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By First Class Mail

June 19, 2017

The Honorable Jefferson B. Sessions III
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Attorney General Sessions:

We represent the California State Senate and write with regard to Executive Order 13768 (the so-called “sanctuary cities” Executive Order) and California Senate Bill 54.¹ California has been a leader in advancing statewide policies that promote and ensure the health and safety of all its residents regardless of immigration status. Senate Bill 54, also known as the California Values Act, embodies that leadership and commitment to strengthening the trust between California’s immigrant communities and state and local agencies. That trust is critical to the safety of all California residents. As a sovereign State, California has the constitutional authority and responsibility to allocate its limited state resources to those areas of greatest significance to the safety and well-being of its residents. California is not required, in other words, to divert those resources and compromise its security to enforce federal immigration laws.

Recent statements from the Trump Administration, however, have suggested that the Administration considers state and local laws like Senate Bill 54 to be in violation of, or preempted by, federal law. *See, e.g.*, U.S. Att’y General, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), *available at* <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>) (stating that “some states and cities have adopted policies designed to frustrate the enforcement of our immigration laws” by “refusing to honor Immigration and Customs Enforcement (ICE) detainer requests”). And Section 9(a) of Executive Order 13768 purports to direct the Attorney General to “take appropriate enforcement action against any entity that violates 8 U.S.C. [§] 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law,” with no explanation of what policies the Administration might consider to “hinder” such enforcement. 82 Fed. Reg. 8799 (Jan. 25, 2017). Without any support for such a statement, the President has even described California as “out of control” and threatened to use federal funds as a “weapon” against the State.

Senate Bill 54, however, fully complies with the Constitution and federal law. Although the Administration’s statements— which admittedly have been somewhat inconsistent, *see Implementation of Executive Order 13768*, Memo. from U.S. Att’y General to All Department Grant-Making Components (May 22, 2017)—suggest that States must enforce federal immigration law, we have previously explained, in a letter to you, that foundational constitutional principles prohibit the federal government from directing or commandeering States or state officials to enforce

¹ Exhibit 1 to this letter contains the text of Senate Bill 54, the California Values Act, as passed by the California State Senate on April 3, 2017. The Bill is currently pending before the State Assembly.

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The Honorable Jefferson B. Sessions III
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federal law.² The Constitution instead gives California the power to prioritize its limited resources in areas of state concern. Senate Bill 54 represents California's constitutional exercise of that sovereign authority.

On a more personal note, I know you will agree with me that it is the honor of a lifetime to lead the dedicated women and men of the Department of Justice. They serve the citizens of the United States and pursue justice above all else. They swear an oath to uphold the Constitution; they do not pledge loyalty to any one man, nor any one President. I urge you not to force them to further defend the indefensible—the President's inhumane and unjust Executive Orders. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *petition for cert. & application for stay filed* (U.S. June 1, 2017); *Cty. of Santa Clara v. Trump*; *City and Cty. of San Francisco v. Trump*, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017); *Hawai'i v. Trump*, 2017 WL 2529640 (9th Cir. June 12, 2017) (per curiam), *application for stay filed* (U.S. June 1, 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). Nor should you deploy them to attempt to shut down a prudent and constitutional effort by our clients to prioritize the State of California's limited resources to ensure the health and safety of its residents, should it become law in the State. Instead of continuing the Administration's trend of unconstitutional actions, we ask that you confirm our assessment that Senate Bill 54 is both constitutional and complies with federal law.³

Sincerely,



Eric H. Holder, Jr.

² Exhibit 2 to this letter contains a copy of a letter dated April 6, 2017, from Daniel Shallman of Covington & Burling LLP to you and Homeland Security Secretary John Kelly. We received no response to this letter from either you or Secretary Kelly.

³ Exhibit 3 to this letter is a detailed white paper my team prepared entitled "*The California Values Act: A Constitutional Exercise of California's Sovereign Authority*." We urge you and your team to carefully review this analysis before taking any further action to attempt to punish state and local governments that enact policies similar to those reflected in the California Values Act.

Exhibit 1

AMENDED IN SENATE MARCH 29, 2017

AMENDED IN SENATE MARCH 6, 2017

AMENDED IN SENATE MARCH 1, 2017

AMENDED IN SENATE JANUARY 24, 2017

SENATE BILL

No. 54

Introduced by Senator De León

(Principal coauthors: Senators Atkins, Beall, Pan, and Wiener)

(Principal coauthors: Assembly Members Bonta, Chiu, Cooper, Gomez, Levine, and Reyes Reyes, and Santiago)

December 5, 2016

An act to add Chapter 17.25 (commencing with Section 7284) to Division 7 of Title 1 of the Government Code, to repeal Section 11369 of the Health and Safety Code, and to add Sections 3058.10 and 3058.11 to the Penal Code, relating to law enforcement, and declaring the urgency thereof, to take effect immediately. *enforcement.*

LEGISLATIVE COUNSEL'S DIGEST

SB 54, as amended, De León. Law enforcement: sharing data.

Existing law provides that when there is reason to believe that a person arrested for a violation of specified controlled substance provisions may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.

This bill would repeal those provisions.

Existing law provides that whenever an individual who is a victim of or witness to a hate crime, or who otherwise can give evidence in a hate crime investigation, is not charged with or convicted of committing any crime under state law, a peace officer may not detain the individual

exclusively for any actual or suspected immigration violation or report or turn the individual over to federal immigration authorities.

This bill would, among other ~~things~~, *things and subject to exceptions*, prohibit state and local law enforcement agencies, including school police and security departments, from using resources to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, as specified. The bill would require, within 3 months after the effective date of the bill, the Attorney General, in consultation with the appropriate stakeholders, to publish model policies limiting assistance with immigration enforcement to the fullest extent possible for use by those entities for those purposes. The bill would require all public schools, *public libraries*, health facilities operated by the state or a political subdivision of the state, and courthouses to implement the model policy, or an equivalent policy. The bill would state that all other organizations and entities that provide services related to physical or mental health and wellness, education, or access to justice, including the University of California, are encouraged to adopt the model policy. The bill would require a law enforcement agency that chooses to participate in a joint law enforcement task force, as defined, to submit a report every 6 months to the Department of Justice, as specified. The bill would require the Attorney General, within 14 months after the effective date of the bill, and twice a year thereafter, to report on the types and frequency of joint law enforcement task forces, and other information, as specified, and to post those reports on the Attorney General's Internet Web site. The bill would require the Board of Parole Hearings or the Department of Corrections and Rehabilitation, as applicable, to notify ~~the Federal Bureau of Investigation~~ *United States Immigration and Customs Enforcement* of the scheduled release on parole or postrelease community supervision, or rerelease following a period of confinement pursuant to a parole revocation without a new commitment, of all persons confined to state prison serving a *current* term for the conviction of a violent ~~felony~~, and would ~~authorize the sheriff to notify the Federal Bureau of Investigation of the scheduled release of a person confined to county jail for a misdemeanor offense who has a prior conviction for a violent felony, as specified. or serious felony, or who has a prior conviction for a violent or serious felony.~~

This bill would state findings and declarations of the Legislature relating to these provisions.

By imposing additional duties on public schools, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

~~This bill would declare that it is to take effect immediately as an urgency statute.~~

Vote: $\frac{2}{3}$ -majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 17.25 (commencing with Section 7284)
2 is added to Division 7 of Title 1 of the Government Code, to read:

3
4 CHAPTER 17.25. COOPERATION WITH FEDERAL IMMIGRATION
5 AUTHORITIES

6
7 7284. This chapter shall be known, and may be cited, as the
8 California Values Act.

9 7284.2. The Legislature finds and declares the following:

10 (a) Immigrants are valuable and essential members of the
11 California community. Almost one in three Californians is foreign
12 born and one in two children in California has at least one
13 immigrant parent.

14 (b) A relationship of trust between California’s immigrant
15 community and state and local agencies is central to the public
16 safety of the people of California.

17 (c) This trust is threatened when state and local agencies are
18 entangled with federal immigration enforcement, with the result
19 that immigrant community members fear approaching police when
20 they are victims of, and witnesses to, crimes, seeking basic health
21 services, or attending school, to the detriment of public safety and
22 the well-being of all Californians.

23 (d) Entangling state and local agencies with federal immigration
24 enforcement programs diverts already limited resources and blurs
25 the lines of accountability between local, state, and federal
26 governments.

1 (e) State and local participation in federal immigration
2 enforcement programs also raises constitutional concerns, including
3 the prospect that California residents could be detained in violation
4 of the Fourth Amendment to the United States Constitution,
5 targeted on the basis of race or ethnicity in violation of the Equal
6 Protection Clause, or denied access to education based on
7 immigration status.

8 (f) This act seeks to ensure effective policing, to protect the
9 safety, well-being, and constitutional rights of the people of
10 California, and to direct the state's limited resources to matters of
11 greatest concern to state and local governments.

12 7284.4. For purposes of this chapter, the following terms have
13 the following meanings:

14 (a) "California law enforcement agency" means a state or local
15 law enforcement agency, including school police or security
16 departments.

17 (b) "Civil immigration warrant" means any warrant for a
18 violation of federal civil immigration law, and includes civil
19 immigration warrants entered in the National Crime Information
20 Center database.

21 (c) "Federal immigration authority" means any officer,
22 employee, or person otherwise paid by or acting as an agent of
23 United States Immigration and Customs Enforcement or United
24 States Customs and Border Protection, or any division thereof, or
25 any other officer, employee, or person otherwise paid by or acting
26 as an agent of the United States Department of Homeland Security
27 who is charged with immigration enforcement.

28 (d) "Health facility" includes health facilities as defined in
29 Section 1250 of the Health and Safety Code, clinics as defined in
30 Sections 1200 and 1200.1 of the Health and Safety Code, and
31 substance abuse treatment facilities.

32 (e) "Hold request," "notification request," "transfer request,"
33 and "local law enforcement agency" have the same meaning as
34 provided in Section 7283. Hold, notification, and transfer requests
35 include requests issued by United States Immigration and Customs
36 Enforcement or United States Customs and Border Protection as
37 well as any other federal immigration authorities.

38 (f) "Immigration enforcement" includes any and all efforts to
39 investigate, enforce, or assist in the investigation or enforcement
40 of any federal civil immigration law, and also includes any and all

1 efforts to investigate, enforce, or assist in the investigation or
2 enforcement of any federal criminal immigration law that penalizes
3 a person’s presence in, entry, or reentry to, or employment in, the
4 United States, including, but not limited to, violations of Section
5 1253, 1324e, 1325, or 1326 of Title 8 of the United States Code.
6 States. “Immigration enforcement” does not include either of the
7 following:

8 (1) Efforts to investigate, enforce, or assist in the investigation
9 or enforcement of a violation of Section 1326(a) of Title 8 of the
10 United States Code that may be subject to the enhancement
11 specified in Section 1326(b)(2) of Title 8 of the United States Code
12 and that is detected during an unrelated law enforcement activity.

13 (2) Transferring an individual to federal immigration authorities
14 for a violation of Section 1326(a) of Title 8 of the United States
15 Code that is subject to the enhancement specified in Section
16 1326(b)(2) of that title if the individual has been previously
17 convicted of a violent felony listed in subdivision (c) of Section
18 667.5 of the Penal Code.

19 (g) “Joint law enforcement task force” means a California law
20 enforcement agency collaborating, engaging, or partnering with a
21 federal law enforcement agency in investigating, interrogating,
22 detaining, detecting, or arresting persons for violations of federal
23 or state crimes.

24 (h) “Judicial warrant” means a warrant based on probable cause
25 and issued by a federal judge or a federal magistrate judge that
26 authorizes federal immigration authorities to take into custody the
27 person who is the subject of the warrant.

28 (i) “Public schools” means all public elementary and secondary
29 schools under the jurisdiction of local governing boards or a charter
30 school board, the California State University, and the California
31 Community Colleges.

32 (j) “School police and security departments” includes police
33 and security departments of the California State University, the
34 California Community Colleges, charter schools, county offices
35 of education, schools, and school districts.

36 7284.6. (a) California law enforcement agencies shall not do
37 any of the following:

38 (1) Use agency or department moneys, facilities, property,
39 equipment, or personnel to investigate, interrogate, detain, detect,

- 1 or arrest persons for immigration enforcement purposes, including,
 2 but not limited to, any of the following:
- 3 (A) ~~Inquiring into or collecting information about an individual's~~
 4 ~~immigration status, except as required to comply with Section~~
 5 ~~922(d)(5) of Title 18 of the United States Code.~~ *status.*
- 6 (B) Detaining an individual on the basis of a hold request.
- 7 (C) ~~Responding to requests for notification or transfer requests.~~
 8 *by providing release dates or other information unless that*
 9 *information is available to the public.*
- 10 (D) *Providing information regarding a person's release date*
 11 *unless that information is available to the public.*
- 12 ~~(D)~~
- 13 (E) ~~Providing or responding to requests for nonpublicly available~~
 14 ~~personal information about an individual, including, but not limited~~
 15 ~~to, information about the person's release date, home address, the~~
 16 *individual's home address or work address for immigration*
 17 ~~enforcement purposes.~~ *unless that information is available to the*
 18 *public.*
- 19 ~~(E)~~
- 20 (F) Making arrests based on civil immigration warrants.
- 21 ~~(F)~~
- 22 (G) Giving federal immigration authorities access to interview
 23 ~~individuals~~ *an individual* in agency or department ~~custody for~~
 24 ~~immigration enforcement purposes.~~ *custody, except pursuant to a*
 25 *judicial warrant, and in accordance with Section 7283.1.*
- 26 ~~(G)~~
- 27 (H) Assisting federal immigration authorities in the activities
 28 described in Section 1357(a)(3) of Title 8 of the United States
 29 Code.
- 30 ~~(H)~~
- 31 (I) Performing the functions of an immigration officer, whether
 32 pursuant to Section 1357(g) of Title 8 of the United States Code
 33 or any other law, regulation, or policy, whether formal or informal.
- 34 (2) Make agency or department databases, including databases
 35 maintained for the agency or department by private vendors, or
 36 the information therein other than information regarding an
 37 individual's citizenship or immigration status, available to anyone
 38 or any entity for the purpose of immigration enforcement. Any
 39 agreements in existence on the date that this chapter becomes
 40 operative that conflict with the terms of this paragraph are

1 terminated on that date. A person or entity provided access to
2 agency or department databases shall certify in writing that the
3 database will not be used for the purposes prohibited by this
4 section.

5 (3) Place peace officers under the supervision of federal agencies
6 or employ peace officers deputized as special federal officers or
7 special federal deputies except to the extent those peace officers
8 remain subject to California law governing conduct of peace
9 officers and the policies of the employing agency.

10 (4) Use federal immigration authorities as interpreters for law
11 enforcement matters relating to individuals in agency or department
12 custody.

13 (5) *Transfer an individual to federal immigration authorities*
14 *unless authorized by a judicial warrant or for a violation of Section*
15 *1326(a) of Title 8 of the United States Code that is subject to the*
16 *enhancement specified in Section 1326(b)(2) of Title 8 of the United*
17 *States Code and the individual has been previously convicted of*
18 *a violent felony listed in subdivision (c) of Section 667.5 of the*
19 *Penal Code.*

20 (b) ~~Nothing~~ *Notwithstanding the limitations in subdivision (a),*
21 *nothing* in this section shall prevent any California law enforcement
22 agency from doing any of the following:

23 (1) Responding to a request from federal immigration authorities
24 for information about a specific person's criminal history, including
25 previous criminal arrests, convictions, and similar criminal history
26 information accessed through the California Law Enforcement
27 Telecommunications System (CLETS), where otherwise permitted
28 by state law.

29 (2) Participating in a joint law enforcement task force, so long
30 as the *primary* purpose of the joint law enforcement task force is
31 not immigration enforcement, as defined in subdivision (f) of
32 ~~Section 7284.4.~~ 7284.4, *and participation in the task force by the*
33 *California law enforcement does not violate any local law or policy*
34 *of the jurisdiction in which the agency is operating.*

35 (3) *Making inquiries into information necessary to certify an*
36 *individual who has been identified as a potential crime or*
37 *trafficking victim for a T or U Visa pursuant to Section*
38 *1101(a)(15)(T) or 1101(a)(15)(U) of Title 8 of the United States*
39 *Code or to comply with Section 922(d)(5) of Title 18 of the United*
40 *States Code.*

1 (4) Responding to a notification request from federal
2 immigration authorities for a person who is serving a term for the
3 conviction of a misdemeanor or felony offense and has a current
4 or prior conviction for a violent felony listed in subdivision (c) of
5 Section 667.5 of the Penal Code or a serious felony listed in
6 subdivision (c) of Section 1192.7 of the Penal Code, provided that
7 response would not violate any local law or policy.

8 (c) If a California law enforcement agency chooses to participate
9 in a joint law enforcement task force, it shall submit a report every
10 six months to the Department of Justice, as specified by the
11 Attorney General. ~~The reporting agency or the Attorney General~~
12 ~~may determine a report, in whole or in part, is not a public record~~
13 ~~for purposes of the California Public Records Act pursuant to~~
14 ~~subdivision (f) of Section 6254 to prevent the disclosure of~~
15 ~~sensitive information, including, but not limited to, an ongoing~~
16 ~~operation or a confidential informant. The report shall detail for~~
17 ~~each task force operation, the purpose of the task force, the federal,~~
18 ~~state, and local law enforcement agencies involved, the number~~
19 ~~of California law enforcement agency personnel involved, a~~
20 ~~description of arrests made for any federal and state crimes, and~~
21 ~~a description of the number of people arrested for immigration~~
22 ~~enforcement purposes. The reporting agency or the Attorney~~
23 ~~General may determine a report, in whole or in part, shall not be~~
24 ~~subject to disclosure pursuant to subdivision (f) of Section 6254,~~
25 ~~the California Public Records Act, to the extent that disclosure of~~
26 ~~a particular item of information would endanger the safety of a~~
27 ~~person involved in an investigation or would endanger the~~
28 ~~successful completion of the investigation or a related~~
29 ~~investigation.~~

30 (d) The Attorney General, within 14 months after the effective
31 date of the act that added this section, and twice a year thereafter,
32 shall report on the types and frequency of joint law enforcement
33 task forces. The report shall include, for the reporting period,
34 assessments on compliance with paragraph (2) of subdivision (b),
35 a list of all California law enforcement agencies that participate
36 in joint law enforcement task forces, a list of joint law enforcement
37 task forces operating in the state and their purposes, the number
38 of arrests made associated with joint law enforcement task forces
39 for the violation of federal or state crimes, and the number of arrests
40 made associated with joint law enforcement task forces for the

1 purpose of immigration enforcement by all task force participants,
2 including federal law enforcement agencies. The Attorney General
3 shall post the reports required by this subdivision on the Attorney
4 General’s Internet Web site.

5 (e) Notwithstanding any other law, in no event shall a California
6 law enforcement agency transfer an individual to federal
7 immigration authorities for purposes of immigration enforcement
8 or detain an individual at the request of federal immigration
9 authorities for purposes of immigration enforcement absent a
10 ~~judicial warrant~~. *warrant, except as provided in paragraph (4) of*
11 *subdivision (b)*. This subdivision does not limit the scope of
12 subdivision (a).

13 (f) This section does not prohibit or restrict any government
14 entity or official from sending to, or receiving from, federal
15 immigration authorities, information regarding the citizenship or
16 immigration status, lawful or unlawful, of an individual pursuant
17 to Sections 1373 and 1644 of Title 8 of the United States Code.

18 7284.8. The Attorney General, within three months after the
19 effective date of the act that added this section, in consultation
20 with the appropriate stakeholders, shall publish model policies
21 limiting assistance with immigration enforcement to the fullest
22 extent possible consistent with federal and state law at public
23 schools, *public libraries*, health facilities operated by the state or
24 a political subdivision of the state, courthouses, Division of Labor
25 Standards Enforcement facilities, and shelters, and ensuring that
26 they remain safe and accessible to all California residents,
27 regardless of immigration status. All public schools, health facilities
28 operated by the state or a political subdivision of the state, and
29 courthouses shall implement the model policy, or an equivalent
30 policy. All other organizations and entities that provide services
31 related to physical or mental health and wellness, education, or
32 access to justice, including the University of California, are
33 encouraged to adopt the model policy.

34 7284.10. The provisions of this act are severable. If any
35 provision of this act or its application is held invalid, that invalidity
36 shall not affect other provisions or applications that can be given
37 effect without the invalid provision or application.

38 SEC. 2. Section 11369 of the Health and Safety Code is
39 repealed.

40 SEC. 3. Section 3058.10 is added to the Penal Code, to read:

1 3058.10. (a) The Board of Parole Hearings, with respect to
 2 inmates sentenced pursuant to subdivision (b) of Section 1168, or
 3 the Department of Corrections and Rehabilitation, with respect to
 4 inmates sentenced pursuant to Section 1170, shall notify ~~the Federal~~
 5 ~~Bureau of Investigation~~ *United States Immigration and Customs*
 6 *Enforcement* of the scheduled release on parole or postrelease
 7 community supervision, or rerelease following a period of
 8 confinement pursuant to a parole revocation without a new
 9 commitment, of all persons confined to state prison serving a
 10 *current* term for the conviction ~~of of, or who have a prior~~
 11 *conviction for*, a violent felony listed in subdivision (c) of Section
 12 ~~667.5. 667.5 or a serious felony listed in subdivision (c) of Section~~
 13 *1192.7.*

14 (b) The notification shall be made at least 60 days prior to the
 15 scheduled release date or as soon as practicable if notification
 16 cannot be provided at least 60 days prior to release. The only
 17 nonpublicly available personal information that the notification
 18 may include is the name of the person who is scheduled to be
 19 released and the scheduled date of release.

20 ~~SEC. 4. Section 3058.11 is added to the Penal Code, to read:~~

21 ~~3058.11. (a) Whenever any person confined to county jail is~~
 22 ~~serving a term for the conviction of a misdemeanor offense and~~
 23 ~~has a prior conviction for a violent felony listed in subdivision (c)~~
 24 ~~of Section 667.5 or has a prior felony conviction in another~~
 25 ~~jurisdiction for an offense that has all the elements of a violent~~
 26 ~~felony described in subdivision (c) of Section 667.5, the sheriff~~
 27 ~~may notify the Federal Bureau of Investigation of the scheduled~~
 28 ~~release of that person, provided that no local law or policy prohibits~~
 29 ~~the sharing of that information with either the Federal Bureau of~~
 30 ~~Investigation or federal immigration authorities.~~

31 ~~(b) The notification may be made up to 60 days prior to the~~
 32 ~~scheduled release date. The only nonpublicly available personal~~
 33 ~~information that the notification may include is the name of the~~
 34 ~~person who is scheduled to be released and the scheduled date of~~
 35 ~~release.~~

36 ~~SEC. 5.~~

37 *SEC. 4.* If the Commission on State Mandates determines that
 38 this act contains costs mandated by the state, reimbursement to
 39 local agencies and school districts for those costs shall be made

1 pursuant to Part 7 (commencing with Section 17500) of Division
2 4 of Title 2 of the Government Code.

3 ~~SEC. 6. This act is an urgency statute necessary for the~~
4 ~~immediate preservation of the public peace, health, or safety within~~
5 ~~the meaning of Article IV of the California Constitution and shall~~
6 ~~go into immediate effect. The facts constituting the necessity are:~~

7 ~~Because changes in federal immigration enforcement policies~~
8 ~~require a statewide standard that clarifies the appropriate level of~~
9 ~~cooperation between federal immigration enforcement agents and~~
10 ~~state and local governments as soon as possible, it is necessary for~~
11 ~~this measure to take effect immediately.~~

Exhibit 2

COVINGTON

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April 6, 2017

Via United States Mail

The Honorable Jefferson B. Sessions III
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, D.C. 20530-0001

The Honorable John F. Kelly
Secretary of Homeland Security
Washington, D.C. 20528

Dear Attorney General Sessions and Secretary Kelly:

We represent the California State Legislature and write in response to your March 29, 2017 letter to California Supreme Court Chief Justice Tani G. Cantil-Sakauye. In that letter, you assert that “the State of California and many of its largest counties and cities[] have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests.” The letter cites no California statute or ordinance that you believe was designed to prohibit or hinder ICE’s enforcement of federal immigration law.

As California’s lawmaking body, our client deserves to know which of its laws are supposedly “designed to specifically prohibit or hinder” the federal government’s enforcement of immigration law. On multiple occasions, the Trump Administration—whether through the President, Attorney General, or others—has criticized and impugned the policies of States like California while offering few, if any, specifics as to the State laws that purportedly “prohibit or hinder” federal government enforcement. Instead of continuing to make unsupported accusations, the Administration should inform States of the laws it considers prohibitions or hindrances to federal enforcement of immigration law.

In its repeated attacks on States, the Administration appears to forget that our system is one of “dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that framework, the California Legislature, like all State

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legislatures, is “*not* subject to federal direction” or commandeering. *Printz v. United States*, 521 U.S. 898, 912 (1997). This “balance of power between the States and the Federal Government” is necessary to “reduce the risk of tyranny and abuse.” *Gregory*, 501 U.S. at 458. By suggesting that California must bow to the federal government’s directive or commandeering as to enforcement of federal immigration law, the Administration disregards these foundational principles of the Constitution. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

Your letter is particularly troubling when viewed together with Section 9(a) of the Executive Order dated January 25, 2017, entitled “Enhancing Public Safety in the Interior of the United States.” Using virtually the same language as your letter, the Order purports to direct the Attorney General to “take appropriate enforcement action against any entity . . . which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.” Like the letter, the Order offers no specifics as to what laws may “prevent or hinder” enforcement of federal immigration law. Moreover, any attempt by the Administration to enforce this provision of the Order against California would encounter the serious constitutional concerns described above. *See Printz*, 521 U.S. at 935 (“The 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.”).

The Administration’s unnecessary and repeated assaults on the policies of California, its counties, and its cities are deeply unsettling. Acting within our constitutional framework, California, its counties, and its cities have enacted laws that best protect the rights and interests of their residents. For example, the California Legislature has enacted two important laws, the TRUST Act and the TRUTH Act. The TRUST Act defines the circumstances in which law enforcement in California may honor a request by federal immigration authorities to hold an individual in detention without a warrant. The TRUTH Act ensures transparency concerning law enforcement cooperation with federal immigration authorities. Numerous California counties and municipalities have also made their own judgments about what is best for their communities, and developed policies for when they will or will not go beyond their local enforcement obligations to actively participate in federal immigration enforcement. These laws and policies reflect the will of the people of California, who overwhelmingly rejected the President’s harsh campaign rhetoric—which has only metastasized into even harsher policies. *See California Results*, The New York Times, <http://www.nytimes.com/elections/results/california> (Feb. 10, 2017).

It is our understanding that these laws do not violate federal law and would not be subject to an enforcement action by the federal government. Given your letter and recent statements from the Administration, however, we request that you identify which California statutes or ordinances, if any, the Administration perceives as “specifically designed to prohibit or hinder”

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enforcement of federal immigration law. We also ask that you confirm that the Administration does not intend to take “appropriate enforcement action” under the Order against California. If the Trump Administration resorts to attempting to enforce its Order against California, the Legislature will use all available means to defend the rights, values, and safety of California.

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'D' and 'S' followed by a long horizontal line.

Daniel Shallman

Exhibit 3

The California Values Act:
A Constitutional Exercise of California's Sovereign
Authority

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Executive Summary

- Senate Bill 54 represents a constitutional exercise of sovereign state authority by California to allocate its limited *state* resources to priorities that, in the State's best judgment, ensure the health and safety of its residents and communities.
 - Senate Bill 54 expressly finds that a "relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California."
 - Entangling state and local agencies in federal immigration enforcement threatens that trust.
 - Immigrants fear approaching police who enforce immigration laws, even when the immigrants are victims of, or witnesses to, crime. This dynamic undermines the safety of the community for everyone.
 - State and local governments are accountable to the taxpayers of the State and diversion of their limited resources to federal immigration enforcement programs weakens state and local law enforcement, education, and public health and safety programs.
 - By devoting its limited resources to areas of state concern, in order to protect the safety and well-being of its residents, rather than to federal immigration enforcement programs, California has exercised core sovereign authority.
- Congress may not commandeer the California Legislature or California state and local law enforcement to enact and enforce a federal immigration program.
 - The constitutional framework of dual sovereignty prohibits Congress from requiring States or their officers to enact or enforce federal programs.
 - Senate Bill 54 follows Supreme Court precedent establishing that States may constitutionally implement state programs to further state interests and providing that Congress cannot prohibit such state laws by commandeering state resources to enforce federal programs instead.
- Senate Bill 54 does not interfere with or obstruct the enforcement of federal immigration programs by federal law enforcement officers, and is not otherwise preempted by federal immigration law.
 - Senate Bill 54 explicitly provides, in Section 7284.6(f), that government entities or officials are not prohibited or restricted from sending to, or receiving from, federal immigration authorities, information about the citizenship or immigration status of an individual pursuant to federal statutes, Sections 1373 and 1644 of Title 8 of the United States Code.
 - That is specifically what those federal statutes provide: that states and local entities may not prohibit their entities or officials from sending to, or receiving from, the federal government information about the citizenship or immigration status of an individual. The Trump Administration's apparent broader view of these statutes is atextual, and appears to be based on a misunderstanding or mischaracterization of the statutory language. Federal law does not require States to affirmatively collect information about an individual's immigration status, to arrest individuals who are present in violation of immigration laws, or to hold individuals in custody based on requests from federal immigration officials.

- Senate Bill 54 is not somehow otherwise preempted by federal immigration law, which expresses no intent to, and does not operate to, preempt state laws that leave federal immigration enforcement to the federal government.
 - Federal immigration law recognizes that the federal government has primary immigration enforcement power, and the Supreme Court has so held.
 - The Supreme Court and other courts have held that state laws, like those at issue in *Arizona v. United States*, were preempted by federal immigration law when the States attempted to regulate immigration themselves and intruded on the federal government's authority.
 - Senate Bill 54 has no similar risk of preemption because it leaves federal immigration enforcement to federal officials, which does not interfere with the federal government's authority, while the State would exercise its constitutional prerogative to focus on state priorities.

I. What SB 54 Does

Senate Bill 54 (“SB 54”), also known as the California Values Act, stands as a commitment by California to protect the safety and well-being of its residents and to prioritize its limited law enforcement resources for use to further that commitment. The stated purpose of the Act is “[t]o ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state’s limited resources to matters of greatest concern to state and local governments.” SB 54, Sec. 1, to be codified at Govt. Code § 7284.2(f).¹

SB 54 includes express findings that “[a] relationship of trust between California’s immigrant community and state and local agencies is central to the public safety of the people of California” and that relationship “is threatened when state and local agencies are entangled with federal immigration enforcement.” *Id.* § 7284.2(b), (c). A weakening of that trust causes immigrants to “fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians.” *Id.* President Obama’s Taskforce on 21st Century Policing agreed, concluding that “whenever possible, state and local law enforcement should not be involved in immigration enforcement.” Senator Kevin De León, Fact Sheet, SB 54 (De León) The California Values Act (Mar. 7, 2017) (quoting Final Report of the President’s Taskforce on 21st Century Policing (May 2016)). One study “found that 44 percent of Latinos are less likely to contact police officers if they have been the victim of a crime because they fear that police officers” may inquire about immigration status. *Id.* (citing *Insecure Communities, Latino Perceptions of Police Involvement in Immigration Enforcement*, Nik Theodore, Dep’t of Urban Planning and Policy, Univ. of Ill. at Chicago (May 2013)). Without crime-reporting by victims and cooperation by witnesses to crime, the safety of everyone across the State’s localities is jeopardized.

SB 54 prioritizes California’s limited law enforcement resources by ensuring those resources are devoted to areas of greatest significance to the safety and well-being of California residents and by not diverting those resources to do the federal government’s job.

Thus, SB 54 directs California local law enforcement agencies in general to not use their resources to investigate, interrogate, detain, detect or arrest persons for federal immigration enforcement purposes. *See* SB 54, § 7284.6(a)(1). SB 54 further provides, however, various exceptions, including that, if there is a judicial warrant, state and local law enforcement agencies may provide federal immigration authorities access to interview an individual in custody, *id.* § 7284.6(a)(1)(G); may detain an individual for purposes of federal immigration enforcement, *id.* § 7284.6(e); and may transfer an individual to federal immigration authorities, *id.*

SB 54 also allows use of state and local resources to assist in federal immigration enforcement against individuals who have violated the federal criminal prohibition against reentering unlawfully after previously being removed “subsequent to a conviction for commission of an aggravated felony,” 8 U.S.C. § 1326(b)(2), *see* SB 54, § 7284.4(f)(1), and to transfer such individuals to federal immigration authorities if they were previously convicted of a state violent felony, Cal. Penal Code § 667.5(c), *see* SB 54, §§ 7284.4(f)(2), 7284.6(a)(5).

In line with California’s conclusion that its law enforcement resources are best focused on criminal law enforcement and not on federal immigration programs, SB 54 indicates that

¹ Unless otherwise indicated, references in this memorandum to § 7284 refer to the section of the Government Code that would be added by Section 1 of SB 54.

California law enforcement may participate in joint federal task forces where the primary purpose of the taskforce is not federal immigration enforcement, consistent with local law, *id.* § 7284.6(b)(2), and subject to certain reporting requirements about arrests made for state and federal crimes as opposed to immigration enforcement, *id.* § 7284.6(c), (d). Also, consistent with California's interest in the safety and well-being of its residents, SB 54 directs the California Attorney General to publish model policies, within three months of the effective date of SB 54, that would limit state and local assistance with federal immigration enforcement to the fullest extent possible, consistent with federal and state law, at certain locations. Those locations are places where individuals go to engage with the state or local government regarding important programs such as schools, public libraries, state or local health facilities, courthouses, government offices regarding enforcement of state labor laws, and shelters. Such schools, health facilities, and courthouses must implement that policy or an equivalent policy, and other entities "that provide services related to physical or mental health and wellness, education, or access to justice," are encouraged to do so as well. *Id.* § 7284.8.

Furthermore, with regard to the sharing of information with the federal government, SB 54 explicitly provides, in Section 7284.6(f), that state and local government entities and officials are not prohibited or restricted from sending to, or receiving from, federal immigration authorities, information about *the citizenship or immigration status of an individual* as provided in federal statutes, Sections 1373 and 1644 of Title 8 of the United States Code. *See also* SB 54, § 7284.6(a)(2). Moreover, SB 54 does not restrict any state law enforcement agency from responding to requests from federal immigration authorities for information about a specific person's criminal history information accessed through the state law enforcement telecommunications system, where otherwise permitted by state law. *Id.* § 7284.6(b)(1). And, so long as the information is otherwise public, there is no preclusion of providing even release dates, and home or work or other personal information regarding an individual. *Id.* § 7284.6(a)(1)(C), (D), and (E). SB 54 also specifically allows California law enforcement agencies to respond to requests from Immigration and Customs Enforcement ("ICE") for advance notice of the non-public release date and time of those who have a current or prior conviction for a state violent felony, Cal. Penal Code § 667.5(c), or state serious felony, Cal. Penal Code § 1192.7(c), consistent with local law. *See* SB 54, § 7284.6(b)(4). Indeed, SB 54 requires the California Board of Parole Hearings and Department of Corrections and Rehabilitation to notify ICE at least 60 days in advance of the scheduled date of release from state prison confinement for all persons with a current or previous conviction for a state violent felony, Cal. Penal Code § 667.5(c), or serious felony, Cal. Penal Code § 1192.7(c). *See* SB 54, Sec. 3 (adding to Penal Code new § 3058.10).

Importantly, SB 54 does not purport to alter the status or rights of immigrants. It does not provide immigrants easier access into the United States or purport to legalize their presence if federal law deems it unlawful. SB 54 does not create additional procedural hurdles before an immigrant may be removed from the country by federal authorities.

SB 54 allows state and local entities to devote their limited resources to their priorities, in particular state and local criminal law enforcement that relies on cooperation from victims of, and witnesses to, crime to ensure a meaningful ability to investigate, punish, and prevent crime in localities across the State to the benefit of all its residents. What SB 54 does not allow, however, is the federal government to commandeer state resources to do the federal government's job of implementing its federal immigration program.

II. SB 54 Is A Constitutional Exercise Of State Authority

A. SB 54 Exercises The Core Of The State's Traditional Sovereign Authority.

The Constitution “establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Each State “ha[s] its own government, and [is] endowed with all the functions essential to separate and independent existence.” *Id.* This division of authority is “for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). Indeed, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.” *Gregory*, 501 U.S. at 457 (citation omitted).

SB 54 is an exercise of state authority that is well within the area of a State's sovereignty. One of the core powers in which States have “historic primacy” is in matters of health and safety, where States have “great latitude . . . to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). The primary purpose of SB 54 is just that—to protect the safety and well-being of the residents of California. SB 54 finds that establishing a relationship of trust between residents and law enforcement and other state and local agencies is necessary to secure the safety and well-being of *all* state residents. That trust is weakened when local agencies are viewed as an arm of federal immigration enforcement. California has observed that crime reporting by immigrants decreases when local law enforcement becomes entangled with federal immigration enforcement. In addition, California has concluded that members of the immigrant community may fear attending school or obtaining health care if local agencies are involved in immigration enforcement. SB 54 seeks to minimize those fears by ensuring a strong bond of trust between state and local agencies and all who reside in California. In making these decisions about how best to protect the well-being of its residents and to ensure they receive health care and education, California is exercising core state sovereign authority. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) (recognizing that “criminal law enforcement [and] education” are areas “where States historically have been sovereign”).

SB 54 also is an exercise of California's core historic sovereign power to control the allocation of its own resources. *See Alden v. Maine*, 527 U.S. 706, 751 (1999) (“Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process.”). SB 54 prioritizes California's limited law enforcement resources in those areas of most significance to protect the safety and well-being of its residents. California is constitutionally empowered to allocate its resources in those areas, rather than have its resources commandeered by the federal government to implement federal immigration programs.

Moreover, SB 54 is an exercise of California's sovereign authority to direct the actions of the officers that work for its government and municipalities. This right is central to the independent and autonomous sovereignty of a State. *See City of New York v. United States*, 179 F.3d 29, 36 (2d Cir. 1999) (“[W]hatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies.” (quoting *Koog v. United States*, 79 F.3d 452, 460 (5th

Cir. 1996))). The Supreme Court has emphasized that it is “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” *Az. State Legislature v. Az. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Gregory*, 501 U.S. at 460).

B. Congress May Not Commandeer The California Legislature or California Law Enforcement To Implement The Federal Government’s Immigration Program.

The Tenth Amendment of the U.S. Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. The Supreme Court has explained that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York*, 505 U.S. at 162. Instead, “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *Id.* at 166.

As a result, Congress cannot commandeer the services of state officials or compel state governments “to enact or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997). In our system of dual sovereignty, “state residents [who] prefer their government to devote its attention and resources to problems other than those deemed important by Congress . . . may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program.” *New York*, 505 U.S. at 168. This allocation of responsibility fosters “accountability [for] state [and] federal officials,” ensuring that federal officials can be held accountable to their constituents for federal policies with which they may disagree, and state officials can be held accountable for state policies. *Printz*, 521 U.S. at 930.

The Supreme Court has consistently considered the ability of States to not participate in a particular federal program to be the determining factor as to whether a federal regulatory program violates the anti-commandeering dictate of the Constitution. Where the federal government compelled the States to administer a federal regulatory program, the Court has invalidated the legislation. *See, e.g., Printz*, 521 U.S. at 935.

It is only when the federal government allows States to determine for themselves whether to participate in particular federal law enforcement that the Supreme Court has rejected Tenth Amendment challenges. For example, in *Reno v. Condon*, 528 U.S. 141, 151 (2000), the Court upheld a federal statute restricting the States’ ability to sell personal information in part because “it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals.” And, in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981), the Court rejected a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977 because the States were “not compelled to enforce the [mining] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever.” The Act established a cooperative system where States could submit regulatory programs for approval by the federal government if they so desired. If a State did “not wish to submit a proposed permanent program that complies with the Act,” then “the full regulatory burden w[ould] be borne by the Federal Government.” *Id.*

Similarly, in *FERC v. Mississippi*, the Supreme Court upheld a federal statute regarding energy policy because it stopped short of commandeering the States. 456 U.S. 742 (1982). The statute required States, if they wanted to participate in energy policy, to “consider” federal standards. But the Court acknowledged that “if a State has no utilities commission, or simply

stops regulating in the field, it need not even entertain the federal proposals.” *Id.* at 764. As in *Hodel*, the Court upheld the constitutionality of the statute because States had the option to “stop[] regulating in the field” altogether. Likewise in *New York v. United States*, 505 U.S. 144, 181 (1992), the Court upheld a federal provision that allowed States to “either regulate the disposal of radioactive waste according to federal standards . . . or their residents who produce radioactive waste will be subject to federal regulation.” 505 U.S. at 174. It was dispositive that “[t]he State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.” *Id.* The State could instead “devote its attention and its resources to issues its citizens deem more worthy; the choice remain[ed] at all times with residents of the State, not with Congress.” *Id.* But the Supreme Court held that a separate provision that required States to either enact legislation providing for the disposal of radioactive waste or to take possession of the waste was unconstitutional commandeering. “The Federal Government,” the Court held, “may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188.

These cases demonstrate that States, consistent with the Constitution, may respond to the needs of their constituencies by prioritizing those needs and leaving the duty of federal law enforcement to the federal government. Federal law enforcement programs are constitutional only if States have the option to not be commandeered. *See Printz*, 521 U.S. at 925 (“[W]e sustained statutes against [a Tenth Amendment] constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law.” (citing *Hodel*, 452 U.S. 264 and *FERC*, 456 U.S. 742)).

SB 54 reflects a sovereign choice available to California under this Supreme Court precedent. Pursuant to the Constitution’s framework of dual sovereignty, Congress cannot commandeer the services of state and local officials or compel the state government to divert the State’s resources from its own state and local law enforcement to implement, instead, the federal government’s immigration program. Through SB 54, California makes a decision about its resources and priorities that the Constitution guarantees to it.

C. SB 54 Does Not Interfere With Or Obstruct Federal Immigration Enforcement And Is Not Somehow Otherwise Preempted.

When Congress acts under its constitutional powers, it may preempt state law through (1) an express preemption provision that “withdraw[s] specified powers from the States”; (2) by “preclud[ing] [States] from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance”; or (3) through conflict preemption when “compliance with both federal and state regulations is a physical impossibility,” or the “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012) (internal quotation marks omitted). “[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.” *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality op.) (internal quotation marks omitted).

Courts that review the preemptive effect of a federal law must “assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’” *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That presumption against preemption is in full force where the State has exercised its authority in an area which the States have traditionally occupied. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see supra* Section II.A.

SB 54 is not preempted by federal law. To the contrary, its provisions fully comply with the federal statutory framework created by Congress as demonstrated below. None of its directives exercise power expressly withdrawn from the State, rather they are crafted specifically to take into account and be consistent with the provisions enacted by Congress. SB 54 does not regulate in a field where Congress has precluded state regulation; indeed, it purposefully does not regulate immigration, a field not wholly preempted in any event, but an area in which the federal government “has broad, undoubted power over the subject.” *Arizona*, 132 S. Ct. at 2498. And SB 54 does not conflict with the purposes of the federal statutory scheme, but instead is wholly consistent with the framework constructed by Congress that allows for voluntary participation by States in federal immigration enforcement in a limited fashion, for which California has chosen not to volunteer.

1. SB 54 Does Not Interfere With Or Obstruct The Federal Statutory Provisions Regarding Sending To, Or Receiving From, Federal Immigration Authorities, Information About An Individual’s Citizenship Or Immigration Status

SB 54 explicitly states that it “does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual pursuant to Sections 1373 and 1644 of Title 8 of the United States Code.” SB 54, § 7284.6(f). Sections 1373 and 1644 are the provisions of the federal immigration statutes that address the sending or receiving of immigration-related information between States and the federal government. Section 1373(a) provides that “[n]otwithstanding 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.” 8 U.S.C. § 1373(a); *see also id.* §§ 1373(b), 1373(c), 1644 (containing similar prohibitions).²

Sections 1373 and 1644 are couched in terms of a prohibition against restricting government entities or officials from voluntarily sending to the federal government, or receiving from the federal government, certain specific types of immigration-related information. SB 54 makes clear that it does not violate that prohibition, and thus does not interfere with or obstruct those federal statutes.

Under SB 54, California law enforcement officials and local agencies may send to, or receive from, federal immigration officials, information about an individual’s citizenship or immigration status. In addition to the explicit statement in SB 54, § 7284.6(f) that so provides, Section 7284.6(a)(2) contains a discussion of database information that repeats that fact and avoids any ambiguity there as well. Section 7284.6(a)(2) provides that California law enforcement agencies may not make agency or department database information available to anyone for the purpose of immigration enforcement, but it further specifies that it applies only to information “*other than information regarding an individual’s citizenship or immigration status.*” Thus, under SB 54, California law enforcement officials and local agencies may send to, or receive from, federal immigration officials, information about an individual’s citizenship or

² The statutory reference to the Immigration and Naturalization Service now is to federal immigration officials within the Department of Homeland Security, such as officials in ICE. 8 U.S.C. § 1551 note; 6 U.S.C. §§ 542 note, 557.

immigration status even if it is part of a database otherwise not disclosable, as Sections 1373 and 1644 direct.

The provisions in Section 7284.6(a)(2) regarding database information also demonstrate that SB 54 is consistent with another provision of 8 U.S.C. § 1373 that provides that no person or agency may prohibit or restrict a state or local government entity from “maintaining” information regarding the immigration status of any individual. 8 U.S.C. § 1373(b)(2). Not only does Section 7284.6(a)(2) not create any such restriction, it affirmatively exempts immigration status information that is maintained in databases from the category of database information that is nondisclosable. Similarly, in Section 7284.6(a)(1)(A), SB 54 provides that California law enforcement agencies not “[i]nquir[e] into an individual’s immigration status,” but it imposes no prohibition on recording or otherwise maintaining such information that may come into the possession of the law enforcement agencies through means other than agency-initiated inquiries. Section 7284.6(a)(1)(A) is unquestionably consistent with the federal government’s own understanding of the unambiguous text of Section 1373. A recent government guidance specifically explained to state and local government recipients of Department of Justice funding 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.” Dep’t of Justice, Office of Justice Programs, Guidance Regarding Compliance with 8 U.S.C. § 1373, *available at* <https://www.bja.gov/funding/8uscsection1373.pdf>.

Far from challenging the information provisions of federal immigration law, SB 54 allows greater information to be provided to federal immigration authorities than the citizenship and immigration status that is required by Sections 1373 and 1644.³ SB 54 does so in a tailored

³ Because SB 54 complies with the information-sharing provisions of Sections 1373 and 1644, this Memorandum does not consider whether Section 1373(b) would even apply directly to these circumstances in that it speaks in terms only of “person or agency.” Significantly, this Memorandum also does not address the broader constitutional questions of whether those provisions violate the Tenth Amendment. And, because SB 54 complies with Sections 1373 and 1644, this Memorandum does not address whether the federal government could somehow constitutionally withhold federal funds consistent with the various Spending Clause doctrines, such as the prohibition against coercion, requirement for unambiguous conditions and nexus, and use of legislative authority. Significantly, a district court granted a nationwide injunction against the recent “sanctuary jurisdiction” Executive Order, E.O. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), on the ground, *inter alia*, that it purported to condition all federal funds on compliance with Section 1373. *See Cty. of Santa Clara v. Trump; City and Cty. of San Francisco v. Trump*, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017). The court ruled that plaintiffs are likely to succeed on alleged violations of the Separation of Powers, Spending Clause, Tenth Amendment, and Fifth Amendment. *Ibid.* Following that preliminary injunction, the United States Attorney General issued a memorandum, which claims that compliance with Section 1373 is tied “solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding.” *Implementation of Executive Order 13768*, Memo. from U.S. Att’y General to All Department Grant-Making Components (May 22, 2017). The federal government cited that AG memorandum as “binding guidance” in a same-day court filing that seeks reconsideration or clarification of the preliminary injunction. *See* D.E. 108, *Cty. of Santa Clara v. Trump*, No. 17-cv-00574 (N.D. Cal.); D.E. 102, *City & Cty.*

and balanced manner, consistent with the State's interests in criminal law enforcement and public safety.

SB 54 allows state and local law enforcement agencies to respond to requests from federal immigration authorities for information about a specific person's criminal history information accessed through the state law enforcement telecommunications system, where otherwise permitted by state law. SB 54, § 7284.6(b)(1). And, so long as the information is otherwise public, state and local law enforcement agencies may provide release dates and home or work or other personal information regarding any individual. *Id.* § 7284.6(a)(1)(C), (D), and (E). Even non-public release dates can be provided under SB 54 by California law enforcement agencies to respond to requests from ICE for advance notice of the non-public release date and time of those who have a current or prior conviction for a state violent felony, Cal. Penal Code § 667.5(c), or state serious felony, Cal. Penal Code § 1192.7(c), consistent with local law. *See* SB 54 § 7284.6(b)(4). In fact, SB 54 *mandates* that the Board of Parole Hearings and Department of Corrections and Rehabilitation notify ICE at least 60 days in advance of the scheduled date of release from state prison confinement for all persons with a current or previous conviction for a state violent felony, Cal. Penal Code § 667.5(c), or serious felony, Cal. Penal Code § 1192.7(c). *See* SB 54, Sec. 3 (adding to Penal Code new § 3058.10).

The fact that SB 54 makes less information available about issues other than citizenship and immigration status, particularly outside the context of violent felons, does not mean that SB 54 is preempted. Sections 1373 and 1644 are directed to sending and receiving information only about an individual's *citizenship or immigration status*. Congress did not include similar provisions regarding any other type of information. Congress did not withdraw authority from the State to determine how to allocate its resources and to establish the responsibilities of its officials and localities regarding information other than citizenship or immigration status. Congress also did not demonstrate any intent to foreclose regulation in the field by the State, nor did it establish a structure where compliance with SB 54 would not be possible along with federal law or stand as an obstacle to congressional purpose. Congress knew how to instruct that certain information not be restricted from being provided to federal immigration authorities, but did so with respect only to certain information and not to other information, clearly demonstrating that a similar instruction was not critical to its purpose. There certainly is no means here of overcoming the presumption against preemption.

2. SB 54 Wholly Comports With The Framework Constructed By Congress That Allows For Voluntary, Limited Participation By States In Federal Immigration Enforcement

Congress, in enacting federal immigration law, did not require state legislatures and law enforcement officers to enforce that federal law. Nor could Congress have done so, consistent with the Tenth Amendment as discussed above. Instead, Congress adhered to Supreme Court precedent by offering an optional, and limited, role to the States.

of San Francisco v. Trump, No. 17-cv-00485 (N.D. Cal.). The Administration's proposed FY 2018 budget, however, in Section 219, would greatly expand Section 1373 and also add a grant condition provision. *See Summary of General Provisions-Department of Justice*, Table 2, n. 7 (amendment requested, *inter alia*, to "expand" the scope of Section 1373 to prevent state and local officials from restricting compliance with "a lawful civil immigration detainer request").

Federal statute, Section 1357 of Title 8 of the United States Code, speaks directly to the “performance of immigration officer functions by state officers and employees,” and far from mandating such functions, it makes them voluntary and subject to a host of restrictions that ensure federal authority over such conduct. 8 U.S.C. § 1357(g). For example, Section 1357(g)(1), authorizes the Attorney General to “enter into a written agreement with a State” or political subdivision, pursuant to which its employees “may carry out [the] function” of “an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States,” but *only if* the Attorney General determines that the particular employee is qualified. 8 U.S.C. § 1357(g)(1). And Congress unambiguously stated that such functioning was authorized only “to the extent consistent with State and local law,” *ibid.*, expressly precluding that provision being viewed as having any type of preemptive force.

Eliminating any possible doubt on the matter, Congress went on to provide in Section 1357(g)(9), that “[n]othing” in Section 1357(g) “shall be construed to require any State . . . to enter into an agreement” under that subsection. 8 U.S.C. § 1357(g)(9). Notably, Congress did not enact any provision prohibiting any restrictions on state and local use of resources to carry out federal immigration functions akin to Section 1373, although it prohibited any restrictions on government entities or officials sending information about citizenship or immigration status. Moreover, any agreement that is established for state or local employees to perform federal immigration functions must include provisions for training them in relevant federal immigration laws, 8 U.S.C. § 1357(g)(2), and such employees “shall be subject to the direction and supervision of the Attorney General,” *id.* § 1357(g)(3); *see also Arizona*, 132 S. Ct. at 2506 (noting other limited provisions of federal immigration statutes that allow state immigration enforcement and that “[o]fficers covered by [Section 1357(g)] agreements are subject to the Attorney General’s direction and supervision”). If States do not enter into Section 1357(g) agreements, their officers may not act as immigration officers. *See Arizona*, 132 S. Ct. at 2506 (“Federal law specifies *limited* circumstances in which state officers may perform the functions of an immigration officer.” (emphasis added)).

Federal law also provides that state officers may, without a Section 1357(g) agreement, “communicate with the Attorney General regarding the immigration status of any individual,” and “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10)(A), (B). But, again, although the ability to communicate such information is required under 8 U.S.C. § 1373 and explicitly allowed by SB 54, any participation in other activity, such as the apprehension, detention and the like is not mandatory. Indeed, the Administration agrees, for example, that “[d]etainers [a]re [v]oluntary,” and that the role of States in immigration enforcement is one of voluntary cooperation. Brief of United States as Amicus Curiae at 22, *Commonwealth of Mass. v. Lunn*, No. SJC-12276 (filed Mar. 27, 2017); *id.* at 31 (explaining that State officers “may help the Federal Government” in immigration enforcement in certain circumstances “unless [the] State government has affirmatively cabined its own police powers”).

The cooperation provisions in Section 1357 establish that Congress’s intent was to limit and circumscribe States’ participation in federal immigration enforcement programs, and to respect the right of States to choose whether to assist federal enforcement or to instead focus on their own priorities. The intent of Congress was *not* to preclude a state law such as SB 54, one that leaves federal immigration enforcement to the federal government.

Against this federal statutory framework of a voluntary option for States, it is unremarkable that SB 54, in Section 7284.6(a)(1)(I), provides that California law enforcement agencies may not use their resources to “[p]erform[] the functions of an immigration officer,

whether pursuant to Section 1357(g) of Title 8 of the United States Code or any other law, regulation, or policy, whether formal or informal.” Similarly, SB 54’s provision that California law enforcement agencies generally may not use their resources “to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes,” § 7284.6(a)(1), is not problematic. *See also* SB 54, § 7284.6(a)(3) (prohibiting employing peace officers as special federal officers unless they remain subject to state law); *id.* § 7284.6(a)(4) (prohibiting the use of “federal immigration authorities as interpreters for law enforcement matters relating to individuals in agency or department custody”). Far from being preempted, SB 54 conforms to the federal framework leaving to States the determination whether to seek to have their employees function as immigration officers. And that would not be something to which California would be entitled to do, in any event, even if it so declared, because Congress ensured that the federal government has the final say on whether to enter into Section 1357(g) agreements and to determine whether individual employees can qualify to serve as immigration officers. Because States need not participate in federal immigration enforcement, and because of the explicit non-preemptive text and structure of Section 1357, federal immigration law does not clear the “high threshold [that] must be met if [SB 54] is to be preempted for conflicting with the purposes of a federal Act.” *Whiting*, 563 U.S. at 607.

In addition, SB 54 is tailored in particular ways to further address the State’s interest in protecting the safety and well-being of its residents and communities. These measures are consistent with, and work in conjunction with, federal law to prioritize the use of law enforcement resources to address state violent felons who reenter unlawfully after previously having been removed, situations where federal immigration authorities have obtained judicial warrants, and joint federal task forces where the primary purpose is not immigration enforcement.

SB 54 provides that its general instruction that California and local law enforcement agencies not use their resources to investigate, interrogate, detain, detect or arrest persons for federal immigration enforcement purposes, § 7284.6(a)(1), does not prevent use of state and local resources to investigate and enforce or assist in federal immigration investigation and enforcement in a certain group of cases—cases that arise in unrelated law enforcement activity, and indicate a violation of the federal criminal prohibition against reentering unlawfully after previously being removed “subsequent to a conviction for commission of an aggravated felony,” 8 U.S.C. § 1326(b)(2). *See* SB 54, § 7284.4(f)(1) (defining “immigration enforcement” to exclude such efforts). SB 54 also allows use of state and local resources to transfer individuals to federal immigration authorities for such a violation if the individual was previously convicted of a state violent felony, Cal. Penal Code § 667.5(c). *See* SB 54, § 7284.4(f)(2) (defining “immigration enforcement” to exclude such transfers), § 7284.6(a)(5) (specifically allowing such transfers).

The second means of tailoring SB 54 is its various exceptions that allow state and local entities to participate in federal immigration enforcement when there is a federal judicial warrant that authorizes federal immigration authorities to take into custody an identified individual. SB 54, § 7284.4(h). If there is a judicial warrant, state and local law enforcement agencies may provide federal immigration authorities access to interview an individual in custody. *Id.* § 7284.6(a)(1)(G). The federal government has acknowledged that providing such access, at least in absence of a warrant, is an example of optional cooperation, not a mandatory requirement. *See* U.S. Dep’t of Homeland Security, *Guidance On State And Local Governments’ Assistance In Immigration Enforcement And Related Matters* (2015) (identifying as an example of “cooperation” a State “[a]llowing federal immigration officials access to state and local facilities for the purpose of identifying detained aliens who are held under the state or local

government's authority, but who also may be of interest to the Federal Government"); *Arizona*, 132 S. Ct. at 2507 (citing the Guidance).

A judicial warrant also means that, under SB 54, state and local law enforcement may detain an individual for purposes of federal immigration enforcement and may transfer an individual to federal immigration authorities. SB 54, § 7284.6(e). Allowing certain conduct only pursuant to a judicial warrant is a common approach in law enforcement, and even in immigration enforcement, immigration officials' own actions are limited without administrative warrants that are directed to those federal officials. *Cf.* 8 U.S.C. § 1357(a)(2) (limiting authority of federal immigration officials to arrest an alien for immigration enforcement without an administrative warrant only (1) if the alien, in the presence or view of the official, enters or attempts to enter in violation of federal immigration law or regulation, or (2) if the official has reason to believe that an alien is in the United States in violation of an immigration law or regulation and is likely to escape before a warrant can be obtained for his arrest). *See also Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014) ("[I]mmigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal.").

Indeed, complying with detainer requests absent a judicial warrant could be subject to challenge as an unconstitutional seizure under the Fourth Amendment. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 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."). The fact that an administrative warrant may accompany a detainer, *see* DHS Policy Number 10074.2, does not alter the analysis because administrative warrants are not issued by a neutral magistrate, *see* 8 U.S.C. § 1226(a), and are directed to federal immigration officers, not to state or local officers, *see* Form I-200, Warrant for Arrest of Alien, U.S. Dep't of Homeland Security (Sept. 2016) (directed to "[a]ny immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act [8 U.S.C. §§ 1226, 1357] and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations"); *see also Arizona*, 132 S. Ct. at 2506 ("[T]he warrants [issued by the Attorney General] are executed by federal officers who have received training in the enforcement of immigration law." (citing 8 C.F.R. §§ 241.2(b), 287.5(e)(3))). Absent a Section 1357(g) agreement delegating to state and local law enforcement officers the power to make arrests based on Section 1226(a) administrative warrants, such officers are not empowered to unilaterally serve such warrants, and nothing in those warrants requires the officers to take particular action. *See also Galarza*, 745 F.3d at 643 ("Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government."); *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013) (holding that local law enforcement officials, who "were not authorized to engage in immigration law enforcement under the Sheriff's Office's Section 1357(g)(1) agreement with the Attorney General[,] . . . lacked authority to enforce civil immigration law and violated [plaintiff's] rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant"); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) (concluding that local law enforcement had "no . . . authority" to "enforce federal civil immigration law" without a Section 1357(g) agreement).

SB 54 further provides that California law enforcement may participate in joint federal task forces so long as the primary purpose of the taskforce is not federal immigration enforcement, consistent with local law, *id.* § 7284.6(b)(2), and subject to certain reporting requirements about arrests made for state and federal crimes as opposed to immigration

enforcement, *id.* § 7284.6(c), (d). Allowing voluntary participation by state and local law enforcement in significant criminal law enforcement efforts in cooperation with federal authorities, even where it leads to immigration enforcement, so long as that is not the primary purpose of the task force, once again demonstrates California’s commitment to providing for the safety and well-being of its residents.

Finally, consistent with California’s interest in the safety and well-being of its residents, SB 54 directs the California Attorney General to publish model policies, within three months of the effective date of SB 54, that would limit state and local assistance with federal immigration enforcement to the fullest extent possible, consistent with federal and state law, at certain locations. Those locations are places where individuals go to engage with the state or local government regarding important programs such as schools, public libraries, state or local health facilities, courthouses, government offices regarding enforcement of state labor laws, and shelters. Such schools, health facilities, and courthouses must implement that policy or an equivalent policy, and other entities “that provide services related to physical or mental health and wellness, education, or access to justice,” are encouraged to do so as well. *Id.* § 7284.8. SB 54’s focus on ensuring access to such state resources by making these locations places where federal immigration enforcement is no greater than otherwise required by law is well within the State’s sovereign prerogative and is consistent with the federal statutory framework.

3. The Supreme Court’s Ruling In *Arizona v. United States* Provides No Barrier To SB 54

In *Arizona v. United States*, the Supreme Court held that various provisions of Arizona laws establishing an Arizona immigration-enforcement scheme were unconstitutional because they were preempted by federal immigration law. 132 S. Ct. at 2501-07. For example, one state law provision criminalized conduct by an unauthorized alien to seek or engage in work in Arizona, even though such conduct does not constitute a crime under federal law. The Supreme Court noted that the provision “attempt[ed] to achieve one of the same goals as federal law,” but struck down the provision as unconstitutional because it created a “conflict in the method of enforcement.” *Id.* at 2505. The Court also held unconstitutional a state provision that authorized state officers to “decide whether an alien should be detained for being removable.” *Id.* at 2506. In so holding, the Court rejected Arizona’s argument that it was “cooperating” with the federal government and ruled, instead, that Arizona’s “unilateral decision” to enforce immigration law “violat[e]d the principle that the removal process is entrusted to the discretion of the Federal Government.” *Id.* at 2506-07.

What the *Arizona* decision and other Supreme Court preemption precedent make clear is that States must *refrain* from regulating immigration unless it is done in a manner authorized by, and consistent with, the federal statutory scheme. *See, e.g., Arizona*, 132 S. Ct. at 2506; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (“[O]ur cases have also been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage.”). Lower courts have reached the same conclusion. *See United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (en banc).

SB 54 stands in stark contrast to the state laws invalidated in *Arizona*. Rather than creating a separate state enforcement scheme to regulate immigration as Arizona did, SB 54 constitutes an exercise of state authority in core areas of state sovereignty involving the health and safety of its residents, allocation of state resources, and supervision of state and local employees. *Cf.* Brief for United States at 30, *Arizona*, 132 S. Ct. 2492 (2012) (noting that

Arizona statute punishing failure to comply with “federal alien-registration and documentation requirements does not lie within any traditional police power of the state”). California is not making any “unilateral decision[s]” to enforce federal immigration law as Arizona did, but instead immigration enforcement remains with the federal government. And SB 54 does not alter the status or rights of immigrants nor does it regulate immigrants. *See De Canas v. Bica*, 424 U.S. 351, 355 (1976) (Immigration is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”). SB 54 implements California’s decision to prioritize its scarce resources in areas other than enforcement of *federal* immigration law. This choice is guaranteed to California by the Constitution, and poses no obstacle to enforcement of *federal* immigration law by the *federal* government.

* * *

The California Legislature has found that a relationship of trust between its immigrant community and state and local agencies is necessary for the safety and well-being of all California residents. Because that trust is weakened when state and local agencies become entangled in enforcing federal immigration programs, California has concluded in Senate Bill 54 that its limited resources should be devoted to areas of state concern, in order to protect the safety and well-being of its residents. For the reasons set forth above, Senate Bill 54 represents a constitutional exercise of core sovereign state authority by California to allocate its limited *state* resources to priorities that, in the State’s best judgment, ensure the health and safety of its residents and communities.