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Re: Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses

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I. Introduction

This memorandum addresses legal issues surrounding municipal, county or state jurisdictions with laws or policies limiting involvement of local government officials and employees in efforts to enforce federal immigration laws.[1] Specifically, this memo addresses potential federal legislation or administrative policy that would either force localities to take part in immigration enforcement, or bar cities and municipalities that fail to comply with "immigration detainers" or other federal immigration enforcement programs from wide sources of federal funds. This memo also addresses the Department of Justice's position that 8 U.S.C. § 1373 is an applicable federal law with which a state or locality must certify compliance in order to be eligible for certain grants.

In summary, federal legislation or administrative policy seeking to direct local or state governments to take part in immigration enforcement would face significant challenges under current interpretations of the Tenth Amendment of the U.S. Constitution. Similarly, legislative or administrative attempts to cut off wide sources of federal funding to localities unless they partake in immigration enforcement schemes would also face significant challenges under current interpretations of the Tenth Amendment and Spending Clause of the U.S. Constitution.

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[1] The current discourse refers to jurisdictions with local laws or policies limiting local enforcement of immigration laws as "sanctuary cities." The term "sanctuary city" is not defined by federal law, but it is often used to refer to those localities which, as a result of a state or local act, ordinance, policy, or fiscal constraints, place limits on their assistance to federal immigration authorities seeking to apprehend and remove unauthorized aliens. *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RS22773, "SANCTUARY CITIES": LEGAL ISSUES (Jan. 15, 2009), *available at* http://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf. According to some law enforcement officials, the term distracts from the real purpose of the policies to provide safe communities for all residents. *See* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247, 253 (2012). Further, the term is overly broad. Accordingly, this memo will not use the term and will instead describe specific policies.

Section 1373, a federal law which prohibits local and state governments from enacting laws or policies that limit communication with the Department of Homeland Security (DHS) about information regarding the "immigration or citizenship status" of individuals and prohibits restrictions on "[m]aintaining such information," is limited by its plain terms.[2] Unless a local jurisdiction's policies or laws specifically limit communication with DHS or affirmatively forbid the maintenance of information specifically about an individual's citizenship or immigration status, that jurisdiction's policies will not conflict with the plain terms of Section 1373.

The analysis as set forth in this memo is based on current assumptions, and may be modified as the federal government's potential legislative and administrative responses to local governmental policies on immigration enforcement become more specific.

II. Background on Local and State Restrictions on Local Enforcement of Federal Immigration Laws

In the 1980s, churches, community organizations and concerned private individuals established networks that provided assistance and shelter to Central American immigrants who were fleeing civil unrest in their home countries and had been denied asylum in the United States.[3] Though some polices existed beforehand,[4] in response to the "sanctuary" movement of the 1980s and related immigration-related concerns, a number of municipalities passed resolutions, policies, or laws limiting local law enforcement's role in federal immigration enforcement. These measures were implemented in large part to facilitate public safety by encouraging all residents, regardless of immigration status, to report crimes to local police without fear of immigration consequences.[5]

Community policing, a philosophy that calls for trust and engagement between law enforcement and the people they protect, is increasingly recognized as vital to effective public safety measures. That trust is undermined when individuals fear interaction with the police because of concerns that local officers will enforce federal immigration laws. As a result, immigrant communities are less likely to trust and cooperate with local police, and local law enforcement suffers. One study of Latinos in four major cities found that 70% of undocumented immigrants and 44% of all Latinos are less likely to contact law enforcement

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[2] As discussed in more detail below, some jurisdictions have policies barring local officers from *requesting* or *collecting* immigration status information that do not address or affect the "maintenance" of such information.

[3] *See* Rose Cuison Villazor, *What Is A "Sanctuary"?*, 61 SMU L. REV. 133 (2008).

[4] *See* Los Angeles, CA Police Dept., Special Order 40: Undocumented Aliens (Nov. 29, 1979), *available at* http://www.lapdonline.org/assets/pdf/SO_40.pdf.

[5] *See e.g.* Chicago, IL, Mayor Harold Washington Exec. Order 85-1: Equal Access to City Services, Benefits and Opportunities, (March 7, 1985), *available at* http://www.chicityclerk.com/legislation-records/journals-and-reports/executive-orders?page=1; and the similar 1984 Executive Order issued by Washington D.C Mayor Marion Barry. *See also* Villazor, *supra* note 3; *and* Hing, *supra* note 1 (discussing history of local ordinances and stating that "[t]he idea is that by seeking to create good relations and trust with immigrant communities, law enforcement is more effective for the entire community.")

authorities if they were victims of a crime for fear that the police will ask them or people they know about their immigration status, and 67% of undocumented immigrants and 45% of all Latinos are less likely to voluntarily offer information about, or report, crimes because of the same fear.[6]

Current local and state policies limiting local and state involvement in federal immigration enforcement seek to address this issue of trust, and take several different forms. These policies generally seek to preserve local and state resources and improve public safety by promoting cooperation between law enforcement and the communities they serve.[7]

First, some administrative policies or laws include formal restrictions on local law enforcement's ability to apprehend or arrest an individual for federal immigration violations. These polices include restrictions on arrests for *civil* violations of federal immigration law,[8] as well as restrictions on arrests for criminal immigration violations, such as illegal reentry.[9]

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[6] Nik Theodore, Dep't of Urban Planning and Policy, Univ. of Ill. at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (May 2013), *available at* https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF; *see also id.* at 1 ("Survey results indicate that the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, . . . exacerbating their mistrust of law enforcement authorities.").

[7] *See Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact of Public Safety and Honoring the Victims: Hearing Before the S. Comm. on the Judiciary 2* (July 21, 2015) (statement of Tom Manger, Chief, Montgomery Cty., Md., Police Dep't & President, Major Cities Chiefs Ass'n), *available at* http://www.judiciary.senate.gov/imo/media/doc/07-21-15%20Manger%20Testimony.pdf.

[8] The Supreme Court in *Arizona v. United States* clarified that local law enforcement agents do not have authority to stop or detain people for suspected violations of civil immigration law. Although authority to arrest is generally a matter of state law, the Supreme Court struck down part of an Arizona law that sought to authorize detention based on suspicion of immigration violations, finding that such authority was preempted by federal law. *See Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) ("[I]t would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."); *see also Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) ("[the sheriff] may not detain individuals solely because of unlawful presence."); *Santos v. Frederick Cnty. Bd. Of Com'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013) (holding that local police do not have authority to make their own immigration arrests); *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 919 (S.D. Ind. 2011) (granting preliminary injunction against a state law authorizing LLEAs to make civil immigration arrests).

[9] See MICHAEL JOHN GARCIA AND KATE M. MANUEL, CONG. RESEARCH SERV., R43457, STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT, 9 (July 10, 2015), *available at* https://www.fas.org/sgp/crs/homesec/R43457.pdf; *see also* OR. REV. STAT. ANN. § 181A.820 ("No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws."); Washington, DC, Mayor's Order 2011-174: Disclosure of Status of Individuals: Policies and Procedures of District of Columbia Agencies (Oct. 19, 2011), at 2 ("No person shall be detained solely on the belief that he or she is not present legally in

Second, some policies include restrictions on local law enforcement inquiries or investigations into a person's immigration status or the gathering of such information on a local level.[10]

Third, many jurisdictions include a policy or law preventing continued detention pursuant to an immigration detainer, a request from ICE that the local agency hold an individual in local custody in order to give ICE the opportunity to take the individual into federal custody.[11] The implementation of the Secure Communities program by Immigration and Customs Enforcement's (ICE) between 2008 and 2014 relied heavily on the use of immigration detainers. Under Secure Communities, DHS emphasized that it prioritized noncitizens who posed a danger to national security or a risk to public safety, specifically, aliens convicted of "aggravated felonies," as defined by the Immigration and Nationality Act, or two or more crimes each punishable by more than one year.[12] DHS discontinued the Secure Communities Program and established the Priority Enforcement Program (PEP) in November 2014.[13] The prior immigration detainer form (I-247) was replaced with three separate forms: DHS Form I-247D, used to request detention of a subject for up to forty-eight hours, when the subject is considered to be a priority for removal because he or she is suspected of terrorism, has a prior felony conviction, or has three prior misdemeanor convictions; DHS Form I-247N, used to request advance notification of the subject's release

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the United States or that he or she has committed a civil immigration violation."), available at http://dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=1784041 [hereinafter *DC Order*]; Phoenix, AZ, Police Dep't Operations Order Manual, (Jan. 2011) at 1.4, ("The investigation and enforcement of federal laws relating to illegal entry and residence in the United States is specifically assigned to [Immigration and Customs Enforcement within DHS]."), *available at* https://www.phoenix.gov/policesite/Documents/089035.pdf.

[10] *See, e.g.*, DC Order, supra note 9 (public safety employees "shall not inquire about a person's immigration status ... for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation").

[11] 8 C.F.R. § 287.7; *see also* GARCIA AND MANUEL, *supra* note 9, at 14.

[12] Dir. John Morton, U.S. ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 10072.1 (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf. These priorities remained in effect until November 20, 2014, when they (along with the Secure Communities program) were replaced. *See* Sec'y Jeh Charles Johnson, U.S. Dep't of Homeland Sec., Secure Communities (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (discontinuation of the Secure Communities program); Sec'y Jeh Charles Johnson, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (superseding the March 2, 2011, memorandum on civil immigration enforcement priorities) [hereinafter *Secure Communities Letter*].

[13] *See* U.S. ICE, *Priority Enforcement Program Overview*, https://www.ice.gov/pep (last visited Jan. 11, 2017).

date; and DHS Form I-247X, used to request a detention of up to forty-eight hours, when the subject is a removal priority for some other reason.[14]

As discussed further below, detainers have raised numerous issues for local jurisdictions, including resource concerns, reports of detainers being issued for persons who were not convicted of *any* offense under Secure Communities, and Fourth Amendment compliance concerns. A number of courts have found that detentions pursuant to detainers violate the probable cause requirement of the Fourth Amendment,[15] and that detainers exceed ICE's warrantless arrest authority.[16] Accordingly, many jurisdictions have adopted policies against continued detention of an individual based on immigration detainer requests for at least some categories of noncitizens.[17] Several states, including California, Connecticut and Rhode Island, have statewide laws, executive orders, or policies that limit how much local police can cooperate with detainer requests, and at least 364 counties and 39 cities have policies limiting cooperation with detainers.[18] Some of these jurisdictions will honor immigration detainers only where law enforcement determines that the noncitizen is being held for felony crime, is believed to post a threat to the community, or meets another specific factor.[19] Some policies state that the jurisdiction will not honor an ICE detainer unless there is a judicial determination of probable cause for that detainer, or a warrant from a judicial officer.[20] Other policies additionally require a prior written agreement with the federal government by which all costs incurred by the jurisdiction in complying with the ICE detainer shall be reimbursed.[21] Some jurisdictions further indicate that local officials should not expend time responding to ICE inquiries regarding a person's custody status or release date.[22]

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[14] *Id.*; *see also Moreno v. Napolitano*, No. 11 C 5452, 2016 WL 5720465, at *3 (N.D. Ill. Sept. 30, 2016).

[15] *See infra*, Part IV.A.

[16] *See Moreno*, 2016 WL 5720465 at *8 ("ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2).").

[17] GARCIA AND MANUEL, *supra* note 9 at 14.

[18] *See* Jasmine C. Lee, Rudy Omri, and Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES, Sept. 3, 2016, *available at* http://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html; *see also* Immigrant Legal Resource Center, *Detainer Polices*, *available at* https://www.ilrc.org/detainer-policies [hereinafter *ILCR Detainer Policies*].

[19] *See, e.g.,* CONN. GEN. STAT. ANN. § 54-192h.

[20] *See, e.g.*, N.Y. CITY ADMIN. CODE § 9-131 (2014).

[21] *See, e.g.*, Santa Clara, CA, Policy Resolution No. 2011-504, Resolution of the Board of Supervisors of the County of Santa Clara Adding Board Policy 3.54 Relating to Civil Immigration Detainer Requests, (Oct. 18, 2011), *available at* https://www.ilrc.org/sites/default/files/resources/santa_clara_ordinance.pdf.

[22] *See, e.g.*, Cook County, IL Code § 46-37(b): Policy for Responding to ICE Detainers. As discussed below, the types of communications regarding custody status and release dates differ from communications regarding "immigration or citizenship status" contemplated under Section 1373.

Finally, related to policies regarding compliance with detainers, some jurisdictions also limit the ability of ICE or other federal officers to physically access local jails or facilities.[23]

III. Background on Section 1373 and the Department of Justice's Recent Guidance

This section provides a background on Section 1373 and guidance issued by the Department of Justice regarding the intersection of Section 1373 and certain DOJ grants. An analysis of Section 1373's application is provided below in Part IV.D.

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Section 1373, 8 U.S.C. § 1373, titled "Communication between Government agencies and the Immigration and Naturalization Service," forbids the restriction of communications with the federal government regarding "citizenship or immigration status," and the restriction of the maintenance of such information, and states in relevant part as follows:

> (a) In general
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> 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.
>
> (b) Additional authority of government entities
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> > (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
> >
> > (2) Maintaining such information.
> >
> > (3) Exchanging such information with any other Federal, State, or local government entity.[24]

Local jurisdictions around the country are eligible for Edward Byrne Memorial Justice Assistance Grants ("JAG") pursuant to 42 U.S.C. § 3751(a) and funds under the

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[23] *Id*.

[24] 8 U.S.C. § 1373; *see also* IIRIRA § 642(a).

State Criminal Alien Assistance Program (SCAAP) pursuant to 8 U.S.C. § 1231(i). According to the U.S. Department of Justice Office of Justice Programs ("OJP"), "[t]he JAG Program provides states and units of local governments with critical funding necessary to support a range of program areas including law enforcement; prosecution and court programs; prevention and education programs; corrections and community corrections; drug treatment and enforcement; crime victim and witness initiatives; and planning, evaluation, and technology improvement programs."[25] The SCAAP program provides partial reimbursement to state, local, and tribal governments for prior year costs associated with incarcerating qualifying undocumented individuals, namely, those with at least one felony or two misdemeanor convictions for violations of state or local law, and who are incarcerated at least four consecutive days.[26]

On May 31, 2016, the Department of Justice's (DOJ) Office of the Inspector General (OIG) issued a memorandum to DOJ's Office of Justice Programs (OJP) analyzing whether ten different state and local laws regarding local enforcement of federal immigration laws violate 8 U.S.C. § 1373 and whether such a violation can disqualify the state or locality from receiving SCAAP and JAG block grant awards.[27] On July 7, 2016, OJP responded to the OIG stating that 8 U.S.C. § 1373 is an "other applicable federal law" that a state or locality must certify that they are in compliance with in order to be eligible for SCAAP and JAG block grant funds. OJP also issued a Question and Answer document relative to Section 1373 and grant recipients, stating in part that "Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information. Rather, the statute prohibits government entities and officials from taking action to prohibit or in any way restrict the maintenance or intergovernmental exchange of such information, including through written or unwritten policies or practices."[28]

On October 6, 2016, OJP issued "Additional Guidance Regarding Compliance with 8 U.S.C. § 1373," stating in part that "[a]uthorizing legislation for the Byrne/JAG grant program requires that all grant applicants certify compliance both with the provisions of that authorizing legislation and all other applicable federal laws. The Office of Justice Programs has determined that 8 U.S.C. § 1373 (Section 1373) is an applicable federal law under the Byrne/JAG authorizing legislation. Therefore, all Byrne/JAG grant applicants must certify compliance with all applicable federal laws, including Section 1373, as part of

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[25] Dep't of Justice, Office of Justice Programs, BJA-2016-9020, Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fiscal Year (FY) 2016 Local Solicitation (May 16, 2016), *available at* https://www.bja.gov/funding/JAGLocal16.pdf.

[26] *See* 8 U.S.C. § 1231(i).

[27] *See* Dep't of Justice, Office of the Inspector General, Memorandum: Dep't of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), *available at* https://oig.justice.gov/reports/2016/1607.pdf [hereinafter *OIG Memo*]. This memo was prompted by an inquiry made by Representative John A. Culberson.

[28] *See* Dep't of Justice, Office of Justice Programs, *Guidance Regarding Compliance with 8 U.S.C. § 1373*, Jul. 7, 2016, *available at* https://www.bja.gov/funding/8uscsection1373.pdf [hereinafter *July 7, 2016 Q&A*].

the Byrne/JAG grant application process."[29] The October 6, 2016 Additional Guidance also stated:

> If a recipient is found out of compliance with Section 1373, the recipient must take sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. Failure to remedy any violations could result in a referral to the Department of Justice Inspector General, the withholding of grant funds or ineligibility for future OJP grants or subgrants, suspension or termination of the grant, or other administrative, civil, or criminal penalties, as appropriate.[30]

DOJ's Office of Community Oriented Policing Services (COPS) also provides grants to law enforcement agencies to hire and/or rehire career law enforcement officers in an effort to increase their "community policing" capacity and crime prevention efforts.[31] In its Fiscal Year 2016 Application Guide for the COPS Hiring Program (CHP), the COPS Office stated that "all recipients for this program should understand that if the COPS Office receives information which indicates that a recipient may be in violation of 8 U.S.C. section 1373 (or any other applicable federal law) that recipient may be referred to the DOJ Office of Inspector General for investigation. If the recipient is found to be in violation of an applicable federal law by the OIG, the recipient may be subject to criminal and civil penalties, in addition to relevant DOJ programmatic penalties, including suspension or termination of funds, inclusion on the high-risk list, repayment of funds, or suspension and debarment."[32]

IV. Analysis

This section addresses four issues. First, it addresses constitutional concerns with ICE detainers that have led numerous jurisdictions to make clear that they will not continue to detain individuals pursuant to ICE detainer requests. Second, it addresses the constitutional limitations on congressional or administrative attempts to directly compel local or state jurisdictions to comply with immigration enforcement schemes, namely the

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[29] *See* Dep't of Justice, Office of Justice Programs, *Additional Guidance Regarding Compliance with 8 U.S.C. § 1373*, Oct. 6, 2016, *available at* https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf [hereinafter *October 6, 2016 Q&A*].

[30] *Id.*

[31] *See* Dep't Justice, Office of COPS, *CHRP Background and Award Methodology*, https://cops.usdoj.gov/Default.asp?Item=2267 (last visited Jan. 11, 2017); *see also* 42 U.S.C. § 3796dd *et seq*.

[32] Dep't of Justice, COPS Office FY 2016 Application Guide: COPS Hiring Program (CHP), 2016, *available at* https://cops.usdoj.gov/pdf/2016AwardDocs/chp/AppGuide.pdf.

Tenth Amendment.[33] Third, it addresses similar limitations on congressional or administrative attempts to cut broad sources of federal funds to jurisdictions with policies limiting local enforcement of immigration laws, including under the Tenth Amendment and the Spending Clause of the Constitution.[34] Finally, it addresses DOJ's guidance with respect to § 1373, and the limited requirements of that section, which only prohibit local and state governments from enacting laws or policies that limit maintenance and communication with DHS about information regarding the "*immigration or citizenship status*" of individuals.

A. *Fourth Amendment Concerns Regarding ICE Detainers*

As discussed above, one of the central aspects of local enforcement of federal immigration laws is the use of ICE detainers, a request from ICE that a local agency hold an individual in custody in order to give ICE the opportunity to take the individual into federal custody.[35] Detentions pursuant to ICE detainers, however, have raised numerous constitutional concerns, namely that continued detention under an ICE detainer violates the probable cause requirement of the Fourth Amendment.

The Supreme Court has found that being held in jail, "regardless of its label"—whether it is "termed 'arrest[]' or 'investigatory detention[]'"—is a seizure that triggers the Fourth Amendment's protections.[36] Courts have also recognized that when a person is kept in custody *after* he or she should otherwise be released, the detention is a new seizure that requires its own Fourth Amendment justification.[37] The Fourth Amendment's most basic

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[33] The Tenth Amendment to the United States Constitution states: "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.

[34] The Spending Clause is found in Article I, Section 8 of the Constitution, and states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. U.S. CONST. ART. I, § 8.

[35] Courts have held that an immigration detainer is a request that does not impose any obligation on the receiving jurisdiction. *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (local law enforcement agencies are free to disregard detainers and cannot use them as a defense of unlawful detention); *Villars v. Kubiatowski*, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) (federal courts and all relevant federal agencies and departments consider ICE detainers to be requests).

[36] *Dunaway v. New York*, 442 U.S. 200, 215-16 (1979) (internal quotation marks and citations omitted); see also *Brown v. Illinois*, 422 U.S. 590, 605 (1975). Certain brief, limited seizures—called "Terry stops"—can be supported by the lower evidentiary standard of reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1 (1968).

[37] *See Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (once the initial reason for a seizure is resolved, officers may not prolong the detention without a new, constitutionally adequate justification); *see also Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) ("A legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee [for a separate civil purpose]"); *Barnes v. Dist. of Columbia*, 242 F.R.D. 113, 118 (D.D.C. 2007) ("Plaintiffs allege that, despite being entitled to release, they were taken back into custody . . .

requirement is that all arrests must be supported by probable cause.[38] Probable cause requires that "the facts and circumstances within . . . the officers' knowledge and of which they ha[ve] reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[39] Probable cause must be based on specific, individualized facts, not generalized suspicion.[40] The Fourth Amendment also requires that at some point, the probable cause "determination must be made by a judicial officer" who can make a neutral and detached assessment.[41] This judicial determination must occur "either before" the seizure in the form of a judicially issued warrant, or "promptly after" the seizure in the form of a probable cause hearing.[42]

Under these precedents, numerous federal courts have found that continued detention under an ICE detainer, absent probable cause, would state a claim for a violation of the Fourth Amendment and subject the detaining officer or jurisdiction to civil liability.[43]

. [T]hey allege that they essentially were re-arrested or re-seized. These allegations of Fourth Amendment violations are sufficient to survive a motion to dismiss").

[38] *See Dunaway*, 442 U.S. at 213.

[39] *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (internal quotation marks, brackets, and citation omitted).

[40] *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

[41] *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). ICE's predecessor, the INS, responded to comments on proposed changes to 8 C.F.R. § 287.8(c) ("Conduct of arrests"), acknowledging that "[t]he Service is clearly bound by . . . [judicial] interpretations [regarding arrest and post-arrest procedures], including those set forth in *Gerstein v. Pugh*[.]" 59 Fed. Reg. 42406-01 (1994).

[42] *Id*.

[43] *See Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I.), *aff'd on appeal*, 2015 WL4385945 (1st Cir. 2015) (holding that plaintiff stated a Fourth Amendment claim where she was held for 24 hours on an ICE detainer issued without probable cause); *Galarza v. Szalczyk*, No. 10-6815, 2012 WL 1080020, at *10, *13 (E.D. Pa. Mar. 30, 2012) (unpub.) (holding that where plaintiff was held for 3 days after posting bail based on an ICE detainer, he stated a Fourth Amendment claim against both federal and local defendants; it was clearly established that the "detainer caused a seizure" that must be supported by "probable cause"), *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014) (holding that the County operating the jail, too, may be liable for violating the Fourth Amendment); *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (holding that plaintiff's detention on an ICE detainer after she would otherwise have been released "constituted a new arrest, and must be analyzed under the Fourth Amendment;" and resulting in a settlement in the amount of $30,100); *Mendoza v. Osterberg*, No. 13-65, 2014 WL 3784141, at *6 (D. Neb. July 31, 2014) (recognizing that "[t]he Fourth Amendment applies to all seizures of the person," and thus, "[i]n order to issue a detainer[,] there must be probable cause") (internal quotation marks, ellipses, and citations omitted); *Villars v. Kubiatowski*, 45 F.Supp.3d 791 (N.D. Ill. 2014) (holding that plaintiff stated a Fourth Amendment claim where he was held on an ICE detainer that "lacked probable cause," and resulting in settlement as to local defendants); *Uroza v. Salt Lake Cnty.*, No. 11-713, 2013 WL 653968, at *5-6 (D. Ut. Feb. 21, 2013) (holding that plaintiff stated a Fourth Amendment claim where ICE issued his detainer without probable cause; finding it clearly established that "immigration enforcement agents need probable cause to arrest . . . [and] detainees who post bail should be set free in the absence of probable cause to detain them again," and resulting in settlement as to local defendants in amount of $75,000); *Vohra v. United States*, No. 04-0972, 2010

These courts have found that local jails must have a warrant or probable cause of a new offense to detain a person after they would otherwise be released from custody.[44]

In 2015, ICE changed its detainer forms in response to court decisions regarding probable cause violations. A revised form, Form I-247D, requests that the state or local enforcement agency "maintain custody of" an individual for a period not to exceed 48 hours "beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody."[45] The revised form contains boilerplate language stating that "probable cause exists that the subject is a removable alien," and that "this determination is based on" one of four check-boxes. The revised detainer form does not address the requirement of a prompt judicial probable cause hearing before a neutral judicial officer following arrest.[46]

Further, the generalized categories on the revised detainer form do not establish that ICE has made an *individualized* determination of probable cause based on the facts and circumstances of a particular case, as required under the Fourth Amendment. Additionally, the revised form does not require ICE agents to obtain a judicial warrant before issuing a detainer, and thus the detainer request is lawful *only* if it complies with the statutory limitations on ICE's warrantless arrest authority.[47] Under the INA, ICE may only make warrantless arrests if ICE has "reason to believe" that the alien "is likely to

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U.S. Dist. LEXIS 34363, *25 (C.D. Cal. Feb. 4, 2010) (magistrate's report and recommendation) ("Plaintiff was kept in formal detention for at least several hours longer due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless arrest" to which the "'probable cause' standard . . . applies"), adopted, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010) (unpub). *See also* American Civil Liberties Union, *ICE Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?* (Nov. 13, 2014), *available at* https://www.aclu.org/sites/default/files/assets/2014_11_13_-_ice_detainers_4th_am_limits.pdf; Immigrant Legal Resource Ctr., *Legal Issues with Immigration Detainers* (Nov. 2016), *available at*, https://www.ilrc.org/sites/default/files/resources/detainer_law_memo_november_2016_updated.pdf.

[44] *See, e.g., Morales*, 793 F.3d at 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes— one that must be supported by a new probable cause justification."); *Vohra*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010).

[45] DHS Form I-247D; *see also* 8 C.F.R. §287.7(d) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.")

[46] The only form of post-arrest review that ICE provides is an examination conducted by a non-judicial enforcement officer within 48 hours after the subject of the detainer is taken into *ICE custody*, not when the individual is held in local custody pursuant to an ICE detainer. *See* 8 U.S.C. § 1357; 8 C.F.R. § 287.3.

[47] *See Moreno v. Napolitano*, No. 11 C 5452, 2016 WL 5720465, *8 (N.D. Ill. Sept. 30, 2016) ("Defendants do not argue that the changes they invoke warrant decertification as to Plaintiffs' claim that ICE's practice of issuing detainers without obtaining a warrant exceeds its statutory authority under 8 U.S.C. § 1357(a)(2). Nor can they.").

escape before a warrant can be obtained for his arrest."[48] The revised detainer form, as well as ICE's policies and practices, do not require *any* individualized determination that an individual is likely to escape before a warrant can be obtained for his arrest.[49] As with probable cause, ICE is required to make an individualized determination of flight risk prior to making a warrantless arrest or requesting that another agency make such arrest on its behalf.

Because the revised detainer request form lacks an individualized determination as to probable cause and risk of flight, any detention subject to an ICE detainer has and would continue to subject individual officers and jurisdictions to potential liability.

B. ***Constitutional Implications of Potential Congressional or Administrative Attempts to Directly Compel Local Jurisdictions to Enforce Federal Immigration Laws***

This section addresses federal attempts to directly compel local jurisdictions to enforce federal immigration laws, including ICE detainers.

The relationship between federal immigration priorities and municipal and state action implicates the Tenth Amendment and the Spending Clause of the U.S. Constitution. Should the federal government make attempts to directly compel compliance with certain immigration enforcement provisions, such as immigration detainers, these attempts will face strong challenges under the Tenth Amendment.

The Tenth Amendment provides that "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."[50] In its 1992 decision in *New York v. United States*,[51] the U.S. Supreme Court addressed a congressional attempt to regulate in the area of low-level radioactive waste by providing that states *must* either develop legislation on how to dispose of all low-level radioactive waste generated within the states, or the states would be forced to take title to such waste, making the waste the states' responsibility. The Court found that Congress had attempted to *require* the states to perform a duty, and thus sought to "commandeer" the legislative process of the states.[52] The Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

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[48] *Id*. at *4; *see also* 8 U.S.C. § 1357(a)(2).

[49] *Id*. at *6 ("Defendants acknowledge that, '[a]s part of the process of issuing immigration detainers, ICE's policies and practices do not require any individualized determination that a class member is likely to escape before a warrant can be obtained for his arrest.' . . . . Defendants further admit that, in fact, 'ICE agents *do not make any determination at all* that the class member is likely to escape before a warrant can be obtained for his arrest.') (citations and internal quotation marks omitted).

[50] U.S. CONST. AMEND. X.

[51] 505 U.S. 144 (1992).

[52] 505 U.S. at 175-76.

Subsequently, in *Printz v. United States*, the Supreme Court held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law-enforcement officials to perform background checks.[53] Under the Brady Handgun Act, Congress sought to temporarily require state and local law enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase.[54] This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. The Supreme Court concluded that commandeering of state executive branch officials, even temporarily, was outside of Congress's power, and thus a violation of the Tenth Amendment.[55] The Court held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[56]

Thus, under *New York* and *Printz*, a legislative attempt to *directly* compel state and local compliance with immigration enforcement would likely violate the Tenth Amendment and would be struck down by a reviewing court. Under these precedents, it is unlikely that legislation stating that local jurisdictions *shall* comply with requests from ICE to detain individuals will survive a challenge by states or local jurisdictions on Tenth Amendment grounds.[57]

Similarly, regulatory or administrative attempts to compel state and local compliance with immigration detainers would likely fail, given that the courts will apply the same "anti-commandeering" principals to regulations and administrative action. In *Galarza v. Szalczyk*, for example, the Third Circuit Court of Appeals addressed whether detainers issued under a regulation, 8 C.F.R. § 287.7, were mandatory, and found that in light of *New York* and *Printz*, detainers are explicitly not mandatory and that electing not to respond to them is entirely within the discretion of local law enforcement. The *Galarza* Court stated:

> [I]t is clear to us that reading § 287.7 to mean that a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of

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[53] 521 U.S. 898, 933-935 (1997).

[54] Brady Handgun Violence Prevention Act, P.L. 103-159, §102.

[55] 521 U.S. at 935.

[56] *Id*.

[57] *See also* Erwin Chemerinsky, Annie Lai and Seth Davis, *Trump Can't Force 'Sanctuary Cities' to Enforce His Deportation Plans*, WASHINGTON POST, Dec. 22, 2016, *available at* https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.d69495c29f77 ("Trump insists that he can force states and cities to participate in his plan to deport undocumented immigrants. But this ignores the 10th Amendment, which the Supreme Court has repeatedly interpreted to prevent the federal government from 'commandeering' state and local governments by requiring them to enforce federal mandates.").

> the Tenth Amendment. As in *New York* and *Printz*, immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme. The District Court's interpretation of § 287.7 as compelling Lehigh County to detain prisoners for the federal government is contrary to the Federal Constitution and Supreme Court precedents.[58]

As such, any congressional or administrative action seeking to directly compel states or local officers to act would likely fail under the Tenth Amendment.

C. ***Constitutional Implications of Potential Congressional or Administrative Attempts to Withhold General Federal Funds from Local Jurisdictions That Do Not Enforce Federal Immigration Laws***

In lieu of legislation or regulations seeking direct compliance with enforcement schemes, Congress may attempt to withhold general federal funds from municipalities and jurisdictions that do not continue to detain individuals pursuant to ICE detainers or take part in other enforcement mechanisms. Congress has made attempts in the past to enact this type of legislation, which would expressly tie various types of federal funding to compliance with immigration detainers and other civil immigration enforcement.[59] For example, S. 3100, introduced in June 2016, would revoke federal funding for Economic Development Administration Grants and the Department of Housing & Urban Development's Community Development Block Grants programs unless jurisdictions comply with all DHS detainer requests.[60] President-elect Trump has also said that his administration will pursue a policy of blocking *all* federal funding for cities where local law enforcement agencies do not cooperate with ICE agents.[61]

These laws or policies regarding general federal funding will face similar challenges under the Tenth Amendment and the Spending Clause of the U.S. Constitution.

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States."[62] Under the Spending Clause, Congress can allocate money to states, private entities, or individuals, and require those recipients to engage in or refrain from certain activities as a condition of receiving and spending that

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[58] 745 F.3d 634, 643 (3d. Cir. 2014).

[59] *See, e.g.*, H.R. 3009, "Enforce the Law for Sanctuary Cities Act"; S.1814, "Stop Sanctuary Cities Act"

[60] Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2nd Sess. 2016) (Sec. 4 places limitations on grants through the U.S. Department of Housing and Urban Development's Community Development Block Grant program ("CDBG"), as well as the U.S. Economic Development Administration).

[61] *See, e.g.*, Donald J. Trump for President, Inc., *Donald J. Trump Contract with the American Voter* (Oct. 22, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-delivers-groundbreaking-contract-for-the-american-vote1.

[62] U.S. CONST., Art. I, § 8, cl. 1.

money.[63] However, under precepts of federalism, there are limitations on Congress' ability to apply such requirements to the states. The Supreme Court has scrutinized Spending Clause legislation to ensure that "Congress is not using financial inducements to exert 'a power akin to undue influence.'"[64]

In *South Dakota v. Dole*, the Court considered a challenge to federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court noted that under the Spending Clause, there are limits to the conditions on the receipt of federal funds: they must be (1) related to the general welfare, (2) stated unambiguously, (3) clearly related to the program's purpose, and (4) not otherwise unconstitutional.[65] The Court asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion,'"[66] and, whether the condition was related to the particular national project or program to which the money was being directed.[67] The Court upheld the condition in *Dole*, finding that the amount of money at issue was only "relatively mild encouragement to the States," and that the drinking age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[68]

Subsequently, in *National Federation of Independent Business v. Sebelius*, the Supreme Court addressed a provision of the Affordable Care Act (ACA) that would have withheld Medicaid reimbursement to a state unless that state complied with an expansion of its Medicaid program. Under the ACA, if a state did not comply with the Act's coverage requirements, it would lose not only the federal funding for those requirements, but *all* of its federal Medicaid funds.[69] The Court held that the Medicaid expansion *was* unconstitutionally coercive.

Chief Justice Roberts, writing for a plurality, noted that while Congress may use its spending power to create incentives for states to act in accordance with federal policies, Congress may not exert undue influence by compelling states' policy choices. He stated that "[w]hen, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[70] The Roberts plurality found that in the ACA, Congress had unconstitutionally threatened states with the loss of all of their existing Medicaid funds,

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[63] *See S. Dakota v. Dole*, 483 U.S. 203 (1987).

[64] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

[65] 483 U.S. at 207-208.

[66] *Id*. at 211 (citing *Steward Machine*, 301 U.S. at 590).

[67] *Id*. at 207-209.

[68] *Id.* at 211.

[69] 132 S. Ct. 2566, 2582.

[70] *Id.* at 2604.

which amounted to a "gun to the head."[71] The plurality concluded that the threatened loss of all Medicaid funds, which constitute over 10% of a state's overall budget, left the States with no real option but to acquiesce in the Medicaid expansion.[72]

Further, *Sebelius* also affirms that Congress cannot create a funding condition that is unrelated to the original funding purpose; that is, there must be a relationship between the grant condition and the underlying grant program. By finding that the Medicaid expansion was not a modification of the existing Medicaid program, he rejected Justice Ginsburg's assertion in her concurrence that *Dole* is distinguishable because in the ACA, "Congress has not threatened to withhold funds earmarked for any *other* program."[73] Chief Justice Roberts also noted that Congress may not surprise states with post-acceptance or retroactive conditions.[74] Thus, if a policy goal is unrelated to the underlying grant condition, the condition will not survive constitutional scrutiny under the Spending Clause.[75]

Thus, cuts to general federal funds would be examined based on the percentage of the local or state budget threatened and the nexus between the grant condition and the underlying grant program. This doctrine applies to both congressional and executive threats to pull unrelated federal funding for municipalities and jurisdictions that have local laws or policies limiting local enforcement of federal immigration law, such as the honoring of ICE detainers. First, restricting general federal funding would most certainly be coercive: New York City alone could lose $10.4 billion annually in federal money.[76] Further, general federal funding has no direct connection to immigration enforcement, and certainly has less of a connection or nexus than the Medicaid funding at issue in *Sebelius* to the condition imposed.

The same lack of nexus would apply to unrelated Economic Development Administration (EDA) Grants and the Department of Housing & Urban Development's Community Development Block Grants (CBDG) contemplated in proposed legislation. EDA funding supports economic development, public works, and other projects with the goal of building durable regional economies, including those in economically distressed areas of the United States.[77] CDBG funds are intended to ensure decent affordable housing, provide

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[71] *Id*. at 2604.

[72] *Id*. at 2605.

[73] *Id*. at 2605; *id*. at 2634 (Ginsburg, J., dissenting)

[74] *Id*. at 2606.

[75] *See also* KENNETH R. THOMAS, CONG. RESEARCH SERV., THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBILIUS 15, (July 17, 2012); *see also* Chemerinsky, Lai and Davis, *supra* note 57 ("Nor can the federal government do indirectly — by threatening to withdraw federal funding from states — what it cannot do directly.").

[76] *See* Noah Feldman, *Sanctuary Cities Are Safe, Thanks to Conservatives*, BLOOMBERG, Nov. 29, 2016, *available at* https://www.bloomberg.com/view/articles/2016-11-29/sanctuary-cities-are-safe-thanks-to-conservatives.

[77] U.S. Econ. Dev. Admin., *Overview*, https://www.eda.gov/about/ (last visited Jan. 11, 2017).

services to vulnerable community members, and expand and retain businesses. Grants are also provided for areas recovering from Presidentially declared disasters, as well as areas affected by housing foreclosures.[78] Project funds have been used for various projects wholly unrelated to immigration, for instance, to help deliver groceries to vulnerable populations in California; construct a shelter for youth experiencing homelessness in Fairbanks, Alaska; and to create a family-friendly park and recreational area in Arlington, Texas.[79]

Finally, the Court in *Dole* held that Congress' Spending Clause power "may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress' broad spending power."[80] With respect to any federal legislation or action withholding funds unless a jurisdiction complies with detainers, a growing number of courts have recognized that DHS, state, and local officials may be held liable for causing wrongful detentions under a detainer in violation of the Fourth Amendment.[81] The current Secretary of DHS has acknowledged the "increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment."[82] As such, any legislation or administrative attempts to tie funding to compliance with ICE detainers could face this additional challenge.

It should be noted, however, that despite this analysis, the federal government or the incoming administration could attempt to withhold generalized federal funds pending legal challenges, affecting the budgets of local and state governments or agencies.

D. ***Section 1373 and the Department of Justice's Position on Certification of Compliance***

As discussed above, following a memo issued by the DOJ Office of the Inspector General (OIG), DOJ's Office of Justice Programs (OJP) and Office of Community Oriented Policing Services (COPS) have issued guidance that they consider 8 U.S.C. § 1373 an applicable federal law with which grant applicants must certify compliance.

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[78] U.S. Dep't of Hous. and Urban Dev., *Cmty. Dev. Block Grant Program – CDBG*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Jan. 11, 2017).

[79] U.S. Dep't of Hous. and Urban Dev., *CDBG Project Profiles*, https://www.hudexchange.info/community-development/project-profiles/ (last visited Jan. 11, 2017).

[80] *Dole*, 483 U.S. at 210–11.

[81] *See, e.g., Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) ("There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention."); *See also Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements).

[82] *See* Secure Communities Letter, *supra* note 12 at 2 n.1.

Thus far, neither the memo issued by OIG nor guidance issued by OJP or COPS has concluded that any jurisdiction's policy with respect to local enforcement of federal immigration laws is in violation of § 1373, nor does either recommend the withholding of any grants. Further, the OIG memo and grant-related guidance issued by OJP and COPS appear to be at odds with the recommendations of the President's 21st Century Policing Task Force, which states that law enforcement agencies "should build relationships based on trust with immigrant communities."[83] In order to do that, the Task Force recommends "[d]ecoupl[ing] federal immigration enforcement from routine local policing for civil enforcement and nonserious crime," and that DHS "should terminate the use of the state and local criminal justice system, including through detention, notification, and transfer requests, to enforce civil immigration laws against civil and non-serious criminal offenders."[84] However, the Task Force was convened by the outgoing administration, and is not binding in any event.

i. Section 1373's Limited Application

Section 1373 has limited application. It states in relevant part that "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, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[85] It also prohibits restrictions on "[m]aintaining such information."[86]

By its terms, the statute in pertinent part only prohibits local and state governments and agencies from enacting laws or policies that limit communication with DHS about information regarding the "*immigration or citizenship status*" of individuals.[87] The statute does *not* prohibit laws or policies that limit communications regarding criminal case information, custody status, or release dates of individuals in local or state custody.

The statute also does not compel compliance with ICE detainers or prohibit policies or laws regarding compliance with ICE detainers. As discussed above, in addition to their questionable constitutionality under the Fourth Amendment, detainers *cannot* be mandatory under federalism principles and the Tenth Amendment,[88] and nothing in § 1373 or the guidance issued by DOJ changes that analysis.

Section 1373 also does not impose any affirmative obligation on local law enforcement to *collect* information regarding immigration or citizenship status, nor does it

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[83] FINAL REPORT ON PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, 1.9 Recommendation: Law enforcement agencies should build relationships based on trust with immigrant communities. This is central to overall public safety, p. 18, *available at* https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

[84] *Id*.

[85] 8 U.S.C. § 1373.

[86] *Id*. Since local governments are not required to maintain such information, the ban on restricting the maintenance of such information is of less significance.

[87] *Id*. (emphasis added).

[88] *See supra* Part IV.B.

prevent any local jurisdiction from enacting a law or ordinance instructing local employees not to collect such information. Nor does the statute affirmatively obligate local law enforcement to assist ICE in collecting such information through jail visits or interviews, or prohibit policies restricting ICE access to local jails or facilities. The statute only bars prohibitions on government entities from maintaining or sharing *citizenship or immigration status* information.

Thus, unless a local jurisdiction's policies or laws specifically limit communication with DHS about an individual's *citizenship or immigration status*, or affirmatively forbids the maintenance of information, the jurisdiction would be in compliance with the plain terms of 8 USC § 1373.

Further, under the prior program of Secure Communities, and under DHS's current Priority Enforcement Program (PEP), when an individual is arrested and booked by a law enforcement officer for a criminal violation and his or her fingerprints are submitted to the FBI for criminal history and warrant checks, the same biometric data is also sent to ICE to check against immigration databases so that ICE can determine whether the individual is a priority for removal.[89] Given this reality, it is unclear whether in practice local officials do actually prohibit local government entities or officials from sharing information regarding immigration status or citizenship to ICE.

ii. Challenges Involving Section 1373

Section 1373 has been found by at least one court to be valid under the Tenth Amendment. The City of New York and Mayor Rudolph Giuliani challenged the statute after it was passed in 1996, in light of the City's 1989 Executive Order which prohibited any City officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities except under certain circumstances.[90] The City brought a facial challenge to § 1373, arguing that it violated the Tenth Amendment because it forbid state and local government entities from controlling the use of information regarding immigration status, and that interference with a state's control over its own workforce was outside Congress's plenary power over immigration.[91] Citing *New York* and *Printz*, the Second Circuit found that in § 1373:

> Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's

[89] *See* U.S. ICE, *Priority Enforcement Program Overview*, https://www.ice.gov/pep (last visited Jan. 11, 2017).

[90] *See City of New York v. U.S.*, 179 F.3d 29, 31 (2d Cir. 1999). The City also challenged a similar provision codified at 8 U.S.C. § 1644, passed as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which states that "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."

[91] *City of New York*, 179 F.3d at 33.

> service. These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.[92]

The Court in *City of New York* also found that the City had failed to show that § 1373 constituted an impermissible intrusion on the City's authority to control the use of confidential information and to determine how such information will be handled by City employees, because the City's Executive Order was the only city policy the City claimed was affected. The Court, however, stated that "[w]hether these Sections would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question.[93] In the wake of the Second Circuit's decision, the City of New York revoked its Executive Order and put in place a new order (Executive Order 41) which incorporated privacy protections for immigration-related information into a more generalized privacy policy that applies to a broader category of information in a variety of contexts.[94]

While the Second Circuit found § 1373 to be valid under the Tenth Amendment in *City of New York*, the decision makes clear that while § 1373 prohibits state and local governments from placing restrictions on the reporting of immigration status, it does not actually mandate that states or localities take any affirmative action.[95] This finding has been made by other courts as well.[96] For example, in *Sturgeon v. Bratton*, a resident of Los Angeles brought a challenge in California state court to the validity of the policy of the Los Angeles Police Department (LAPD) which stated that "[o]fficers shall not initiate police action where the objective is to discover the alien status of a person," and that "[o]fficers shall neither arrest nor book persons for violation of" the federal illegal reentry statute.[97] The plaintiff alleged that the LAPD policy violated the Supremacy Clause of the U.S. Constitution because it was in direct conflict with § 1373.[98] The Court found no conflict because the LAPD policy said nothing about communication with ICE, the only topic

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[92] *Id*. at 35.

[93] *Id*. at 37.

[94] N.Y.C., N.Y., Exec. Order No. 41 §§1-2: City-Wide Privacy Policy and Amendment of Exec. Order No. 34 Relating to City Policy Concerning Immigrant Access to City Servs, (Sept. 17, 2003), *available at* http://www.nyc.gov/html/dfta/downloads/pdf/EO41.pdf [hereinafter *N.Y. Exec. Order*]; *see also* Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and A Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 188-89 (2016).

[95] *City of New York*, 179 F.3d at 35 ("These Sections do not directly compel states or localities to require or prohibit anything.").

[96] *See Doe v. City of N.Y.*, 19 Misc. 3d 936, 940, 860 N.Y.S.2d 841, 844 (Sup. Ct. 2008), *aff'd*, 67 A.D.3d 854, 890 N.Y.S.2d 548 (2009) ("However, while said provision prohibits state and local governments from placing restrictions on the reporting of immigration status, it does not impose an affirmative duty to make such reports.").

[97] 95 Cal. Rptr. 3d 718, 722 (Ct. App. 2009); *see also* LAPD Special Order 40 (SO40) (1979).

[98] *Id*.

addressed by § 1373, and § 1373 said nothing about initiation of police action or arrests for illegal entry.[99]

Further, *City of New York* did not address provisions that prohibit the gathering, rather than the sharing of confidential immigration-related information. New York City's Executive Order 41, for example, prohibits city employees, except in limited circumstances, from inquiring about immigration status,[100] and such a policy does not conflict with the plain terms of § 1373.

iii. Authority to Require Certification with Compliance of Mandate Training

DOJ has not provided specific authority under which the SCAAP or COPS reimbursement or grant programs will seek to require certification of compliance with § 1373. With respect to the SCAAP program, the statutory provision, does not require certification of compliance with any specific federal laws, including § 1373,[101] and there are no specific implementing regulations for the SCAAP program. Similarly, the statutory provision regarding COPS grants, including the COPS Hiring Program,[102] does not contain a requirement for certification of compliance with any specific federal laws, including § 1373, and the regulations regarding the COPS program do not contain any provisions regarding conditions for COPS Hiring Program grants, including compliance with § 1373.[103]

With respect to JAG grants, the statute and regulations do require a certification of compliance with the JAG statutory provisions and "all other applicable Federal laws."[104] However, the phrase "all other applicable Federal laws" is not defined in the statute or regulations.

None of the three programs, SCAAP, COPS, or JAG, have legislative or regulatory provisions specifically authorizing DOJ to mandate that local jurisdictions provide guidance or training to their personnel, as contemplated by the DOJ guidance on JAG Grants.[105] Such requirements would likely raise similar Tenth Amendment or Spending Clause considerations raised above.

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[99] 95 Cal. Rptr. 3d at 731-32.

[100] N.Y., Exec. Order No. 41, §§3-4.

[101] 8 U.S.C. § 1231(i).

[102] 42 U.S.C. § 3796dd *et seq*.

[103] 28 C.F.R. § 92 et seq.

[104] 42 U.S.C. § 3752(5); *see* 28 C.F.R. § 33.41(f)(5).

[105] See *supra* note 28, July 7, 2016 Q & A ("Your personnel must be informed that notwithstanding any state or local policies to the contrary, federal law does not allow any government entity or official to prohibit the sending or receiving of information about an individual's citizenship or immigration status with any federal, state or local government entity and officials.").

V. Conclusion

Cities and states have various policies regarding local enforcement of federal immigration laws, and the expenditure of local resources on cooperation with ICE enforcement programs. These policies seek to preserve trust between local law enforcement organizations and the communities they serve, which is undermined when individuals fear that local law enforcement will enforce federal immigration laws. These policies also seek to preserve the limited financial resources available to state and local governments. Though they take many forms, these policies include limitations on local law enforcement making arrests based on immigration violations, limitations on local law enforcement gathering information about immigration status, compliance with ICE detainers, and sharing certain information with ICE, including an individual's custody status or release date from local custody.

Any future efforts by the federal government to limit or defeat these local policies will likely face challenges under the Tenth Amendment and Spending Clause of the Constitution. Any attempts to directly compel local law enforcement to comply with ICE detainers or other enforcement provisions are likely to be struck down. Attempts to cut off all federal funding to jurisdictions with local policies limiting local enforcement will likely be found to exceed Congressional power under the Spending Clause, as will attempts to cut off large, general grants unrelated to immigration enforcement.

While § 1373 has been found by at least one court to be valid under the Tenth Amendment, its pertinent language is limited to prohibiting local and state governments from enacting laws or policies that limit communication with DHS about information regarding the "*immigration or citizenship status*" of individuals. It does not mandate any affirmative action on the part of local officials. Unless a local jurisdiction's policies or laws specifically limit communication with DHS about and individual's *citizenship or immigration status*, or prohibit the "maintaining" (but not the collecting) of such information, the jurisdiction would be in compliance with the plain terms of 8 USC § 1373.