UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CORECIVIC, INC., *Plaintiff*, v. PHILIP D. MURPHY, in his official capacity as Governor of the State of New Jersey, and MATTHEW J. PLATKIN, in his official capacity as Attorney General of the State of New Jersey, *Defendants*.	Case No. 3:23-cv-00967-RK-TJB

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, 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. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022), *petition for cert. filed,* No. 22-1071 (S. Ct. May 1, 2023); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

[1] Defendants have consented in writing to the filing of this *amicus curiae* brief. At the time of filing, neither Plaintiff nor the United States has responded to IRLI's written request for consent. 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 this brief's preparation or submission.

INTRODUCTION

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* ("INA"), provides that the Department of Homeland Security ("DHS") "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1).[2] To accomplish these detention requirements, the INA authorizes the expenditure of funds for detention facilities and requires DHS to consider "the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use." *Id*. § 1231(g)(2). U.S. Immigration and Customs Enforcement ("ICE"), a constituent agency of DHS, is authorized to "enter into contracts of up to fifteen years' duration for detention or incarceration space or facilities, including related services." 48 C.F.R. § 3017.204-90. In sum, the INA and its implementing regulations contemplate the use of leased detention facilities to meet DHS's obligation for detention and removal of aliens under the INA. Plaintiff CoreCivic, Inc. ("CoreCivic"), operates such a facility in New Jersey.

The law at issue in this case, AB 5207, was enacted in August 2021. *See* New Jersey Legislature, https://www.njleg.state.nj.us/bill-search/2020/A5207. AB 5207 prohibits both public and private entities in New Jersey from entering, renewing, or extending contracts for immigration detention. CoreCivic has operated the Elizabeth Detention Center ("EDC") under such a contract with ICE since 2005. Pl. Mot. for Prelim. Inj., Doc. 17-4, at 6-8. Despite a provision that the statute is not to be construed "to prohibit, or in any way restrict, any action where the prohibition or restriction would be contrary to federal law, the United States Constitution, or the New Jersey Constitution," N.J. Rev. Stat. § 30:4-8.16.c, the explicit purpose of AB 5207 is to prevent ICE

[2] Although the INA refers to the "Attorney General," *id.*, those powers were transferred to DHS. *See* 6 U.S.C. § 557; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

from contracting for immigration detention services in the State of New Jersey. N.J. Rev. Stat. § 30:4-8.15.d ("[T]he intent of the Legislature [is] to prevent new, expanded or renewed agreements to detain people for civil immigration purposes"). New Jersey does, however, allow for detention agreements with private entities to house *state* criminal detainees. *See* N.J. Stat. § 40:4-91.10 ("[T]he Commissioner of Corrections may authorize the confinement of eligible inmates in private facilities."). The combination of this allowance and the ban on private detention of aliens discriminates against the federal government in violation of intergovernmental immunity. Furthermore, AB 5207's ban on private immigration detention leaves ICE without the avenue it has deemed best to carry out its detention objectives, and thus directly impedes the purposes of federal law.

ARGUMENT

AB 5207 is unconstitutional under the Supremacy Clause, U.S. CONST. art. VI, cl.2[3], because it both violates intergovernmental immunity and creates an obstacle to the full purposes and objectives of the INA. Additionally, no presumption against preemption should apply.

The Ninth Circuit recently considered and rejected a similar law in California that prohibited private detention facilities in that state. The *en banc* court held that the law violated the Supremacy Clause because it "would override the federal government's decision, pursuant to discretion conferred by Congress, to use private contractors to run its immigration detention facilities. . . . . Whether analyzed under intergovernmental immunity or preemption, California cannot exert this level of control over the federal government's detention operations." *Geo Grp.,*

[3] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Inc. v. Newsom, 50 F.4th 745, 750-51 (9th Cir. 2022). This Court should follow the Ninth Circuit and enjoin New Jersey from regulating immigration detention by prohibiting the federal government from contracting for detention services in the state.

I. AB 5207 VIOLATES INTERGOVERNMENTAL IMMUNITY

The Supremacy Clause of the U.S. Constitution "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022). *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 322 (1819) ("[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the national government."); *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914) (explaining that the Constitution protects "the entire independence of the General Government from any control by the respective States.").

Thus, under this doctrine, "the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). Accordingly, a state law is invalid if it directly regulates the federal government or if it imposes burdens on federal interests that are not equally imposed on similarly situated constituents. *Washington*, *supra*; *United States v. County of Fresno*, 429 U.S. 452, 462-64 (1977). *See also North Dakota v. United States*, 495 U.S. 423, 435 (1990) (explaining that a state law violates intergovernmental immunity "only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."). By restricting detention agreements for immigration detention while permitting the state to continue to enter such agreements for state detention purposes, AB 5207 impermissibly discriminates against federal interests.

Intergovernmental immunity necessarily extends to those parties the government works with to enforce and administer federal law. *See North Dakota*, 495 U.S. at 435 (explaining that a state law is invalid "if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."). The Supreme Court has recognized the right of the federal government to conduct operations, including with outside actors, without interference from the states. *See United States v. Washington*, 142 S. Ct. 1976, 1980 (2022) (striking down a state law because it "singl[ed] out the Federal Government for unfavorable treatment" by applying only to persons, including federal contractors, engaged in work for the United States.); *Washington v. United States*, 460 U.S. 536, 544-45 (1983) ("The State . . . discriminate[s] against the Federal Government and those with whom it deals [when] it treats someone else better than it treats them."); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956) (striking down an Arkansas law on the basis that "[s]ubjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of responsibility and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder."); *Geo Grp., Inc.*, 50 F. 4th at 761 (striking down a law banning private detention centers because it "prohibit[ed] ICE from exercising its discretion to arrange for immigration detention in the privately run facilities it has deemed appropriate."). Because, in AB 5207, New Jersey precludes the federal government from contracting for private detention facilities, but enters such contracts itself, AB 5207 discriminates against federal contractors such as plaintiff in violation of the Supremacy Clause.

II. AB 5207 IS PREEMPTED

The "broad, undoubted power over the subject of immigration and the status of aliens[,]" *Arizona v. United States*, 567 U.S. 387, 394 (2012), has been repeatedly recognized by the

Supreme Court. Indeed, the Supreme Court has, "without exception . . . sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967)). The enactment of the INA reflects the manifest intent of Congress that those rules include the detention of aliens and that such detention would require cooperation between state, local, and private entities. *See, e.g.,* 8. U.S.C. § 1231 (requiring the detention of removable aliens); 8 U.S.C. § 1103(a)(11)(B) (granting DHS the authority to work with state and local governments regarding alien detention); 8 U.S.C. § 1231(g)(2) (requiring ICE to consider private detention before building or updating federal facilities). AB 5207 should be enjoined by this Court because it effectively bars civil immigration detention in New Jersey, thus presenting a direct obstacle to the purposes of federal law.

"The Supremacy Clause provides a clear rule . . . Under this principle, Congress has the power to pre-empt state law." *Arizona*, 567 U.S. at 399. "[P]re-emption doctrine is a necessary outgrowth of the Supremacy Clause. It ensures that when Congress either expresses or implies an intent to preclude certain state or local legislation, offending enactments cannot stand." *Lozano v. City of Hazelton*, 620 F.3d 170, 203 (3d Cir. 2010), *vacated and remanded on other grounds by City of Hazleton v. Lozano*, 563 U.S. 1030 (2011).

"Preemption can be express or implied—either way, the effect is the same: preemption renders the relevant state law invalid." *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 176 (3d Cir. 2013). Conflict preemption can occur in two ways: "when it is impossible for a private party to comply with both state and federal requirements[,]" and "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Holk v.*

Snapple Bev. Corp., 575 F. 3d 329, 339 (3d Cir. 2009) (citations omitted). 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 v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000). Thus, this Court's "ultimate task . . . is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

Obstacle preemption doctrine stems from the necessity of cooperation among dual sovereigns in our federal system. As 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. The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem with 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).

AB 5207 is a direct obstacle to the federal government's ability to administer and enforce federal immigration law in New Jersey. The INA explicitly requires ICE to consider private detention before building or updating federal facilities. 8 U.S.C. § 1231(g)(2). Yet AB 5207 was enacted specifically to end private immigration detention in the state, N.J. Rev. State. § 30:4-8.16, a purpose that explicitly conflicts with the federal government's mission as contemplated by the INA.

As was the case in California, "ICE has decided to rely almost exclusively on privately owned and operated facilities," for immigration detention in New Jersey. *Geo Grp., Inc.*, 50 F.4th at 750. Accordingly, AB 5207

> would give [New Jersey] the power to control ICE's immigration detention operations in the state by preventing ICE from hiring the personnel of its choice. Given the fluctuating demand, Congress's preference for existing facilities, *see* 8 U.S.C. § 1231(g)(1)–(2), . . . ICE has determined that privately run facilities are the most "appropriate" for [New Jersey.] 8 U.S.C. § 1231(g)(1). AB [5207] would take away that choice.

Geo Grp., Inc. v. Newsom, 50 F.4th 745, 757 (9th Cir. 2022) (*en banc*). AB 5207 makes it impossible for federal immigration officials to detain aliens as required by the INA in the way preferred in the INA and chosen by ICE. It thus "stands as an obstacle to the accomplishment and execution of the fill purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and as such is preempted.

III. NO PRESUMPTION AGAINST PREEMPTION SHOULD APPLY

The Supreme Court, based on federalism balancing concerns, has employed a presumption against preemption in some cases. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). Any such presumption, however, is easily overcome in this case.

First, in a leading case setting forth the presumption, the Supreme Court held that the presumption is *ipso facto* surmounted in cases of obstacle preemption. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("We start with the presumption 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 non-preemption is not 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, 107-08 (2000) (quoting *Rice*, *supra*). *See also id.* (declining to apply the presumption against preemption because federal law made clear that "only the Federal Government may regulate the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tankers."); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864 (2000) (holding that no presumption against preemption applied because the allowance of common-law no-airbag suits like the one plaintiff had brought "stood as an obstacle to the accomplishment of a Federal Motor Vehicle Safety Standard"); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (finding that the presumption did not apply to fraud on the Federal Drug Administration because such fraud is not an area of traditional state regulation); *Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010) ("The presumption applies with particular force in fields within the police power of the state, but does not apply where state regulation has traditionally been absent."). Thus, when New Jersey purports to regulate immigration detention, it must show a history of action in that field before claiming any presumption against preemption. But the detention and removal of aliens has always been in the purview not of states, but of the federal government. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from

judicial control.'") (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)); *Arizona*, 567 U.S. at 394 (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)). Thus, the presumption does not protect state laws about immigration, a field in which "Congress has legislated . . . from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id*. In short, "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). 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. Because New Jersey has intruded into immigration—an area of exclusive federal power—it can enjoy no presumption that its law is not preempted.

CONCLUSION

For the foregoing reasons, Plaintiff's application for preliminary injunction with temporary restraining order should be granted.

Dated: July 24, 2023

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CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, by which service was effected on the parties in this case.

/s/ John M. Miano