

Nos. 20-2754, 20-2755

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY OF OCEAN, *et al.*,
APPELLANTS,

v.

STATE OF NEW JERSEY, *et al.*,
APPELLEES.

ROBERT A. NOLAN, in his Official Capacity as Cape May County Sheriff, *et al.*,
APPELLANTS,

v.

GURBIR S. GREWAL, in his official capacity as Attorney General of the State of
New Jersey, *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

**BRIEF FOR THE DISTRICT OF COLUMBIA, CALIFORNIA,
CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA,
NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VIRGINIA,
VERMONT, AND WASHINGTON AS AMICI CURIAE
IN SUPPORT OF APPELLEES**

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The District of Columbia and the States of California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, and Washington (collectively, “Amici States”) file this brief as amici curiae, pursuant to Federal Rule of Civil Procedure 29(a)(2), in support of the appellees. Millions of immigrants, both documented and undocumented, call the Amici States home. Immigrant communities play an important role not just in states’ civic and economic life, but also in their criminal justice systems, where immigrants’ trust and cooperation are vital to ensuring public safety. With the paramount goal of promoting public safety for all residents, the Amici States have adopted different approaches to policing based on state needs, enforcement priorities, and available resources.

For example, at least eight states and the District of Columbia have enacted state-wide measures, like the New Jersey provision at issue in this case, that limit state and local law enforcement officers’ involvement with federal immigration enforcement.¹ These measures reflect the considered judgment of state lawmakers,

¹ See Cal. Gov’t Code §§ 7284-7284.10; Colo. Rev. Stat. § 24-76.6-102 to -103; Conn. Gen. Stat. Ann. § 54-192h; D.C. Code § 24-211.07; 5 Ill. Comp. Stat. 805/15; N.Y. Exec. Chamber, Exec. Order No. 170, *State Policy Concerning Immigrant Access to State Services* (Sept. 15, 2017), <https://tinyurl.com/1f3x35t3>; Or. Rev. Stat. § 181A.820; Vt. Stat. Ann. tit. 20, § 4651; Wash. Rev. Code § 43.10.315.

who have reasonably determined that the “erosion of trust” that occurs when state and local police officers engage in federal immigration enforcement “makes the entire community vulnerable because people are fearful of reporting crimes, coming out as witnesses, or reporting domestic violence abuses.” Silva Mathema, Ctr. for Am. Progress, *Keeping Families Together* 6 (Mar. 16, 2017);² see Cal. Gov’t Code § 7284.2(b), (c) (finding that the “trust between California’s immigrant community and state and local agencies” is “threatened when state and local agencies are entangled with federal immigration enforcement”); Comm. on Judiciary & Pub. Safety, Council of D.C., Report on B23-0501, the “Sanctuary Values Amendment Act of 2020,” at 4 (Nov. 23, 2020) (“[I]mmigrant communities in the District fear and avoid interactions with the police because they believe the police will enforce immigration policies and potentially detain or deport someone they love.”).³

Like those other jurisdictions, New Jersey determined that disentangling state and local law enforcement from federal immigration enforcement would best serve the needs of its residents. By its own terms, the Attorney General Law Enforcement Directive No. 2018-6 v2.0 (“the Directive”) “seeks to ensure effective policing, protect the safety of all New Jersey residents, and ensure that limited state, county, and local law enforcement resources are directed towards enforcing the criminal

² Available at <https://tinyurl.com/keep-families>.

³ Available at <https://tinyurl.com/1o56j40y>.

laws of this state.” N.J. Off. of Att’y Gen., *Attorney General Law Enforcement Directive No. 2018-6 v2.0*, at 2 (revised Sept. 27, 2019). By challenging New Jersey’s authority to implement the Directive, this lawsuit threatens the sovereign interests of all the Amici States.

The Amici States rely on their historic police powers to implement policies that maintain trust, facilitate cooperation, and protect all residents by promoting positive relationships between law enforcement officers and the communities they serve. And these policies are reinforced by recent studies that confirm that there are public safety and economic benefits to disentangling local law enforcement from federal immigration enforcement. Accordingly, the Directive is an appropriate exercise of New Jersey’s sovereign authority and is not preempted by federal immigration law impliedly or expressly. Specifically, the Directive does not conflict with the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., or 8 U.S.C. §§ 1373(a) and 1644, in particular. Further, any interpretation of Sections 1373(a) or 1644 that would require New Jersey law enforcement officers to assist with federal immigration enforcement in ways limited by the Directive would violate the anticommandeering rule of the Tenth Amendment.

ARGUMENT

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

Under the doctrine of obstacle preemption, federal law impliedly preempts state law when the law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The possibility of implied preemption, however, “does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,’” for “such an endeavor ‘would undercut the principle that it is Congress rather than the courts that pre-empts state law.’” *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Rather, courts impose a “high threshold” for “a state law . . . to be preempted for conflicting with the purposes of a federal Act.” *Id.* (quoting *Gade*, 505 U.S. at 110).

In this case, the Counties of Ocean and Cape May and their officials (collectively “the Counties”) contend that two provisions of the Directive run afoul of federal immigration law. First, the Directive prohibits state, county, and local law enforcement officials from sharing certain information—including “non-public personally identifying information regarding any individual” and “notice of a detained individual’s upcoming release from custody”—with federal immigration

authorities. Directive § II.B.2, 5. Second, the Directive requires that detained individuals be “promptly notif[ied]” “in writing” “when federal civil immigration authorities request:” (1) “To interview the detainee,” (2) “[t]o be notified of the detainee’s upcoming release from custody,” or (3) “[t]o continue detaining the detainee past the time he or she would otherwise be eligible for release.” Directive § VI.A.

The Counties assert that these provisions obstruct “federal immigration enforcement in the State of New Jersey” “by strangling the communication and cooperation that is necessary between federal immigration authorities and localities.” Cape May Br. 11; *see* Ocean Br. 22-23. But, as appellees ably demonstrate, the federal statutes relied on by the Counties in no way require state and local law enforcement agencies to assist federal immigration officials in the manner prohibited by the Directive. Moreover, applying preemption is particularly disfavored where, as here, a state is exercising its prerogative over the public safety of its residents.

A. Congress expressed no “clear and manifest purpose” to override the historic right of states to govern their own law enforcement priorities and processes.

1. Where obstacle preemption is at issue, “[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby v. Nat’l Foreign Trade*

Council, 530 U.S. 363, 373 (2000). In our federalist system of concurrent state and federal sovereignty, “there is a strong presumption against preemption in areas of the law that States have traditionally occupied.” *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016). Therefore, the analysis must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

There is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *United States v. Morrison*, 529 U.S. 598, 618 (2000). Since the States “entered into the Union,” their “very highest duty” has been “to protect all persons within their boundaries in the enjoyment of the[] ‘unalienable rights’” of “life and personal liberty.” *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (quoting The Declaration of Independence para. 2 (U.S. 1776)). It follows that state and local governments are in the best position to determine how to allocate limited resources to best serve the public safety needs of their communities. *See Hillsborough County. v. Automated Med. Lab’ys, Inc.*, 471 U.S. 707, 719 (1985) (“[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.”); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 334 (3d Cir. 2009) (“Health and safety issues have traditionally fallen within the province of state

regulation.”). Thus, “[t]he promotion of safety of persons and property is unquestionably at the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The Directive falls squarely within New Jersey’s historic police power. New Jersey Attorney General Grewal determined that the federal government’s increasing reliance on state and local law enforcement agencies to enforce federal immigration law “presents significant challenges to New Jersey’s law enforcement officers, who have worked hard to build trust with [the] state’s large and diverse immigrant communities.” Directive at 1. For example, the Directive explains, “individuals are less likely to report a crime if they fear that the responding officer will turn them over to immigration authorities.” Directive at 1. “This fear,” in turn, “makes it more difficult for officers to solve crimes and bring suspects to justice, putting all New Jerseyans at risk.” Directive at 1. And other circuit courts have recognized that policy judgments like those embodied in New Jersey’s Directive fall within states’ traditional police powers. *See, e.g., City of Chicago v. Barr*, 961 F.3d 882, 891-92 (7th Cir. 2020) (recognizing that state is “exercising its police power” when it “decid[es] that its law enforcement needs would be better met if its undocumented residents could report crimes and communicate with its police force without fear of immigration consequences”); *United States v. California*, 921 F.3d 865, 887 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020) (describing a California

law limiting the circumstances in which state and local law enforcement officials may assist in the enforcement of federal immigration law as falling within the “state’s historic police power”).

Because “the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.” *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 536 (2012). This decentralized system—i.e., “federalism”—“secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). In a “nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential.” Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 *Vand. L. Rev.* 1563, 1574 (1994). For these reasons, “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers.’” *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

2. Especially in light of the traditional state powers at play, the Counties have not met the high threshold of demonstrating that Congress’s “clear and manifest

purpose” was to preempt state provisions like the Directive. *Sikkelee*, 822 F.3d at 687 (quoting *Wyeth*, 555 U.S. at 565).

For one thing, despite the Counties’ intimations to the contrary, *see* Cape May Br. 12-13; Ocean Br. 23, the INA “direct[s] *federal* activities, not those of state or local governments,” *California*, 921 F.3d at 887. For example, “nothing in the federal regulatory scheme requir[es] States to alert federal agents before releasing a state or local inmate.” *Id.* (internal quotation marks omitted). By prohibiting state and local officers from communicating release date information, the Directive does nothing to obstruct federal immigration authorities’ ability to detain individuals formerly held in state or local custody. Federal immigration authorities maintain the ability to determine release dates by consulting publicly available information, such as the New Jersey Department of Corrections’ inmate search page. *See* N.J. Dep’t of Corr., *Offender Search Form*.⁴

The Counties further contend that the Directive’s prohibition on sharing inmates’ release information, as well as “requiring localities to notify . . . illegal immigrant[s] that ICE is actively pursuing them, . . . assists illegal immigrants to evade federal immigration authorities.” Cape May Br. 14. The Counties, however, do not identify any requirement imposed by federal law with which these Directive

⁴ Available at <https://tinyurl.com/jvrf6urh> (last visited Feb. 16, 2020).

provisions conflict. In fact, despite the Counties' protestation that the Directive's notice requirement "provid[es] illegal immigrants with rights and protections not otherwise established by" federal law, Cape May Br. 14, the notification requirements are consistent with the Department of Homeland Security's ("DHS") own requirement that a law enforcement agency provide notice to a detainee that DHS "intends to assume custody" after she "otherwise would be released" from state or local custody, U.S. Dep't of Homeland Security, Form I-247A, at 2 (Mar. 2017).⁵

Nor do the provisions of the INA that authorize state cooperation with federal immigration enforcement demonstrate that Congress intended for such cooperation to be mandatory. *See, e.g.*, 8 U.S.C. § 1357(g)(10)(B) (authorizing a State or political subdivision "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"); *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018) ("Section 1357 does not require cooperation at all."). If anything, provisions that permit *voluntary* state cooperation underscore Congress's understanding that such cooperation should not, and indeed cannot, be mandated. *See Printz v. United States*, 521 U.S. 898, 917-18 (1997) (recognizing "two centuries of apparent congressional avoidance of the practice" of "requir[ing] the participation of state or local officials

⁵ Available at <https://tinyurl.com/dhs-i-247a>.

in implementing federal regulatory schemes”); *California*, 921 F.3d at 891 (reasoning that “the federal government was free to *expect* as much [cooperation with federal immigration authorities] as it wanted, but it could not *require* California’s cooperation without running afoul of the Tenth Amendment”); *see also* Part II, *infra*. Because “it is a state’s historic police power—not preemption—that we must assume, unless clearly superseded by federal statute,” the Counties have not made the requisite showing for obstacle preemption. *California*, 921 F.3d at 887.

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

States like New Jersey—including many of the Amici States—have reasonably concluded that disentangling local law enforcement from federal immigration enforcement improves public health and safety.

When the campaign to “involve local police in federal immigration enforcement” emerged in the 1990s and “intensified after the September 11th terrorist attacks,” Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. Rev. 1703, 1721-22 (2018), “[b]y far, the most frequent and impassioned objection” to this new push “came from state and local police concerned [about] their own effectiveness,” David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*,

38 Rutgers L.J. 1, 37 (2006). Police officers “wanted no part of immigration enforcement because they knew that taking on this task would undermine their ability to keep the public safe.” *Id.* Empirical evidence confirms that residents of immigrant communities “are less likely to communicate with law enforcement if they believe officers will question their immigration status or that of people they know.” Danyelle Solomon et al., Ctr. for Am. Progress, *The Negative Consequences of Entangling Local Policing and Immigration Enforcement* 3 (Mar. 21, 2017).⁶ Consequently, the “[f]ailure to maintain trust and open lines of communication” between law enforcement and the communities they serve “results in an unwillingness to cooperate or share information.” *Id.*

In 2006, a group of police chiefs and sheriffs from the 69 largest law enforcement agencies in the United States issued a statement warning that “[i]mmigration enforcement by local police would likely negatively [a]ffect and undermine the level of trust and cooperation between local police and immigrant communities.” Major Cities Chiefs Ass’n, *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 6 (June 2006).⁷ The police chiefs reasoned that local entanglement with federal immigration enforcement would discourage both legal and undocumented

⁶ Available at <https://tinyurl.com/negative-conseq>.

⁷ Available at <https://tinyurl.com/MCC-rec>.

immigrants from contacting or cooperating with the police for “fear that they themselves or undocumented family members or friends may become subject to immigration enforcement.” *Id.* And, the police chiefs cautioned, “[w]ithout assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear.” *Id.* Further entanglement between local officials and federal immigration enforcement would “result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.” *Id.*

Over time, these predictions have proven accurate. A 2013 study by the University of Illinois at Chicago found that “the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police,” which, “in turn, has led to a reduction in public safety.” Nik Theodore, Dep’t of Urban Planning & Pol’y, Univ. of Ill. at Chi., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 18 (2013).⁸ Roughly 45 percent of Latinos surveyed stated that they were “less likely to contact police officers if they have been the victim of a crime”

⁸ Available at <https://tinyurl.com/insecure-comm>.

or “to voluntarily offer information about crimes” “because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know.” *Id.* at 6.

Further, as immigration arrests in 2017 “soared by 30 percent from the 2016 fiscal year,” a national survey of police officers correspondingly “reported the most dramatic drop in outreach from and cooperation with immigrant and limited English proficiency . . . communities over the past year.” Am. C.L. Union, *Freezing Out Justice: How Immigration Arrests at Courthouses Are Undermining the Justice System* 1 (2018).⁹ Specifically, many police officers “reported that immigrants were less likely in 2017 than in 2016 to be willing to make police reports,” “help in investigations,” or “work with prosecutors.” *Id.* As a result, law enforcement officials reported that crimes such as domestic violence, human trafficking, and sexual assault “have become more difficult to investigate.” *Id.* Further, police officers reported that this “lack of trust and cooperation” had adverse impacts on “their ability to protect crime survivors” and on “officer safety.” *Id.*

These trends have also played out in jurisdictions across the country with large immigrant populations, which have seen a steep drop in crime reporting over the past several years. In the first three months of 2017, the Houston Police Department

⁹ Available at <https://tinyurl.com/freezing-out>.

reported “a 13 percent decrease in violent crime reporting by Hispanics,” including a “43 percent drop in the number of Hispanics reporting rape and sexual assault.” Lindsey Bever, *Hispanics ‘Are Going Further Into the Shadows’ Amid Chilling Immigration Debate, Police Say*, Wash. Post (May 12, 2017).¹⁰ Similarly, the Los Angeles Police Department reported “a nearly 10 percent drop from [2016] in the reporting of spousal abuse and a 25 percent drop in the reporting of rape among Hispanic communities.” *Id.* The department concluded that “deportation fears may be preventing Hispanic members of the community from reporting when they are victimized.” Lasch et al., *supra*, at 1762 (internal quotation marks omitted). From January through May 2017, relative to the same period in 2016, the Salt Lake City Police Department “received 12.9 percent fewer reports of criminal activity in Latino neighborhoods,” as compared with only 1.4 percent fewer reports citywide. Randy Capps et al., Migration Pol’y Inst., *Revving Up the Deportation Machinery: Enforcement and Pushback Under Trump* 69 (May 2018).¹¹

Local prosecutors’ offices likewise reported significant reductions in crime reporting by immigrants. Between December 2016 and May 2017, the Nassau County, New York District Attorney’s Office of Immigrant Affairs, which “typically receive[d] up to ten calls each week” to its tip line for crime victims, “received no

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

¹¹ Available at <https://tinyurl.com/15rrr3ag>.

calls.” N.Y. State Office of the Attorney General et al., *Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement: The Facts and the Laws* 17 (May 2017).¹² Similarly, “[t]he special victims investigations division in Montgomery County, Maryland, which has a significant immigrant population, received approximately one-half the volume of calls for sexual assault and domestic violence” in the first half of 2017 as it did in the same period in 2016. *Id.*

Increased fears about immigration enforcement have also affected public health, as immigrants have been reluctant to enroll in healthcare programs and to seek treatment when they are sick. See Alexia Elejalde-Ruiz, *Fear, Anxiety, Apprehension: Immigrants Fear Doctor Visits Could Leave Them Vulnerable to Deportation*, Chi. Trib. (Feb. 22, 2018);¹³ Kelli Kennedy, *Deportation Fears Have Legal Immigrants Avoiding Health Care*, AP News (Jan. 21, 2018).¹⁴ For example, the Migrant Clinicians Network reported that a majority of surveyed health-care providers reported a change in 2017 “in immigrant or migrant patients’ attitudes or feelings toward health care access,” with most providers citing “an increase in fear among their patients that drives them to avoid care.” Claire Hutkins Seda, *Taking a Pulse: Clinician Poll on Migrant and Immigrant Patient Care*, Migrant Clinicians

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

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

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

Network (Mar. 14, 2018).¹⁵ Similarly, “[i]n Los Angeles, a large community-based provider reported a 20 percent reduction in health-care visits in May 2017, by likely unauthorized immigrants.” Capps et al., *supra*, at 69. In Houston, local governments indicated that “fewer Latino immigrants were participating in the Special Supplemental Nutrition Program for Women, Infants, and Children . . . as well as preventive check-ups and health screenings in public health clinics.” *Id.* at 69-70. Further, “Texas Children’s Hospital also noted a drop in the number of low-income Latino patients,” while several Houston clinics “reported a more than 50 percent drop in unauthorized [immigrant] patients” in late 2017. *Id.* at 70.

Indeed, several studies have found that jurisdictions that limit local law enforcement officers’ assistance with federal immigration enforcement are safer than jurisdictions without such laws. The Center for American Progress compared annual crime statistics of demographically matched counties and found that non-cooperation counties—counties that forbid their officials from cooperating with federal immigration officials—experienced an average of 35.5 fewer crimes per 10,000 people than cooperation counties—counties that do not prohibit their officials from cooperating with federal authorities. Tom K. Wong, Ctr. for Am. Progress, *The Effects of Sanctuary Policies on Crime and the Economy* 6 (Jan. 26,

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

2017).¹⁶ The most pronounced difference was in large central metropolitan counties, which experienced 65.4 fewer crimes per 10,000 people than comparable counties that do not limit assistance with federal immigration enforcement. *Id.* Similarly, a study by the Center on Juvenile and Criminal Justice found that white residents of urban non-cooperation counties were “33 percent less likely to die from all violent causes, 53 percent less likely to be a victim of homicide, and 62 percent less likely to die from gun violence than white residents of” urban cooperation counties. Mike Males, Ctr. on Juv. & Crim. Justice, *White Residents of Urban Sanctuary Counties are Safer from Deadly Violence than White Residents in Non-Sanctuary Counties 2* (Dec. 2017).¹⁷

There is also evidence that jurisdictions that limit local law enforcement officers’ assistance with federal immigration enforcement have stronger economies than jurisdictions without such laws. The Center for American Progress found that “the labor force participation rate is, on average 2.5 percent higher” and “the unemployment rate is, on average, 1.1 percent lower” in non-cooperation counties than in cooperation counties. Wong, *supra*, at 8, 10. The study also found that the “median household income is, on average, \$4,352.70 higher” and that the percentage

¹⁶ Available at <https://tinyurl.com/effects-crime-econ>.

¹⁷ Available at <https://tinyurl.com/cjcj-report>.

of people living “at or below the federal poverty line is, on average, 2.3 percent lower” in non-cooperation counties than in cooperation counties. *Id.* at 7-8.

Under their traditional and historic police power, “States have broad authority to enact legislation for the public good.” *Bond*, 572 U.S. at 854. Many states have concluded, based on empirical studies, expert analysis, and anecdotal evidence, that laws like the Directive promote public health and safety. The Directive is an exercise of New Jersey’s traditional police power, directing the use of limited public safety resources in a manner that increases, rather than threatening, public safety. The Counties have not met the “high threshold” needed to establish that Congress’s “clear and manifest purpose” was to prohibit such an exercise of police power. *Sikkelee*, 822 F.3d at 687 (quoting *Wyeth*, 555 U.S. at 565).

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

Even if the INA could be read to preempt the Directive, such an interpretation would “run[] directly afoul of the Tenth Amendment and the anticommandeering rule.” *California*, 921 F.3d at 888. The anticommandeering doctrine is “the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Commandeering “undermine[s] federalism by undercutting a state’s ability to pursue its own policies.” John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense*

of Judicial Review in a Federal System, 99 Nw. U. L. Rev. 89, 119 (2004). The Supreme Court has made clear that “such commands are fundamentally incompatible with our constitutional system of dual sovereignty.” *Printz*, 521 U.S. at 935. And this Court has experience construing provisions of the INA so as to avoid “this potential constitutional problem.” *Galarza v. Szalczynk*, 745 F.3d 634, 645 (3d Cir. 2014); *see id.* at 644-45 (concluding that immigration detainers should not be interpreted as mandatory orders to local law enforcement officials because of the potential anticommandeering concerns).

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

Like other jurisdictions, New Jersey expressed this exact concern in the Directive, reasoning that “state, county, and local law enforcement officers” should “be mindful that providing assistance above and beyond” the requirements imposed by law “threatens to blur the distinctions between state and federal actors and between federal immigration law and state criminal law.” Directive at 1-2; *see, e.g.*, Cal. Gov’t Code § 7284.2 (“Entangling state and local agencies with federal immigration enforcement programs . . . blurs the lines of accountability between local, state, and federal governments.”). If Congress prohibits these jurisdictions from limiting their assistance with immigration enforcement, it effectively forces them “to advance objectionable . . . federal policies,” and “there is a real danger that citizens will denounce the [state] official[s] for being complicit in federal [immigration] enforcement.” Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. Pa. L. Rev. 103, 130 (2012).

The anticommandeering rule also “prevents Congress from shifting the costs of regulation to the States.” *Murphy*, 138 S. Ct. at 1477; *see Galarza*, 745 F.3d at 644 (“[T]he command to detain federal prisoners at state expense is exactly the type of command that has historically disrupted our system of federalism.”). But the Counties propose to do just that—shift some of the costs of federal immigration enforcement to local law enforcement. To be sure, “[s]tates and localities assume the costs of federal immigration policy when,” for example, “they enforce

detainers,” transfer detainees to the custody of immigration officials, and defend against litigation arising out of wrongful detentions. Kate Evans, *Immigration Detainers, Local Discretion, and State Law’s Historical Constraints*, 84 Brook. L. Rev. 1085, 1105 (2019); see Solomon et al., *supra*, at 5 (observing that jurisdictions have, in part, limited local law enforcement officers’ assistance of federal immigration enforcement to insulate themselves from the “growing body of lawsuits that have resulted in court judgments and hefty settlements”).

Information sharing itself can also be costly. State and local governments “gather massive quantities of information detailing the activities they regulate,” including their interactions with immigrant communities. Mikos, *supra*, at 105. This information-gathering is “essential to good governance” because “[r]egulators need information to draft prudent regulations, to study their effects, and . . . to observe and enforce compliance.” *Id.* at 109. Yet the “threat of commandeering” imposes additional costs by “mak[ing] it more difficult for states to gather information in the first instance.” *Id.* at 121. For example, residents may feel incentivized to conceal information or activity from state regulators. *Id.* Also, commandeering threatens states’ abilities to respect the “assurances of confidentiality” they afforded individuals in order to obtain personal information. Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 Rutgers U. L. Rev. 1553, 1575 (2017). This concern

is particularly acute for law enforcement, which “frequently depend[s] on cooperation from private citizens—crime victims, witnesses, etc.,” who “may be less forthcoming . . . if the information they give to state agents is turned over to federal law enforcement.” Mikos, *supra*, at 123; *see* Bell, *supra*, at 1591 (“Potential sharing of information with federal immigration authorities is likely to lead to a significantly increased reluctance to share the information with state and local officials.”).

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

¹⁸ Available at <https://tinyurl.com/effect-police-crime>.

By striking a “healthy balance of power between the States and the Federal Government,” the anticommandeering rule reduces “the risk of tyranny and abuse from either front.” *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 181-82). To that end, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *NFIB*, 567 U.S. at 577 (quoting *New York*, 505 U.S. at 162). And as this Court has made clear, that understanding is no different in the immigration context: “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. Measures like the Directive take reasonable steps to disentangle local law enforcement from federal immigration enforcement in order to conserve resources and preserve the trust between state and local governments and the immigrant communities they serve. The Constitution guarantees New Jersey and the Amici States the sovereign “right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts.” *California*, 921 F.3d at 891.

CONCLUSION

The Court should affirm the district court's judgment.

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CERTIFICATE OF SERVICE

I certify that on February 16, 2020, I electronically filed this brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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