UNITED STATES DISTRICT COURT
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)** Motion Return Date: February 11, 2020

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS IN LIEU OF AN ANSWER

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PRELIMINARY STATEMENT

The central question this Court must answer is what role state and local law enforcement officers are required to play in enforcing federal civil immigration laws. As a policy matter, the issue of state and local involvement in federal immigration enforcement is a sensitive one, generating reasoned debate between the Federal Government and the States, and between States and their subdivisions. But as a legal matter, the answer is far simpler: while state and local law enforcement officers may not *obstruct* the enforcement of federal civil immigration laws, they are not obligated to play an *affirmative* role in immigration enforcement. And because officers enjoy discretion regarding whether and when to participate in immigration enforcement, in New Jersey, the Chief Law Enforcement Officer has the authority to tell them how to use it. New Jersey Attorney General Gurbir Grewal did exactly that when he issued the Immigrant Trust Directive, which seeks to build trust with the State's immigrant communities and to ensure that *all* individuals will approach law enforcement if they have been the victims of or witnesses to a crime.

Nothing about the Immigration and Nationality Act (INA) is to the contrary. Notwithstanding how Plaintiffs portray the statute, the INA actually has little to say about state laws. A single sentence, repeated twice in the U.S. Code, prohibits states from restricting the sharing of "information regarding" an individual's "immigration status, lawful or unlawful" with federal immigration agents. Contrary to the view of

Plaintiffs, every court to evaluate the text has held that this provision covers exactly what it says—and exactly the information the Immigrant Trust Directive allows law enforcement officers to provide. Nor does the remainder of the INA, which imposes a series of requirements on *federal* authorities enforcing federal immigration laws, preempt the ability of States to decide whether to participate in such enforcement. If Congress wants to fundamentally change the relationship between the United States and the States by requiring the latter to participate in federal enforcement efforts, it must speak far more clearly than it did in passing the INA. That is because the Tenth Amendment gives States the authority to set their own enforcement priorities, and courts refuse to read federal laws to contravene clear constitutional mandates. And that is why every court to consider the issue has refused to invalidate policies like those embodied in the Immigrant Trust Directive.

The fact that the United States has now sided with Plaintiffs does not change the proper resolution of this case. The United States, after all, was party to all of the cases that rejected the Department of Justice's view—namely, that the INA preempts restrictions on state participation in immigration enforcement—and confirmed the anti-commandeering doctrine's role in requiring this result. The United States is, of course, free to continue advancing its position in yet another forum, but it provides this Court no reason to disregard that overwhelming judicial consensus. The Federal Government simply overestimates its authority to hold States to its policy choices,

as federal courts have explained repeatedly. Nor does the United States' reliance on the intergovernmental immunity doctrine, an argument not raised by Plaintiffs, make a difference, because that theory too has been rejected by all the courts to consider it. As before, Plaintiffs' complaints must be dismissed.

ARGUMENT

I. THIS COURT SHOULD DISMISS THESE SUITS ON THE MERITS.

A. The Immigrant Trust Directive Is Not Preempted.

1. The INA Does Not Expressly Preempt the Directive.

Plaintiffs and the United States agree that only one provision of the INA even potentially expressly preempts the Immigrant Trust Directive's limits on information sharing, but they misunderstand the provision's meaning. Under Section 1373(a), "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); *see also id.* § 1644 (similar). Plaintiffs' and the United States' argument boils down to this: although the Immigrant Trust Directive allows law enforcement officers to share the "immigration status, lawful or unlawful, of any individual," *see* Directive 2018-6 § II.C.10 (citing 8 U.S.C. §§ 1373 & 1644), it does not allow for sharing of personally identifiable information and release dates. While that information would not normally count as someone's "immigration status,

lawful or unlawful," Plaintiffs and the United States rely entirely on the fact that the INA covers information "*regarding*" such status. Although Plaintiffs and the United States do not say what precise information is swept in by the addition of "regarding," they say that "the information covered by that bar is broad," ECF 25 at 14, and that it must cover at least personally identifiable information and release dates.

There are a number of problems with this argument, which is why every court to consider the issue has rejected it. *See* ECF 14-1 at 23-26 (collecting cases). If one concludes, as Plaintiffs and the United States do, that the phrase "immigration status, lawful or unlawful" itself only refers to an individual's "category of presence in the United States," *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 333 (E.D. Pa. 2018), it becomes hard to see how the addition of the word "regarding" sweeps in all the information Plaintiffs and the United States describe. For one, as New Jersey already explained, while the word regarding can broaden a statute's reach, it cannot be taken to the "furthest stretch of its indeterminacy," because "preemption would never run its course." *United States v. California*, 921 F.3d 865, 892 (9th Cir. 2019) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). This case presents a perfect example: "the range of facts that might have some connection to federal removability or detention decisions is extraordinarily broad," even including "vaccination history, education, financial resources, and [political] membership.'" *Id.* (citing 8 U.S.C. § 1182); *see also* ECF

14-1 at 24.[1] Plaintiffs and the United States never deny that their interpretation of the INA sweeps in these types of information, but they never explain how that can cohere with the INA's text. Nor do they explain how adding the single term "regarding" can bear the textual weight placed on it, let alone overcome the rule that "the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 567 U.S. 387, 400 (2012) . It is a core rule of interpretation that Congress "does not … hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), yet that is supposedly what it did by adding the word "regarding" to Section 1373(a).

Although Plaintiffs and the United States then turn to the INA's structure for support, the structure undermines their view. Plaintiffs and the United States rely on the fact that Section 1373(c)—which imposes requirements on information ICE must share with state officials—does not use "regarding," whereas Section 1373(a) does. This argument has a number of shortcomings. First, courts have drawn precisely the opposite inference from this very distinction—namely, "the fact that subpart (c) only concerns itself with immigration status suggests, given § 1373's focus on reciprocal

[1] Ocean County erroneously contends that *California* involved only the question of whether release dates are included within the information covered by Section 1373. ECF 21-1 at 24. To the contrary, the United States argued there (as it reiterates again here) that "'information regarding' immigration status includes information necessary to ascertain an individual's 'category of presence' in the United States." Brief for Appellant at 49, *California*, 921 F.3d 865 (No. 18-16496).

communication between states and the federal government, that immigration status is the extent of subpart (a)'s reach." *California*, 921 F.3d at 892. Second, Congress "used more expansive phrases in other provisions of Title 8 when intending to reach broader swaths of information," *id.*, including a command that other *federal* officials provide to ICE "information … as to the identity and location of aliens in the United States," *id.* (quoting 8 U.S.C. § 1360(b))—a fact to which Plaintiffs and the United States offer little response. Taken together, there is only one sensible conclusion: if Congress had wanted to mandate a broad array of information sharing, it would have used the broad language from other parts of the INA, rather than copying the narrow formulation in Section 1373(c) and simply adding the word "regarding." At the very least, more clarity is needed to upset the usual federal-state balance.

Plaintiffs and the United States then rely on legislative history to support their position, but that also proves unavailing. As a threshold matter, given the clarity of the text, this Court should not consider the legislative history. *See, e.g., Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 528, 599 (2011). That clarity persists even though all the parties have looked to statutory structure as part of the textual analysis; contrary to Cape May County's contention, *see* ECF 20 at 12, structure is a well-accepted part of interpreting text. *See, e.g., United States v. Fausto*, 484 U.S. 439, 449 (1988) (Scalia, J.). In any event, the legislative history does not help Plaintiffs. Plaintiffs rely on a House Report that says the INA addresses "information regarding

the immigration status of an alien or the presence, whereabouts, or activities of illegal aliens." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 2649, 2771. As the Ninth Circuit explained, however, "the fact that the report distinguished between the two categories—'information regarding the immigration status of an alien *or* the presence, whereabouts, or activities'—suggests that" the former clause, which is the only clause that appears in the INA's text, "does *not* include 'the presence, whereabouts, or activities' of noncitizens." *California*, 921 F.3d at 892-93 n.18. And nothing in the Senate Report for the same law—which speaks only of "immigration-related information," S. Rep. No. 104-249, at 19-20—suggests Congress intended Section 1373 to govern more than category of presence. Once again, more is needed when seeking to divine Congress's intent to upend the usual federal-state balance. *See Arizona*, 567 U.S. at 400.

It is thus no surprise that every single court to consider the question has agreed with New Jersey's interpretation of Section 1373(a). Plaintiffs and the United States have offered no sufficient reason here to break from that judicial consensus.

2. The INA Does Not Impliedly Preempt the Directive.

The arguments that the Immigrant Trust Directive is impliedly preempted are equally unavailing. Plaintiffs and the United States primarily argue that the Directive violates principles of conflict preemption because it serves as an obstacle to the full implementation of the INA. *See Arizona*, 567 U.S. at 399. To advance that argument,

Plaintiffs and the United States cobble together a series of INA provisions imposing duties on federal officials to detain aliens, and to do so quickly after those aliens are released from state custody. *See, e.g.*, ECF 25 at 9-11 (citing 8 U.S.C. §§ 1226 & 1231). They add that federal regulations allow federal immigration agents to obtain information from state and local officials by sending detainers to them. *Id.* (citing 8 C.F.R. § 287.7). And Cape May County (but not the United States) also relies upon 8 U.S.C. § 1357, which sets forth the INA's rules governing 287(g) agreements.

None of these provisions preempt the information-sharing restrictions in the Directive. Importantly, Plaintiffs and the United States accept that Sections 1226 and 1231 (among other provisions) only impose duties on *federal* officials—to arrest and detain aliens, to do so promptly, and to do so after those aliens finish serving criminal sentences. Conversely, that means Sections 1226 and 1231 do not impose any duties on state and local officials. *See California*, 921 F.3d at 887 (Sections 1226 and 1231 "direct *federal* activities, not those of state and local governments"). At most, then, these statutes confirm "Congress had every expectation that … states would conduct their law enforcement activities in concert with federal immigration efforts," but still "opted not to codify its belief" in the INA's text. *Id.* The question before this Court is whether that unstated assumption is enough for preemption. The answer, as the Ninth Circuit held, must be no. For one, "it is a state's historic police power—not preemption—that [courts] assume, unless clearly superseded by federal statute," *id.*

(quoting *Arizona*, 567 U.S. at 400), a fact that New Jersey raised in its Opening Brief but that Plaintiffs and the United States ignore. And for another, Plaintiffs and the United States fail to grasp the central distinction between laws that actually *obstruct* enforcement of federal laws, which are preempted, and laws that decline to provide *affirmative* assistance in the enforcement of federal laws, which "cannot be invalid under the doctrine of obstacle preemption." *Id.* at 890.[2] At bottom, because the States have a right to decline to participate in federal enforcement work, Plaintiffs and the United States cannot rely on hypothetical and unstated Congressional assumptions to show that the INA preempts States from making that choice here.

Federal regulations providing for immigration detainers, on which Plaintiffs and the United States also rely, actually confirm that preemption is inapplicable. Just as the United States argued that Sections 1226 and 1231 require cooperation by state and local officers, so too does the United States argue that detainers are an important "complement to all of the[INA's] statutory directives," ECF 25 at 10, and that the "removal [of aliens] of course depend[s] upon state and local officials" cooperating with detainers, *id.* at 11. But as a matter of circuit precedent and federal regulations, an immigration detainer seeking personal data or release date information is merely

[2] Cape May County (but not the United States) tries to distinguish *California* on the basis that California's law did not cover action by its Department of Corrections and Rehabilitation. But that played no role in the Ninth Circuit's analysis, which upheld the State's analogous restrictions on information sharing generally. And nothing in the INA implies that it applies differently to different types of agencies.

a "request[]," 8 C.F.R. § 287.7(a), and responding is "permissive, not mandatory," *Galarza v. Szalczyk*, 745 F.3d 634, 642 n.9 (3d Cir. 2014). Indeed, no matter how important detainer responses can be for INA implementation, the Third Circuit noted that "settled constitutional law clearly establishes that [detainers] must be deemed requests," and not mandatory orders. *Id.* at 643; *see also California*, 921 F.3d at 887. The fact that States can ignore detainers seeking release date information is powerful evidence that the INA does not require them to provide such information.[3]

Finally, Cape May County's arguments regarding the Directive's restrictions on 287(g) agreements—which not even the United States joins—also come up short. As New Jersey explained in its Opening Brief, the program is entirely voluntary, *see City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018), and the INA is clear that law enforcement agencies can only carry out 287(g) agreements "to the extent consistent with State and local law," 8 U.S.C. § 1357(g)(1). Cape May County does not even mention these provisions and precedents. Instead, Cape May County relies on *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), but that decision

[3] The United States suggests in a footnote that the Directive's statement that "local law enforcement agencies are not required to enforce civil administrative warrants" is "irreconcilable with the INA" because it "could be interpreted as authorizing state and local officials to refuse to surrender aliens in their custody … unless the federal government procures a judicial warrant of arrest." *See* ECF 25 at 13 n.3. But, as the Ninth Circuit noted, administrative warrants issued by DHS do not compel state and local officials to do anything. *See California*, 921 F.3d at 887; *see also, e.g.*, 8 C.F.R. § 236.1(b)(1) (noting that such administrative warrants "may be served only by those [federal] immigration officers listed in § 287.5(e)(3) of this chapter").

does not address 287(g) agreements, and has been abrogated by *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018). At bottom, while the INA "regulates *how* local entities may cooperate in immigration enforcement," it leaves "*whether* they cooperate" to the States. *El Cenizo*, 890 F.3d at 177.[4]

B. Plaintiffs and the United States Misinterpret the Tenth Amendment.

There is another reason that Plaintiffs and the United States may not prevail—their view of the INA risks bringing it into conflict with the Tenth Amendment, and so the canon of constitutional avoidance counsels against adopting it. Plaintiffs and the United States accept that state and local law enforcement cannot be required to participate in federal immigration enforcement efforts. And Plaintiffs and the United States agree the Federal Government lacks authority to order States either to enact or refrain from enacting policies. But they still resist the obvious conclusion: that the INA should not be read as such a sweeping command. *See* ECF 14-1 at 31-38.

Plaintiffs and the United States provide a number of reasons why they believe that their approach to the INA fits comfortably with the anti-commandeering rule, but they are mistaken. First, they argue, although *Murphy* admittedly stands for the

[4] Ocean County alone briefly asserts that the Directive is subject to field preemption, which arises only if "Congress regulates a domain so pervasively that it leaves no room for state regulation." *Roth v. Norfalco LLC*, 651 F.3d 367, 374 (3d Cir. 2011). But the opposite is true here, as both the INA and the Tenth Amendment ensure that *States* have the right to decide the extent of their participation in federal immigration enforcement. *See, e.g.*, 8 U.S.C. § 1357(g)(1); *California*, 921 F.3d at 891.

proposition that laws directly operating on States are invalid, the INA is no such law; rather, the INA "evenhandedly regulates activity in which both the States and private individuals engage." ECF 21 at 27 (citing *Reno v. Condon*, 528 U.S. 141, 143-45 (2000)); *see also* ECF 25 at 19 (same). As every other court to consider the question has found, however, that is wrong—the relevant INA provisions speak exclusively to the conduct of public entities. *See Philadelphia*, 309 F. Supp. at 333 (holding that, "[g]iven their plain language, neither Section 1373(a) nor Section 1373(b) can be best read as regulating private actors"). Just like the law at issue in *Murphy*, Section 1373 "does not confer any federal rights on private actors," nor does it "impose any federal restrictions on private actors." 138 S. Ct. at 1481. That Section 1373 regulates how states share information *about* private parties does not mean it actually regulates the private parties themselves. *See California*, 921 F.3d at 889.

Second, Plaintiffs and the United States spend the large majority of their briefs arguing that the INA falls into an exception to the anti-commandeering doctrine for laws that direct officials to "provide information to the federal government." ECF 25 at 18; ECF 21-1 at 28. But that argument fares no better. For one, as New Jersey laid out in its Opening Brief, no such exemption exists. *See, e.g.*, *Philadelphia*, 309 F. Supp. 3d at 330-31; *Oregon v. Trump*, 406 F. Supp. 3d 940, 973 (D. Or. 2019). That is true as a matter of precedent and principle. With respect to the former, the language in *Printz v. United States*, 521 U.S. 898 (1997), on which Plaintiffs and the

United States rely was "actually part of a paragraph in which the Court summarized the Government's (failed) arguments" and it "does not stand for the proposition for which [the United States] has cited it." *Philadelphia*, 309 F. Supp. 3d at 330-31. Nor does *Reno* suggest the existence of such an exemption; as *Murphy* explained, the law in *Reno* did not violate the doctrine because it fell within the separate exception for laws that evenhandedly regulate public and private actors, rather than any purported information-sharing exemption. *See Murphy*, 138 S. Ct. at 1478-79. And as a matter of principle, there is no reason to think such an exemption would fit with the Tenth Amendment; information sharing can involve significant regulatory burdens, which the Federal Government cannot properly shift to State and local law enforcement. *See, e.g.*, *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 866-873 (N.D. Ill. 2018). It can also undermine "political accountability" by leading immigrant communities to believe that the States are playing a role in federal immigration enforcement and thus hold those States responsible for it. *See Murphy*, 138 S. Ct. at 1477.

Even assuming such an exception did exist, it would not save the INA. That is because the INA does more than require provision of information; it specifically prohibits States from enacting laws that restrict the passing of certain information, running headlong into *Murphy*'s holding that "Congress cannot issue direct orders to state legislatures." 138 S. Ct. at 1478; *see Oregon*, 406 F. Supp. 3d at 973 (noting that the INA includes "more than just information-sharing provisions [and] instead

prevent[s] state and local policymakers from enacting a wide range of information-governance rules and force[s] them to stand aside and allow the federal government to conscript the time and cooperation of local employees" (alterations and citations omitted)).[5] Said another way, this case is about the distribution of power in a state—whether a line law enforcement officer or a State's Chief Law Enforcement Officer gets to decide what detainers to answer and what information to provide immigration authorities. Whatever the precise context, "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." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

Plaintiffs' remaining arguments fare no better. Cape May County says that the INA is valid because it prevents States from outlawing voluntary cooperation. ECF 20 at 19. But that is a distinction without a difference; the Court held in *Murphy* that a federal law of this type is still an impermissible "command to the States," 138 S. Ct. at 1481, no matter whether designed to compel state action or (as here) to prohibit a state from enacting laws. Ocean County, for its part, says the anti-commandeering clause cannot apply if Congress "enacts a regulatory scheme involving 'cooperative

[5] In its attempt to shoehorn Sections 1373 and 1644 into this alleged "information-sharing" exception, the United States mischaracterizes both provisions as commands that State governments provide information to the Federal Government, rather than prohibitions on laws restricting the provision of this information. *See, e.g.*, ECF 25 at 18. The plain text of the INA shows otherwise.

federalism,' in which states are given a choice either to implement, on its own, a federal regulatory program, or opt out." ECF 21 at 27. But that merely identifies an exception to the anti-commandeering rule; Ocean County fails to offer any basis to conclude that it applies here, and none exists.

Since Plaintiffs and the United States misunderstand the anti-commandeering rule, it is no surprise that they also misunderstand the relevant case law. They all rely heavily on *City of New York v. United States*, a Second Circuit decision from two decades ago that upheld the INA against a Tenth Amendment challenge. 179 F.3d at 35. But *Murphy* plainly abrogates that decision. The Second Circuit's opinion relied on its belief that while laws that "affirmatively conscript states … into the federal government's service" are unconstitutional, laws that "*prohibit* state and local governmental entities or officials" from taking certain action are copasetic. *Id.* That is the very 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. And that is why every single court to consider the question after *Murphy*—at least five courts in total—found that *City of New York* is no longer good law. *See California*, 921 F.3d at 889; *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018), *appeals docketed*, Nos. 19-267 & 19-275 (2d Cir. Jan. 28, 2019); *Philadelphia*, 309 F. Supp. 3d at 333; *Chicago*, 321 F. Supp. 3d at 866-873; *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924,

949-53 (N.D. Cal. 2018).[6] As Plaintiffs and the United States essentially ignore this subsequent case law, they provide no reason to break from post-*Murphy* consensus.

C. The Immigrant Trust Directive Does Not Violate The Principles Of Intergovernmental Immunity.

The United States' argument that the Directive violates the doctrine of intergovernmental immunity gets it no further. As a threshold matter, the parties did not raise this theory in their complaints, which instead focus on the claim that the INA preempts the Directive. It follows those complaints cannot survive a motion to dismiss on a theory they do not contain—and that has only been raised by an amicus brief. *See, e.g., N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 382 n.2 (3d Cir. 2012). In any event, this argument fails on its face. The doctrine seeks to prevent States from "regulat[ing] the United States directly or discriminat[ing] against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990); *see also Treasurer of N.J. v. U.S. Dep't of the Treas.*, 684 F.3d 382, 410 (3d Cir. 2012). New Jersey has done no such thing.

[6] The United States' reliance on *Delaware County v. Federal Housing Finance Agency*, 747 F.3d 215 (3d Cir. 2014), is similarly misplaced. In that case, the Third Circuit upheld a federal law exempting Fannie Mae and Freddie Mac, as well as their conservator FHFA, from taxation by state and local governments, with the exception of taxes on real property—an issue that has no bearing here. And the language from that opinion on which the United States relies has since been thoroughly rejected by the Supreme Court: after *Murphy*, it is not a defense to an anti-commandeering claim that a law "simply preclude[s]" States from taking actions "[r]ather than impose[s] an affirmative obligation" on them. *Delaware Cty.*, 747 F.3d at 228.

In fact, the only court to consider this question has rejected the United States' position on a number of grounds. For one, the doctrine does not apply to the State's decision on whether to participate in another sovereign's enforcement operations—and any contrary ruling requiring such participation "would be inconsistent with the Tenth Amendment and the anticommandeering rule." *California*, 921 F.3d at 891. But even were the doctrine to apply here, there is no impermissible discrimination. A State only violates the doctrine, after all, when it "treats someone else better than it treats" the Federal Government, *Washington v. United States*, 460 U.S. 536, 544-45 (1983), and even then a claim will fail if there are "significant differences between the two classes" that explain the distinct treatment, *Davis v. Mich. Dep't. of Treas.*, 489 U.S. 803, 816 (1989). New Jersey has offered significant reasons to think that participation in civil immigration enforcement work, which is *only* conducted by the United States, undermines law enforcement officers' ability to do their job in a way quite unlike other activities. The United States has failed to explain which similarly-situated parties—those that also engage in immigration enforcement—are favored over the Federal Government with respect to information sharing, since none exist. The mere fact that the Directive explicitly refers to federal immigration authorities does not change this analysis; as courts have found, the intergovernmental immunity doctrine is "not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment." *California*, 921 F.3d at 881. The

manner in which New Jersey's Chief Law Enforcement Officer chose to build trust with potential immigrant victims and witnesses is thus perfectly justifiable and is not a form of invidious discrimination against the Federal Government alone.

II. THIS COURT SHOULD DISMISS PLAINTIFFS' FEDERAL AND STATE LAW CLAIMS WITHOUT REACHING THE MERITS.

A. This Court Must Dismiss Plaintiffs' Federal Claims.

Although the doctrine admittedly remains unsettled, political subdivisions like Cape May County and Ocean County lack the authority to bring federal law claims against their creator states in federal court. In its Opening Brief, New Jersey supplied both case law and first principles to explain why that is so, and in their oppositions, Plaintiffs supplied case law going the other way. That is no surprise, as New Jersey noted that circuits have split on this issue. *Compare City of San Juan Capistrano v. Cal. PUC*, 937 F.3d 1278, 1280 (9th Cir. 2019), *with Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 72-73 (2d Cir. 2019). New Jersey also recognized that the language in the governing Third Circuit case, *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991), points in both directions at once, although the State did explain why it has the better of the case. *Compare id.* at 755 (declining to "endors[e] a policy of federal court abstention from all suits between state governmental actors"), *with id.* (holding the rule "that counties … and other subdivisions cannot assert constitutional claims against their own state governments ... may remain the law of the land, at

least absent state waiver"). This Court must thus decide as a matter of first principles whether counties can bring federal claims in federal court against their states.

New Jersey's commonsense approach ultimately reflects the better reading of black letter constitutional principles, a point that Plaintiffs generally ignored and cannot overcome. An unbroken line of cases confirms that (as a matter of federal law) political subdivisions are "convenient agencies" whose powers are subject to their creator State's "absolute discretion," *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991), and thus a "State may withhold, grant, or withdraw powers and privileges" from a political subdivision "as it sees fit." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362-63 (2009) (citing *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)). It follows inexorably that when a State decides to grant or withdraw such powers, there is no federal law claim to be had; were it otherwise, the promise of absolute State discretion under federal law would be a nullity. Neither Plaintiff seriously grapples with these points, and even more strikingly, neither one offers any principles to justify their alternative reading. If *Ysursa* remains the Supreme Court's most current assessment of the relationship between the States and their subdivisions, then it is hard to defend Plaintiffs' contrary rule.

That one decision in this District previously allowed such municipal suits to proceed is insufficient to overcome this analysis. *See* ECF 20 at 10 (citing *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cty.*, 893 F. Supp.

301 (D.N.J. 1995)); ECF 21 at 3 (same). For one, *Atlantic Coast* did not turn on whether political subdivisions can assert a Supremacy Clause claim; even assuming, that were so, the court still dismissed municipal plaintiffs' claims because "the law in this circuit precludes the municipal plaintiffs from asserting their constitutional claims against both the state and the county authorities." *Atl. Coast*, 893 F. Supp. at 315. For another, *Atlantic Coast* does not bind this Court, and it also preceded *Ysursa*'s exposition on the relationship between States and subdivisions. That explanation, and the principles *Ysursa* espouses, should be dispositive here.

B. This Court Must Dismiss Plaintiffs' State Law Claims.

Plaintiffs all but admit that sovereign immunity bars this Court from hearing any of their state claims. ECF 14-1 at 39-40. Though relying on the supplemental jurisdiction doctrine, they never deny it "does not authorize district courts to exercise jurisdiction over claims against nonconsenting states." *King v. Christie*, 981 F. Supp. 2d 296, 310 n.12 (D.N.J. 2013)). This Court must dismiss those causes of action.

CONCLUSION

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

Respectfully submitted,

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