphy*, 138 S. Ct. at 1480.

*Amici* agree with the Attorney General that the Immigrant Trust Directive is not preempted by federal law because there is no clash between the Directive and federal immigration law. As the Supreme Court has made clear, the preemption principle “does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.” *Chamber of Commerce v. Whiting*, 563 U.S.

582, 607 (2011) (internal quotation marks omitted). But in this brief, *amici* do not address in detail the question of whether the Directive and federal law clash for purposes of preemption analysis. Rather, *amici* focus on an important constitutional point that this Court need address only if it rejects the Attorney General’s arguments against statutory preemption: that even if there were a clash between federal law and the Immigrant Trust Directive, federal law could not preempt the Directive because such preemption would violate constitutional anti-commandeering principles.

A federal law crosses the line from a valid preemption statute to an unconstitutional attempt to commandeer state authority when rather than regulating *private actors*, it instead attempts to directly regulate *state governments themselves*. *Murphy*, 138 S. Ct. at 1481. This is because “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York v. United States*, 505 U.S. 144, 166 (1992). As the Supreme Court has explained, “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to *compel the States* to require or prohibit those acts.” *Id.* (emphasis added). When the federal government attempts to control state governments in this way, it challenges the fundamental notion of state sovereignty, and runs up against the principle of anti-commandeering.

Although the notion of anti-commandeering “may sound arcane,” it is in fact “simply the expression of a fundamental structural decision” the Framers made to “withhold from Congress the power to issue orders directly to the States.” *Murphy*, 138 S. Ct. at 1475. In a series of cases defining the scope and meaning of the anti-commandeering principle, the Supreme Court has found that several different methods of compelling state action amount to unconstitutional commandeering. These include commanding a state legislature to pass a law, commanding a state legislature *not* to pass a law, and commanding officers of state or local government to implement a federal law. *See New York*, 505 U.S. at 161-63; *Murphy*, 138 S. Ct. at 1478; *Printz v. United States*, 521 U.S. 898, 926-930 (1997). Because none of these actions are compatible with the fundamental notion of state sovereignty, none are permissible under the United States Constitution.<sup>35</sup>

Moreover, the substantive area of policy in which commandeering is attempted is irrelevant. The Supreme Court has struck down laws under the anti-commandeering principle in areas as diverse as gun control, the disposal of nuclear

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<sup>35</sup> The Supreme Court has made clear that although the federal government is not permitted to commandeer state authority or officers, it may – within constitutional limits – encourage state governments to adopt certain policies by conditioning the receipt of federal funds on such adoption. *New York*, 505 U.S. at 166-67. In addition, Congress is permitted to directly regulate state governments when they engage in activities private actors also engage in, such as hiring employees, as part of a larger scheme which evenhandedly governs the participation of both private and public actors. *Murphy*, 138 S. Ct. at 1478. No such scenario applies here.

waste, sports gambling, and health care. *See Printz*, 521 U.S. at 902; *New York*, 505 U.S. at 149; *Murphy*, 138 S. Ct. at 1478; *NFIB v. Sibelius*, 567 U.S. 519, 577-80 (2012). Moreover, federal Courts of Appeals, including the Third Circuit, have made clear that the anti-commandeering doctrine applies to questions of state involvement in the enforcement of federal immigration law. *Galarza*, 745 F.3d at 643-45; *see also United States v. California*, 921 F.3d 865, 888-91 (9th Cir. 2019), *cert. denied*, --- S.Ct. ----, 2020 WL 3146844 (June 15, 2020). Thus, regardless of the particular program in question and regardless of whether the program affects immigrants, “Congress cannot compel the States to enact or enforce a federal regulatory program.” *Printz*, 521 U.S. at 935. Congress also may not “circumvent that prohibition by conscripting the State’s officers directly.” *Id.*

The anti-commandeering doctrine forecloses the United States’ claim that federal law preempts the Immigrant Trust Directive, because the relevant federal statutes are not valid preemption provisions that regulate private actors. Rather, if interpreted to prohibit the Attorney General’s adoption of the Immigrant Trust Directive, they are unconstitutional attempts to commandeer the officers and authority of the State of New Jersey. *See United States v. California*, 921 F.3d at 891, *cert denied*, 2020 WL 3146844 (“California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts.”).

**B. The Federal Statutes Cited by the United States Cannot Preempt the Immigrant Trust Directive Because Congress Cannot Command New Jersey Not to Adopt a Particular Policy.**

Among the laws that the United States suggests may preempt the Immigrant Trust Directive is 8 U.S.C. § 1373 (hereinafter “Section 1373”).<sup>36</sup> Section 1373 states that no state or local governmental entity may prohibit the sharing of “information regarding the citizenship or immigration status, lawful or unlawful, of any individual” with federal authorities.

As noted above, *amici* agree with the Attorney General that there is no conflict between Section 1373 and the Immigrant Trust Directive, both because the Directive permits the sharing of information about immigration status, and because Section 1373 should be interpreted narrowly to apply only to immigration-status information. *See United States v. California*, 921 F.3d at 889, *cert. denied*, 2020 WL 3146844; *Steinle v. City & Cty. Of San Francisco*, 919 F.3d 1154, 1167 (9th Cir. 2019); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 333 (E.D. Pa. 2018), *aff’d in part & vacated in part on other grounds*, 916 F.3d 276 (3d Cir. 2019). But even if this were not the case, Section 1373 still could not preempt the Directive for two closely related reasons.

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<sup>36</sup> The United States also cites 8 U.S.C. § 1644, the text of which is nearly identical to 8 U.S.C. § 1373(a). All of the arguments made by *amici* with regard to 8 U.S.C. § 1373 apply equally to 8 U.S.C. § 1644.

First, Section 1373 is explicitly directed at state and local governments, not at private actors. *See* 8 U.S.C. § 1373(a) (“a Federal, state, or local government entity or official may not prohibit . . . any government entity or official . . .”). In order for a federal statute to preempt a state policy, it must regulate private actors, not state or local governments. *See Murphy*, 138 S. Ct. at 1480-81. Section 1373 regulates only government actors. Therefore, Section 1373 cannot be a valid preemption provision. Second, Section 1373 cannot forbid the enactment of a policy like the Directive without running afoul of the anti-commandeering doctrine. If Section 1373 directly commands the Attorney General not to adopt certain provisions in the Directive, then it is a direct command to the government of New Jersey that it cannot adopt a particular policy.

This is exactly the kind of command that violates the anti-commandeering doctrine, and which the Supreme Court has therefore held that Congress cannot issue to a state legislature. *See Murphy*, 138 S. Ct. at 1481-82. Because the anti-commandeering doctrine applies equally to both the legislative and executive branches of state governments, the fact that the Directive was issued by the Attorney General (rather than adopted by the New Jersey Legislature) is irrelevant. *See Printz* at 521 U.S. at 907-8, 925-26.<sup>37</sup>

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<sup>37</sup> While the Court need not reach this issue in light of the arguments above, several courts that have recently considered the constitutionality of Section 1373 have found the statute unconstitutional under the anti-commandeering doctrine. *See City*

**C. Immigration Statutes Cannot Preempt the Trust Directive Because the Federal Government Cannot Force State Entities to Bear the Burden of Enforcing Federal Law.**

The United States also suggests that because the Directive limits the assistance that state and local law enforcement authorities can provide to federal immigration enforcement efforts, it poses an obstacle to the enforcement of various federal immigration laws regarding the detention and deportation of immigrants. This argument fails under a well-established anti-commandeering principle: the federal government may not command state entities to enforce federal laws, because states cannot be forced to bear the political or economic costs of federal policies.

In *Printz v. United States*, the Supreme Court considered the constitutionality of a federal law that “direct[ed] state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme” by conducting background checks on individuals who sought to buy firearms. 521 U.S. at 904. The Supreme Court held that the law was unconstitutional under anti-commandeering principles. *Id.* at 933. As the Court explained, “it is no more compatible with [states’] independence and autonomy that their officers be dragooned . . . into administering federal law, than it would be compatible with the independence and sovereignty of

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*of Philadelphia v. Sessions*, 309 F. Supp. at 329-30 (E.D. Pa. 2018); *Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); *City and Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018).

the United States that its officers be impressed into service for the execution of state laws.” *Id.* at 928 (internal quotation marks and citation omitted). This was so even though the measure was meant to be a mere stopgap while the federal government set up its own background check system. *Id.* at 902. Under the anti-commandeering doctrine, *any* demand Congress makes of state officers – even one that requires officers to temporarily perform arguably ministerial tasks – is a “command[.] . . . fundamentally incompatible with our constitutional system of dual sovereignty.” *Id.* at 927-29, 935.

There is good reason why such commands are not constitutionally permitted. As the Supreme Court has explained, anti-commandeering principles promote democratic accountability by making it clear to voters which governments are responsible for which policies. *See Murphy*, 138 S. Ct. at 1477. Thus, the anti-commandeering doctrine ensures that New Jersey residents can clearly identify the officials responsible for particular policies, and that local leaders will not be forced to bear the potentially high political costs associated with federal immigration policies with which many New Jerseyans disagree.<sup>38</sup>

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<sup>38</sup> The treatment of immigrants by state and local authorities tends to be a significant issue in New Jersey elections. *See, e.g.*, Dustin Racioppi, *Phil Murphy Campaign Promise Tracker: On Minimum Wage, PARCC Testing, NJ Transit and More*, NorthJersey.com (Feb. 8, 2018), <https://www.northjersey.com/story/news/new-jersey/governor/2018/02/08/phil-murphy-promise-tracker-minimum-wage-nj-transit-and-more/1034208001/>.

The doctrine also ensures that the federal government cannot pass the cost of expensive programs onto unwilling States. Rather, under the anti-commandeering doctrine, “[i]f state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense” of federal programs. *New York*, 505 U.S. at 168. Thus, the United States can neither command New Jersey to adopt a particular policy, nor force New Jersey to expend resources on federal priorities.

**D. The Immigrant Trust Directive’s Notification Provisions are Consistent with Federal Immigration Law.**

Separate and apart from the Tenth Amendment analysis, and as noted above, *amici* support the Attorney General’s position that the Directive is not preempted by federal law. While they do not repeat his full analysis, *amici* note that the United States has inaccurately characterized the notification provisions of the Directive, *see* Dir. No. 2018-6 § VI.A, as attempts to somehow encourage immigrants to evade law enforcement. *See* Compl., ECF Doc. 1, ¶ 32. This line of argument is misleading at best. The notification provisions of the Directive require New Jersey officers to provide immigrants only with information that federal law permits them to have, and in no way impede the federal government’s ability to enforce its immigration laws on its own.

For instance, the Directive requires that state and local officials inform any individual in their custody if immigration officials seek information about the person's upcoming release date, or request that the person remain in detention beyond the time he would otherwise be released. As the United States admits in its complaint, the federal government itself requests that immigrants be notified when these types of requests (which are typically made through DHS Form I-247A) are made about them. *See* Compl. ¶ 20 (explaining that when the government issues Form I-247A, it requests that the receiving state or local authority “serve the alien with a copy” of the form.). Indeed, the relevant form specifically states that in order for the request to take effect, the immigrant about whom it is made “must be served with a copy of this form[.]” *See* Immigration and Customs Enforcement, DHS Form I-247A (3/17).<sup>39</sup> Thus, the United States' vague suggestion that informing people when these requests are made “thwart[s]” immigration enforcement is belied by its own policies. Compl. ¶ 32.

The only other instance in which the Directive requires that an individual in state or local custody be informed about immigration activity is when immigration authorities request to interview someone. *See* Dir. No. 2018-6 § 6.A. This notification simply allows the individual an opportunity to consent or decline to

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<sup>39</sup> *Available at*  
<https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>

participate in the interview. *Id.* § II.B.4. Before the Directive was enacted, people in criminal custody already had the opportunity to consent or decline to answer immigration officers' questions;<sup>40</sup> this opportunity simply arose at a later date.

The Directive's notification provisions thus in no way equate to "assisting removable aliens to evade law enforcement" as the United States has misleadingly alleged. Compl. ¶ 32. Rather, the notification provisions merely replicate and reinforce pre-existing features of current immigration enforcement policy. These notifications allow individuals in state or local custody to seek legal advice, gather documents and other evidence, communicate with their families, and otherwise prepare for the fact that they may be required to undergo immigration proceedings in the future. Because these provisions are consistent with federal law, they cannot be preempted by it.

### **III. The Intergovernmental Immunity Doctrine Does Not Bar the Immigrant Trust Directive.**

The United States also alleges that the Directive violates the intergovernmental immunity doctrine. This claim fares no better than its preemption claim, as the only circuit court to consider such a question has held. *See United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019), *cert. denied*, 2020 WL 3146844. The intergovernmental immunity doctrine, like the preemption doctrine, stems from

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<sup>40</sup> *See, e.g., United States v. Carvajal-Garcia*, 54 Fed. Appx. 732, 737-39 (3d Cir. 2002) (describing use of *Miranda* warning by federal immigration agents).

the Supremacy Clause. *See North Dakota v. United States*, 495 U.S. 423, 434 (1990). Under the doctrine, a state regulation is invalid if it: (1) “regulates the United States directly,” or (2) “discriminates against the Federal Government or those with whom it deals.” *Id.* The Immigrant Trust Directive does neither.

First, the Immigrant Trust Directive does not directly regulate the federal government. This is clear from the Directive’s plain text, which does not require the federal government to do or refrain from doing anything, but rather issues directions exclusively to state and local law enforcement entities. This clearly distinguishes the Directive from other state regulations that have run afoul of the intergovernmental immunity doctrine, such as an unclaimed property act that required the federal government to comply with “onerous record-keeping and reporting requirements,” *Treasurer of N.J. v. United States Dep’t of the Treasury*, 684 F.3d 382, 410 (3d Cir. 2012), or a law that required the federal government to post certain safety warnings in a federal park, *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996). Unlike those regulations, the Immigrant Trust Directive does not order the federal government to take any action whatsoever; rather, it addresses what *state* and *local* officers will do.

Second, the Immigrant Trust Directive does not discriminate against the federal government. As the Supreme Court has explained, a state “does not discriminate against the Federal Government and those with whom it deals unless it

treats someone else better than it treats them.” *Washington v. United States*, 460 U.S. 536, 544-5 (1983). The United States has not alleged and cannot allege that any other entity requests the type of assistance, information, or access from state and local law enforcement authorities that federal immigration officers regularly request. *See United States v. California*, 314 F. Supp. 3d 1077 (N.D. Cal. 2018), *aff’d* 921 F.3d 865, *cert. denied*, 2020 WL 3146844 (rejecting similar intergovernmental immunity claim in part because the United States had “not identified any examples of similarly situated authorities . . . that the State treats better than it does federal immigration authorities.”).

Moreover, the intergovernmental immunity doctrine cannot limit a state’s choice about whether or not to help enforce a federal program without running up against the anti-commandeering doctrine, discussed above. The Supreme Court has “adopted a functional approach to claims of governmental immunity, accommodating of the full range of each sovereign’s legislative authority[.]” *North Dakota*, 495 U.S. at 435. New Jersey’s sovereign authority must include the ability to decline to assist in the enforcement of federal laws, and the ability to refuse to adopt the federal government’s preferred policies as its own.

Indeed, as the Ninth Circuit explained when it rejected an intergovernmental immunity challenge to a California statute similar to New Jersey’s Trust Directive,<sup>41</sup> a decision to the contrary “would imply that California cannot choose to discriminate against federal enforcement authorities by refusing to assist their enforcement efforts – a result that would be inconsistent with the Tenth Amendment and the anticommandeering rule.” *United States v. California*, 921 F.3d at 891, *cert. denied*, 2020 WL 3146844. Here, too, the intergovernmental immunity doctrine cannot bar the Immigrant Trust Directive without running afoul of the Tenth Amendment, thus displacing the Constitution’s carefully balanced system of dual sovereignty.

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<sup>41</sup> The California statute, SB 54, or the California Values Act, “limits law enforcement’s ‘discretion to cooperate with immigration authorities,’” including by prohibiting state and local agencies from honoring hold requests or providing information about release dates to immigration authorities. 921 F.3d at 876.

## CONCLUSION

Because the Immigrant Trust Directive is a lawful policy that benefits all New Jerseyans, the Court should grant the defendants' motion to dismiss.

Dated: June 25, 2020

Respectfully Submitted,

s/ Jeanne LoCicero

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