UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COUNTY OF OCEAN, BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF OCEAN, *et al.*,	)	
Plaintiffs,	)	Honorable Freda L. Wolfson Honorable Tonianne J. Bongiovanni
v.	)	Consolidated Civil Action No. 3:19-cv-18083
GURBIR S. GREWAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, *et al.*,	)	
Defendants.	)	

STATEMENT OF INTEREST OF
THE UNITED STATES OF AMERICA

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INTRODUCTION

The United States respectfully submits this Statement of Interest in accordance with federal statutes that authorize the U.S. Department of Justice "to attend to the interests of the United States" by "argu[ing] any case in a court of the United States in which the United States is interested." 28 U.S.C. §§ 517, 518(b).[1] Those interests include the United States' ability—in cooperation with state and local governments—to promote public safety by enforcing the immigration laws of the United States and to remove criminal aliens from the country.

This Statement of Interest explains why a central provision of the recently issued New Jersey Attorney General Law Enforcement Directive No. 2018-6 ("Directive") is preempted by federal law. Part II.B of the Directive restricts the ability of state and local officials to share with the federal government the identifying and release information of removable aliens.

First, Part II.B of the Directive is conflict-preempted. The Constitution provides the federal government with plenary power over immigration. Congress has exercised that power in enacting the Immigration and Nationality Act (INA). Under the INA, the federal government's ability to regulate immigration depends in part on obtaining information from state and local government officials. By directing state and local officials not to provide this information, Part II.B of the

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States . . . ." *See also* 28 U.S.C. § 518 (authorizing Attorney General to send Department attorneys to argue such cases). These statutes provide a mechanism for the United States to submit its views in cases in which the United States is not a party. *See, e.g.*, *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000); *see also Freund v. Republic of France*, 592 F. Supp. 2d 540, 568 (S.D.N.Y. 2008) (Sullivan, J.), *aff'd sub nom. Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939 (2d Cir. 2010) (affording deference to the United States' Statement of Interest "because of both its source and the persuasiveness of its reasoning").

Directive unlawfully impedes the federal government from exercising its statutorily granted powers.

Second, Part II.B of the Directive is expressly preempted. The INA, in 8 U.S.C. §§ 1373(a) and 1644, proscribes any "[S]tate or "local government entity or official [from] prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from, the [federal government] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." That provision squarely preempts Part II.B of the Directive, which directs state and local officials not to provide such information. Part II.B of the Directive attempts to paper over this constitutional defect by purporting to exempt information "regarding the citizenship or immigration status, lawful or unlawful, of any individual" from its reach, Directive at 6, ¶ 10, but its restrictions on information-sharing have the effect of prohibiting state and local officials from sharing "information regarding the citizenship or immigration status" of individuals, running afoul of 8 U.S.C. §§ 1373(a) and 1644.

Because the Directive's restrictions on information-sharing in Part II.B affect only the federal government, Part II.B of the Directive also unlawfully discriminates against the federal government in violation of the intergovernmental-immunity doctrine. Part II.B of the Directive impermissibly singles out the federal government for disfavored treatment, which the Constitution forbids.

Finally, though Defendants suggest that the INA's provisions that preempt Part II.B of the Directive violate the Tenth Amendment, *see* Mot. 31-38, to the contrary, the INA's preemption of Part II.B of the Directive is consistent with the Tenth Amendment. Section 1373(a) constitutionally promotes the free flow of information between the federal government and state and local officials and thus does not commandeer state and local officials. The remaining federal

statutory provisions at issue similarly promote compliance with federal law—and do not impermissibly trench on state or local authority.

For these reasons, Part II.B of the Directive is unconstitutional.

BACKGROUND

Legal Background. The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). This includes the authority to interview, arrest, and detain removable aliens. *See, e.g.*, 8 U.S.C. § 1226(a) (Secretary of Homeland Security may issue administrative arrest warrants and may arrest and detain aliens pending a decision on removal); *id.* § 1226(c)(1) (Secretary "shall take into custody" aliens who have committed certain crimes when "released"); *id.* § 1231(a)(1)(A), (2) (Secretary may detain and remove aliens ordered removed during removal period); *id.* § 1357(a)(1), (2) (authorizing certain warrantless interrogations and arrests).[2]

In enforcing the immigration laws, the federal government works closely with state and local governments. The INA, 8 U.S.C. § 1101, *et seq.*, contemplates these cooperative efforts, which are critical to enabling the federal government to identify and remove the many thousands of aliens who violate immigration laws each year. "Consultation between federal and state officials is an important feature of the immigration system," which is why "no formal agreement or special training needs to be in place for state officers to communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," and why "Congress had obligated [the Department of Homeland Security (DHS)] to respond to any request made by state

[2] Following the Homeland Security Act of 2002, many references in the INA to the "Attorney General" are now read to mean the Secretary. *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

officials for verification of a person's citizenship or immigration status." *Arizona*, 567 U.S. at 411-12 (citing 8 U.S.C. § 1357(g)(10)(A) & 8 U.S.C. § 1373(c)). Thus, state officials can assist the federal government's immigration efforts in a number of ways, such as by: "responding to requests for information about when an alien will be released from their custody," *id.* at 410 (citing 8 U.S.C. § 1357(d)), "participat[ing] in a joint task force with federal officers," *id.*, "provid[ing] operational support in executing a warrant," *id.*, or "allow[ing] federal immigration officials to gain access to detainees held in state facilities." *Id.*

The cooperation between state and local officials and the federal government is enshrined in a number of different provisions of the INA and its implementing regulations. Several provisions are particularly important to this case, and each shows the importance of state and local assistance in fulfilling the ends of federal immigration law.

First, 8 U.S.C. § 1226(a) provides that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Thus, if a warrant is issued under section 1226(a) for an alien in state or local custody, for the warrant to be effective, state and local officials must provide information identifying the alien, must identify the custodial status of the alien (including any release date), and must surrender the alien to the federal government to be "arrested and detained."

Second, 8 U.S.C. § 1226(c) states that "[t]he Attorney General shall take into custody any alien" who commits certain offenses, such as crimes involving moral turpitude, espionage, aggravated felonies, and crimes involving terrorist activities when that alien "is released." As with section 1226(a), for this provision to be effective for aliens in state and local custody, the federal government must be told whether an alien is in custody and whether the alien will be imminently released.

Third, 8 U.S.C. § 1231(a)(1)(A) mandates that the "Attorney General shall remove" any alien who is "ordered removed" from the United States "within a period of 90 days," with the removal period commencing for aliens who are "detained or confined" on "the date the alien is released from detention and or confinement." 8 U.S.C. § 1231(a)(1)(A), (B)(iii). The clock for removing an alien accordingly begins to run immediately when an alien is released from custody. Likewise, 8 U.S.C. § 1231(a)(4) provides that the Attorney General "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment," which presupposes that the federal government knows when an alien is released from imprisonment.

To effectuate these provisions, DHS may issue an "immigration detainer" that "serves to advise another law enforcement agency that [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). An immigration detainer "is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody." *Id.* Both Immigration and Customs Enforcement (ICE) and the Customs and Border Protection (CBP), components of DHS, issue detainers. Detainers allow ICE to ascertain the release dates of criminal aliens in state or local criminal custody, which furthers the detention and removal functions described above. *See* ICE Policy No. 10074.2 (April 2, 2017), https://www.ice.gov/detainer-policy. ICE detainers must be accompanied by a signed administrative warrant of arrest issued under 8 U.S.C. §§ 1226 or 1231(a). *See id.*

Finally, 8 U.S.C. §§ 1373 and 1644 mandate that no "[s]tate or local government entity or official may . . . prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [federal government] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); 8 U.S.C. § 1644. As a

complement to provisions that presuppose the sharing of certain information, these provisions squarely address the flow of information from state and local officials to the federal government.

Factual Background. The Attorney General of New Jersey issued the Directive on November 29, 2018, and it was revised on September 27, 2019. The Directive consists of a series of limitations on the manner in which state and local officials may cooperate with the federal government's immigration efforts. We summarize the provisions relevant to this lawsuit and to this Statement of Interest.

First, section II.A of the Directive states that "no state, county, or local law enforcement agency or official shall . . . [s]top, question, arrest, search, or detain any individual based solely on: (a) actual or suspected citizenship or immigration status; *or* actual or suspected violations of federal civil immigration law." Directive at 3 (emphasis in original). State and local officials are similarly prohibited from "[i]nquir[ing] about the immigration status of any individual, unless doing so is: (a) necessary to the ongoing investigation of an indictable offense by that individual; *and* (b) relevant to the offense under investigation." *Id* (emphasis in original).

Next, section II.B, titled "Limitations on Assisting Federal Immigration Authorities in Enforcing Federal Civil Immigration Law," provides that "no, state, county, or local law enforcement agency or official shall provide the following types of assistance": (1) "[p]articipating in civil immigration enforcement operations"; (2) "[p]roviding any non-public personally identifying information regarding any individual"; (3) "[p]roviding access to any state, county, or local law enforcement equipment, office space, database, or property not available to the general public"; (4) "[p]roviding access to a detained individual for an interview, unless the detainee signs a written consent form"; (5) "[p]roviding notice of a detained individual's upcoming release from custody, unless the detainee: (a) is currently charged with [or] has ever been convicted of . . . a

violent or serious offense" as that term is defined by provisions of New Jersey law, "(b) in the past five years, has been convicted of an indictable crime other than a violent or serious offense; *or* (c) is subject to a Final Order of Removal that has been signed by a federal judge and lodged with the county jail or state prison where the detainee is being held"; and (6) "[c]ontinuing the detention of an individual past the time he or she would otherwise be eligible for release from custody based solely on a civil immigration detainer request," unless one of the three exceptions to subsection (5) applies. Directive at 3-5 (emphasis in original), Appendix A.

The Directive provides limited "[e]xceptions [to] and exclusions" from these rules. Directive at 5. Two exceptions are particularly relevant here. First, the Directive states that "[n]othing in Sections II.A or II.B shall be construed to restrict, prohibit, or in any way prevent a state, county, or local law enforcement agency or official from: [c]omplying with a valid judicial warrant or other court order, or responding to any request authorized by a valid judicial warrant or other court order." *Id.* The Directive qualifies this exception by noting that "a 'judicial warrant' is one issued by a federal or state judge. It is not the same as an immigration detainer (sometimes referred to as an ICE detainer) or an administrative warrant, both of which are currently issued not by judges but by federal immigration officers." Directive at 5 n.2; *see also* 8 U.S.C. §§ 1226(a), 1357(d); 8 C.F.R. § 287.7. Second, the Directive purports to exempt the "sending to, maintaining, or receiving from federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual" from the exclusions codified at sections II.A and II.B. *Id.* at 6.

This Lawsuit. Plaintiffs in this action are the County of Ocean and the Board of Chosen Freeholders of the County of Ocean, as well as the County of Cape May and Sheriff Robert A. Nolan in his official capacity as Cape May County Sheriff. County of Ocean Compl. ¶¶ 4-5, Cape

May Compl. ¶¶ 13-14. Plaintiffs allege that that Part II.B of the Directive "usurps" the Plaintiffs' authority to "voluntarily share Inmate Information with law enforcement agencies pursuant to federal law" and that "[b]y virtue of this overreaching Directive," Plaintiffs are "restrained from exercising [their] authority to provide [DHS] with Inmate Information and access Inmate Information . . . in accordance with [their] responsibility to safeguard [their] local communities." County of Ocean Compl. ¶¶ 28-29. Plaintiffs contend that Part II.B of the Directive "frustrates and impedes the federal government's regulation and enforcement of immigration laws" and is unlawful because the Directive is preempted and transgresses the Supremacy Clause. County of Ocean Compl. ¶¶ 32, 34; Cape May Compl. ¶¶ 38-42. The Ocean County Plaintiffs further argue that Part II.B of the Directive violates provisions of the New Jersey Constitution, County of Ocean Compl. ¶¶ 41-59, and the Cape May Plaintiffs contend that the Directive effectuated an intentional interference with a preexisting agreement that Sheriff Nolan entered into with" DHS. Cape May Compl. ¶¶ 2, 46. (This Statement of Interest does not address these state-law claims.)

Plaintiffs filed a motion for a preliminary injunction, *see* Dkt. 13, and Defendants moved to dismiss the Complaints, *see* Dkt. 14.

ARGUMENT

Part II.B of the Directive is conflict-preempted by the INA and its implementing regulations because, by limiting the manner in which state and local officials may share information with the federal government, Part II.B of the Directive undermines the INA's operation and interferes with the federal government's ability to apprehend and detain unlawfully present aliens for removal from this country. Part II.B of the Directive is also expressly preempted by 8 U.S.C. § 1373(a), which mandates that state and local officials may not "prohibit, or in any way restrict" information sharing "regarding the citizenship or immigration status, lawful or

unlawful, of any individual." Moreover, because the information-sharing restrictions in Part II.B of the Directive only apply to the federal government, Part II.B of the Directive unlawfully discriminates against the federal government. Finally, the INA's preemption of Part II.B of the Directive is consistent with the Tenth Amendment.

I. Part II.B of the Directive is Conflict-Preempted by the INA.

The "Supremacy Clause provides a clear rule that federal law shall be the supreme Law of the Land," and "[u]nder this principle, Congress has the power to preempt state law." *Arizona*, 567 U.S. at 399. A state law is conflict-preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399-400; *Farnia v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010) (same). "[T]he purpose of Congress is the ultimate touchstone of conflict preemption analysis." *Deweese v. Nat'l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 246 (3d Cir. 2009). Conflict preemption requires assessing "the entire scheme of the [federal] statute and identify[ing] its purpose and intended effect" and then determining whether state law "presents a sufficient obstacle such that it requires preemption." *Id.* "[F]ederal and state law need not be contradictory on their faces for preemption to apply. It is sufficient that state law impose[s] ... additional conditions not contemplated by Congress." *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 283 (3d Cir. 2006).

Here, Part II.B of the Directive prevents the "accomplishment and execution of the full purposes and objectives" of the INA by obstructing the "method[s] of enforcement" that Congress chose to detain and remove aliens. *Arizona*, 567 U.S. at 400, 406. In the INA, Congress enacted a comprehensive framework for the detention and removal of criminal and other aliens. It did so through numerous interlocking and mutually reinforcing provisions that depend on and call for information-sharing by state and local officials. To start, in 8 U.S.C. § 1226(a), Congress directed

the Secretary of Homeland Security to take custody of removable aliens by issuing "warrant[s]" to "arrest[] and detain[]" an alien "pending a decision on whether the alien is to be removed from the United States." This statutory directive depends upon the issuance of a warrant by an officer of the Executive Branch, and the ability to identify and take custody of removable aliens when presenting such a warrant to state and local authorities that alien in custody. The same is true of 8 U.S.C. § 1226(c), which provides that aliens who commit certain delineated crimes "shall" be "take[n] into custody." This "mandatory detention provision" applies to "aliens who ha[ve] committed certain enumerated crimes." *Burns v. Cicchi*, 702 F. Supp. 2d 281, 284 (D.N.J. 2010); *see also Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 154 (3d Cir. 2013). Like section 1226(a), section 1226(c) depends on DHS knowing when an alien who has committed a listed offense is released from custody.

On top of those detention provisions, the INA provides critical directives on removal. 8 U.S.C. § 1231(a)(1)(A) provides that "when an alien is ordered removed," removal shall occur "within a period of 90 days," and correspondingly, 8 U.S.C. § 1231(a)(1)(B)(iii) provides that the removal period shall begin, for aliens who are "detained or confined" on the "date the alien is *released* from detention or confinement." *Id.* (emphasis added); *O'Farril v. Chertoff*, No. 07-1221 (SDW), 2007 WL 1217355, at *2 (D.N.J. Apr. 24, 2007). And when criminal aliens are serving a term of imprisonment—again, including in state criminal custody—and *have* been ordered removed, they may not be removed "until released from imprisonment." 8 U.S.C. § 1231(a)(4)(A). Again, for the objectives of these removal provisions to be achieved, DHS must have information about aliens in state and local custody and about their release. As a complement to all of these statutory directives, DHS uses the immigration-detainer tool under 8 C.F.R. § 287.7. Detainers seek (in part) information about persons in state or local custody, so that DHS can apprehend and

remove them. Such apprehension and removal of course depend upon state and local officials "advis[ing] the Department, *prior to release of the alien*, in order for the Department to arrange to assume custody." 8 C.F.R. § 287.7(a) (emphasis added).

Part II.B of the Directive is conflict-preempted by this robust federal-law information-sharing framework, for several reasons.

First, Part II.B of the Directive forbids state and local officials from "[p]roviding notice of a detained individual's upcoming release from custody." Directive at 4. This command undercuts DHS's ability to execute administrative warrants pursuant to 8 U.S.C. §1226(a), fulfill the mandatory detention obligation set forth in 8 U.S.C. § 1226(c), and to timely remove aliens under 8 U.S.C. § 1231. Part II.B of the Directive hobbles DHS's efforts to detain aliens as required by statute and to remove aliens in the time prescribed by statute, because the very information that starts the clock for removal—an alien's release date—is the information that state and local officials do not, under Part II.B of the Directive, have to convey to the federal government.

Part II.B of the Directive provides exceptions to this notice prohibition, but those exceptions simply underscore that Part II.B of the Directive departs from—and impedes—federal-law objectives and mandates. To start, Part II.B of the Directive provides an exception to this prohibition for individuals charged with or found guilty of "a violent or serious offense" as defined by New Jersey law, Directive at 4, Appendix A, but nothing about that eliminates the conflict with federal law. The administrative warrants described in 8 U.S.C. § 1226(a), the nondiscretionary detention obligations in 8 U.S.C. § 1226(c), and the removal obligations in 8 U.S.C. § 1231 are not circumscribed to offenses that state law treats as violent or serious. Instead, for example, under federal law the federal government must take aliens into custody who commit: (1) crimes "involving moral turpitude," 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), (ii); (2) crimes

involving "controlled substance[s]," *id.* §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B); (3) firearm-related offenses, *id.* § 1227(a)(2)(C); (4) crimes relating to "espionage," "sabotage," or "treason and sedition," *id.* § 1227(a)(2)(D); and (5) crimes pertaining to terrorist activities, *id.* §§ 1182(a)(3)(B), 1227(a)(4)(B). Part II.B of the Directive does not track the set of crimes for which Congress directed DHS to detain and remove certain aliens, and this feature underscores the Directive's departure from federal-law objectives and mandates. *See Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens").

Next, Part II.B of the Directive carves out from the information-sharing prohibition convictions "in the past five years" for crimes "other than . . . violent or serious offense[s]." Directive at 4. But federal law triggers obligations and objectives for many crimes that are not necessarily committed within a five-year look-back period. *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who *at any time* after admission has been convicted of a violation of ... any law or regulation ... relating to a controlled substance ... is deportable." (emphasis added)). The third exception Part II.B of the Directive contemplates, when a "Final Order of Removal [is] signed by a federal judge," Directive at 4, again hits home the Directive's departure from federal law. Neither 8 U.S.C. § 1226 nor 8 U.S.C. § 1231 requires or contemplates that such a process be followed before aliens are detained to be removed. And such a requirement is clearly designed to thwart the chosen methods and techniques Congress provided for. Not only do these restrictions on sharing release dates delay the detention and removal of aliens, but they also increase the likelihood that aliens are not removed within the 90-day removal period, which then allows removable aliens to avoid detention and functionally be paroled into the United States "subject to supervision." 8 U.S.C. § 1231(a)(3); *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 423-24 (M.D.

Pa. 2004). These exceptions all illustrate the Directive's stark obstruction of federal law—they do nothing to mitigate it.

Second, Part II.B of the Directive prevents state and local officials from "[p]roviding any non-public personally identifying information regarding any individual." Directive at 4. Such information is integral to the execution of administrative warrants authorized by 8 U.S.C. § 1226(a).[3] And non-public personally identifying information is likewise germane to the federal government's efforts to detain aliens, *see* 8 U.S.C. § 1226(c), and to remove them, *see id.* § 1231.

In these ways, the Directive's prohibitions and limitations on information-sharing depart from, obstruct, and undermine federal-law objectives and mandates regarding the detention and removal of aliens.

II. Part II.B of the Directive is Expressly Preempted.

Part II.B of the Directive is preempted for a second and independent reason: the "express preemption" provisions of 8 U.S.C. §§ 1373(a) and 1644 invalidate it. *Arizona*, 567 U.S. at 399. Those provisions prohibit state and local officials from "prohibit[ing], or in any way, restrict[ing] . . . sending to, or receiving from, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373(a) & 1644. By limiting state and local officials' ability to share "non-public personally identifying information regarding any

[3] Additionally, the assertion in Part II.B of the Directive that "local law enforcement agencies are not required to enforce civil administrative warrants," Directive at 5 n.2, could be interpreted as authorizing state and local officials to refuse to surrender aliens in their custody who are subject to a "warrant issued by the Attorney General," 8 U.S.C. § 1226(a), unless the federal government procures a judicial warrant of arrest, *see* Directive at 5 n.2. Requiring a judicial warrant, however, is irreconcilable with the INA, which establishes a system of civil *administrative* warrants. *See* 8 U.S.C. §§ 1226(a), 1231(a).

individual," as well as "notice of a detained individual's upcoming release from custody," Directive at 4, Part II.B of the Directive is expressly preempted by sections 1373(a) and 1644.

These provisions, by their terms, broadly bar state and local officials from erecting a "prohibit[ion]" or "restrict[ion]" on state or local officials' sharing of certain information with federal officials. 8 U.S.C. §§ 1373(a), 1644. And the information covered by that bar is broad, as the statutory text makes clear. The text of both provisions reaches—and thus safeguards the flow of—"information *regarding* the citizenship or immigration status . . . of any individual." *Id.* § 1373(a) (emphasis added); *id.* § 1644. Words such as "regarding," "relating to," and "respecting" "generally ha[ve] a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759-60 (2018). That principle applies with particular force here: section 1373(a) can be contrasted with 8 U.S.C. § 1373(c), which imposes an obligation on the federal government to respond to any state or local request to "verify or ascertain the citizenship or immigration status of any individual." Section 1373(c) notably omits the critical, "broadening" word (*Lamar*, 138 S. Ct. at 1760) "regarding." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The contrast in the two provisions confirms section 1373(a)'s broad scope. It follows that although "information regarding the citizenship or immigration status" includes "an individual's category of presence in the United States," Mot. 23, it is not limited to such information, as Defendants suggest, *see* Mot. 23-26. As the government demonstrated in Part I, an alien's personal identifying information and release date are both critical

pieces of information that the government relies on to ascertain whether an alien may be detained and removed—*i.e.* the "immigration status" of that alien. 8 U.S.C. § 1373(a).

That conclusion is consistent with the overarching principle undergirding the INA: that, to regulate immigration, the federal government must have information concerning the whereabouts of aliens. *See* 8 U.S.C. §§ 1103(a)(3), 1184(a)(1), 1225(b), 1226, 1231, 1357. Indeed, the INA is replete with provisions requiring aliens to share such information under penalty of perjury with the federal government, to carry proof of having furnished such information, and establishing criminal penalties for failing to do so. *E.g.*, *id.* §§ 1201(b), 1221(c)(9), 1229(a)(1)(F), 1301-1306, 1357(f). Consistent with and in furtherance of that overarching aim, sections 1373 and 1644 enable state and local officials to "communicate with the [federal government] regarding the presence, whereabouts, or activities of illegal aliens." H.R. Rep. No. 104-725, at 383 (1996); *see* S. Rep. 104-249, at 19-29 (1996) ("The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with . . . the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.").

In resisting this conclusion, Defendants rely on (*see* Mot. 22-23) the Directive's caveat that it shall not be construed to prohibit or limit "[s]ending to, maintaining, or receiving from federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Directive at 6. But because Part II.B of the Directive also allows state and local officials to refuse to provide "any non-public personally identifying information regarding any individual," along with "notice of a detained individual's upcoming release from custody," Directive at 4, the carve-out Defendants rely on cannot save Part II.B of the Directive from violating 8 U.S.C. §§ 1373(a) and 1644. Defendants protest that neither release dates nor personally identifying information can be covered by 8 U.S.C. §§ 1373(a) and 1644 because the

term "regarding" "cannot be taken to extend to the furthest stretch of its indeterminacy." Mot. 24. But the information that Part II.B of the Directive allows state and local officials to withhold is directly tied to ascertaining an individual's immigration status—and is thus squarely authorized by those statutes. And Defendants' view would make the term "regarding" superfluous, as the reach of 8 U.S.C. § 1373(a) would be coextensive with 8 U.S.C. § 1373(c), even though the latter is circumscribed to "citizenship or immigration status," *id.*, while the former is not—and, indeed, has a far broader sweep, as explained above.[4]

III. Part II.B of the Directive Violates Principles of Intergovernmental Immunity.

Part II.B of the Directive is unlawful for the independent reason that it is inconsistent with the intergovernmental-immunity principles embodied in the Supremacy Clause. *See North Dakota v. United States*, 495 U.S. 423, 434 (1990) (plurality opinion); *see also Dawson v. Steager*, 139 S. Ct. 698, 703 (2019). A state law violates the United States' intergovernmental immunity if it "discriminates against the Federal Government or those with whom it deals." *North Dakota*, 495 U.S. at 435 (plurality opinion). And "states may not directly regulate the federal government's operations or property." *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 410 (3d Cir. 2012).

The Directive's restrictions on information-sharing discriminate only against the federal government. The title of Part II.B of the Directive is, tellingly, "Limitations on assisting federal immigration authorities in enforcing federal civil immigration law," Directive at 3, and the restrictions the Directive places on information-sharing apply only to the federal government. Part

[4] The fact that other provisions of the INA employ different language to reach different types of information, *see* Mot. 25-26, has no bearing on what the term "regarding" means in connection with an individual's immigration status, especially because none of these provisions deal with the statutory language at issue: "information regarding the citizenship or immigration status." 8 U.S.C. § 1373(a).

II.B of the Directive thus "singles out" federal immigration authorities for disfavored treatment—exactly what intergovernmental-immunity principles forbid. *Dawson*, 139 S. Ct. at 705; *United States v. California*, 921 F.3d 865, 882 (9th Cir. 2019), *petition for certiorari filed*, Oct. 22, 2019, No. 19-532 ("AB 103 imposes a specialized burden on federal activity, as the district court recognized. That vital distinction renders the burdensome provisions of AB 103 unlawful under the doctrine of intergovernmental immunity."). Part II.B of the Directive "interfere[s] with Congress's power" to regulate immigration, *Treasurer of New Jersey*, 684 F.3d at 410, and unlawfully discriminates against the federal government.

IV. The INA's Preemption of Part II.B of the Directive Accords with the Tenth Amendment.

A. 8 U.S.C. §§ 1373(a) and 1644 Are Constitutional.

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," U.S. CONST. AMEND. X, and prohibits the federal government from "commandeer[ing] the state legislative process by requiring a state legislature to enact a particular kind of law" or by commanding "state and local enforcement officers" to take discrete action "by conscripting the States' officers directly." *Reno v. Condon*, 528 U.S. 141, 149 (2000). Any Tenth Amendment assessment of a federal statute begins with "the time-honored presumption" that the statute "is a constitutional exercise of legislative power." *Id.* at 148.

Sections 1373(a) and 1644 are consistent with the Tenth Amendment. Those provisions "require only the provision of information to the Federal Government"—a constitutional exercise of federal power. *Printz v. United States*, 521 U.S. 898, 918 (1997). Those statutes do not constitute a prohibited, "forced participation of the States' executive in the actual administration of a federal program," *id.*, as they simply concern "ministerial reporting requirements imposed by

Congress on state and local authorities" such as the statutory requirement for "state and local law enforcement agencies to report cases of missing children to the Department of Justice." *Id.* at 936 (O'Connor, J., concurring); *see also Reno*, 528 U.S. at 151 ("[T]he [challenged statute] does not require the States in their sovereign capacity to regulate their own citizens. [It] regulates the States as the owners of data bases . . . . We accordingly conclude that the [statute] is consistent with the constitutional principles enunciated in . . . *Printz*."). Indeed, based on this precedent, the Ninth Circuit in *California*, a decision Defendants deem "particularly relevant," Mot. 36, straightforwardly concluded that "the Supreme Court has implied the existence of a Tenth Amendment exception for reporting requirements." 921 F.3d at 890. Thus, no case "holds that the scope of state sovereignty includes the power to forbid state or local employees from voluntarily complying with a federal program." *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1035 (N.D. Cal. 2018). Section 1373 "does not require that the State enact any laws or regulations" and "does not require state officials to assist in the enforcement of federal statutes regulating private individuals": it merely directs them to provide information to the federal government. *Id.* The Tenth Amendment allows Congress to enact such a directive. *See Freilich v. Bd. Of Dir. of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001), *aff'd sub nom. Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002) ("This Court has found no case finding that" a "statutory command" to "forward . . . information to the federal data bank" "commandeers the state . . . . Indeed, under the Supreme Court's most recent jurisprudence on the Tenth Amendment in a similar context, the claim is completely meritless." (citing *Reno*, 528 U.S. at 151)). Thus, sections 1373(a) and 1644 are constitutional: neither statute "compel[s] state and local governments to enact or administer any federal regulatory program. Nor [have they] affirmatively conscripted states, localities, or their employees into the federal

government's service . . . . Rather, they prohibit state and local government entities or officials only from directly restricting the voluntary exchange of immigration information with [DHS]." *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). A contrary holding would "turn the Tenth Amendment[]" on its head by "allowing states and localities to engage in passive resistance that frustrates federal programs." *Id.* The Second Circuit's conclusion is consistent with Third Circuit precedent holding that federal statutes that "simply preclude" States from interfering with federal laws comport with the Tenth Amendment, because a "state official's compliance with federal law and non-enforcement of a preempted state law—as required by the Supremacy Clause—is not an unconstitutional commandeering." *Del. Cty., Pa. v. Fed. Housing Fin. Agency*, 747 F.3d 215, 228 (3d Cir. 2014).

Defendants contend that 8 U.S.C. § 1373 is unconstitutional under the Supreme Court's decision in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). *See* Mot. 32-37. That decision held that 28 U.S.C. § 3702(1), which made it "unlawful for a State to authorize sports gambling schemes," *id.* at 1469, violated the Tenth Amendment. But the federal statute at issue in *Murphy* is far afield from 8 U.S.C. §§ 1373 and 1644. The provision invalidated in *Murphy* "unequivocally dictate[d] what a state legislature may and may not do." 138 S. Ct. at 1468, 1478. And *Murphy* deemed *Reno* inapposite because *Reno* "concerned a federal law restricting the disclosure and dissemination of personal information" and thus "did not regulate the States' sovereign authority to regulate their own citizens." *Id.* at 1478-79. Sections 1373(a) and 1644 fall within the same permissible category as the information-provision exception discussed in *Printz* and the federal law at issue in *Reno*: as in *Reno*, the provisions here call for the disclosure of information; they do not dictate or regulate the States' regulation of their citizens. And *Murphy* concerned a subject (gambling regulation) that falls within the traditional police

powers of a state "inherent" in state sovereignty, heightening the Tenth Amendment concerns at issue. *Id.* at 1475. By contrast, the federal government exercises "broad, undoubted power over the subject of immigration and the status of aliens"—power that states like New Jersey cannot obstruct. *Arizona*, 567 U.S. at 394. Defendants assert that the enforcement of sections 1373(a) and 1644 constitutes 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." Mot. 35. But that just ignores the teaching in *Printz* that information-sharing is different in kind: sections 1373(a) and 1644 permissibly "regulate[] the States [and local governments] as the owners of data bases" instead of unlawfully "requir[ing] the States in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 151; *California*, 921 F.3d at 890 ("[T]he Supreme Court has implied the existence of a Tenth Amendment exception for reporting requirements."). Defendants relatedly contend that applying 8 U.S.C. §§ 1373 and 1644 compels assistance "in federal immigration enforcement in a variety of ways." Mot. 35. But again, this ignores the limited nature of those statutes: they are limited to information-sharing—which as explained, the Tenth Amendment permits.

Defendants further argue that enforcement of 8 U.S.C. §§ 1373 and 1644 "reassign[s] 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." Mot. 35. But the statutes simply place state and local officials on an even playing field by ensuring that neither have the power to unlawfully restrict the flow of information. Far from causing an incursion on the distribution of authority "between a State and its municipal subdivisions," *id.*, the statutory provisions simply ensure "compliance with federal law and non-enforcement of a preempted state law," which "is not an unconstitutional commandeering." *Del. Cty.*, 747 F.3d at 228.

Defendants also rely on a number of lower court decisions issued "after *Murphy*." Mot. 36. But each of these decisions misconstrued *Murphy* as compelling the holding that 8 U.S.C. §§ 1373(a) and 1644 are not preemption provisions because they do not regulate private actors. *See Murphy*, 138 S. Ct. at 1481 ("[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States."); *California*, 921 F.3d at 890 ("Here, by contrast, 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."); *State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 235 (S.D.N.Y. 2018), *appeal filed* No. 19-cv-267 (2d Cir. 2019) (same); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329 (E.D. Pa. 2018), *aff'd in part and vacated in part by City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276 (3d Cir. 2019) (same); Mot. 36-37. That view is wrong because the information covered by 8 U.S.C. §§ 1373(a) and 1644 belongs to private actors, and the statutes ensure that the federal government can access this information. Defendants' myopic focus on the fact that 8 U.S.C. §1373(a) "speaks only to the conduct of a Federal, State, or local government entity or official," Mot. 37 ignores the Supreme Court's admonition in *Murphy* that "it is a mistake to be confused by the way in which a preemption provision is *phrased*" with respect to "language [that] might appear to operate directly on the States." 138 S. Ct. at 1480 (emphasis added).

This Court should uphold the constitutionality of 8 U.S.C. §§ 1373 and 1644.

B. 8 U.S.C. §§ 1226 and 1231 Are Constitutional.

For many of the same reasons, 8 U.S.C. §§ 1226 and 1231, which mandate that the federal government detain and remove aliens within a prescribed period of time, are consistent with the Tenth Amendment. The Tenth Amendment does not "limit[] congressional power to pre-empt or displace state regulation of private activities." *Hodel v. Va. Surface Mining & Reclamation Ass'n*,

452 U.S. 264, 289-90 (1981); *Del. Cty.*, 747 F.3d at 228 ("[A] state official's compliance with federal law and non-enforcement of a preempted state law—as required by the Supremacy Clause—is not an unconstitutional commandeering."). States lack the authority to adopt a scheme that regulates matters affecting aliens in a way that conflicts with "the integrated scheme of regulation created by" the federal government—the "single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Arizona*, 567 U.S. at 401-02. Thus, in *Arizona*, the Supreme Court found that state law provisions attempting to criminalize immigration-related offenses that had the "same aim as federal law" were preempted. *Id.* at 402. The lack of state and local authority here is even clearer: if the State of Arizona lacked "independent authority" to bolster federal immigration enforcement, then plainly the State of New Jersey lacks authority to *hinder* immigration enforcement. *Id.*

Indeed, Congress could have concluded that any removable alien convicted or even arrested by a State should be removed immediately by federal authorities while their location is known. But Congress instead decided to allow States to subject aliens to their criminal-justice systems first. *See* 8 U.S.C. § 1231(a)(4)(A) (providing that federal authorities "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment"). In allowing States to do so, Congress imposed implicit conditions that States not use their criminal-justice systems to obstruct federal immigration enforcement. New Jersey cannot now choose to violate those conditions, and then claim that such a violation is shielded by the Tenth Amendment.

Defendants portray Part II.B of the Directive as simply expounding on how state and local officials should "devote law enforcement resources." Mot. 28. As already explained, however, Part II.B of the Directive manifestly undermines and frustrates the INA. And States may not avoid

preemption "just by framing" a preempted law in an artful way. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). The INA provisions at issue here are consistent with the Tenth Amendment.

CONCLUSION

Part II.B of the Directive is conflict-preempted, expressly preempted, and otherwise barred by the Supremacy Clause.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which provides notice to all parties, on this 24th day of January, 2020.

/s/ Archith Ramkumar
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