UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COUNTY OF OCEAN, BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF OCEAN, Plaintiffs, v. GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey, AND OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, Defendants, and ROBERT A. NOLAN, in his official capacity as Cape May County Sheriff, and COUNTY OF CAPE MAY, Plaintiffs, v. GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey, and OFFICE OF THE STATE OF NEW JERSEY, DEPARTMENT OF LAW, AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, Defendants.	Hon. Freda L. Wolfson, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. CONSOLIDATED CIVIL ACTION NO. 3:19-CV-18083-FLW-TJB **CIVIL ACTION** (ELECTRONICALLY FILED)

BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINTS IN LIEU OF AN ANSWER ON BEHALF OF DEFENDANTS

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PRELIMINARY STATEMENT

State and local law enforcement officers fulfill a critical role in keeping the public safe from harm. To do the hard work of solving crimes and bringing criminals to justice, New Jersey law enforcement officers rely on the trust they have built over the years with the communities they serve, including the State's diverse immigrant communities. Part of building that trust means making clear to New Jersey residents that an interaction with state and local law enforcement—whether as the victim of domestic violence or as an eyewitness to a violent crime—will not end with their deportation, no matter their immigration status. That promise is critical because both studies and commonsense confirm that immigrants are less likely to report a crime if they fear that the responding officer will turn them over to immigration authorities. And if victims and witnesses refuse to cooperate, it is that much more challenging to remove criminals from the streets, putting all New Jersey residents at risk.

The Immigrant Trust Directive, issued by Defendant Attorney General Gurbir S. Grewal on November 29, 2018, addresses those concerns directly. The Directive seeks to draw a line between the state and local law enforcement officers responsible for enforcing state criminal law and the federal immigration authorities responsible for enforcing federal civil immigration law. The Directive does this by placing limits on when state and local officers may voluntarily assist in the enforcement of federal immigration law above and beyond the situations in which federal law requires them

to do so. Among other things, the Directive says that state and local law enforcement officers cannot participate in civil immigration raids or arrest persons solely based on their immigration status. And the Directive makes clear that state and local law enforcement can only rarely refer residents for deportation by sharing their personal information with federal civil immigration authorities, although there are exceptions where such information sharing is required by federal law or would help state and local law enforcement transfer certain criminals and violent individuals to federal immigration detention and keep them off the streets.

Two of New Jersey's counties, which seek to provide voluntary assistance to federal civil immigration authorities in ways that the Immigrant Trust Directive does not permit, argue that this Directive is preempted by federal immigration law. But Plaintiffs, Ocean County and Cape May County and some of their elected officials, misunderstand the issues in this case. Although the Complaints allege that the U.S. Constitution grants the Federal Government broad power to set the rules governing immigration and to enforce them as it sees fit, subject as always to constitutional restrictions, that is beside the point. Defendants agree that the Federal Government, not the States, sets criteria governing admission to this country, and that the Federal Government decides whether an alien should be removed. The Federal Government, not the States, maintains an enforcement apparatus for detaining and removing non-citizens. And federal immigration authorities, not state law enforcement officers, are

the ones who decide whether, when, and where to detain those non-citizens. Nothing in the Immigrant Trust Directive so much as suggests otherwise.

The only question this case presents is whether state governments can decide for themselves what voluntary assistance their law enforcement officers may provide to federal immigration authorities enforcing federal immigration law. As every court to consider the question has held, States retain that authority, and nothing about the Immigration and Nationality Act (INA) preempts their decision to exercise it. The INA does not purport to infringe upon the State's sovereign authority over its laws, resources, and officers. It does not require state and local law enforcement officers to participate in federal civil immigration efforts, and it does not prevent States from setting rules governing that participation. Nor could it. Under the Tenth Amendment, the Federal Government may not conscript state and local law enforcement officers into federal service, and it may not order States to refrain from adopting policies that limit participation in federal enforcement initiatives. Plaintiffs' various preemption claims thus fail, and their federal causes of action must be dismissed.

In addition to falling short on the merits, Plaintiffs' causes of action all suffer from fatal threshold flaws. Plaintiffs' federal claims cannot prevail because Plaintiffs are political subdivisions of the State, which means that they cannot challenge New Jersey law on federal constitutional grounds in federal court. That rule follows from the Supreme Court's repeated teachings that, vis-à-vis federal law, States have the

power to grant or withdraw powers and privileges from their counties as they see fit. Plaintiffs' state law claims fare no better because Defendants—a state agency and a state official sued in his official capacity—enjoy sovereign immunity in federal court from state law causes of action. As such, this Court should dismiss these Complaints in their entirety without addressing the merits of Plaintiffs' arguments.

Ultimately, this lawsuit represents nothing more than Plaintiffs' disagreement with the State's executive policy decisions regarding the efficient administration of its law enforcement resources and prudent strategies for fighting crime and building community trust. Although these policy interests are significant, and this subject is a sensitive one over which reasonable officials can differ, such policy disagreements do not justify this Court's intervention. Whether based on the merits, on a threshold ground, or both, this Court must dismiss Plaintiffs' Complaints.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Federal Immigration Law

The Federal Government enjoys broad authority when it comes to setting and enforcing immigration policy. *See, e.g., Arizona v. United States*, 567 U.S. 387, 394-95 (2012). In general, and subject to constitutional requirements, the United States can determine "who should or should not be admitted into the country," as well as "the conditions under" which they may remain. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Congress has set out the Nation's immigration policy in the Immigration and

Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which prescribes criteria for admission to the United States and establishes "which aliens may be removed from the United States and the procedures for doing so." *Arizona*, 567 U.S. at 396; *see also*, *e.g.*, 8 U.S.C. §§ 1151(a), 1181, 1226, 1231. These laws establish a comprehensive federal enforcement apparatus for detaining and removing non-citizens. Under federal law, the Department of Homeland Security (DHS) "play[s] a major role in enforcing the country's immigration laws," and its Immigration and Customs Enforcement (ICE) officers are "responsible for the identification, apprehension, and removal of" those who are unlawfully in the country. *Arizona*, 567 U.S. at 397.

In passing the INA, Congress allowed state and local law enforcement officers to assist federal agents in enforcing immigration laws. Among other things, the INA permits such officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). Such assistance can "include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Arizona*, 567 U.S. at 410.

The INA also allows federal officials to ask state and local officers for help in transferring certain immigrants from state criminal custody to federal immigration detention. Because federal agents can remove immigrants who commit state crimes

only after they complete their state sentences (with certain limited exceptions), *see* 8 U.S.C. §§ 1227(a)(2) & 1231(a)(4), ICE can ask state and local law enforcement officers to provide advance notice of the date a specific immigrant will be released from prison. *See Arizona*, 567 U.S. at 410. Typically, ICE asks for this information by issuing "detainers," which are "requests that [a state and local law enforcement] agency advise [DHS], prior to release of [an] alien, in order for [DHS] to arrange to assume custody." 8 C.F.R. § 287.7(a).

In contrast to the voluntary detainers described above, the INA issues just one direct command to the States. Section 1373 says that, "[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). For its part, ICE "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." *Id.* § 1373(c).

The INA also permits state and local law enforcement agencies to choose to participate in immigration enforcement directly under federal supervision by signing formal agreements with the Federal Government known as "287(g) agreements."

The federal law establishing such agreements says that "the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which" state or local law enforcement may perform the "function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1). Any such agreement, the INA adds, may be carried out only "to the extent consistent with State and local law." *Id.* The INA explains that "[n]othing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement," *id.* § 1357(g)(9), and fewer than ninety law enforcement agencies across the country have done so. *See* ICE, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," *available at* https://www.ice.gov/287g.

B. The Immigrant Trust Directive

The New Jersey Attorney General is the "chief law enforcement officer of the State." N.J. Stat. Ann. § 52:17B-98. As such, the Criminal Justice Act of 1970, N.J. Stat. Ann. §§ 52:17B-97 to -117, grants the New Jersey Attorney General "power to adopt guidelines, directives and polices that bind law enforcement throughout" the State. *Paff v. Ocean Cty. Prosecutor's Office*, 192 A.3d 975, 986 (N.J. 2018). These guidelines, directives, and policies all bind local law enforcement "in the day-to-day administration of the law enforcement process." *O'Shea v. Twp. of W. Milford*, 982 A.2d 459, 465 (N.J. App. Div. 2009). Attorneys General have used this authority

nearly 75 times in the past two decades, including to address important and sensitive issues, from Attorney General Peter Harvey's Directive barring racially-influenced policing (2005-1) to Attorney General Chris Porrino's Directive implementing New Jersey's criminal justice reform law (2016-6).

New Jersey's Attorneys General have also relied on this authority to address state and local law enforcement cooperation with federal immigration authorities. In 2007, then-Attorney General Anne Milgram issued Directive 2007-3 to "establish the manner in which local, county, and state law enforcement agencies and officers shall interact with federal immigration authorities." Directive 2007-3 at 1. Her Directive explained that the "enforcement of immigration law is primarily a federal responsibility" and that the overriding mission of state and local law enforcement officers must be "to enforce the state's criminal laws and to protect the community that they serve." *Id.* The Directive thus placed certain limits on when state and local law enforcement officers could participate in federal civil immigration efforts.

In November 2018, Attorney General Grewal promulgated Directive 2018-6, known as the "Immigrant Trust Directive," to update these rules. The Immigrant Trust Directive explains that new guidance was appropriate because ongoing state and local participation in federal immigration enforcement operations "present[ed] challenges to New Jersey's law enforcement officers, who have worked hard to build trust with [the] state's large and diverse immigrant communities." Directive 2018-6

(Appx. A), at 1 (introductory clauses). "It is well-established," the Directive notes, that immigrants will be "less likely to report a crime if they fear that the responding officer will turn them over to immigration authorities." *Id.* And if such individuals are afraid to approach law enforcement as victims or to cooperate as witnesses, it is "more difficult for officers to solve crimes and bring suspects to justice, putting all New Jerseyans at risk." *Id.* The objective of the Directive is thus to draw a clear line between New Jersey's "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).

To be clear, even with those concerns in mind, the Directive describes many instances in which New Jersey law enforcement officers either can or must provide assistance to federal civil immigration authorities. Importantly, the Directive notes that "law enforcement officers should assist federal immigration authorities when required to do so by law." *Id.*; *see also id.* ("[N]othing in this Directive restricts New Jersey law enforcement agencies or officers from complying with the requirements of Federal law or valid court orders, including judicially-issued arrest warrants for individuals, regardless of immigration status."). Beyond mandating compliance with judicial warrants and court orders, *id.* § II.C.3, the Directive says that "nothing" in its rules "restrict[s], prohibit[s], or in any way prevent[s] a state, county, or local law enforcement agency or official from ... [s]ending to, maintaining, or receiving from

federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual," using the same language that Congress employed in the INA. *See id.* § II.C.10 (citing 8 U.S.C. §§ 1373 & 1644).

The Directive also makes clear that New Jersey law enforcement officers need to comply with state law. As the Directive puts it, "[n]othing" in the Directive "shall be construed to restrict, prohibit, or in any way prevent a state, county, or local law enforcement agency or official from … [e]nforcing the criminal laws of this state." *Id.* § II.C.1. For that reason, the Directive makes clear, the State is not "provid[ing] 'sanctuary' to those who commit crimes in this state. Any person who violates New Jersey's criminal laws can and will be held accountable for their actions, no matter their immigration status." *Id.* at 1 (introductory clauses).

The only issue that the Directive addresses is whether and when New Jersey officers can provide voluntary assistance to federal civil immigration enforcement efforts "above and beyond" the requirements of federal law. *Id.* at 1-2 (introductory clauses). The Directive limits, but does not foreclose, such assistance. The Directive states that law enforcement officers cannot "[s]top, question, arrest, search, or detain any individual based solely on: actual or suspected citizenship or immigration status; *or* actual or suspected violations of federal civil immigration law." *Id.* § II.A.1. The Directive prevents officers from "[p]articipating in civil immigration enforcement operations." *Id.* § II.B.1. And it explains that such officers cannot provide "any non-

public personally identifying information regarding any individual" or grant "access to any ... database" to federal agents when the "sole purpose of that assistance is to enforce federal civil immigration law." *Id.* § II.B.3-4. In order words, the Directive prevents law enforcement officers from acting as civil immigration officials.

But when it comes to the transfer of individuals from state criminal custody to federal immigration detention, the Directive permits some assistance. While law enforcement officers cannot "[p]rovid[e] notice of a detained individual's upcoming release from custody" to immigration agents for a low-level offender, such officers can provide ICE with advance notice of the release date for any inmate who "in the past five years, has been convicted of an indictable crime" or for any inmate who is charged with, or has ever been convicted of, a wide range of offenses, including any first or second degree crime, domestic violence assault, or other violent or serious offense. *Id.* § II.B.5. Likewise, law enforcement officers can provide advance notice of release, regardless of the severity of prior criminal history, for any inmate who is "subject to a Final Order of Removal that has been signed by a federal judge." *Id.* Officers are permitted to detain these inmates "until 11:59 pm on the calendar day on which the person would otherwise have been eligible for release." *Id.*

Attorney General Grewal updated the Directive in September 2019. As noted above, the INA permits law enforcement agencies to enter into 287(g) agreements with the United States, pursuant to which the agency's officers become deputized as

federal immigration agents, subject to federal direction and supervision. The version of the Directive issued in November 2018 said that law enforcement agencies could not sign such agreements without the Attorney General's permission. But on further review, Attorney General Grewal found that 287(g) agreements were unnecessary, and that they in fact undermined public safety. *See* "Letter Regarding the Immigrant Trust Directive" (Appx. B). As he explained, "the problem with 287(g) agreements is that they blur the distinction between federal civil immigration enforcement and local law enforcement," thereby "creat[ing] confusion regarding the distinct roles of local law enforcement and federal agents" and "mak[ing] it less likely that victims and witnesses will cooperate with local police." *Id.* at 2. Attorney General Grewal also noted that just two agencies in the State maintained such agreements. *Id.* As a result, the updated version of the Directive clarifies that no law enforcement agency "shall enter into, modify, renew, or extend" a 287(g) agreement or "exercise any law enforcement authority" under a preexisting agreement. Appx. A § III.A.

C. The Instant Lawsuits

On September 18, 2019, Ocean County and its Board of Chosen Freeholders ("Ocean County Plaintiffs") filed a Complaint for Declaratory Judgment against Attorney General Grewal and the New Jersey Department of Law and Public Safety ("Defendants"). On October 15, 2019, Robert A. Nolan, in his official capacity as Cape May County Sheriff, and Cape May County ("Cape May County Plaintiffs")

also filed a Complaint against Defendants, seeking declaratory and injunctive relief. The Complaints assert a mix of federal and state law causes of action. These matters were consolidated before this Court on November 7, 2019. *See* ECF No. 11.

The Ocean County Plaintiffs' Complaint asserts one federal claim, contending that the INA preempts the Immigrant Trust Directive. According to the Complaint, the Ocean County Department of Corrections ("OCDOC") collects and maintains "biographical information" for its inmates. The Ocean County Plaintiffs previously shared this information with ICE, and they would like to do so again. *Ocean Compl.*, ¶¶13-14, 20, 24. OCDOC houses that information within its Offender Management System, to which the County would also like to grant ICE agents access. *Id.* ¶¶15, 18, 20. And, the County adds, it wishes to share information about the release dates of all inmates with ICE, even if the inmate has not been convicted of or charged with a qualifying offense under the Immigrant Trust Directive. *Id.* ¶¶19-22. The Ocean County Plaintiffs seek a declaration that the INA, 8 U.S.C. §§ 1373, 1644, preempts the Directive, and that the Directive is invalid and unenforceable. *Id.* ¶¶31-40.

The Cape May County Plaintiffs assert two federal causes of action, both of which also rely on the assertion that the INA preempts the Directive.[1] Like the Ocean

[1] The Cape May County Plaintiffs argue that "the Directive is preempted by federal law," *Cape May Compl.* (Count Three), and that it "violates the Supremacy Clause of the United States Constitution," *id.* (Count Two). But the latter count represents something of a misnomer. The Court has explained that "the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action."

County Plaintiffs, the Cape May County Plaintiffs contend that 8 U.S.C. §§ 1373 & 1644 preempt the Directive. *Cape May Compl.*, ¶42. And they add, more generally, that the Directive "frustrates and impedes the federal government's regulation and enforcement of immigration laws." *Id.* ¶¶24, 39. But unlike the other Complaint, the Cape May County Plaintiffs focus on their desire to maintain a 287(g) agreement with the Federal Government. *Id.* ¶¶2-9, 24-25, 29-37. Describing such agreements as "partnership[s]" between federal and local law enforcement agencies "to identify and remove aliens who are subject to removal from the United States," *id.* ¶2, this Complaint states that the Cape May County Sheriff's Office had previously entered into a 287(g) agreement with ICE on April 10, 2017, *id.* ¶31. The decision to prevent law enforcement agencies from maintaining such agreements, the Cape May County Plaintiffs contend, violates federal law.

Both sets of Plaintiffs also challenge the validity of the Directive on state law grounds. For their part, the Ocean County Plaintiffs claim that the Directive violates the authority that the state constitution provides to localities, *Ocean Compl.*, ¶¶ 41-49 (Count Two), and that it exceeds the authority that the New Jersey constitution, statutes, and common law each accord to the Attorney General, *id.* ¶¶ 50-59 (Count

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Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 324-25 (2015). Instead, "this Clause creates a rule of decision" that "instructs courts what to do when state and federal law clash." *Id.* at 325. So while the Clause undergirds the preemption doctrine, it does not itself support an independent cause of action.

Three). The Cape May County Plaintiffs contend that the Directive was enacted in violation of state administrative law, and that it also violates the State's common law doctrine of intentional interference. *Cape May Compl.*, ¶¶ 43-47 (Count Three).

Defendants now move to dismiss both Complaints in their entirety.

STANDARD OF REVIEW

When a defendant challenges a plaintiff's standing pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of persuasion to show that it has standing. *See Heges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). "[T]he district court may not presume the truthfulness of plaintiff's allegations, but rather must evaluat[e] for itself the merits of [the] jurisdictional claims." *Id*.

When a defendant moves to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must "accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to [the plaintiff]." *See Philips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). But this Court may not accept a plaintiff's "legal conclusions," which it must evaluate for itself. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. THIS COURT MUST DISMISS THE FEDERAL LAW CLAIMS.

This Court must dismiss Plaintiffs' federal law claims for either or both of two reasons. First, political subdivisions (including counties) cannot sue their states for

alleged violations of federal constitutional law in federal court. Second, Plaintiffs' preemption claims plainly fail on the merits.

A. As A Threshold Matter, This Court Must Dismiss These Claims Because Counties Cannot Sue Their States In Federal Court.

Plaintiffs cannot pursue their federal law causes of action because "political subdivisions of the state"—like counties—lack the power "to challenge state law on constitutional grounds in federal court." *City of San Juan Capistrano v. Cal. PUC*, 937 F.3d 1278, 1280 (9th Cir. 2019). Federal courts have repeatedly applied that rule to dismiss challenges to state statutes, regulations, and administrative decisions, *id.* at 1280-81, suits against both a State and its instrumentalities, *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999), and cases involving the Supremacy Clause, *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363-64 (9th Cir.), *cert. denied*, 525 U.S. 873 (1998). This rule disposes of Plaintiffs' federal law causes of action.

Although this approach admittedly remains the subject of an ongoing debate among the courts of appeals, it reflects the best reading of Supreme Court precedent. Indeed, the Supreme Court announced this very rule a century ago, holding that any political subdivision created by the State "has no privileges or immunities under the federal constitution" to invoke against the State. *Williams v. Baltimore*, 289 U.S. 36, 40 (1933). The Court has relied on this rule to reject claims from cities brought under the Contract Clause, the Just Compensation Clause, and the Equal Protection Clause.

See, e.g., *Coleman v. Miller*, 307 U.S. 433, 441 (1939) ("Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator."); *R.R. Comm'n v. L.A. Ry. Corp.*, 280 U.S. 145, 156 (1929); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Trenton v. New Jersey*, 262 U.S. 182, 185-86 (1923).

Not only does this rule reflect the proper reading of Supreme Court precedent, but also it reflects black letter constitutional principles. Indeed, the Supreme Court has repeatedly addressed the relationship between States and their local governments under federal law, counseling that the latter "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991); *Trenton*, 262 U.S. at 185-86 (same). It follows that localities "never were and never have been considered as sovereign entities" for purposes of federal law, but are instead "subordinate unit[s] of government created by the State to carry out delegated government functions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362-63 (2009). That is why, vis-à-vis federal law, the "State may withhold, grant or withdraw powers and privileges as it sees fit." *Id.* at 363 (citing *Trenton*, 262 U.S. at 187). In light of that relationship, it makes sense that a county lacks the power to bring federal claims in federal court against its State.

There are two different ways this rule has been framed. One approach, taken by the Ninth Circuit, is to treat this as a rule of standing. *See, e.g.*, *City of San Juan Capistrano*, 937 F.3d at 1280 (holding that "political subdivisions lack standing to challenge state law on constitutional grounds in federal court"). The Supreme Court itself described this rule as a standing doctrine. *See, e.g.*, *Coleman*, 307 U.S. at 441. To have standing, a plaintiff must suffer a "judicially cognizable" injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992), and decisions from *Williams* to *Ysursa* confirm that a locality's alleged injury at the hands of the State is not one that federal law recognizes. Alternatively, under the second approach, even if this Court does not believe this rule fits the Article III framework, this Court can apply it as a categorical rule of constitutional law. *See City of San Juan Capistrano*, 937 F.3d at 1282-84 (Nelson, J., concurring) (questioning whether the standing rationale is correct, but noting that a categorical merits-based bar could still be appropriate). That approach, too, follows from the Supreme Court's decisions: because federal law permits the State to grant or withdraw powers from its subdivisions as it sees fit, a county cannot prevail on a federal law claim when the State does exactly that. Either mode of analysis leads to the same result.

The Third Circuit has recognized that this per se rule preventing subdivisions from "assert[ing] constitutional claims against their own state governments" seems to reflect "the law of the land." *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991);

see also id. (noting that federal courts should maintain a "general reluctance … to meddle in disputes between state governmental units" and "must be certain not to adjudicate them unnecessarily"). While the Third Circuit has not resolved whether this is a rule of standing or on the merits, *see id.* (holding that "these cases may not be standing cases (in the modern sense of the term), but instead holdings on the merits"), that bears only on the rule's rationale, and not on whether the rule is correct. And although *Amato* suggested that "judicial support for this rule may be waning with time," *id.*, the Supreme Court has not changed course since the Third Circuit's decision. To the contrary, the Court has reiterated that States can withdraw any and all powers from their subdivisions, even citing *Trenton* in support. *See Ysursa*, 555 U.S. at 362. Until the Supreme Court reverses that view—and overrules a century of its precedent—this Court should follow the "law of the land."

While some circuits have taken a different approach, their decisions rely on a number of misconceptions. *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 72-73 (2d Cir. 2019); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998); *Rogers v. Brockette*, 588 F.2d 1057, 1070 (5th Cir. 1979). These courts believe that subdivisions are barred from bringing some constitutional claims (such as those under the Contract, Equal Protection, and Just Compensation Clauses) but can bring others (such as those involving the Supremacy Clause). As these courts admit, however, this approach is difficult to square with the language in the Supreme

Court's cases like *Williams*. *See Branson Sch. Dist.*, 161 F.3d at 628 (accepting that its approach is in contrast to "the sweeping breadth of Justice Cardozo's language").[2] And it is even harder to square with the underlying principles motivating the rule—namely, that subdivisions are "convenient agencies" that receive powers entrusted by a State in "its absolute discretion," *Wis. Pub. Intervenor*, 501 U.S. at 607-08, and that States can withdraw any powers that they choose, *see Ysursa*, 555 U.S. at 362—which would hold true no matter which provision is at stake. Finally, these courts' distinctions between permissible and impermissible actions are unpersuasive. These courts advance a test based on whether the "constitutional provision that supplies the basis for the complaint was written to protect individual rights"—which the county "may not bring"—"as opposed to [those written to protect] collective or structural rights." *Branson Sch. Dist.*, 161 F.3d at 628. But the Supremacy Clause "is not the source of *any* federal rights," *Armstrong*, 575 U.S. at 324-25, let alone structural

[2] Some circuits have taken the view that a later decision, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), narrowed the holdings in *Trenton* and its progeny to the provisions involved in those cases. *Gomillion* does not support the view that subdivisions can sue their States, however, because it has nothing to do with actions by subdivisions. *Gomillion* involved citizens who sued to prevent a subdivision from enforcing a state law that affected their voting rights. The Court rightly held that States lack "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations"—because such manipulations could conflict with *individuals'* rights. *Id.* at 344. (And that was the context in which the Court said *Trenton* stands "only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship." *Id.* at 343.) *Gomillion* remained silent as to whether the locality had federal rights sufficient to support a lawsuit against the State.

ones. So even were this alternative test correct, it is not at all clear why these courts have allowed subdivisions' Supremacy Clause challenges to go forward.

In short, this Court must dismiss the federal law claims because Plaintiffs, as political subdivisions, cannot sue their State for violations of federal law.

B. This Court Must Dismiss These Claims Because Plaintiffs' Preemption Arguments Lack Merit.

Even if this Court considers the merits of Plaintiffs' federal law claims, the result is the same—the Complaints must be dismissed. The core of their argument is that the INA either expressly or impliedly preempts the Immigrant Trust Directive. But Plaintiffs misunderstand the Directive and the scope of preemption. Plaintiffs are right to say that the United States enjoys plenary authority in setting immigration policy. But that power is beside the point, because the Immigrant Trust Directive in no way undermines this federal authority. Instead, all the Directive does is limit the voluntary assistance that state and local law enforcement officials can provide to the Federal Government as it implements that federal policy.

In line with every other court to consider the issue, this Court must hold that New Jersey can make its own decisions regarding when to voluntarily participate in federal immigration enforcement. That is so for two reasons. First, the INA does not preempt the Immigrant Trust Directive, and the two can easily coexist. Second, this position is confirmed by the canon of constitutional avoidance, because a reading of

the INA that requires States to participate in the enforcement of federal immigration law violates the Tenth Amendment's anti-commandeering doctrine.

i. The INA Does Not Preempt The Immigrant Trust Directive.

Nothing in the INA preempts the Directive's choices as to when New Jersey law enforcement will assist in federal immigration enforcement. That is true under any of the relevant preemption analyses.

a. The INA Does Not Expressly Preempt The Directive.

Express preemption "arises when there is an explicit statutory command that state law be displaced." *St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't of the V.I.*, 218 F.3d 232, 238 (3d Cir. 2000). The only provision of the INA that potentially speaks to the Directive is Section 1373, which declares that a State may not restrict the communication of information "regarding the citizenship or immigration status, lawful or unlawful, of any individual" between "any government entity or official" and the Federal Government. 8 U.S.C. § 1373(a).[3] While Plaintiffs rely heavily on Section 1373, Plaintiffs ignore that the Directive in fact allows for full compliance with the statute's terms. The Directive states explicitly that "[n]othing" in the policy

[3] Section 1644 also governs communications between state and local government entities and the Federal Government regarding someone's "immigration status." 8 U.S.C. § 1644. Because it uses the same language as Section 1373—and is narrower, because (unlike Section 1373) this provision does not mention "citizenship status"—the brief focuses only on Section 1373. If Section 1373 does not expressly preempt New Jersey law, *a fortiori* Section 1644 does not either.

"shall be construed to restrict, prohibit, or in any way prevent a state, county, or local law enforcement agency or official from ... [s]ending to, maintaining, or receiving from federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Appx. A § II.C.10 (citing 8 U.S.C. §§ 1373 & 1644). Because New Jersey law does not do what Section 1373 prohibits, express preemption cannot apply.

To show that the INA expressly preempts the Directive, Plaintiffs would have to claim—as the United States unsuccessfully argued in other cases—that Section 1373 requires the sharing of *other* kinds of information that the Directive restricts, such as an immigrant's release date from jail or her home or work address. But as courts unanimously have held, that interpretation is incorrect. The statutory phrase "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" means exactly what it says: "an individual's category of presence in the United States—e.g., undocumented, refugee, lawful permanent resident, U.S. citizen, etc.—and whether or not an individual is a U.S. citizen, and if not, of what country." *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); *see also United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019) (agreeing this "is naturally understood as a reference to a person's legal classification under federal law"). Indeed, when Congress used this phrase in another part of the INA, Congress

gave only one illustrative example of such information: "knowledge that a particular alien is not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(A). By contrast, and as a matter of plain English, dates that "an individual will be released from a [county jail] cannot be considered 'information regarding' his immigration status." *Philadelphia*, 309 F. Supp. 3d at 333; *see also Steinle v. City & Cty. of San Francisco*, 919 F.3d 1154, 1164 (9th Cir. 2019) (same).

The fact that Section 1373 refers to information "regarding" an individual's immigration status does not change the analysis. While the term "regarding" can at times "ha[ve] a broadening effect," *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018), the Supreme Court has cautioned that this term cannot be "taken to extend to the furthest stretch of its indeterminacy," *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *see also California*, 921 F.3d at 892 (same). Although Plaintiffs have not offered a limiting principle for their interpretation of the statute, to the extent Plaintiffs argue that the phrase "regarding the … immigration status, lawful or unlawful, of any individual" sweeps in anything that relates to federal removability or detention decisions, that reaches far beyond the plain text. After all, a wide range of facts affect admissibility, including an individual's vaccination history, health, education, skills, and financial resources, *see* 8 U.S.C. § 1182, and an even broader set of facts can help authorities identify and detain someone, including the addresses of a non-citizen's relatives. But

as a matter of plain text, none of those facts relate to an individual's "citizenship or immigration status." Simply put, "[t]he phrase 'information regarding' includes only information relevant to *that* inquiry," *Philadelphia*, 309 F. Supp. 3d at 333 (emphasis added)—namely, the inquiry into someone's immigration status.[4]

The INA's structure confirms what every court has found as a matter of text. Importantly, "Congress has used more expansive phrases in other provisions of Title 8 when intending to reach broader swaths of information." *California*, 921 F.3d at 892. Indeed, the INA requires all *federal* agencies to provide "[a]ny information in any records … as to the identity and location of aliens" to ICE, 8 U.S.C. § 1360(b), and calls on the Social Security Administrator to provide "information regarding the name and address" of undocumented individuals reporting employment earnings, *id.* § 1360(c). Congress used even broader language in another section, "mandating the inclusion of 'such other relevant information as the Attorney General shall require as an aid' to the creation of a central index of noncitizens entering the country." *California*, 921 F.3d at 892 (quoting 8 U.S.C. § 1360(a)). As these provisions show, Congress knew exactly how to refer to the sharing of a broader array of information relating to immigrants and their whereabouts, but it did not do so in enacting Section

[4] Because the statutory text is so clear, there is no basis to resort to legislative history. *See Byrd v. Shannon*, 715 F.3d 117, 123 (3d Cir. 2013) ("[L]egislative history may be referenced only if the statutory language is written without a plain meaning, *i.e.*, if the statutory language is ambiguous.").

1373. *See, e.g., Steinle*, 919 F.3d at 1164 (explaining that "Congress certainly could have added explicit 'release date' wording to the statutes, but it did not").

The INA preempts provisions of laws that restrict the sharing of citizenship and immigration status information. But the Immigrant Trust Directive allows New Jersey officers to share such information. Express preemption thus does not apply.

b. The INA Does Not Otherwise Preempt The Directive.

Because the INA does not expressly preempt the Directive, Plaintiffs are left to argue that the INA somehow impliedly preempts the State's decisions regarding how best to manage state and local law enforcement resources. *See Ocean Compl.* ¶ 32; *Cape May Compl.* ¶ 26. Plaintiffs rely upon "conflict preemption," under which a state law is preempted when it "stand[s] as an obstacle to the accomplishment and execution" of a federal law. *Arizona*, 567 U.S. at 399. Plaintiffs contend that because "the United States has broad, undoubted power over the subject of immigration and the status of aliens," New Jersey's restrictions on state and local immigration-related cooperation are an impermissible obstacle to the INA's implementation. *Id.* While New Jersey agrees that the United States has broad authority regarding immigration, Plaintiffs' conclusion does not follow. That is because Plaintiffs conflate two distinct issues: (1) whether the Federal Government can set and enforce its own immigration policies, and (2) whether state and local law enforcement officers must participate

in the enforcement of those policies. As every court to consider this issue has held, a State's decision to regulate the latter in no way obstructs the former.

As an initial matter, Plaintiffs improperly describe the Directive's impact. The Directive is not a statement of statewide immigration policy, and it recognizes that the "responsibilities" of "enforcing civil immigration violations … fall to the federal government." Appx. A at 1. As explained above, the Directive establishes that "law enforcement officers should assist federal immigration authorities when required to do so by law," *id.*, including by providing "information regarding the citizenship or immigration status … of any individual," *id.* § II.C.10, and "[c]omplying with a valid judicial warrant or other court order," *id.* § II.C.3. The Directive's aim is simply to lay out when officers should be volunteering assistance to immigration authorities "above and beyond" those legal requirements. *Id.* at 1-2. Even then, the Directive permits officers to provide assistance in a variety of cases, including by supplying federal immigration agents with notice of the release date for an inmate who "in the past five years, has been convicted of an indictable crime" or who is charged with or has ever been convicted of multiple offenses, including any first or second degree crime, domestic violence assault, or other violent or serious offense. *Id.* § II.B.5.

Yet even where the Immigrant Trust Directive places limits on the voluntary assistance that the State's officers may provide in implementing federal immigration law, the Directive in no way obstructs federal immigration law. The Directive does

not give anyone the right to remain in the country, or set limits on whom federal authorities can detain or when or where they can detain them. That is why Plaintiffs' assertion that "the issue [is] whether localities can be allowed to thwart federal law enforcement" is simply "a red herring." *City of Chicago v. Sessions*, 888 F.3d 272, 282 (7th Cir. 2018), *vacated in part on other grounds* 2018 WL 4268817 (7th Cir. June 4, 2018). As the Seventh Circuit explained in an analogous matter, "nothing in this case involves any affirmative interference with federal law enforcement at all, nor is there any *interference* whatsoever with federal immigration authorities." *Id.*; *see also, e.g.*, *California*, 921 F.3d at 889 (recognizing that the decision to refrain from aiding in federal immigration enforcement "is not the same as impeding").

When one considers the real issue in this case—whether the INA preempts a State's ability to choose when to voluntarily assist in federal immigration efforts—the answer becomes obvious: it does not. Rather, "[t]he choice as to how to devote law enforcement resources—including whether or not to use such resources to aid in federal immigration efforts—would traditionally be one left to state and local authorities," including not to "inform[] federal authorities when persons are in their custody and provid[e] access to those persons." *Chicago*, 888 F.3d at 282. Because a "state's ability to regulate its internal law enforcement activities is a quintessential police power," it is that "historic police power—not preemption" that a Court "must assume, unless clearly superseded by federal statute." *California*, 921 F.3d at 887;

see also, e.g., *Parker v. Brown*, 317 U.S. 341, 351 (1943) (noting that "[i]n a dual system of government in which, under the Constitution, the states are sovereign … an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress"). And Plaintiffs do not cite evidence—let alone clear evidence—that the INA was intended to strip the States of the power to decide when their own officers should be volunteering to assist in the enforcement of federal immigration laws. Rather, courts have consistently held the opposite to be true—that the INA "provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities." *California*, 921 F.3d at 889.

That unanimous conclusion makes sense. "With the exception of § 1373(a)" (discussed above), the key portions of the INA "direct *federal* activities, not those of state or local governments." *Id.* at 887. For example, although Congress decided to allow federal agents to remove certain immigrants only after they have completed their criminal sentences (with a few specified exceptions), 8 U.S.C. §§ 1227(a)(2) & 1231(a)(4), the statute says nothing about what the State must do in such cases. The INA does not require States to alert federal authorities before releasing an inmate (as Plaintiffs wish to do) or to hold them for a set time period. The INA permits federal agents to *ask* state and local officials for advance warning of someone's release, but it does not require state and local officials to answer. *See Arizona*, 567 U.S. at 410 (finding that "State officials *can* also assist the Federal Government by responding

to requests for information about when an alien will be released from their custody" (emphasis added)). That is true even when ICE has issued a detainer asking for that information, because a detainer is merely a "request," 8 C.F.R. § 287.7(a), and it is "not mandatory." *Galarza v. Szalczyk*, 745 F.3d 634, 642 (3d Cir. 2014). Congress may have "presume[ed] that states would conduct their law enforcement activities in concert with federal immigration efforts," but such assumptions cannot be enough to overcome the States' power over their law enforcement activities where Congress "opted not to codify its belief" in the INA. *California*, 921 F.3d at 887.

A key provision on which the Cape May County Plaintiffs rely—8 U.S.C. § 1357(g)—actually undermines their point. As laid out above, a "287(g) agreement" is one that allows state and local law enforcement officers to be deputized as federal immigration agents and perform their duties. But Section 1357—which lays out the rules for such agreements—does not preempt a State's decision either to refrain from entering into such an agreement or to stop a locality from doing so. For one, 287(g) agreements are voluntary, not mandatory. *See* 8 U.S.C. § 1357(g)(9) ("Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement."); *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018) ("Section 1357 does not require cooperation at all."). For another, the INA says that 287(g) agreements can be carried out only "to the extent consistent with State and local law," 8 U.S.C. § 1357(g)(1), which means that "some state and

local regulation of cooperation is permissible." *El Cenizo*, 890 F.3d at 178; *see also id.* (noting federal law "does not suggest the intent—let alone a 'clear and manifest' one—to prevent states from regulating" the decision to enter into such agreements). Ultimately, Section 1357 "regulates *how* local entities may cooperate in immigration enforcement," but leaves it to the States to "specif[y] *whether* they cooperate." *Id.*

In short, while the INA sets the Nation's immigration priorities, the Immigrant Trust Directive does not conflict with those priorities and it does not prevent federal agents from doing their job. All the State has done is establish what assistance it will voluntarily offer. The INA does not prevent the State from making that choice.

ii. The Canon of Constitutional Avoidance Bolsters The Conclusion That The INA Does Not Preempt The Immigrant Trust Directive.

The canon of constitutional avoidance reflects the longstanding and "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018). That rule is especially important when a case presents issues of federalism, because courts also have to "be certain of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014). Plaintiffs' interpretation of the INA would require state and local officials to assist the Federal Government in federal immigration enforcement,

or at the very least would prevent the State from regulating state and local officials' decisions to do so. Because that interpretation would plainly contravene the Tenth Amendment, the Court should not adopt it.[5]

Begin with the meaning and the history of the doctrine. Under the Tenth Amendment, the Federal Government "may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). That principle, known as the anti-commandeering rule, is a straightforward one: because the Constitution "'confers upon Congress the power to regulate individuals, not States,'" Congress lacks "the power to issue direct orders to governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). That is true no matter whether the federal law tells state officials to "enact" a certain law or take a specific action, or to "refrain" from enacting certain laws. *Id.* at 1478. It follows that States have the power to "decline to administer [a] federal program." *New York*, 505 U.S. at 177; *see also Printz*, 521 U.S. at 909-10 (noting States may "refuse[] to comply with [a] request" to administer federal law). *Printz* is illustrative. In that case, Congress adopted a federal law regulating the distribution of guns and

[5] To be sure, the narrower construction of Section 1373 may still be unconstitutional because it acts as a direct command on the State. But that question is not presented in this case, because the Immigrant Trust Directive permits officers to share any information covered by the narrower, textual interpretation of that provision.

requiring local law enforcement to perform background checks on gun buyers. The Court invalidated the law because it "command[ed] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 521 U.S. at 935. States thus retain the "prerogative" to refuse a role in implementing "Congress's desired policy, 'not merely in theory but in fact.'" *Nat'l Fed. of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 581 (2012) (citation omitted).[6]

The central theme of the anti-commandeering cases—that the States have no obligation to assist the Federal Government with enforcing federal law—advances a number of important goals. Most obviously, the States' ability to opt out of federal programs "serves as 'one of the Constitution's structural protections of liberty'" by stopping Congress from conscripting thousands of state officers into its regulatory machinery. *Murphy*, 138 S. Ct. at 1461 (quoting *Printz*, 521 U.S. at 921). The rule "promotes political accountability" by enabling residents to know "who to credit or blame" for any particular governmental action. *Id.* at 1477; *see also New York*, 505 U.S. at 169 (same). And it "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1461; *see also Printz*, 521 U.S. at 922 (noting that Congress cannot "impress into its service—and at no cost to itself—the police

[6] Of course, Congress could give States the option of helping administer federal law. *See Murphy*, 138 S. Ct. at 1479. Congress can even offer funds to incentivize States to implement its federal policy. *See New York*, 505 U.S. at 167. Such approaches all comply with the Tenth Amendment because "the residents of the State retain the ultimate decision" as to whether they will participate. *Id.* at 168.

officers of the 50 States"). If Congress wants to enforce its policy, Congress (not the States) must take ownership, and Congress (not the States) must pay the costs.

As a threshold matter, an interpretation of the INA that *requires* state and local officials to aid the Federal Government in enforcing federal immigration laws would violate the Tenth Amendment. That interpretation would prevent these officials from "refus[ing] to comply with [a] request" to administer a federal law, *Printz*, 521 U.S. at 909-10, and it would instead "command" state officers to participate, *id.* at 935. Read in that way, the INA would necessarily "undermine[] political accountability" and "shift[] a portion of immigration enforcement costs onto the States." *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 235 (S.D.N.Y. 2018). It follows, the Third Circuit has held, that "immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme." *Galarza*, 745 F.3d at 644; *see also California*, 921 F.3d at 889 (same). In other words, in order for the INA to be constitutional, state and local officials must have discretion not to participate in federal civil immigration enforcement.

Because state and local officers have discretion not to participate in federal immigration enforcement, the only remaining question is whether the State can adopt rules governing how its officers must exercise that discretion, or whether Congress can order a State to refrain from doing so. After the Court's decision in *Murphy*, the answer is clear: Congress lacks "the power to issue direct orders to governments of

the States," including direct orders to "refrain" from enacting certain kinds of laws. 138 S. Ct. at 1476. And that is what Plaintiffs' interpretation of the INA represents: a direct order that a State "not prohibit, or in any way restrict, any government entity or official" from assisting in federal immigration enforcement in a variety of ways. 8 U.S.C. § 1373(a). Just as the Professional and Amateur Sports Protection Act—held unconstitutional in *Murphy*—made it "unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law" sports gambling, 28 U.S.C. § 3702(1), so too is a prohibition on state policies that limit voluntary state and local assistance in immigration enforcement a "command to the States" that "the anticommandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481.

In truth, Plaintiffs' reading of the INA offends the Tenth Amendment far more than did the law at issue in *Murphy*. Not only would their approach impermissibly order the State to refrain from enacting certain policies, but it would also allow the Federal Government to dictate how decision-making power is distributed within the State—by reassigning the issue of whether to provide voluntary civil immigration assistance from the State's chief law enforcement officer to individual officers or to local governments. The Supreme Court, however, has cast doubt on federal laws that "interpos[e] federal authority between a State and its municipal subdivisions, which … are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v.*

Mo. Mun. League, 541 U.S. 125, 140 (2004). Indeed, Plaintiffs' approach runs afoul of the Court's "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Id.*

It is thus no surprise that, after *Murphy*, every court to consider the issue has agreed that the INA cannot prevent state governments from issuing rules that govern their state and local law enforcement officers' voluntary participation in federal civil immigration initiatives. *See California*, 921 F.3d at 890 (holding that "the choice of a state to refrain from participation cannot be invalid under the doctrine of obstacle preemption where, as here, it retains the right of refusal"); *New York*, 343 F. Supp. 3d at 235 (same, and addressing Section 1373(a) specifically); *Philadelphia*, 309 F. Supp. 3d at 330 (also addressing Section 1373).[7] *California* is particularly relevant.

[7] The only case to go the other way, *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), predates *Murphy* and is inconsistent with that decision. The Second Circuit upheld Section 1373 against a Tenth Amendment challenge only because it believed there was a difference between (unconstitutional) laws that "affirmatively conscript states … into the federal government's service" or "directly compel states or localities to require or prohibit anything," and (purportedly constitutional) statutes that "prohibit state and local governmental entities or officials" from taking certain action. *Id.* at 35. But that is the distinction *Murphy* called "empty" when it concluded that a direct command to a State to refrain from taking particular actions still violates the Tenth Amendment. 138 S. Ct. at 1478. That is why every post-*Murphy* decision within and outside the Second Circuit rejects this pre-*Murphy* approach. *See, e.g.*, *Chicago*, 321 F.Supp.3d at 873; *New York*, 343 F. Supp. 3d at 235.

In that case, the Ninth Circuit upheld a state law limiting the assistance that state and local law enforcement could provide to federal civil immigration authorities. And the panel did so based on the same reasoning that applies fully here: if state and local officers can make a "lawful decision not to assist federal authorities," that decision cannot be "made unlawful when it is codified as state law" without running afoul of *Murphy* and the anti-commandeering doctrine. *California*, 921 F.3d at 890.

None of the possible exceptions to the anti-commandeering rule apply to this case. Plaintiffs may argue that, even under their reading, the INA is a straightforward preemption provision applicable to everyone (state and private actors alike), and not an unlawful attempt to commandeer the States. But as in *Murphy*, that claim gets them nowhere. Section 1373 is "not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors." *Murphy*, 138 S. Ct. at 1481. Instead, it speaks only to the conduct of "a Federal, State, or local government entity or official." 8 U.S.C. § 1373(a). The law "does not confer any federal rights on private actors," and it does not "impose any federal restrictions on private actors." *Murphy*, 138 S. Ct. at 1481. As a result, "[g]iven their plain language, neither Section 1373(a) nor Section 1373(b) can be best read as regulating private actors." *Philadelphia*, 309 F. Supp. 3d at 330; *see also, e.g.*, *California*, 921 F.3d at 890 (adding that "it is the state's responsibility to help enforce federal law, and not conduct engaged in by both state and private actors, that is at issue").

In the alternative, Plaintiffs may argue that their reading of the INA fits within a carve-out to the anti-commandeering rule for statutes facilitating the provision of information to the Federal Government. But courts have unanimously rejected that argument for several reasons. First, the "Court has never actually held that such an exception to the anticommandeering doctrine exists," *New York*, 343 F. Supp. 3d at 236, and given the purposes of the doctrine, there is no reason to think that it should. *See, e.g.*, *Philadelphia*, 309 F. Supp. 3d at 330-31; *Oregon v. Trump*, --- F. Supp. 3d ---, 2019 WL 3716932, at *19 (D. Or. 2019). Second, the INA would not fall within such a carve-out even if one existed. Plaintiffs read the INA to do more than require the provision of information. Plaintiffs envision that state and local law enforcement officials will regularly be enlisted in ongoing federal immigration enforcement, and that the INA prevents the State from enacting laws to limit such voluntary assistance, all of which is prohibited by the holding in *Murphy*. *See, e.g.*, *Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); *New York*, 343 F. Supp. 3d at 236; *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018).

Plaintiffs' reading of the INA runs headlong into the Tenth Amendment. As a result, this Court can and should avoid these questions by instead ruling that the INA does not preempt the Immigrant Trust Directive.

II. THIS COURT MUST DISMISS THE STATE LAW CLAIMS.

Although Plaintiffs dedicate significant portions of their Complaints to their belief that the Immigrant Trust Directive violates New Jersey law, none of these state law claims belong in federal court. As noted above, Ocean County asserts that the Immigrant Trust Directive violates the authority that the state constitution provides to localities (*Ocean Compl.*, Count Two), and exceeds the authority that the state constitution, statutes, and common law all accord to the Attorney General (*id.*, Count Three). Cape May County, for its part, contends that the Directive was enacted in violation of state administrative law, and that it violates New Jersey's common law doctrine of intentional interference (*Cape May Compl.*, Count Three). But the State has not waived its sovereign immunity with regard to those claims.[8]

It is black letter law that "States are not 'subject to suit in federal court unless' they have consented to suit." *In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 103 (3d Cir. 2019). Plaintiffs cannot point to any exception that would allow these state law causes of action to proceed. Although litigants can seek injunctive relief in federal court to prevent violations of *federal* law by States, *Pa. Fed'n of Sportsmen's Clubs, v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002) (citing *Ex parte Young*, 209 U.S.

[8] Because immunity is not merely a defense against liability but from suit altogether, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996), this brief does not address the legal shortcomings (as a matter of state law) that plague these claims and that would also justify their dismissal.

123 (1908)), no such exception exists for claims under *state* law. Instead, a plaintiff suing in federal court "may not bring state law claims—including state constitutional claims—against the State regardless [of] the type of relief it seeks," including relief against a state official acting in his official capacity. *King v. Christie*, 981 F. Supp. 2d 296, 310 n.12 (D.N.J. 2013) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984)). And while these two Complaints also include federal law claims, that does not permit this Court to review the pendant state law causes of action. *See King*, 981 F. Supp. 2d at 310 n.12 ("[S]upplemental jurisdiction does not authorize district courts to exercise jurisdiction over claims against nonconsenting states."); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 540-41 (2002) (agreeing that "the Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants"). It follows that this Court must dismiss Plaintiffs' three state law causes of action.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' complaints.

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