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, v. GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey, *et al.*, Defendants.	Honorable Freda L. Wolfson Honorable Tonianne J. Bongiovanni Consolidated Civil Action No. 3:19-cv-18083

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTEREST OF *AMICI CURIAE*[1]

[1] The parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

SUMMARY OF THE ARGUMENT

The power to make laws or policies that frustrate Congress's purposes in federal laws is prohibited to the states by the U.S. Constitution. This uncontroversial implication of the Constitution's Supremacy Clause means that the Tenth Amendment to the Constitution does not protect the Attorney General's policy here.

It is not difficult to show that Part II.B of New Jersey Attorney General Law Enforcement Directive No. 2018-6 ("the Directive") stands as an obstacle to the purposes Congress sought to achieve in federal immigration laws. In many instances, the Directive prohibits state and local officers from sharing the release

dates of aliens, and their personal information, with U.S. Immigration and Customs Enforcement. With this prohibition, the Attorney General compels many state and local officers who would cooperate with federal enforcement not to cooperate with that enforcement. This choking off of cooperation that would otherwise take place is an obstacle to that enforcement, and to the congressional purpose that criminal aliens, after they have served their sentences, be detained by federal authorities and deported.

Defendants' attempt to say otherwise, on the ground that the Directive merely reflects an inactive stance, a decision on behalf of the state not to involve it in immigration law enforcement, is belied by the active nature of the Attorney General's response—the issuance of a written, purportedly binding policy—and by the (intended) crippling effect that policy has on the fulfillment of federal aims. If the Attorney General had truly chosen to be inactive, he would have made no policy governing the cooperation of the state's officers with federal immigration law enforcement, either to command such cooperation or to prohibit it. Of course, that truly inactive stance would not have violated the Supremacy Clause, under which laws or policies, but not their absence, can be preempted.

Defendants go further than to argue that the Directive is not an obstacle. They also make the remarkable claim that, even if the Directive is an obstacle, the Tenth Amendment prevents it from being preempted.

This claim betrays a profound misunderstanding of the U.S. Supreme Court's federalism jurisprudence, and of the relation between the Supremacy Clause and the Tenth Amendment. The Tenth Amendment sets forth a method of determining whether given powers are reserved to the states (or the people) by the Constitution. According to the Tenth Amendment, if a given power is not delegated to the federal government by the Constitution, nor prohibited to the states by the Constitution, then it is so reserved.

Obviously, that method should be followed here, and thus it should be asked whether a power to make laws or policies that stand as obstacles to the purposes of federal laws is prohibited to the states. The Supremacy Clause and the Supreme Court's doctrine of obstacle preemption provide the ready, affirmative answer—and that answer implies that the power to issue the Directive, on the assumption that it is an obstacle to federal aims, is not reserved to the states by the Tenth Amendment.

Defendants' claims notwithstanding, absent a sustained and robust presumption against preemption founded in Tenth Amendment-related sensitivities, the Directive, being an obstacle to federal aims, is obstacle preempted under the Supremacy Clause. And no presumption designed to protect states' legitimate prerogatives applies here, given the plenary federal power, and the lack of any traditional state power, over immigration.

ARGUMENT

Defendants claim that, even if the Directive stands as an obstacle to congressional purposes in federal immigration law, the Tenth Amendment prevents it from being obstacle preempted. This claim is deeply mistaken; the Directive is, indeed, an obstacle, and as such preempted under the Supremacy Clause.

I. The Directive Is An Obstacle

The Directive prohibits (with some exceptions) state and local law enforcement officials from assisting federal immigration law enforcement by, *inter alia*, "[p]roviding notice [to federal officers] of a detained individual's upcoming release from custody," "[p]roviding any non-public personally identifying information regarding any individual," or "[p]roviding access to any state, county, or local law enforcement equipment, office space, database, or property not available to the general public." Directive at 3-5.

Thus, under the Directive, in many cases, if a federal immigration officers asks when an alien in local custody will be released, or that alien's home or work address, local officials who otherwise would be perfectly willing to provide that information may not provide it. In many cases, if a federal immigration officer seeks to enter a state facility to assume custody of an alien from local officials, local officials who otherwise would be perfectly willing to allow the federal officer's entry for that purpose may not do so.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under this clause, Congress has the power to preempt state and local laws. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

Preemption may be either express or implied, and implied preemption includes both field preemption and conflict preemption. *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3d Cir. 2013) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption can occur in one of two ways: where "compliance with both federal and state regulations is a physical impossibility," or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lozano*, 724 F.3d at 303 (citing *Arizona*, 567 U.S. at 399) (internal quotation marks and citations omitted). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912), *quoted in Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941). The judgment of courts about what constitutes an unconstitutional

impediment to federal law is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Underlying the doctrine of obstacle preemption is the necessity of cooperation between state and federal sovereignties for our federal system to function properly. As the U.S. Court of Appeals for the Second Circuit has explained:

> A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes.

City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (internal citations omitted).

As the United States shows, one purpose of federal immigration laws such as 8 U.S.C. §§ 1226(a), 1226(c), and 1231(a)(1)(A) is that criminal aliens, after serving their state sentences, be detained by federal authorities and deported. Doc. No. 25 at 4-5. By design, the Directive frustrates this federal purpose. It is therefore an obstacle to Congress's purposes in federal immigration law according to the Supreme Court's precedents.

Nevertheless, defendants deny that the Directive is such an obstacle; rather, they claim, it merely reflects a decision by New Jersey, as a state, to limit its assistance to the federal government in immigration law enforcement. Doc. No. 14-1 at 27-28.

The flaw in defendants' position is readily apparent: defendants misread the Directive as a refusal of *New Jersey* to assist the federal government. In fact, the Directive is a prohibition on New Jersey cities, counties, and state and local law enforcement officers, ordering *them* not to assist the federal government. The question is whether this prohibition raises an obstacle to federal enforcement of immigration laws.

It certainly does. Many cities and officials would assist the federal government, as shown by the existence of this lawsuit, which was brought by officials and jurisdictions that wish to provide more assistance to the federal government than the Directive permits in achieving the federal purpose that certain criminal aliens, after serving their state sentences, be detained by federal officers and deported. If these officials and jurisdictions are allowed to go on cooperating as they wish, Congress's purposes will be achieved more fully than if they are forced to withhold their cooperation. Thus, the Directive, operating as a but-for cause, will lessen the achievement of Congress's purposes. Saying that it will so

act is no different from saying that it will "frustrate" or be an "obstacle" to the achievement of those purposes.

True, federal law cannot preempt inaction by a state. But, in the Directive, the Attorney General has taken an active step—the issuance of a purportedly binding policy. Had the Attorney General truly decided to be inactive, he would have issued no policy to control cooperation by officers, either to compel or to forbid it. The Attorney General did not adopt this passive course, and cannot now claim merely to be holding himself aloof.

II. The Directive Is Obstacle Preempted

Defendants also claim that the Tenth Amendment prevents the Directive from being preempted—presumably, whether it is an obstacle to the achievement of Congress's purposes or not. Doc. No. 14-1 at 31-38. This remarkable claim contradicts the letter of the Supreme Court's well-established obstacle-preemption cases, and reflect a basic misunderstanding of the Tenth Amendment.

A. *Defendants misunderstand the Tenth Amendment*

Defendants fail to appreciate the relation between the Supremacy Clause and the Tenth Amendment, and even to understand the Tenth Amendment itself. The Tenth Amendment sets forth a method of determining whether given powers are reserved to the states (or the people) by the Constitution: "The 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. Thus, under the Tenth Amendment, before it can be decided that a given power is reserved to the states, it must be determined whether that power is delegated to the federal government by the Constitution, *and* whether it is prohibited to the states by the Constitution. Only if the answer to both questions is in the negative does the Tenth Amendment reserve that power to the states.

The Supreme Court has proceeded consistently with this rubric in its commandeering cases. First, it derived the anticommandeering rule from the structure of the Constitution and the principle, assumed in the Constitution, that governments govern individuals, not other governments. *See generally New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Then the Court noted that the power to commandeer states or state officers is never a proper means of effectuating any enumerated power, and thus that this power (which is not itself enumerated) is not delegated to the federal government by the Constitution. *Printz*, 521 U.S. at 923-24.

By contrast, defendants simply ignore the method of decision spelled out in the Tenth Amendment in arguing that the Tenth Amendment blocks the Directive from being obstacle preempted. Had they followed that method, they would have asked whether a power to make laws or policies that stand as obstacles to the purposes of federal laws is prohibited to the states. Of course, that power is

prohibited to the states by the Supremacy Clause, as interpreted by the Supreme Court's obstacle preemption cases. *See, e.g., Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) ("[T]he Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, §8, while providing in the Supremacy Clause that federal law is the 'supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,' Art. VI, cl. 2."). Since the power to make laws or policies that are obstacles to federal aims is prohibited to the states, the power to issue the Directive, on the assumption that it is an obstacle to federal aims, is not reserved to the states by the Tenth Amendment. In other words, defendants put the cart of the reservation of states' powers before the horse of preemption. Here, it is the issue of preemption that must be decided before it can be determined whether the power at issue has been reserved to the states by the Tenth Amendment.[2]

Defendants claim that, if the Attorney General is not allowed to issue his Directive, the prerogative of the State of New Jersey to control its law enforcement officers will be compromised in a way that offends the Tenth Amendment. Doc.

[2] Defendants rely heavily on their argument that 8 U.S.C. § 1373 and 8 U.S.C. § 1644 are instances of commandeering. Doc. No. 14-1 at 31-38. But the argument made here—that the Directive is obstacle preempted because it thwarts the congressional purpose that certain criminal aliens, after serving their state sentences, be detained by federal officers and deported—in no way depends on these provisions. This congressional purpose is evinced by other parts of the Immigration and Nationality Act that no one could claim are commandeering, such as 8 U.S.C. §§ 1226(a), 1226(c), and 1231(a)(1)(A).

No. 14-1 at 31-32. But, as shown, it is the Constitution—namely, the Supremacy Clause and the Tenth Amendment itself—not any dictate of Congress standing alone, that so limits the Attorney General. Congress may not commandeer the states; it does not follow that the Constitution itself does not limit them. *See Murphy, supra*.

B. *No presumption against preemption protects the Directive*

Based on federalism balancing concerns, if not on the straightforward text of the Tenth Amendment, the Supreme Court has employed a presumption against preemption in some cases. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). But any such presumption is easily overcome here. First, a leading case setting forth this presumption held that, in cases of obstacle preemption, the presumption is *ipso facto* surmounted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e 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. Such a purpose may be evidenced in several ways. . . [For example,] the state policy may produce a result inconsistent with the objective of the federal statute."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) ("Assuming, *arguendo,* that some presumption against preemption is appropriate, we conclude, based on our analysis below, that

the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted.").

Second, "an 'assumption' of nonpre-emption is not [even] triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice, supra*); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (finding that the presumption against preemption did not apply to fraud on the Federal Drug Administration because it is not an area of traditional state regulation). The question of what happens to deportable aliens has always and quintessentially been in the purview of the federal government. *See, e.g., Arizona v. United States*, 567 U.S. 387, 394 (2012) (recognizing that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens") (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). There is no traditional state power to decide this question, and certainly not to decide it inconsistently with how the federal government has decided it. The Attorney General's intrusion into an area of federal concern prevents even the application of any presumption against preemption in this case.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied.

DATED: February 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 3, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system, by which service was accomplished on the parties in this case.

/s/ John M. Miano
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