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

<p>COUNTY OF OCEAN, <i>et al.</i></p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey, <i>et al.</i></p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No.: 3:19-18083</p> <p>BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND 24 OTHER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS</p>
<p>ROBERT A. NOLAN, in his official capacity as Cape May County Sheriff, <i>et al.</i></p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey, <i>et al.</i></p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No. 1:19-18929</p>

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
ARGUMENT	2
I. The Immigrant Trust Directive Promotes Public Safety for All New Jerseyans.	2
A. The Immigrant Trust Directive Builds Necessary Trust Between Law Enforcement and Immigrant Communities.	5
B. Stories from New Jersey’s Immigrant Communities Confirm the Need for the Immigrant Trust Directive to Build Trust Between Local Law Enforcement and State Residents.	10
C. The Immigrant Trust Directive Conserves New Jersey’s Limited Law Enforcement Resources for Public Safety Purposes.	15
II. The Constitution Does Not Permit the Federal Government to Commandeer New Jersey’s Policy-Making Authority or Law Enforcement Officers, and Therefore No Federal Statute Could Validly Preempt the Immigrant Trust Directive.....	18
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.	19
B. Federal Information-Sharing Statutes Cannot Preempt the Immigrant Trust Directive Because Congress Cannot Command New Jersey Not to Adopt a Particular Policy.....	24
C. Immigration Statutes Cannot Preempt the Trust Directive Because the Federal Government Cannot Force State Entities to Bear the Burden of Enforcing Federal Law.	27
III. The Fact that the Constitution Grants the Federal Government Exclusive Authority over Immigration Has No Impact on the Validity of the Immigrant Trust Directive.	29
CONCLUSION	31

TABLE OF AUTHORITIES

CASES

<i>Chamber of Commerce v. Whiting</i> , 563 U.S. 582 (2011).....	21
<i>Chicago v. Sessions</i> , 321 F. Supp. 3d 855 (N.D. Ill. 2018).....	26
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<i>City of New York v. United States</i> , 179 F.3d 29 (2d Cir. 1999).....	26
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<i>De Canas v. Bica</i> , 424 U.S. 351 (1976).....	29, 30
<i>Galarza v. Szalczyk</i> , 745 F.3d 634 (3d. Cir. 2014).....	16, 23, 30
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	20
<i>Murphy v. NCAA</i> , 138 S. Ct. 1461 (2018).....	<i>passim</i>
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INTEREST OF AMICI CURIAE

Proposed *amici curiae* are the American Civil Liberties Union of New Jersey and 24 other organizations that represent or advocate on behalf of a wide range of New Jersey communities, including immigrants, women, religious communities, law enforcement professionals, parents, youth, survivors of domestic violence, 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.

When Attorney General 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's limited law enforcement resources are directed toward building the community trust necessary for just and effective policing, rather than helping the federal government deport people. Combining local law enforcement and federal immigration enforcement works against that goal. Despite this, plaintiffs argue that certain federal statutes prevent the State of New Jersey from deciding how to use its own resources.

Not only are the plaintiffs' preemption claims wrong as a matter of statutory text, but they are foreclosed by the basic principles of federalism enshrined in the United States Constitution. New Jersey is a sovereign state with its own democratically-elected government, its own laws, and its own law enforcement

entities. Any federal statute that would prevent the Attorney General from issuing the Immigrant Trust Directive, thus forcing this State to use its own officers to implement federal government programs that run counter to 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 for All New Jerseyans.

This lawsuit challenges the validity of Attorney General Law Enforcement Directive No. 2018-6, commonly known as the Immigrant Trust Directive. New Jersey Attorney General Gurbir S. Grewal originally issued the Directive on November 29, 2018. Its purpose was no secret: as the Directive itself made clear from its first lines, it was intended to “strengthen[] trust between law enforcement and immigrant communities.” State of New Jersey, Attorney General Law Enforcement Directive No. 2018-6 v2.0 (hereinafter “Dir. No. 2018-6”), at 1.¹ It did 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*.” *Id.* (emphasis in original).

¹ Available at https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf.

Prior to the issuance of the Immigrant Trust Directive, these lines were blurred because New Jersey law enforcement agencies were permitted to provide frequent and substantial assistance to federal 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 they were also required 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. 2007-3.² New Jersey counties were also permitted to enter into formal contracts with the federal government known as “287(g) agreements,” which deputized local correctional officers to act as immigration enforcement authorities within county jails. *See id.* Cape May County was among several counties to enter such agreements.

In addition, prior to the adoption of the Immigrant Trust Directive, there was no bar on New Jersey officers honoring ICE requests to hold individuals in state prisons or local jails beyond their otherwise-applicable release times. Known as “detainers,” these holds would permit ICE to investigate whether an individual was subject to transfer to ICE custody and potential removal. Likewise, there were no limitations on localities allowing ICE officers to access their facilities and other

² Available at 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.

resources, nor on their ability to share New Jerseyans' personally identifiable information with ICE.

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 Immigrant Trust Directive, New Jersey officers generally may not inquire about an individual's immigration status unless doing so is necessary and relevant to an ongoing criminal investigation. Dir. No. 2018-6 § II(A)(2). They are also limited in their ability to honor detainers by holding individuals past their otherwise-applicable release time for transfer to ICE, although this practice is still permitted for individuals who have been charged with certain enumerated 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). In addition, the revised version of the Directive issued on September 27, 2019, provides that no New Jersey law enforcement agency may participate in a “287(g) agreement” with federal immigration authorities. *Id.* § III(A). 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 immigrants convicted of certain crimes, it generally requires New Jersey law enforcement officers to focus their efforts and resources on enforcing state criminal law, rather than assisting ICE. Attorney General Grewal made this change in an effort to “ensure effective policing” and “protect the safety of all New Jersey residents.” *Id.* at 2. *Amici* strongly believe that the Immigrant Trust Directive does just that.

A. The Immigrant Trust Directive Builds Necessary Trust Between Law Enforcement and Immigrant Communities.

New Jersey is a state of immigrants. According to a 2017 report, two million state residents – more than one in five – were born abroad. In addition, 1.5 million New Jersey residents, or almost one in six New Jerseyans, were native-born citizens who had at least one immigrant parent. American Immigration Council, *Immigrants in New Jersey*, Oct. 13, 2017.³ Nearly a quarter of the immigrants in New Jersey, or five hundred thousand people, were undocumented. *Id.*

³ Available at https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_new_jersey.pdf.

Law enforcement relies on community members to learn when crimes are committed and to provide the information needed to perform effective investigations. This means that a base level of trust between local law enforcement and the communities they serve is essential to public safety. Mixing local law enforcement with federal immigration enforcement destroys that trust in places like New Jersey, where a significant portion of the population is part of the immigrant community. Consequently, many law enforcement organizations agree that local law enforcement should not cooperate with federal authorities to enforce immigration laws. The Major Cities Chiefs Association, for example, which represents several dozen of the country's largest law enforcement agencies, has long argued that 287(g) agreements "undermine[] the trust and cooperation with immigrant communities that are essential elements of community policing." *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law*, Hearing Before the Comm. on Homeland Security, 111th Cong. 26 (2009) (statement of Tom Manger, Chief, Montgomery Cty., Md., Police Dep't & President, Major Cities Chiefs Ass'n).

When immigrants and their families are fearful that interacting with local law enforcement could result in deportation, they are less likely to report crimes or provide information to the police. For example, 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. Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 17, University of Illinois at Chicago (May 2013).⁴ Seventy percent of undocumented immigrant respondents and 44 percent of all Latino respondents regardless of immigration status reported that they would be less likely to communicate with law enforcement⁵ 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.

This degree of distrust can prevent even the most vulnerable members of society, including survivors of sexual abuse and intimate partner violence, from seeking needed help from criminal law enforcement authorities. One study showed that in places with policies that allow for, or in some cases require, state or local immigration enforcement,⁶ the rate of petitions submitted under the Violence

⁴ Available at https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

⁵ This fear can extend to government authorities outside of law enforcement as well. According to a 2017 survey of Latino parents of adolescents, 29 percent of undocumented respondents reported that they “very often” or “almost always/always” avoid medical care, police, and other public services for immigration-related reasons. Kathleen M. Roche, et al., *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, 62 *J. Adolescent Health* 525, 528 (2018).

⁶ 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*

Against Women Act – which creates a pathway for immigrant survivors of domestic violence to leave abusive relationships and independently apply for lawful permanent resident status – decreased. *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 27.⁷

A 2017 national survey of prosecutors revealed that the 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. *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 72-73, National Immigrant Women’s Advocacy Project (May 3, 2018).⁸

The experiences of other localities are instructive. While 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

Violence: Evidence from Immigration Policies, IZA Institute of Labor Economics (Oct. 2019) at 8-10, 13-14.

⁷ Available at <http://ftp.iza.org/dp12721.pdf>.

⁸ Available at <http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>.

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. He concluded that “SB4 will make our communities more dangerous, not safer,” in part by creating a “class of silent victims.” *Id.* at 51-52. 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 17, 52.

The Los Angeles police department announced a similar decrease in reports of sexual assault and domestic violence by Hispanic community members, and attributed the decline to immigrant victims’ fear of coming forward. *See* Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, *The Guardian* (Mar. 23, 2017).⁹ 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. *Id.* Several cases had to be dismissed in Denver when survivors of domestic violence were unwilling to testify, citing their fears of deportation. *See id.*

Cobb, Georgia, witnessed a breakdown in trust after the county sheriff implemented a 287(g) agreement. Cobb Immigrant Alliance had worked hard to

⁹ Available at <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

build the immigrant community's confidence in the local police after a series of gang-related crimes, holding frequent community meetings with police representatives. *See* ACLU of Georgia, *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety* at 17 (Oct. 2009).¹⁰ But after county officers were deputized under 287(g), people would no longer attend the meetings. *See id.* The meetings' organizer found that "287(g) broke down all the trust that had developed between immigrants and the police." *Id.*

B. Stories from New Jersey's Immigrant Communities Confirm the Need for the Immigrant Trust Directive to Build Trust Between Local Law Enforcement and State Residents.

Without the Immigrant Trust Directive in place, New Jersey immigrants and their family members understand that even the most routine interactions with local law enforcement – getting pulled over for a broken tail-light or calling the police for help, for example – could result in immigration arrests and permanent family separations. This fear permeates families' daily activities, and impacts every aspect of their lives and the lives of their children. Several recent stories from our communities demonstrate why, if the Directive does not remain in place, immigrants

¹⁰ Available at <https://www.aclu.org/other/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families-apart-and>.

in New Jersey will have good reason to fear that an ordinary contact with local law enforcement could derail their lives.

In June 2018, the same month advocates sued Newark for elevated lead levels in its water supply,¹¹ Daniel Castro's fiancée asked him to pick up bottled water she needed to prepare their nine-month-old's formula. *See* Thomas E. Franklin, *Despite Newark's Sanctuary City Status, Undocumented City Resident Turned Over to ICE, TAP into Newark* (Aug. 9, 2018);¹² *see also Newark Police Turn Over Undocumented Immigrant to ICE*, WNYC News (Aug. 12, 2018).¹³ Daniel, a 28-year-old Newark resident with no criminal history, had lived in the United States since fleeing political violence and poverty in Nicaragua as a teenager. He sat in the passenger seat while his fiancée's father drove them home from the store. After his fiancée's father made an illegal U-turn, Newark Police officers pulled the two men over and asked for their identification. *See* Franklin, *Undocumented City Resident Turned Over to ICE*.

¹¹ *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/>.

¹² *Available at* <https://www.tapinto.net/towns/newark/sections/government/articles/despite-newarks-sanctuary-city-status-undocumen>.

¹³ *Available at* <https://www.wnyc.org/story/newark-police-turn-over-undocumented-immigrant-ice/>.

Daniel’s interaction with the criminal justice system should have ended there, since the Newark Police did not charge him with any offense. But instead of allowing him to go on his way, Newark Police handcuffed and detained him based solely upon his immigration status. Presumably by contacting ICE or consulting a database, they determined that he had an ICE “warrant” – an administrative document not signed by a judge – which had been issued seven years earlier, when Daniel missed an immigration court date of which his then-lawyer had failed to give him notice. Without issuing any charges, the police simply held him for ICE to pick up. He was turned over to ICE custody, detained, and separated from his fiancée and U.S. citizen son. *See Franklin, Undocumented City Resident Turned Over to ICE.*

Prior to implementation of the Immigrant Trust Directive, many undocumented clients approached *amici* with accounts of known or threatened crimes, yet felt unable to contact local law enforcement out of fear that they would be detained or deported. One mother living in Elizabeth, for example, contacted *amicus* Make the Road New Jersey with an urgent problem: someone was threatening to kidnap her child. She asked what she could do, and whether it was safe for her to call the police.¹⁴ The mother’s dilemma emphasizes how seriously immigrants fear cooperation between local law enforcement and federal immigration

¹⁴ 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.

enforcement – a fear so strong that it forces a mother to feel that she must choose between reporting a threat against her child and protecting her family from deportation.

Amicus Make the Road New Jersey is also aware of survivors of intimate partner violence who were detained by immigration enforcement officers after someone reported a domestic dispute to local law enforcement. In February 2018 in Passaic County, 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.¹⁵

These stories demonstrate how mixing local law enforcement with immigration enforcement can discourage the reporting of crime and put people at risk. Without the Immigrant Trust Directive's clear limits on collaborating with ICE, immigrant residents reasonably fear that any contact with local authorities – even if intended solely to seek protection – could result in potential deportation.

¹⁵ 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.

A recent tragedy also makes the need for the Immigrant Trust Directive starkly clear. On September 16, 2019, five-year-old Dulce Maria Alavez was abducted in broad daylight from Bridgeton City Park. *See* Christina Goldbaum, *A 5-Year-Old Girl Went Missing From a Playground. What Happened?* N.Y. Times (Oct. 1, 2019).¹⁶ A small town in South Jersey, Bridgeton is home to a large immigrant population. Despite the community rallying behind Dulce’s family, the case remains unsolved. Police believe that members of the immigrant community have been afraid to come forward to law enforcement with information, fearing that they may be reported to ICE. One resident told *The New York Times* that the kidnapping has caused the Bridgeton community to worry “in two ways: one is the safety of our kids, the other is immigration enforcement.” *Id.*

This incident took place only a few months after the Attorney General’s Directive went into effect, before the immigrant community was fully informed of the Directive, and before the trust it was intended to foster had a chance to take hold. If the Directive remains in place and is effectively implemented, it has the potential to prevent situations like this, in which community members face the wrenching choice between doing all they can to help solve a horrific crime, or protecting their loved ones from potential deportation. As Attorney General Grewal explained when

¹⁶ Available at <https://www.nytimes.com/2019/10/01/nyregion/missing-child-nj-dulce-alavez.html>.

discussing this family's tragedy, the Immigrant Trust Directive is intended to address exactly this type of situation. WPIX-TV, *NJ AG Worries Immigrants Scared of ICE Have Information on Missing 5-Year-Old Girl They Haven't Shared With Police* (Sep. 24, 2019).¹⁷ See also Editorial, *It's No "Sanctuary": NJ's Policy is About Solving Horrific Crimes Like This*, NJ Advance Media (Sept. 24, 2019) ("[The Immigrant Trust Directive] is about protecting public safety. And it makes it much more likely that police will find this little girl, and bring her home to her family.").¹⁸

C. The Immigrant Trust Directive Conserves New Jersey's Limited Law Enforcement Resources for Public Safety Purposes.

The primary way in which the Immigrant Trust Directive promotes public safety is by allowing immigrant communities to feel safe reporting crimes or providing information to the local law enforcement. But another important way in which the Directive protects New Jerseyans is by ensuring that the State's limited law enforcement resources go toward protecting its residents, rather than assisting the federal government with immigration enforcement.

287(g) agreements, which deputize local law enforcement officers to act as immigration enforcement officers for the federal government, can deplete local

¹⁷ Available at <https://pix11.com/2019/09/24/nj-ag-worries-immigrants-scared-of-ice-have-information-on-missing-5-year-old-girl-they-havent-shared-with-police/?fbclid=IwAR1DxSj-UgrRYERphOraB10qS0vC68TIACldJEUES17U-PRZYIP-RVZDLsc>.

¹⁸ Available at <https://www.nj.com/opinion/2019/09/its-no-sanctuary-njs-policy-is-about-solving-horrific-crimes-like-this-editorial.html>.

agencies' resources. State and local governments must pay significant costs to implement and maintain a 287(g) program, including officer salaries, benefits, and costs associated with required officer training. *See* Office of Inspector General, U.S. Dep't of Homeland Sec., *The Performance of 287(g) Agreements* (March 2010) at 4, 6.¹⁹

Cooperative programs can cost local law enforcement agencies millions of dollars. Prince William County in Virginia was forced to increase property taxes to implement its 287(g) agreement, which cost the county \$6.4 million in its first year and \$26 million over five years. *See* Audrey Singer et al., *Immigrants, Politics, and Local Response in Suburban Washington*, Brookings Institution (Feb. 2009) at 16.²⁰ 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.*, Steve Mayes, *Woman at Center of Landmark Immigration Case Settles Suit that Changed Jail Holds in State, Nation*, *The Oregonian* (May 18, 2015);²¹ *Galarza v. Szalczyk*, 745 F.3d 634 (3d. Cir. 2014)

¹⁹ Available at https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

²⁰ Available at https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf.

²¹ Available at https://www.oregonlive.com/clackamascounty/2015/05/woman_at_center_of_landmark_im.html

(holding that Lehigh County could be liable for the plaintiff's detention due to ICE detainer request).²²

In addition to monetary costs, there are costs in terms of the time and energy that local law enforcement agencies spend enforcing immigration law, rather than protecting their communities. 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. *See Anita Khashu, The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* at 27, Police Foundation (April 2009).²³ Data from counties with cooperative agreements show that after the agreements were implemented, arrests of foreign-born residents for minor offenses, like driving without a license, increased,

²² Arrest statistics in jurisdictions with 287(g) programs have likewise revealed racial profiling, which may further expose local law enforcement agencies to liability for civil rights violations. After adopting a 287(g) agreement, Prince William County spent \$3.1 million to install cameras and monitor footage in 250 police cars to defend against allegations of racial profiling. Singer, *Immigrants, Politics, and Local Response in Suburban Washington*, at 16. An investigation by the Department of Justice concluded that Maricopa County engaged in unlawful profiling and discriminatory jail policies against persons with limited English speaking skills. *See* Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, Maricopa County Sheriff's Office Investigative Findings Announcement (Dec. 15, 2011), <https://www.justice.gov/opa/speech/assistant-attorney-general-thomas-e-perez-speaks-maricopa-county-sheriff-s-office>. Latino drivers in Maricopa County were four to nine times more likely to be stopped than non-Latino drivers. *Id.*

²³ Available at <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf>.

while arrests of foreign-born residents for more serious offenses decreased. For example, Tennessee's Davidson County witnessed an increase in arrests for minor offenses of 15 percent after implementing its 287(g) program, while arrests of foreign-born Davidson residents for more severe offenses decreased by 21 percent. ACLU of Tennessee, *Consequences & Costs: Lessons Learned from Davidson County, Tennessee's Jail Model 287(g) Program* at 6 (Dec. 2012).²⁴ This suggests that the cooperative agreement with ICE caused local law enforcement to focus their energy and resources on minor offenses to the detriment of investigating more serious ones.

II. The Constitution Does Not Permit the Federal Government to Commandeer New Jersey's Policy-Making Authority or Law Enforcement Officers, and Therefore No Federal Statute Could Validly Preempt the Immigrant Trust Directive.

Amici's concern with protecting New Jersey's choice to adopt the Immigrant Trust Directive is consistent with core principles of federalism. Plaintiffs claim that federal law preempts the Immigrant Trust Directive.²⁵ This argument depends on an extreme and erroneous view of the authority of the federal government over the States. Thus, although no federal agency is a party to this case, the plaintiffs'

²⁴ Available at <https://www.aclu-tn.org/wp-content/uploads/2015/01/287gF.pdf>.

²⁵ In addition to their preemption-based claims, plaintiffs have also brought several claims grounded in New Jersey law. In this brief, *amici* address only the preemption-based claims.

misunderstanding of the limits of federal power is one of several reasons their case cannot succeed.

The plaintiffs suggest that because the federal government exclusively controls immigration – that is, decides the question of 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 incorrect. 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 laid out in the Immigrant Trust Directive, New Jersey has chosen not to do so. Although the plaintiffs may have preferred it if the State of New Jersey had decided otherwise, the United States Constitution is clear that New Jersey had every right to adopt the Immigrant Trust Directive.

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. *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. Thus, if a state attempts to counteract a validly enacted federal law by enacting its own contradictory law, under the Supremacy Clause the state law will be preempted. The “supreme” federal law will govern.

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 attempting to compel 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.²⁶

²⁶ 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.

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 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 is relevant 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). 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.*

Plaintiffs in this case argue that the Immigrant Trust Directive is not valid because federal law preempts it. But the anti-commandeering doctrine forecloses any such argument. The federal statutes that plaintiffs cite 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 (“California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts.”).

B. Federal Information-Sharing Statutes Cannot Preempt the Immigrant Trust Directive Because Congress Cannot Command New Jersey Not to Adopt a Particular Policy.

Plaintiffs claim that federal laws regarding the sharing of information between local, state, and federal governments preempt the Immigrant Trust Directive, relying primarily on 8 U.S.C. § 1373 (hereinafter “Section 1373”).²⁷ 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 is best interpreted narrowly. *See United States v. California*, 921 F.3d at 889; *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

²⁷ Plaintiffs also cite 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.

were not the case, Section 1373 still could not preempt the Directive for two closely related reasons.

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 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.

Unsurprisingly, then, courts that have recently considered the constitutionality of Section 1373 have consistently found the statute unconstitutional under the anti-commandeering doctrine. *See City 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).

These decisions were made in spite of a decades-old Second Circuit decision to the contrary. *See City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999). The Second Circuit made its decision in *City of New York* on the basis that Section 1373 ordered state governments *not* to take an action, rather than to take one. *Id.* at 34-35. In 2018, however, the Supreme Court made clear in *Murphy* that such a distinction is not meaningful, and that anti-commandeering principles forbid both affirmative *and* negative commands to state governments. 138 S. Ct. at 1481-2. Thus, as a District Court within the Second Circuit has explained, “[i]t is clear that *City of New York* cannot survive the Supreme Court’s decision in *Murphy*.” *New York v. United States DOJ*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018).

As the Attorney General has argued, there is no conflict between federal information-sharing statutes and the Directive. But even if such a conflict did exist, any resulting command to the State of New Jersey not to adopt the policies contained in the Immigrant Trust Directive would be unconstitutional under anti-

commandeering principles. Thus, the federal information-sharing statutes cited by the plaintiffs cannot preempt the Immigrant Trust Directive.

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

Plaintiffs also claim that the Directive poses an obstacle to the enforcement of federal immigration laws, such as the Immigration and Nationality Act, that determine when an immigrant may be deported. Therefore, plaintiffs suggest, the Directive is preempted. This argument contradicts well-established anti-commandeering principles.

In *Printz v. United States*, the Supreme Court considered the constitutionality of a federal law that “direct[ed] state law enforcement officers to participate, albeit only temporarily, 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 measure was meant to be a mere stopgap while the federal government set up its own background check system. *Id.* at 902. Nonetheless, 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 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). Under anti-commandeering doctrine, any demand Congress makes of state officers – even one that requires officers to 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.²⁸ *See Murphy*, 138 S. Ct. at 1477. They also ensure that the federal government cannot pass the cost of expensive programs onto unwilling States. *Id.* 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. *Amici* and the New Jerseyans they work with have exactly such a preference, and the Immigrant Trust Directive validly follows that preference.

²⁸ 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/>.

Thus, binding Supreme Court precedent demonstrates that Congress cannot require New Jersey officers to assist with the enforcement of immigration law. Yet, in arguing that the Directive is preempted by immigration law, plaintiffs clearly suggest the opposite. If federal immigration laws barred any state government from declining to help with immigration enforcement, state officers and resources would be effectively conscripted into federal government service.

In *Printz*, the Supreme Court made clear that the federal government simply cannot press state and local officers into its service. Under this precedent, plaintiffs' claim that the Immigrant Trust Directive is preempted by the mere existence of federal immigration law simply does not hold water.

III. The Fact that the Constitution Grants the Federal Government Exclusive Authority over Immigration Has No Impact on the Validity of the Immigrant Trust Directive.

In their complaints, plaintiffs vaguely suggest that because the Constitution places our nation's immigration authority in the hands of the federal government rather than the States, the Immigrant Trust Directive is unconstitutional. This is not the case.

The Immigrant Trust Directive is not an immigration law, as it makes no decision regarding who may enter or who must leave the United States. *See De Canas v. Bica*, 424 U.S. 351, 355 (1976) (explaining that a "regulation of immigration" is "essentially a determination of who should or should not be admitted

into the country, and the conditions under which a legal entrant may remain”). The fact that the Directive will have an impact on non-citizens does not make it an immigration law that the federal government has exclusive authority to pass. Rather, the Supreme Court has long held that “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration.” *Id.* at 355.

Courts of Appeals have underscored this principle by applying the anti-commandeering doctrine to uphold state and local policies affecting immigrants. Earlier this year, the Ninth Circuit denied the federal government’s request to preliminarily enjoin a California law limiting state and local cooperation with immigration enforcement authorities, and observed that the preemption arguments made by the United States ran “directly afoul of the Tenth Amendment and the anticommandeering rule.” *United States v. California*, 921 F.3d at 888. Moreover, the Third Circuit has decided that if immigration authorities issued “a command [to local law enforcement agencies] to detain an individual on behalf of the federal government,” that “would violate the anti-commandeering doctrine of the Tenth Amendment.” *Galarza*, 745 F.3d at 644.

As with any other state policy, a state policy that impacts non-citizens must be examined to determine whether it is preempted by any particular federal statute, immigration-related or otherwise. *See De Canas*, 424 U.S. at 356-65 (considering whether any provision of the Immigration and Nationality Act or the Farm Labor

Contractor Registration Act preempted the state law in question). For all the reasons *amici* have indicated, no federal statute validly preempts the Immigrant Trust Directive.

CONCLUSION

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

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Respectfully Submitted,

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