Federal and State Legal Analysist[1] and Responses From Various Entities

Federal Context:

The federal government has the exclusive authority to enforce the civil provisions of federal immigration law relating to issues such as admission, exclusion, and deportation. Existing law generally allows the federal government to permit, but not require, the assistance of local officials in such efforts. In 1996, the federal government enacted two pieces of legislation that prohibit state or local governments from restricting voluntary communication with the federal government regarding the immigration status of any individual: § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, 8 U.S.C. §1644) and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, 8 U.S.C. § 1373). Both pieces of legislation were designed to facilitate communication between state and local law enforcement agencies with federal immigration authorities regarding undocumented immigrants. While neither of these statutes requires local cooperation or information sharing with federal immigration authorities, both prohibit a policy, statute, or ordinance that directly prohibits the voluntary sharing of information once it is acquired.

The above federal statutes have been used to both challenge and support state and local involvement in federal immigration law enforcement. Proponents of state and local involvement have argued that these provisions were intended to maximize cooperation among federal, state, and local law enforcement agencies in enforcing federal immigration laws. Opponents of local involvement in federal immigration policy have argued that these provisions weaken community policing efforts because immigrants feel unsafe cooperating with local law enforcement.

While many state and local jurisdictions throughout the United States have adopted laws or policies that limit their own jurisdictions' federal civil immigration law enforcement efforts, the federal government has not made a formal legal determination as to whether those state and local laws or policies violate these provisions. Some jurisdictions with "sanctuary" policies do restrict staff from making inquiries about a person's immigration status in certain circumstances. Though some have suggested that this method does not directly conflict with federal requirements that states and municipalities permit the free exchange of information regarding persons' immigration status, the practice results in specified agencies or officers lacking information that they could potentially share with federal immigration authorities.

When conducting its work, ICE generally relies upon cooperation or notification from local law enforcement to the extent practicable and allowed by state and local laws and practices. Refusing to provide such notice or cooperation limits, but does not prevent, the federal government's ability to enforce federal immigration laws.

[1] The City of San Leandro recently prepared a comprehensive staff report analyzing the federal and state law regarding immigration status, "sanctuary cities", and law enforcement policies. Much of their staff's analysis is repeated here with their permission.

Overview of Emerging Federal Efforts:

President Trump expressed publicly his opposition to "sanctuary policies," "sanctuary jurisdictions", and "sanctuary cities". Consistent with various speeches and position papers released prior to the November 2016 election, the President issued an executive order on January 25, 2017: "*Enhancing Public Safety in the Interior of the United States*", a copy of which is attached to this report.

The language specific to sanctuary cities within the executive order is contained in Sections 8 and 9, while Section 10 refers to "Previous Immigration Actions and Policies" and reinstitutes the Secure Communities program.

Key provisions from Section 9 include:

- *"Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373."*
- *"…jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."*
- *"The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction."*
- *"The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, a policy, or practice that prevents or hinders the enforcement of Federal law."*
- *"…the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens."*
- *"The Director of the Office of Management and Budget [OMB] is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction."*

Based on Section 9, the executive order defines a sanctuary city as "jurisdictions that willfully refuse to comply with statute 1373" and the Secretary of Homeland Security has the independent discretion to designate any such jurisdictions. 8 U.S.C. section 1373 provides that:

> *"Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."*

According to the order, a city is also subject to enforcement actions at the discretion of the Attorney General if (1) they violate Section 1373, or (2) they have policies or practices that prevent or hinder the enforcement of the federal law. In addition, the order directs the Secretary of the Department of Homeland Security (DHS) to develop a weekly list of jurisdictions that have failed to honor detainers and all resulting criminal activity. Finally, the OMB Director is directed to provide information on all federal grant money that is currently received by a sanctuary city.

Pursuant to section 9(b) of the order, on March 20, 2017, the Secretary of DHS began making available for public release a memorandum with a list of the non-Federal jurisdictions that release undocumented immigrants from their custody, notwithstanding detainer or similar requests issued by ICE to that jurisdiction. However, after just three weeks, DHS officials suspended indefinitely its "sanctuary city" report because inaccurate data was published.

Potential 10th Amendment and Other Legal Challenges:

Legally, the National Immigration Law Center believes that current local policies in place do not violate Section 1373 and that strong arguments can be made that the executive order stretches the scope of the law, such that it is unconstitutional on its face, and in its effect.

Section 1373 is limited to prohibiting local and state governments from enacting laws or policies that limit communication with the DHS about information regarding the immigration or citizenship status of individuals. It does not mandate any affirmative action on the part of law enforcement. Therefore, because the City's proposed resolution does not specifically limit communicating with DHS about individuals' citizenship or immigration status, or the prohibit maintaining (but not collecting) of such information, the City's policy is in compliance with the plain terms of Section 1373.

While the level of discretion and ambiguity afforded the Attorney General and Secretary of Homeland Security make it difficult to know exactly which practices, statuses, or policies constitute violations of section 1373, the fact that the order states "all federal grant money" creates a strong argument for unconstitutional coercion should cities make the legal argument that the order violates the U.S. Constitution, specifically the 10th Amendment which provides that powers not explicitly given to the federal government are reserved for the states, and the Spending Clause.

For example, the Third Circuit Court of Appeals held in *Galarza v. Szalcyk*, 745 F. 3d 634 (3d. Cir. 2014), that administrative attempts to compel local compliance with local immigration laws would likely fail as unconstitutional under the 10th Amendment's anti-commandeering principles. Under the U.S. Constitution's Spending Clause, the court in several cases held that there are limits to the conditions that may be imposed by the Federal government on the receipt of federal funds. The most significant holding was U.S. Supreme Court opinion authored by Chief Justice Roberts. Chief Justice Roberts wrote in a ruling for a case involving the Affordable Care Act and Medicaid expansion in states that, while Congress can offer Medicaid funds to States to expand health care coverage, "*What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding*," (*National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 [2012]). In short, Congress may use its spending

power to create incentives for states to act in accordance with federal policies, but it may not exert conditions that compel the states' policy choices. In other words, the City of Hayward could argue that the amount of money at issue to the City would leave the City no real option but to acquiesce, because the impact of the loss of such funds would have specific and detrimental consequences, some of which are unrelated to the executive order's goal.

On January 31, 2017, the City and County of San Francisco filed a lawsuit in U.S. District Court in the Northern District of California, alleging that President Trump's order violates the 10th Amendment. On April 25, 2017, the Honorable U.S. District Judge William Orrick III in San Francisco blocked President Donald Trump's executive order that sought to withhold federal funds from so-called sanctuary cities. The judge wrote, "Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves." The ruling said that President Trump's January 25th Executive Order targeted broad categories of federal funding for sanctuary governments and that jurisdictions challenging the order were likely to succeed in proving it unconstitutional.

In the case of enforcing ICE detainers, in addition to the 10th Amendment, there are questions as to whether the order would violate an individual's 4th Amendment prohibition on self-incrimination by not creating an independent basis for probable cause to justify detainer.

Other Federal Efforts in Congress:

Members of both parties of the California congressional delegation have signed on as co-sponsors to a bill that would extend Deferred Action for Childhood Arrivals (DACA) protections if President Trump discontinues the program via executive order. The "Bar Removal of Individuals who Dream and Grow our Economy Act," or "BRIDGE Act" would temporarily spare from deportation, and extend employment authorization to, people currently eligible for the Department of Homeland Security's DACA program.

Responses from Other Cities:

Following the November election and in advance of President Trump's inauguration, local officials in more than ten major cities, including San Francisco, Oakland, Los Angeles, New York, Chicago, and Washington, D.C., reaffirmed their commitment to upholding their status as "sanctuary cities".

In Alameda and Contra Costa Counties, the cities of Berkeley, Oakland, Fremont, and San Leandro are formally declared sanctuary cities. Emeryville declared itself a "Welcoming City", adopting a limited cooperation policy for its officers and employees. Though Richmond has not formally adopted the sanctuary city designation, its elected officials have publicly referred to Richmond as a sanctuary city for more than 15 years. Finally, although Alameda has not adopted a sanctuary city designation, Alameda has adopted a policy of limited cooperation with federal immigration enforcement. All seven of these cities – Berkeley, Oakland, San Leandro, Emeryville, Fremont, Richmond, and Alameda – are identified by third party organizations and

news media coverage as sanctuary cities, regardless of whether they have formally adopted the title. Copies of their adopted resolutions are attached.

Jurisdictions in other parts of the country have taken alternative approaches. For example, days after the issuance of the order, the Mayor of Miami Dade County, Florida publicly directed the head of the agency's Corrections and Rehabilitation Department to "honor all immigration detainer requests received from the Department of Homeland Security," thereby eliminating that community's prior sanctuary status.

Responses from National League of Cities:

In response to the executive order, the National League of Cities (NLC) released the following statement:

> *"There appears to be a false assumption that 'sanctuary cities' prevent U.S. Immigration and Customs Enforcement (ICE) agents from enforcing immigration laws. This could not be further from the truth. In practice, federal programs intended to partner with cities and towns on immigration enforcement are broken. The reality is that, in cities across the nation, police departments are routinely cooperating with ICE's immigration enforcement efforts, while at the same time building constructive relationships with their communities to improve public safety. The order signed by President Trump does not clearly define sanctuary jurisdictions, so it is difficult to foresee how and which cities will be impacted by the order. Legislative efforts in 2016 to define and penalize sanctuary cities were defeated in Congress, which could have cost cities up to $137 million or more in COPS hiring grants. We call on President Trump to open a dialogue with city leaders, and work with local governments to enact real, comprehensive immigration reform that respects the principles of local control."*

NLC's longstanding position is that measures requiring cities to use local law enforcement resources to enforce federal immigration laws are unfunded mandates that impose additional responsibilities on local law enforcement, increase financial liability on local governments, and ultimately move the nation further from its foundational principles of federalism. Contrary to the president's stated public safety goals, the NLC argues that this action is likely to jeopardize the effectiveness of many local law enforcement efforts. Furthermore, many police chiefs, mayors, and city council members across the country have expressed concerns that such policies impede efforts to preserve police-community relations and ensure that residents feel safe reporting crimes and accessing government services.

Responses from US Conference of Mayors & Major Cities Police Chiefs:

On January 25, 2017, the US Conference of Mayors and Major Cities Police Chiefs Association issued a joint statement, a copy of which is attached to this report. Highlights from that statement include the following:

> *"Mayors and police chiefs are committed to ensuring that criminals, regardless of their immigration status, are arrested and properly adjudicated by the criminal justice system…Cities that aim to build trusting and supportive relations with immigrant communities should not be punished because this is essential to reducing crime and helping victims…We must be able to continue to protect the safety of all of our residents while ensuring that local law enforcement is focused on community policing."*

Related Efforts at the State Level:

The Trust Act was signed into law in 2013 and went into effect January 1, 2014; one of eight bills signed at the same time in the State's effort to take action on immigration reform. It requires local law enforcement agencies to release people who have been arrested once their bond is posted or their sentence is up, so long as they have no serious convictions and even if ICE officials have issued a detainer. The replacement Priority Enforcement Program focused on those who pose a danger to society, although Secure Communities has now been reestablished by executive order from President Trump.

On September 28, 2016, the Governor also signed into law AB 2792, otherwise known as the TRUTH Act, which states that if ICE notifies a California jail that they plan to deport someone, they have to also serve a copy to the person in jail. This gives the person the "right to know" when ICE wants to deport them so they can seek counsel.

In December 2016, Senate Pro Tem Kevin de Leon introduced SB 54, which would prohibit local law enforcement officials from performing the functions of a federal immigration officer. If enacted into law, it would create "safe zones" throughout the state by prohibiting immigration enforcement on public schools, hospitals, and courthouse premises. To ensure eligible immigrants are not deterred from seeking services and engaging with state agencies, the bill would also require state agencies to review and update confidentiality policies. The California Senate passed the measure on a 27-12 vote on April 3, 2017 and the bill is now with the Assembly. A fact sheet on this proposed legislation is attached.