

“SANCTUARY STATES”

By Rose Cuison Villazor and Alma Godinez-Navarro*

INTRODUCTION

“These are uncertain times for undocumented Californians and their families, and this bill strikes a balance that will protect public safety, while bringing a measure of comfort to those families who are now living in fear every day.”¹ So said California’s former Governor Edmund Brown on October 5, 2017, when he signed Senate Bill 54, “The California Values Act” (SB 54),² which prohibits state and local authorities from inquiring about a person’s immigration status, and from honoring federal immigration detainer requests involving non-citizens, among other things.³ Specifically, Governor Brown was referring to the Trump administration’s increased enforcement of immigration laws across the nation.⁴ Emphasizing that SB 54 “prohibits the commandeering of local officials to do the work of immigration agents,” Governor Brown explained that SB 54 does not prevent or prohibit Immigration and Customs Enforcement (ICE) activities, since the agency is “free to use their own considerable resources to enforce federal immigration

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1. Letter from Edmund G. Brown Jr., Cal. Governor, to Members of the Cal. State Senate (Oct. 5, 2017), https://www.ca.gov/archive/gov39/wp-content/uploads/2017/11/SB_54_Signing_Message_2017.pdf.

2. S.B. 54, 2017-2018 Leg. Reg. Sess. (Cal. 2017).

3. *See id.*

4. *See* Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1225-27 (2019) (examining the heightened enforcement of immigration law under President Trump’s administration).

laws in the state of California.”⁵ More than a year later, on the other side of the country, New Jersey Attorney General Gurbir Grewal issued the “Immigrant Trust Directive” (AG Directive), which provides guidelines to state, county and local law enforcement agencies regarding the scope of their involvement in enforcing federal immigration laws.⁶ Attorney General Grewal explained that “these new rules are designed to draw a clear distinction between local police and federal civil immigration authorities, ensuring that victims and witnesses feel safe reporting crimes to New Jersey’s law enforcement officers.”⁷

The passage of SB 54 and the adoption of the AG Directive have been welcomed news to many immigrant communities and immigrants’ rights advocates.⁸ Significantly, these measures represent the extent to which states today are exhibiting “resistance” to the Trump Administration’s heightened immigration enforcement policies. Indeed, commentators have noted that both laws established California and New Jersey as “sanctuary” states⁹ even though none of the political leaders in either state have referred to SB 54 or the AG Directive as creating “sanctuary” policies.¹⁰ The decision of state leaders to disassociate with the term is perhaps more political than legal

5. See Brown, *supra* note 1.

6. N.J. Office of the Att’y Gen., *Attorney General Law Enforcement Directive No. 2018-6* (Nov. 29, 2018), <https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6.pdf> [hereinafter AG Directive].

7. Press Release, Office of the Att’y Gen., *AG Grewal Issues Statewide Directive Curtailing State and Local Police Participation in Federal Civil Immigration Enforcement*, (Nov. 29, 2018), <https://www.nj.gov/oag/newsreleases18/pr20181129a.html>.

8. See Jazmine Ulloa, *What you need to know about California’s ‘sanctuary state’ bill and how it would work*, L.A. TIMES (Apr. 13, 2017, 12:00 AM), <https://www.latimes.com/politics/la-pol-sac-sanctuary-state-bill-explained-20170413-htmstory.html>; Hannan Adely, *New Jersey cops can’t bust residents over immigration status under new state rules*, N. JERSEY RECORD (Nov. 29, 2018, 1:23 PM), <https://www.northjersey.com/story/news/new-jersey/2018/11/29/nj-policy-seeks-build-trust-between-immigrants-local-law-enforcement/2140702002/>.

9. See Phil Stilton, *Phil Murphy Makes Good on NJ Sanctuary State Promise*, SHORE NEWS NETWORK (Jan. 2, 2019), <https://shorenewsnetwork.com/news/ocean-county-news-community/phil-murphy-makes-good-on-nj-sanctuary-state-promise/>; Kelly Heyboer, *ICE slams N.J. over new rules limiting when cops can turn over unauthorized immigrants*, NJ.COM (Nov. 30, 2018), <https://www.nj.com/expo/news/erry-2018/11/328b3da79e7193/when-can-cops-ask-your-immigra.html>; see also Katy Steinmetz, *California Just Became a ‘Sanctuary State.’ Here’s What That Means*, TIME (Oct. 5, 2017), <http://time.com/4960233/california-sanctuary-state-donald-trump/>; Samantha Raphelson, *California Sanctuary Law Divides State in Fierce Immigration Debate*, NPR (Oct. 17, 2018, 3:11 PM), <https://www.npr.org/2018/10/17/657951176/california-sanctuary-law-divides-state-in-fierce-immigration-debate>.

10. SB 54 does not mention the word “sanctuary” while the AG Directive explicitly states that “nothing in this Directive should be read to imply that New Jersey provides ‘sanctuary’ to those who commit crimes in this state.” See AG Directive, *supra* note 6, at 2.

because there is no legal definition of the term “sanctuary.”¹¹ But, generally, the term “sanctuary” refers to ways in which government entities, primarily “sanctuary cities,” have refused to cooperate with federal immigration authorities in enforcing immigration laws.¹² Thus, by enacting a law and adopting a policy that limits state, county and local enforcement authorities’ involvement in the enforcement of federal immigration law, both California and New Jersey have allied their states with the “sanctuary” label—whether they agree with it or not.¹³

This Essay analyzes SB 54 and the AG Directive and compares the ways in which they minimize the use of state, county and local resources in cooperating with federal immigration authorities to enforce immigration laws. In examining these two laws, this Essay makes three points. First, in order to better understand the work that SB 54 and the AG Directive are doing in resisting the Trump administration’s immigration enforcement policies, these measures need to be situated within the broader framework of state and local governments as stakeholders in federal immigration regulation and enforcement. As Part I explains, this framework recognizes that states and local governments have strong interests in immigration enforcement, including those involving removal policies, because of the impact of such enforcement on people residing in their domains. As such, states concerned about immigrants within their states who are being separated from their families and communities, like California and New Jersey, have passed laws and policies that defy federal immigration enforcement policies by not cooperating with immigration authorities. It should be noted, however, that as stakeholders, states might also pass laws that may help the federal government enforce immigration enforcement. Indeed, several states have enacted “anti-sanctuary” laws, which seek to prohibit and punish sanctuary cities.¹⁴ In these states, cooperation with federal immigration authorities is crucial to what they see as protecting state interests.

11. See generally Cuison Villazor & Gulasekaram, *supra* note 4, at 1217-25 (examining the various understandings of the term “sanctuary”).

12. See Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet Stumpf, *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1736 (2018).

13. In so doing, both states have drawn the ire of the current federal administration, which is invested in immigration enforcement and relies on state and local government cooperation. See Kate Evans, *Immigration Detainers, Local Discretion, and State Law’s Historical Constraint*, 84 BROOK. L. REV. 1085, 1088 (2019). Indeed, the federal government has challenged SB 54. See *Complaint, United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018 (No. 18-264)) (lawsuit by the Trump administration challenging SB 54).

14. See Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 118 COLUM. L. REV. 837, 848-51 (2019) (examining the emergence of state “anti-sanctuary” laws).

Second, as stakeholders in immigration regulation and enforcement, states make choices regarding how to spend their resources and marshal their power over cities in ways that impact the implementation of federal immigration laws and policies. California and New Jersey are among those states that have chosen to not cooperate with the federal government's enforcement of immigration laws. As Part II explains, these two states exemplify two different models of "sanctuary" or non-cooperation laws. SB 54, as a piece of general state legislation, is broader than the AG Directive in imposing limitations on state, county and local officers' ability to enforce federal immigration laws. Meanwhile, the AG Directive contains more exceptions to the general prohibitions imposed on law enforcement's ability to enforce federal immigration laws compared to those found in SB 54.

Third, "sanctuary states" raise a number of legal and policy questions. As Part III explains, both California and New Jersey states must contend with both federal preemption concerns as well as ongoing local government resistance to state laws.

I. STATES AS STAKEHOLDERS IN IMMIGRATION ENFORCEMENT

"Resistance" to federal immigration law enforcement by state and local governments has been on the rise since 2016.¹⁵ Defiance has appeared in different ways, from directly challenging immigration policies¹⁶ to passing laws or adopting measures that limit the use of state and municipal funds and resources in the enforcement of federal immigration laws—what have been referred to as "sanctuary" policies.

"Sanctuary cities" have long been involved in the "resistance movement."¹⁷ Indeed, President Trump campaigned heavily against

15. State and local governments taking a defiant stance against the enforcement of federal immigration laws is, of course, not new. See generally Villazor & Gulasekaram, *supra* note 4, at 1235-42 (discussing the long history of state and local government resistance to immigration enforcement).

16. See *Complaint for Declaratory and Injunctive Relief, State v. Trump*, 2017 WL 443297 (W.D. Wash. 2017) (No. 2:17-cv-00141-JLR) (challenging President Trump's Executive Order No. 13769, which barred the entry of non-citizens from Muslim-majority countries); *Complaint for Declaratory and Injunctive Relief, State v. U.S. Dep't of Homeland Sec.*, 2017 WL 3980570 (N.D. Cal. 2017) (No. 3:17-cv-05235) (challenging the rescission of Deferred Action for Childhood Arrivals); *Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, Ms. L. v. U.S. Immigration & Customs Enf't ("ICE")*, 2018 WL 3155677 (S.D. Cal. 2018) (No. 18CV0428 DMS MDD) (initiating class action lawsuit following the administration's "zero tolerance" policy); *Complaint for Injunctive and Declaratory Relief, La Clinica de la Raza v. Trump*, No. 3:19-cv-04980 (N.D. Cal. 2019), <https://www.nilc.org/wp-content/uploads/2019/08/Clinica-de-la-Raza-v-Trump-complaint-2019-08-16.pdf> [hereinafter *Trump Complaint*] (initiating lawsuit opposing the adoption of a new public charge policy).

17. See Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133, 142 (2008) (discussing the history of the sanctuary movement in the immigration context and explaining that

“sanctuary cities.”¹⁸ No doubt, the number of “sanctuary cities” and “welcoming cities”¹⁹ has increased since 2016.²⁰ There are differences among these cities, which range from those that adopt a policy of not inquiring about a person’s immigration status, to those that refuse to cooperate with federal immigration law enforcement unless required by law, and those that honor detainer requests from federal immigration officers.²¹ Expectedly, cities that have adopted non-cooperation policies challenged the implementation of Executive Order 13768, which sought to remove federal funds and support for “sanctuary jurisdictions.”²²

But it is not only cities that have adopted “sanctuary” policies since 2016. States have also enacted or have proposed to enact laws that are designed to limit state and local involvement in federal immigration law enforcement. For example, in November 2017, California passed SB 54, also known as the “California Values Act.”²³ The legislation led to California being dubbed a “sanctuary state.”²⁴ SB 54 prohibits using state and local government resources to arrest a person on the basis of civil immigration law violations, prohibits state and local employees from inquiring about a person’s immigration status, and prohibits the detention of an individual based on a detainer request by immigration officers.²⁵

beginning in the 1980s, states and cities passed sanctuary policies to oppose federal immigration enforcement actions).

18. Rishi Iyengar, *Donald Trump’s Speech on Immigration*, TIME (Sept. 1, 2016, 1:52 AM), <http://time.com/4475349/donald-trumps-speech-immigration-transcript/>.

19. There is no legal definition of “sanctuary city.” Some cities have declared themselves “sanctuary cities.” Others have rejected the “sanctuary” label and opted for “welcoming city.” Compare Avalon Zoppo, *Newark mayor signs sweeping sanctuary city executive order*, NJ.COM (Jun. 19, 2017), https://www.nj.com/essex/index.ssf/2017/06/newark_mayor_signs_sanctuary_city_executive_order.html, and Associated Press, *Cities Choosing ‘welcoming’ over ‘sanctuary’ for immigrants*, FOX NEWS (May. 9 2017), <https://www.foxnews.com/us/cities-choosing-welcoming-over-sanctuary-for-immigrants>.

20. See, e.g., KRISNA AVILA, ET AL., IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY 14 (2018), https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-1g-20180201.pdf.

21. For a comprehensive examination of “sanctuary cities,” see Lasch et al., *supra* note 12, at 1736-52.

22. Complaint for Injunctive and Declaratory Relief, *La Clinica de la Raza v. Trump*, No. 3:19-cv-04980 (N.D. Cal. 2019), <https://www.nilc.org/wp-content/uploads/2019/08/Clinica-de-la-Raza-v-Trump-complaint-2019-08-16.pdf>.

23. CAL. GOV’T CODE § 7284 (West 2017).

24. Ben Adler, *California Governor Signs ‘Sanctuary State’ Bill*, NPR (Oct. 5, 2017, 7:44 PM), <https://www.npr.org/sections/thetwo-way/2017/10/05/555920658/california-governor-signs-sanctuary-state-bill>.

25. CAL. GOV’T CODE § 7284.6(a)(1)(A) (West 2017).

States like Massachusetts²⁶ and New Mexico²⁷ continue to consider similar legislation.

Perhaps it should not be a surprise that states have joined the post-Trump “sanctuary movement.” The Trump administration’s immigration policies and heightened immigration enforcement have impacted individuals, communities, and cities and collectively affects the states in which they are located. Indeed, states have filed lawsuits against President Trump’s immigration policies, including the travel ban,²⁸ revocation of the Deferred Action for Childhood Arrivals (DACA) policy,²⁹ family separation and “zero-tolerance policy”³⁰ and revised rule on exclusions on the basis of public charge³¹ because of the economic and social costs on states.³²

Thus, from the states’ vantage point, they are stakeholders in the regulation and enforcement of immigration law. The federal government has long been viewed as having plenary power over immigration law for the protection of the sovereignty of the United States. But the protection of the country’s sovereignty and its borders affects multiple entities, organizations, communities and families, many of which are interconnected and have overlapping interests and concerns. In other words, these varied groups, including state governments, are stakeholders in immigration enforcement and regulation due to the overall impact the immigration enforcement scheme has on their residents, interests, resources and values.

The stakeholder framework³³ provides a useful lens that offers a clearer understanding of state resistance to current immigration law enforcement.

26. An Act to Protect the Civil Rights and Safety of All Massachusetts Residents, S.1305, 190th Gen. Ct. Reg. Sess. (Mass. 2017), <https://malegislature.gov/Bills/190/S1305>. See also Scott Baker, *Anti-Sanctuary State Ballot Measure Deemed Constitutional*, THE HEIGHTS (Sep. 11, 2019), <https://bcheights.com/2019/09/11/anti-sanctuary-state-ballot-measure-deemed-constitutional/>.

27. Sara Clarke, *New Mexico Could Become ‘Sanctuary State’*, U.S. NEWS (Jan. 18, 2019), <https://www.usnews.com/news/best-states/articles/2019-01-18/new-mexico-could-become-sanctuary-state>.

28. *Trump v. Hawaii*, 134 U.S. 2392, (2018).

29. *Regents of Univ. of California v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018), *aff’d sub nom. Regents of the Univ. of California v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted sub nom. Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 139 S. Ct. 2779 (2019).

30. *Ms. L. v. U.S. Immigration & Customs Enf’t (“ICE”)*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019).

31. *Trump Complaint*, *supra* note 16.

32. See, e.g., *State v. Trump*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017) (stating that the ban impacts the university’s ability to recruit and retain world-class faculty and students).

33. Stakeholder theory is conventionally used in corporate law. See Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 252-63 (2010) (describing the history of stakeholder theory and the contemporary understanding of the theory). However, its theoretical application has been explored in other contexts, including environmental law and human rights. See Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft*

As stakeholders, states concerned about exclusionary immigration and increased enforcement policies have adopted measures to limit the use of state and local resources in furthering the removal of immigrants from the United States. Whereas California passed a state-wide law, some states issued gubernatorial orders or directives that were also designed to limit state and local enforcement of immigration laws. For example, Governor Andrew Cuomo of New York issued an executive order prohibiting Immigration and Customs Enforcement (ICE) from making arrests in state detention facilities.³⁴ Massachusetts also passed a non-detainer policy, which the state’s highest court has upheld.³⁵ And, as already noted, New Jersey Attorney General Gurbir Grewal issued the “Immigrant Trust Directive,” which prohibits state and local law enforcement from inquiring about a person’s immigration status, arresting or detaining a person on actual or suspected violation of civil immigration laws, or participating with federal immigration authorities in enforcing civil immigration laws.³⁶

Not all states, of course, agree with non-cooperation policies. In fact, some states have passed anti-sanctuary laws, which seek to explicitly prohibit and penalize sanctuary cities. For example, Texas passed SB 4, which provides that a “local entity shall not adopt, enforce, or endorse a policy under which the entity prohibits or discourages the enforcement of immigration laws.”³⁷ SB 4 also allows local law enforcement officers to ask a person about their immigration status and then share that information with federal authorities.³⁸ Mississippi similarly prohibits local governments as well as state agencies and colleges from adopting non-cooperation policies.³⁹ Georgia also targets campuses with sanctuary policies by stripping state funds.⁴⁰

Thus, while “sanctuary states” seek to use their authority to effectively limit the negative impact of federal immigration enforcement, anti-sanctuary

Legal Process, 15 VA. ENVTL. L.J. 137, 139 (1995); Gerald P. Neugebauer III, *Indigenous Peoples as Stakeholders: Influencing Resource Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227, 1241-52 (2003). We provide an initial exploration of its descriptive application to immigration law in this Essay. A broader descriptive and normative analysis of stakeholder theory in the context of immigration law is beyond the scope of this Essay.

34. N.Y. Exec. Order No. 170.1 (Jan. 25, 2017), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_170.1.pdf.

35. Christina Goldbaum, *Sanctuary City Defenders Find Edge in State Courts*, N.Y. TIMES, Dec. 13, 2018, at A27.

36. AG Directive, *supra* note 6.

37. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

38. *Id.*

39. S.B. 2710, 2017 Reg. Sess. (Miss. 2017).

40. H.B. 37, 2017-2018 Leg., Reg. Sess. (Ga. 2017).

states aim to deploy their power to force or coerce local governments to comply with federal immigration laws. Significantly, these states have passed anti-sanctuary laws because they too are stakeholders invested in more stringent enforcement of immigration laws.

In sum, recognizing states (and local governments) as stakeholders in the enforcement and regulation of immigration law helps explain why these entities have not only passed non-cooperation laws but also engaged in litigation strategies that seek to strike down or, in some cases, to strengthen the Trump administration's immigration policies.

II. TWO TYPES OF NON-COOPERATION STATE LAWS: CALIFORNIA'S SB 54 AND NEW JERSEY'S IMMIGRANT TRUST DIRECTIVE

In 1997, the state of Oregon passed a law that prohibited local police from apprehending or detecting a person in the United States who violates immigration laws.⁴¹ The pioneering law recently survived being repealed by voters in the November 2018 state election.⁴² More than thirty years later, this law would be considered a model and the country's first "sanctuary law"⁴³ as states consider how they can wield state power to limit state and local government involvement in the enforcement of federal immigration laws.

This Part of the Essay explains the efforts of two such states—California and New Jersey. By passing SB 54 and implementing the AG Directive, both California and New Jersey aim to foster a relationship of trust between their immigrant communities and state law enforcement agencies in order to promote the public safety of all state residents. Most importantly, both states set a baseline of protections which each city, county, or municipality can strengthen if they choose to do so.⁴⁴

41. See OR. REV. STAT. ANN. § 181a.820.

42. See Shane Dixon Kavanaugh, *Oregon's pioneering sanctuary law endorsed by broad majority in 2018 election*, OR. LIVE (Nov. 7, 2018), https://www.oregonlive.com/politics/2018/11/oregonssanctuarylaw_endorsedth.html.

43. See Conrad Wilson, *30 Years Later, Oregon's 'Sanctuary' Law Serves as a Model for Others*, OPB (Apr. 17, 2017, 8:40 AM), <https://www.opb.org/news/article/oregon-sanctuary-city-state-donald-trump-immigration/>.

44. *Id.*

A. California’s SB 54

As explained earlier, in November 2017, California’s former Governor Brown signed SB 54.⁴⁵ It should be noted, however, that this law was not the first state-wide immigrant protective law that California passed. In 2013, former Governor Brown signed the California Trust Act, which prohibited the state from holding non-citizens in detention after they have served their time in jail unless they have been convicted of serious or violent crimes or misdemeanors that may be classified as felonies.⁴⁶

SB 54 builds on the Trust Act by further limiting what state and local law enforcement officers may do concerning non-citizens they encounter.⁴⁷ SB 54 begins by acknowledging the importance of immigrants who are essential members of the community and, clarifies that the Act merely seeks to promote the relationship of trust between immigrant communities and local enforcement agencies which, the state believes is central to the public safety of the state.⁴⁸ Furthermore, the Act recognizes that state and local participation in the enforcement of federal immigration laws can often raise constitutional concerns including the detention of California residents in violation of the Fourth Amendment, racial profiling in violation of the Equal Protection Clause or denial of access to education due to a person’s immigration status.⁴⁹

Towards those ends, SB 54 restricts the activities of state law enforcement agencies in a number of ways. At the outset, the law prohibits the use of state resources to assist in interrogating, detaining, detecting or arresting non-citizens for civil immigration violations.⁵⁰ Law enforcement actors are proscribed from inquiring into an individual’s immigration status,⁵¹ intentionally participating in arrests based on civil immigration warrants,⁵² and within 25 miles of an external border, boarding and searching a railway car, aircraft, or vehicle to search for a non-citizen.⁵³

Additionally, SB 54 imposes restrictions on the ability of state law enforcement agencies to detain non-citizens. The law prohibits the detention of an individual based on a hold request by an immigration official.⁵⁴ The

45. S.B. 54, 2017-2018 Leg. Reg. Sess. (Cal. 2017).

46. CAL. GOV’T CODE § 7282.5 (West 2013).

47. S.B. 54, 2017-2018 Leg. Reg. Sess. (Cal. 2017).

48. GOV’T § 7284.2(a-b).

49. GOV’T § 7284.2(e).

50. GOV’T § 7284.6(a)(1).

51. GOV’T § 7284.6(a)(1)(A).

52. CAL. GOV’T CODE § 7284.6(a)(1)(E).

53. GOV’T § 7284.6(a)(1)(F) (prohibiting 8 U.S.C. 1357(a)(3)).

54. GOV’T § 7284.6 (a)(1)(B).

legislation also prohibits providing information regarding a person's release date or responding to requests for notifications of a person's release date or other information unless it is available to the public or unless a revised Trust Act exception applies.⁵⁵ Moreover, SB 54 prohibits the transfer of an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination.⁵⁶

One of the most significant prohibitions in SB 54 concerns the ban on written agreements, known as 287(g) contracts, between the federal and state law enforcement agencies.⁵⁷ These agreements, which generally would allow state and local officers to perform the functions of an immigration officer, lost their force after SB 54's enactment.⁵⁸ Although the existing 287(g) contracts remain in place, they cannot be renewed or modified in a way to expand bed space.⁵⁹ Indeed, SB 54 prohibits the use of state or local office space to be exclusively dedicated for the use of federal immigration authorities.⁶⁰

However, SB 54 does not prohibit the sharing, maintenance of or exchange of information with federal, state or local government entities as required by 8 U.S.C. 1373.⁶¹ Furthermore, SB 54 allows state law enforcement agencies to provide information about a person's criminal history that may be accessed through the California Law Enforcement Telecommunications System or information that may be publicly available.⁶² SB 54 gives law enforcement officials the discretion to cooperate with federal immigration authorities but only if the non-citizen has been convicted of a serious or violent crime or convicted within the past five years of a

55. See GOV'T § 7284.6 (a)(1)(C). Revised Trust Act exception applies if the individual has any of the following: a conviction for a felony punishable by imprisonment in state prison at any time, a conviction within the past 15 years for any other "specified" felony, a conviction within the past 5 years for a misdemeanor for a specified wobbler offense, charges for a crime that is serious, violent or punishable by a term in state prison, and finally, if a finding of probable cause has been made by a magistrate pursuant to the laws of California. GOV'T § 7282.5.

56. GOV'T § 7284.6(a)(4).

57. GOV'T § 7284.6(a)(6).

58. CAL. GOV'T CODE § 7284.6 (a)(1)(g) (prohibiting "[p]erforming the functions of an immigration officer . . . pursuant to Section 1357(g) of Title 8 [or INA 287(g)]"). See also GOV'T § 7284.6 (a)(6).

59. CAL. GOV'T CODE § 7310(b).

60. GOV'T § 7284.6(a)(5).

61. GOV'T § 7284.6(c). 8 U.S.C. § 1373 provides 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 [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a). Although SB 54 includes does not prohibit the sharing of immigration information with federal authorities, it should be noted that California has challenged the constitutionality of 8 U.S.C. § 1373. See Part III, *infra*.

62. GOV'T § 7284.6 (b)(2).

misdemeanor for a crime that is punishable as either a misdemeanor or a felony.⁶³

In brief, SB 54 is a comprehensive law, clearly indicating what law enforcement officials in California can or cannot do as they relate to the federal government’s enforcement of immigration law.

B. New Jersey’s Immigrant Trust Directive

On November 26, 2018, New Jersey Attorney General Gurbir S. Grewal issued Law Enforcement Directive No. 2018-6, known as the “Immigrant Trust Directive” (AG Directive), which curtailed state and local participation in federal civil immigration enforcement.⁶⁴ This directive carries the force of law⁶⁵ as of March 15, 2019, and replaced a 2007 directive that allowed police to not only inquire into individual’s immigration status but also allowed law enforcement officers to refer such individuals to ICE if they were suspected to be in the country without lawful authorization.⁶⁶

The purpose of the AG Directive is to ensure effective policing and foster relationships between law enforcement agencies and immigrant communities.⁶⁷ The AG Directive outright recognizes the paralyzing fear preventing immigrants from reporting crimes and the dangers of blurring the lines between state and federal laws.⁶⁸ The beginning sections of the directive are very similar to California’s SB 54 in that both measures acknowledge the need for clear policies to prevent local law enforcement agents from enforcing immigration federal law.⁶⁹

Interestingly, the introduction of the AG Directive explicitly states that its provisions do not imply “sanctuary” to individuals who commit crimes in the state.⁷⁰ Except in the context of individuals who have committed crimes, the AG Directive bears a strong resemblance to California’s SB 54. First, the

63. *Id.*

64. AG Directive, *supra* note 6.

65. See *O’Shea v. Twp. of W. Milford*, 410 N.J. Super. 371, 382 (App. Div. 2009); N.J. STAT. ANN. § 52:17B-98 (West 2010) (discussing the Attorney General’s power, which emanates from statute and includes adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process).

66. N.J. Office of the Att’y Gen., *Law Enforcement Directive No. 2007-3* (Aug. 22, 2007), <https://www.documentcloud.org/documents/3444283-AG-Directive-2007-3.html>. See BASSINA FARBENBLUM ET AL., *THE CTR. FOR SOC. JUSTICE, SETON HALL UNIV. SCHOOL OF LAW, CROSSING THE LINE: DAMAGING IMMIGRATION ENFORCEMENT PRACTICES BY NEW JERSEY POLICE FOLLOWING ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2007-3*, 7 (2009).

67. AG Directive, *supra* note 6, at 2.

68. *Id.* at 1.

69. CAL. GOV’T CODE § 7284.2(a-b).

70. AG Directive, *supra* note 6, at 2 (stating that “nothing in this Directive should be read to imply that New Jersey provides “sanctuary” to those who commit crimes in this state”).

AG Directive prohibits state, county or local law enforcement agencies or officials from stopping, arresting, searching or detaining a non-citizen due to a person's suspected or actual citizenship, immigration status or violations of federal immigration law.⁷¹ Additionally, such officials are prohibited from inquiring about a person's immigration status (unless necessary or relevant for the ongoing investigation of an indictable offense by that individual.)⁷² Law enforcement officials are also prohibited from sharing information that is not publicly available.⁷³

Second, similar to California's SB 54, the AG Directive limits state, county and local law enforcement agencies from enforcing civil immigration laws.⁷⁴ This includes limiting the ability of federal immigration authorities to use state, county or local office space, databases or any property.⁷⁵

Third, the AG Directive limits the ability of state, county and local law enforcement agencies from detaining non-citizens beyond the time that they would be eligible for release from custody based solely on a civil immigration violation unless, among other things, the detainee has committed a violent or serious crime⁷⁶ or is subject to a Final Order of Removal by an immigration judge.⁷⁷ The AG Directive also prohibits notification of a person's release from custody unless the detainee has committed a violent or serious crime or is subject to a Final Order of Removal.⁷⁸ Indeed, the AG Directive prohibits federal immigration authorities from gaining access to detainees unless the detainee gives written permission.⁷⁹ Importantly, the AG Directive differentiates between valid court orders, judicially issued arrest warrants, administrative warrants and immigration detainers. The AG Directive provides that state, county or local officers are not required to comply with administrative warrants and immigration detainers.⁸⁰ The AG directive, by way of a policy, achieves and provides a lot of the same protections that SB 54 affords to its Californian immigrant community.

71. *Id.* at 3.

72. *Id.*

73. *Id.* at 4.

74. *Id.*

75. *Id.*

76. *Id.* at 4-5.

77. *Id.*

78. *Id.* at 4.

79. *Id.*

80. *Id.* at 2.

C. *Key Differences between SB 54 and AG Directive*

Although there are similarities between California’s SB 54 and New Jersey’s AG Directive, there are notable differences. Specifically, the AG Directive includes exceptions that are not found in SB 54.

First, New Jersey’s AG Directive does not apply to law enforcement agencies that are parties to 287(g) agreements and Intergovernmental Service Agreements (IGSA).⁸¹ Therefore, these parties can still detain individuals for civil immigration enforcement purposes when they are acting in their deputized capacity pursuant to such agreements. Areas where county jails housing federal detainees are situated can be especially risky for immigrant residents who may accidentally encounter parties to the agreements.⁸² These officers can still question individuals based solely on suspected citizenship status or suspected civil immigration violations if they chose to do so unrestricted by the AG Directive. By contrast, California’s SB 54 prohibits all state law enforcement officials from asking about an individual’s immigration status, including those who are deputized through 287(g) agreements.⁸³

Second, unlike California’s SB 54, section II.C of the AG Directive lists exclusions and exceptions to the protective measures in subsection A and B of the directive that effectively grants New Jersey law enforcement officials discretion to assist the federal government.⁸⁴ The exceptions that may apply to all state law enforcement agencies include: enforcing the criminal laws of New Jersey, complying with all applicable federal, state, and local laws, complying with valid judicial warrants or court orders, and participating with federal authorities in joint law enforcement tasks forces where the primary purpose is unrelated to immigration enforcement.⁸⁵ Additionally, the exceptions allow officers to do the following: request proof of identity in the course of an arrest or when legally justified during an investigative stop, ask an arrested individual for information necessary to complete the required fields of the LIVESCAN database⁸⁶ and inquire about a person’s place of birth on a correctional facility intake form.⁸⁷ Taken together, section II.C creates various forms and universes where the protections of the AG Directive can be bypassed.⁸⁸

81. *Id.* at 6.

82. *See Adely, supra* note 8.

83. CAL. GOV’T. CODE § 7284.6 (a)(1)(A) (West Supp. 2019).

84. AG Directive, *supra* note 6, at 5.

85. *Id.*

86. *Id.*

87. *Id.* at 6.

88. *Id.*

In contrast, SB 54 makes fewer exceptions to the overall legislative protections afforded. As noted above, SB 54 does not prohibit the sharing, maintenance of, or exchange of information with federal government entities as required by 8 U.S.C. 1373.⁸⁹ Investigations and arrests of persons previously deported are not prohibited only if they are detected during an unrelated law enforcement activity.⁹⁰ Responding to immigration authorities' request for information about a specific person's criminal history is not prohibited.⁹¹ Joint law enforcement task forces are allowed to inquire about a person's criminal history under certain conditions so long as the primary purpose is not immigration enforcement.⁹²

Third, although the AG Directive prohibits providing information regarding a person's release date,⁹³ the directive carves out three exceptions where federal immigration authorities will be or could be notified, two of them being extremely broad and concerning.⁹⁴ The first one would allow state law enforcement officials to contact federal immigration authorities when an individual is charged with but has not been convicted of a violent or serious offense as defined by the AG Directive.⁹⁵ This provision could land New Jersey's immigrants in deportation proceedings without being convicted of violent or serious offenses. The second broad exception where federal immigration authorities will be or could be notified is when a detainee has ever been adjudicated as a delinquent for a violent or serious offense.⁹⁶ This provision does not provide a statute of limitation and could land immigrants in deportation proceedings for offenses they committed in their adolescence. Contrastingly, California's SB 54 has more narrowly defined the situations when notifying federal immigration authorities will occur, mostly restricted to circumstances when an individual has been convicted of a certain crime.⁹⁷

89. CAL. GOV'T CODE § 7284.6(d)

90. GOV'T § 7284.6(b)(1).

91. GOV'T § 7284.6(b)(2).

92. GOV'T § 7284.6(b)(3).

93. AG Directive, *supra* note 6, at 4.

94. *Id.*

95. *Id.* at Appendix A.

96. *Id.* at 4.

97. Gov't § 7282.5(a)(1-3). *See, e.g.*, IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY SB 54 AND THE CALIFORNIA VALUES ACT: A GUIDE FOR CRIMINAL DEFENDER 3 (2018), https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf. It should be noted, however, that a recent report by a non-profit organization indicates that some law enforcement agencies have found ways to inform ICE about a non-citizen who is about to be released from their custody, which has enabled immigration authorities to detain and remove the non-citizen. *See* ASIAN AMERICANS ADVANCING JUSTICE-ASIAN LAW CAUCUS, UNIVERSITY OF OXFORD CENTRE FOR CRIMINOLOGY, AND BORDER CRIMINOLOGIES, TURNING THE GOLDEN STATE INTO A SANCTUARY STATE A REPORT ON THE IMPACT AND IMPLEMENTATION OF THE CALIFORNIA VALUES ACT (SB 54) (2019), <https://www.advancingjustice-alc.org> (follow "menu");

Fourth, the AG Directive removes law enforcement officials’ authority to enter into, modify, renew, or extend, any 287(g) agreements or Intergovernmental Service Agreements unless otherwise authorized by the Attorney General.⁹⁸ The AG Directive does not dismantle the existing facilities⁹⁹ nor eliminate the possibility of new agreements being made where as California’s SB 54 prohibits contracting with the federal government altogether. The AG Directive only makes it so that any new agreement, modification, renewal or extension of 287(g) agreements or Intergovernmental Service Agreements are authorized by the Attorney General first.

In sum, the AG Directive is the most expansive and immigrant-friendly policy New Jersey has seen in many years.¹⁰⁰ However, compared to the measures enacted by California, the AG Directive has broader exceptions that allow more local discretion on whether to participate in the enforcement of federal immigration law. Nevertheless, this policy is certainly a change from previous state policy, placing the obligation primarily on ICE to enforce immigration law in New Jersey.

III. LEGAL CHALLENGES

Unsurprisingly, the exercise of state power to enact legislation that affects the implementation of federal immigration laws inevitably raised legal challenges. The first issue is whether the INA preempts state sanctuary or non-cooperation laws and policies given the well-established principle that the federal government has plenary power over immigration law. The second issue is whether local governments that want to cooperate with federal immigration authorities may legally refrain from following the state sanctuary policy.

Part A examines the federal preemption issue by discussing the Trump administration’s lawsuit against California’s SB 54.¹⁰¹ This part explains that, thus far, courts have rejected the Trump administration’s

then follow “media and resources”; then follow “Publications/Resources”) (noting that more than twenty-four Sheriff’s Departments have made publicly available through their website information about when a non-citizen in their custody will be released).

98. AG Directive, *supra* note 6, at 6.

99. See Felipe De La Hoz, *New Jersey is Holding Nearly Triple its Capacity in ICE Detainees*, DOCUMENTED (Aug. 6, 2018, 12:48 PM), <https://documentedny.com/2018/08/06/new-jersey-jail-is-holding-nearly-triple-its-capacity-in-ice-detainees/>.

100. See Colleen O’Dea, *Grewal Announces New Rules for How NJ Law Enforcement Will Deal With ICE*, NJ SPOTLIGHT (Nov. 30, 2018), <https://www.njspotlight.com/stories/18/11/29/grewal-announces-new-rules-restrictions-on-njs-dealing-with-ice/>.

101. See *United States v. California (The Trump Administration Case)*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018).

arguments, holding that SB 54 is not preempted and the federal government cannot commandeer a state to enforce immigration law. Part B discusses the localism argument and describes some of the local resistance faced in both California and New Jersey. As this part illustrates, the state “sanctuary” legislation is susceptible to lawsuits from local governments on the grounds that such legislation may violate municipal self-governing rights that may be guaranteed under state constitutions.¹⁰²

A. Federal Preemption

Both California’s SB 54 and New Jersey’s AG Directive have been praised by immigration advocates¹⁰³ but predictably criticized by the Trump administration. A deputy director with Immigration and Customs Enforcement (ICE) stated that the AG Directive undermines public safety and “hinders” ICE from performing its federally mandated mission.¹⁰⁴ After the passage of SB 54, the Department of Justice spokesperson commented that the law constituted “an abandonment of the rule of law.”¹⁰⁵

The issue of whether SB 54 impedes federal immigration enforcement ultimately reached the court. In particular, on March 6, 2018, the federal government sued California, seeking to invalidate SB 54 and two other pro-immigrant laws.¹⁰⁶ In their motion for preliminary injunction, the Trump

102. For more in-depth analysis of local government challenges to state laws that either require or prohibit cooperation with the federal government, see Villazor & Gulasekaram, *supra* note 4.

103. Adely, *supra* note 8; Jazmine Ulloa, *California becomes ‘sanctuary state’ in rebuke of Trump immigration policy*, L.A. TIMES (Oct. 5, 2017, 11:01 AM), <https://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html>.

104. Joseph De Avila, *New Jersey Attorney General Shields Immigrants with New Directive*, WALL ST. J. (Nov. 29, 2018, 5:52 PM), <https://www.wsj.com/articles/new-jersey-attorney-general-shields-immigrants-with-new-directive-1543531955?mod=searchresults&page=1&pos=1>. Right before this essay went to press, the Trump administration filed a lawsuit challenging New Jersey’s Immigrant Trust Directive. See Katie Benner, *Justice Dept. Sues Over Sanctuary Laws in California, N.J. and Seattle*, N.Y. TIMES, Feb. 10, 2020, at A21.

105. Kristine Phillips, *In Message of Defiance to Trump, Lawmakers Vote to Make California a Sanctuary State*, WASH. POST (Sept. 16, 2017, 3:25 PM), <https://www.washingtonpost.com/news/politics/wp/2017/09/16/in-message-of-defiance-to-trump-lawmakers-vote-to-make-california-a-sanctuary-state/>.

106. *The Trump Administration Case*, 314 F. Supp. 3d at 1085; Laura Mackler & Alicia A. Caldwell, *Justice Department Sues California Over ‘Sanctuary’ Immigration Laws*, WALL ST. J. (Mar. 7, 2018, 12:01 PM), <https://www.wsj.com/articles/justice-department-sues-california-over-sanctuary-immigration-laws-1520388055>. To date, the federal government has not taken action against the state of New Jersey for its pro-immigrant curtailing directive. However, the directive has been in force for less than a year. The federal government could take action against the state at any moment. Note that the federal government’s lawsuit against California’s SB 54 also included a challenge to two other laws: The Immigrant Worker Protection Act (AB 450) and AB 103. This Essay examines only the Trump administration’s challenge to SB 54.

administration’s legal arguments focused on preemption principles. Specifically, the federal government argued that SB 54 stands as an obstacle to U.S. immigration laws by making it more difficult for immigration authorities to fulfill the government’s responsibility to detain and remove non-citizens.¹⁰⁷ The federal government further argued that “the structure of the INA makes [it] clear that states and localities are required to allow a basic level of information sharing and cooperation with immigration enforcement” pursuant to 8 U.S.C §1226(c)(1) and U.S.C §1231.¹⁰⁸ Therefore, SB 54 “undermines the system Congress designed.” Consequently, the “limits on information sharing and transfers prevent or impede immigration enforcement” because ICE has a more difficult time detaining non-citizens.¹⁰⁹

Opposing the preemption arguments, California’s response emphasized that SB 54 is not preempted because the federal government can still enforce immigration law.¹¹⁰ Moreover, underscoring the state’s police powers, the state argued that SB 54 merely “allocate[s] the use of limited law-enforcement resources and protect[s] the rights of Californian residents.”¹¹¹ As such, the state had acted within its constitutional authority when it enacted the laws in question, including SB 54.¹¹²

Further, California argued that 8 U.S.C. § 1373 is unconstitutional under *Murphy v. National Collegiate Association*.¹¹³ In *Murphy*, the Court held that the Professional and Amateur Sports Protection Act (PAPSA), which prohibited states from authorizing sports gambling, violated the anticommandeering doctrine.¹¹⁴ Although the statute did not force the states to legislate, the Court concluded that the provision unequivocally dictated what a state legislature may and may not do, which affronts state sovereignty.¹¹⁵ Applying *Murphy* to the case, California argued that §1373 is unconstitutional because it tells states that they may not prohibit, through legislation, the sharing of information regarding immigration status with ICE and other government agencies.¹¹⁶ The federal government rebutted this claim by stating that the new holding and anti-commandeering rules

107. *Id.*

108. *Id.* at 1104.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *The Trump Administration Case*, 314 F. Supp. 3d at 1099. *See also* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1481(2018).

114. *Murphy*, 138 S. Ct. at 1478.

115. *Id.*

116. *The Trump Administration Case*, 314 F. Supp. 3d at 1099.

generally do not reach statutes requiring information sharing between government agencies citing *Reno v. Condo*.¹¹⁷

Ultimately, the district court rejected the government's argument that SB 54 constitutes an obstacle to the enforcement of immigration law.¹¹⁸ In so doing, it emphasized the difference between a state's refusal to help the federal government and a state actively impeding the federal government's enforcement actions. The Trump administration argued that SB 54 impedes the federal government's enforcement obligations by placing limits on information that may be shared with the federal government, which hampers the government's ability to detain, arrest and remove non-citizens.¹¹⁹ The court countered, however, that "refusing to help is not the same as impeding."¹²⁰ The court recognized that the state's decision to not assist the federal government will make it more challenging to achieve federal law. Yet, as the court explained, a state choosing to "stand aside does not equate to standing in the way."¹²¹

Moreover, the court highlighted that California's statute expressly permits information sharing in accordance with Section 1373, which has been interpreted to include only one's immigration status and not release dates and addresses.¹²² The court reasoned that if Congress intended for a broad interpretation of what "information" constituted, it should have included language to that effect.¹²³ In sum, the district court held that California's decision to not assist federal immigration enforcement did not mean that SB 54 was an obstacle to the INA.¹²⁴ Essentially, refusing to help is not the same as impeding.

The U.S. Court of Appeals for the Ninth Circuit upheld the lower court's decision, underscoring the choice that states and localities have to participate in federal immigration enforcement.¹²⁵ At the outset, the court held that federal immigration law (except for Section 1373) does not require states and local governments to enforce immigration law.¹²⁶ SB 54 is essentially the state's manifestation of the choice afforded under the INA to assist immigration authorities.¹²⁷ Moreover, the court held that under *Murphy*, SB

117. *Id.* at 1099-100.

118. *Id.* at 1104.

119. *Id.*

120. *Id.*

121. *Id.* at 1104-05.

122. *Id.* at 1102.

123. *Id.* at 1102-03 (stating that "a contrary interpretation would know no bounds").

124. *Id.* at 1105.

125. *United States v. California*, 921 F.3d 865, 894 (9th Cir. 2019).

126. *Id.* at 887 (stating that the "federal law does not actually mandate any state action").

127. *Id.* at 889.

54 would not be conflict preempted because a contrary ruling would mean that the federal government may dictate what California may or may not do.¹²⁸ The decision acknowledged that “[f]ederal schemes are inevitably frustrated when states opt not to participate in federal programs or enforcement actions.”¹²⁹ But, the choice to refuse cannot be held invalid under the preemption doctrine when the state “retains the right of refusal.”¹³⁰ Here, the state made the lawful decision to refuse to cooperate with the federal government, which it codified vis-à-vis SB 54.

The court also concluded that Section 1373 does not preempt SB 54’s limits on information-sharing because the law explicitly allows the sharing of information required by Section 1373.¹³¹ That is, Section 1373 provides for the sharing of information of a person’s immigration or citizenship status only.¹³² SB 54 allows such information to be shared but prohibits other information from being shared (such as release dates), which are not covered by Section 1373.¹³³

In sum, as the Ninth Circuit and district court’s opinions make evident, the Trump administration has thus far been unsuccessful in its preemption challenge to SB 54.¹³⁴

B. Localism

State “sanctuary” or non-cooperation laws face challenges not only from the federal government but also from local governments. In New Jersey, for example, at least four counties have opposed the Attorney General’s Immigrant Trust Directive.¹³⁵ Ocean County’s general counsel has

128. *Id.* at 890.

129. *Id.*

130. *Id.*

131. *Id.* at 891.

132. *Id.*

133. *Id.*

134. This matter could ultimately be decided by the U.S. Supreme Court in the coming term if it grants the federal government’s petition for a writ of certiorari. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, United States of America v. State of California, Et Al., https://www.supremecourt.gov/DocketPDF/19/19-532/119897/20191022192538521_California.Pet.10.22.19.pdf.

135. *See* Erin Vogt, *NJ Voters in this County will weigh in on “sanctuary state” rules*, N.J. 101.5 (Apr. 11, 2019), <https://nj1015.com/nj-voters-in-this-county-will-weigh-in-on-sanctuary-state-rules/> (reporting that at least one township and one county have passed resolutions opposing the Immigrant Trust Directive); Observer Politics Team, *NJ Politics Digest: Fight Brewing Over Counties’ Refusal to Obey AG’s Policies*, OBSERVER (July 10, 2019, 6:00 AM), <https://observer.com/2019/07/nj-politics-digest-fight-brewing-over-counties-refusal-to-obey-ags-policies/> (reporting Monmouth and Cape May have not complied with the Immigrant Trust Directive). Indeed, one county, Ocean County, filed a lawsuit. *See* Complaint for Declaratory Judgment, County of Ocean v. Gurbir S. Grewal, Et Al, (2019) (No. 3:19-cv-18083), <https://www.scribd.com/document/426609566/Immigration-Trust-Directive-suit>.

questioned the New Jersey Attorney General's authority to pass the directive, commenting that "it should be up to the individual counties and law enforcement agencies to determine on their own, how best they feel they can work together with ICE to protect their own interests and the interests of the residents."¹³⁶ As this comment highlights, from a local government official's perspective, the AG Directive infringes upon their autonomy over law enforcement.

In California, several cities have opposed SB 54 and joined the Trump administration's lawsuit arguing that the state law is preempted.¹³⁷ Significantly, at least one city has directly challenged the validity of SB 54 by raising a localism argument—that the state legislation violates the city's local authority and municipal affairs. Specifically, the City of Huntington Beach argued that as a "charter city," the state lacks the authority to interfere with the city's local affairs.¹³⁸ Citing the state's constitution recognition of the "municipal affairs doctrine," which confers upon the city the power to regulate its police force, the City of Huntington Beach contended that SB 54 unconstitutionally interferes with the city's ability to regulate its police force.¹³⁹ Further supporting its localist claims, the city maintained that SB 54 violates the city's municipal powers by affirmatively requiring the establishment of safe zones for undocumented immigrants¹⁴⁰ and interfering with the ability of their law enforcement officers to conduct arrests, interrogation, investigation and detention of non-citizens with respect to immigration enforcement.¹⁴¹

The City of Huntington Beach initially prevailed against California. In an oral decision issued on September 27, 2018, the Superior Court judge ruled that the City of Huntington Beach, as a charter city, did not need to comply with SB 54.¹⁴² Specifically, the judge concluded that the state had granted the city some degree of autonomy in order to limit the "ever-

136. *Id.*

137. *See id.* at 55 (discussing litigation between California cities opposed to SB 54).

138. *See* Petition for Writ of Mandamus and a Complaint for Declaratory Relief and Injunctive Relief, *City of Huntington Beach v. California*, https://www.huntingtonbeachca.gov/government/elected_officials/city_attorney/city-of-huntington-beach-vs-state-of-california-ref-sb54.pdf.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Don DeBenedictis, *California Can't Enforce Sanctuary Law Against Charter Cities*, COURTHOUSE NEWS SERV. (Sep. 28, 2018), <https://www.courthousenews.com/california-cant-enforce-sanctuary-law-against-charter-cities/>; Susan Christian Goulding, *Judge rules Huntington Beach can defy California's sanctuary law*, THE ORANGE COUNTY REGISTER (Sep. 28, 2018, 4:07 PM), <https://www.ocregister.com/2018/09/27/judge-rules-huntington-beach-can-defy-californias-sanctuary-law/>.

extending tentacles of state government.”¹⁴³ Commentators subsequently noted the decision’s potentially significant impact on the more than one-hundred charter cities in California and their ability to refuse to comply with SB 54.¹⁴⁴

The lower court’s decision, however, was eventually reversed. The California Court of Appeal for the Fourth District held that SB 54 “is constitutional as applied to charter cities.”¹⁴⁵ Applying a four-part analytical framework,¹⁴⁶ the appellate court recognized that the city’s laws regarding the regulation of its police force constitute municipal affairs¹⁴⁷ but found that it did not conflict with SB 54.¹⁴⁸ That is because SB 54 imposes only “impartial enforcement” and not that every single federal and state law must be enforced.¹⁴⁹ The court did find, however, that SB 54 conflicts with the city’s power to enforce municipal affairs by directly restricting the city’s charter that allows police officers to inquire about a person’s immigration status.¹⁵⁰ However, the appellate court held that SB 54 is nevertheless constitutional because it addresses matters of statewide concern.¹⁵¹ Such matters include SB 54’s role in ensuring immigrants’ ability to report crimes, have access to health care, gain access to schools, and exercise their constitutional rights.¹⁵² Further, the court found that uniform application of SB 54 constitutes a matter of statewide concern.¹⁵³ Lastly, the court held that SB 54 is reasonably related to address the statewide concerns of “effective policing, public health and safety, prudent use of public resources, and protection of constitutional rights.”¹⁵⁴ Crucially, SB 54 is narrowly tailored because it still allows local law enforcement officers, in some context, to work with immigration authorities and provide them with a person’s immigration information.¹⁵⁵ In short, although the appellate court recognized

143. Goulding, *supra* note 142.

144. *Id.* It should be noted that “sanctuary cities” have also opposed state “sanctuary” laws. See Villazor & Gulasekaram, *supra* note 4, at 5-7 (explaining the City of El Cienizo’s lawsuit against Texas’s SB 4).

145. *City of Huntington Beach v. Becerra*, No. G057013, 2020 WL 113677, at *22 (Cal. Ct. App. Jan. 10, 2020).

146. *Id.* at 6 (stating that the state uses a four-part analytical framework to determine whether a state law unconstitutionally infringes upon a charter city’s home rule authority).

147. *Id.* at 15 (holding that the City of Huntington Beach correctly asserted that their laws touch on municipal affairs, which are impacted by SB 54).

148. *See id.*

149. *See id.*

150. *See id.* at 16.

151. *See id.* at 16-19 (discussing legislative findings that SB 54 addresses various issues that constitute matters of statewide concerns).

152. *See id.*

153. *See id.*

154. *See id.* at 20-21.

155. *See id.* at 21.

the power of charter cities to have control over municipal affairs, such power may be limited where there are legitimate findings of statewide concerns.

CONCLUSION

In sum, both California's SB 54 and New Jersey's Immigrant Trust Directive demonstrate states' "resistance" efforts to limit the impact of federal immigration law enforcement on their communities in the era of the Trump Administration's heightened immigration enforcement policies. While the nature of both laws has established California and New Jersey as "sanctuary" states, these measures signify much more. State action of this magnitude demonstrates how state and local governments as stakeholders in federal immigration regulation and enforcement can choose to use or limit their resources and marshal their power over their jurisdictions. As Part I explained, states and local governments have strong interests in curtailing immigration enforcement due to the impact of such enforcement on people residing in their jurisdictions. States like California and New Jersey have passed laws and policies that defy federal immigration enforcement policies by not cooperating with immigration authorities. States, as stakeholders, have also enacted laws that seek to help the federal government enforce immigration laws. The nature of these various laws and policies rests ultimately on what the state holds crucial to protecting state interests.

As such, California and New Jersey have fashioned two different models of "sanctuary" and non-cooperating laws. While both SB 54 and the AG Directive, in essence, are quite similar, they also differ significantly. The AG Directive is a policy, not a piece of legislation, with much broader exceptions allowing local government discretion on whether to participate in the enforcement of immigration law. Notably, as both of these laws illuminate, the exercise of these stakeholders' power to enact legislation that affects the implementation of federal immigration laws inevitably raises legal challenges both by the federal and local government. Further scholarship should explore the ramifications and benefits associated with the two respective models of non-cooperation or "sanctuary" laws. As the Trump Administration's federal immigration enforcement policies become more aggressive, one thing is certain for now: although neither California and New Jersey identify as "sanctuary" states, they remain active stakeholders over federal immigration law enforcement and are poised to continue to protect the people, resources and interests of their states.