

# Reversing the ICE Age: Immigration Reform in California

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## Code Sections Affected

Government Code §§ 7284–7284.10 (new); Health and Safety Code § 11369 (repealed); Penal Code § 3058.10 (new).  
SB 54 (De León).

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I. INTRODUCTION

During the height of the 2016 presidential campaign, a sleeping giant was jostled awake.<sup>1</sup> It began with bloodshed on the evening of July 1, 2015.<sup>2</sup> While visiting a famous fishing pier in San Francisco with her family, 32-year-old Kathryn Steinle was shot and killed.<sup>3</sup> Her alleged assailant, Juan Francisco Lopez-Sanchez, was an undocumented immigrant with seven felony convictions and whom the government had deported five times.<sup>4</sup> Earlier that year, police had brought Lopez-Sanchez into custody on a twenty-year old drug warrant.<sup>5</sup> While

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1. Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 *NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT* 159, 162 (2016); see also Seema Mehta, *San Francisco Slaying Upends Immigration Debate in 2016 Presidential Race*, *L.A. TIMES* (July 24, 2015), <http://www.latimes.com/nation/la-na-politics-immigration-20150724-story.html> (on file with *The University of the Pacific Law Review*) (describing the murder of Kathryn Steinle as “scrambl[ing] the political equation overnight”).

2. Mehta, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

there, U.S. Immigration and Customs Enforcement (ICE) requested that he remain in police custody until they could pick him up.<sup>6</sup> Despite this request, the San Francisco District Attorney dismissed Lopez-Sanchez's drug charges and the Sheriff's Department released him.<sup>7</sup> The Sheriff's Department released him because of a San Francisco city ordinance that prevents local law enforcement from detaining a person on behalf of ICE after the person becomes eligible for release unless the person is a violent felon.<sup>8</sup> Steinle's story reignited a longstanding political dialogue about reforming the United States immigration system.<sup>9</sup>

In the 1980s, churches sheltered Central American refugees who immigrated to America illegally in an attempt to escape persecution and violent civil wars in their home countries.<sup>10</sup> Hence, the term "sanctuary city" was born.<sup>11</sup> While there is no legal definition for a "sanctuary" jurisdiction, the term is most often used to describe localities that "place limits on their assistance to federal immigration authorities seeking to apprehend and remove unauthorized aliens."<sup>12</sup> The federal government has increasingly relied on state and local law enforcement agencies (LEAs) to enforce federal immigration laws.<sup>13</sup> Cities across the country responded to this reliance with sanctuary policies.<sup>14</sup> Chapter 495 is California's attempt to distance itself from the business of enforcing federal immigration laws.<sup>15</sup>

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6. *Id.*; *What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT DEP'T HOMELAND SECURITY, <http://www.ice.gov/overview> (last visited June 1, 2017) (on file with *The University of the Pacific Law Review*) (ICE is a federal law enforcement agency under DHS whose "mission is to protect America from the cross-border crime and illegal immigration that threaten national security and public safety.").

7. Mehta, *supra* note 1.

8. *Id.*; S.F., CAL., ADMIN. CODE ch. 12I, § 12I.3 (Oct. 8, 2013), available at <https://sfgov.org/occeia/sites/default/files/Documents/SF%20Admin%20Code%2012H-12I.pdf> (on file with *The University of the Pacific Law Review*).

9. Maxwell Tani, *The Chilling Murder of a San Francisco Woman Has Roiled the Immigration Debate*, BUS. INSIDER (July 11, 2015), <http://www.businessinsider.com/kathryn-steinle-murder-immigration-sanctuary-cities-2015-7> (on file with *The University of the Pacific Law Review*).

10. Barbara E. Armacost, "Sanctuary" Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199 (2016).

11. *Id.*

12. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., "SANCTUARY CITIES": LEGAL ISSUES 1 (Jan. 15, 2009), available at <https://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf> (on file with *The University of the Pacific Law Review*).

13. Alia Al-Khatib, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 118 (2014).

14. See Dean Kuipers, *Fire and ICE: Beyond Sanctuary*, CAP. & MAIN (Apr. 26, 2017), <http://capitalandmain.com/fire-and-ice-beyond-sanctuary-0426> (on file with *The University of the Pacific Law Review*) (discussing the sanctuary movement in California); see also Clyde Haberman, *Trump and the Battle Over Sanctuary in America*, N.Y. TIMES (Mar. 5, 2017) <https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html> (on file with *The University of the Pacific Law Review*) (explaining the origins and recent evolution of the sanctuary movement throughout America).

15. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 2 (Jan. 30, 2017).

## II. LEGAL BACKGROUND

Although the Constitution does not expressly grant the federal government the power to regulate immigration, the federal government has nonetheless traditionally exercised that power.<sup>16</sup> The United States Supreme Court has “anchored this authority” in several clauses in the Constitution: the Naturalization Clause, Commerce Clause, War Clause, and Migration and Importation Clause.<sup>17</sup> The Court reiterated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>18</sup> Despite the federal government’s dominion over immigration in America, in recent years, state and local LEAs have become increasingly involved in immigration enforcement.<sup>19</sup> This shift is largely due to changes in federal and state law, and strengthened efforts of federal immigration agencies to solicit and incentivize state and local aid.<sup>20</sup> These developments have exposed a deep, foundational divide across the United States, with some states choosing to react by passing sanctuary laws and others vehemently desiring to collaborate with the federal government in curbing illegal immigration.<sup>21</sup> There is no consensus on the number of United States

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16. APPLESEED, FORCING OUR BLUES INTO GRAY AREAS: LOCAL POLICE AND FEDERAL IMMIGRATION ENFORCEMENT 7 (2008), available at <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1603> (on file with *The University of the Pacific Law Review*); Steven Papazian, *Secure Communities, Sanctuary Laws, and Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 S. CAL. REV. L. & SOC. JUST. 283, 287 (2012).

17. Papazian, *supra* note 16, at 287–88; U.S. CONST. art. I, § 8, cl. 4 (the Naturalization Clause provides “The Congress shall have Power . . . To establish a uniform Rule of Naturalization”); *Id.* at art. I, § 8, cl. 3 (the Commerce Clause provides “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); *Id.* at art. I, § 8, cl. 11 (the War Clause provides “The Congress shall have Power . . . To declare War”); *Id.* at art. I, § 9, cl. 1 (the Migration and Importation Clause provides “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person”).

18. *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

19. Armacost, *supra* note 10, at 1206.

20. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 88 (2016). The enactment of the Immigrant Reform and Responsibility Act of 1996 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 were central to and responsible for increasing state and local participation in immigration law. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 1373) (limiting state and local restrictions on communications with federal immigration authorities); *see also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1644) (setting further limits on restricting communication regarding immigration status between local and state agencies and federal immigration authorities); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563–64 (codified at 8 U.S.C. § 1357(g)) (creating the 287(g) program, which allows federal immigration authorities to deputize local and state LEAs to perform the functions of immigration officers).

21. GARCIA, *supra* note 12, at 1; *see also* Laurel Brubaker Calkins & Kartikay Mehrotra, *Battle over Sanctuary Cities Pits California Against Texas*, BLOOMBERG POL. (June 19, 2017), <https://www.bloomberg.com/news/articles/2017-06-19/sanctuary-cities-pits-california-against-texas>.

sanctuary cities.<sup>22</sup> This is likely because the term lacks a uniform definition.<sup>23</sup> In California, however, unofficial reports suggest there are currently 18 cities and counties with sanctuary policies in effect.<sup>24</sup>

Section A discusses how federal lawmakers and immigration agencies have taken a joint approach to immigration enforcement.<sup>25</sup> Section B explains how California law regulates state and local law enforcement participation in immigration enforcement.<sup>26</sup> Section C reviews the constitutional framework and issues surrounding sanctuary policies.<sup>27</sup> Section D describes the social and political context surrounding sanctuary jurisdictions in the United States.<sup>28</sup>

#### *A. Federal Legislation: A Collaborative Approach*

In the mid-1990s, state and local authorities started becoming more active participants in federal immigration enforcement.<sup>29</sup> The need for federal immigration authorities to harness a wider pool of resources and manpower inspired this change.<sup>30</sup> Subsection 1 discusses the open-door policy required under federal law and explains the program authorizing LEAs to perform the functions of an immigration officer.<sup>31</sup> Subsection 2 describes the information-sharing network between federal criminal and immigration agencies during the

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com/news/articles/2017-06-20/battle-over-sanctuary-cities-pits-california-against-texas (on file with *The University of the Pacific Law Review*) (discussing the countervailing stances taken by California and Texas).

22. See Jasmine C. Lee et al., *What Are Sanctuary Cities?* N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> (on file with *The University of the Pacific Law Review*) (reporting that there are at least 633 counties with sanctuary policies in place throughout the US); see also Stephen Dinan, *Number of Sanctuary Cities Nears 500*, WASH. TIMES (Mar. 14, 2017), <http://www.washingtontimes.com/news/2017/mar/14/number-sanctuary-cities-nears-500-report/> (on file with *The University of the Pacific Law Review*) (reporting that there are nearly 500 sanctuary cities in America as of March 2017).

23. See GARCIA, *supra* note 12, at 1 (noting the lack of a federal definition of the term sanctuary city, but describing the term's usage).

24. Sandy Coronilla, *List of 'Sanctuary' Cities 2017*, ABC 10 NEWS, KGTV SAN DIEGO (Apr. 25, 2017), <http://www.10news.com/news/list-of-sanctuary-cities-2017> (on file with *The University of the Pacific Law Review*).

25. *Infra* Part II.A.

26. *Infra* Part II.B.

27. *Infra* Part II.C.

28. *Infra* Part II.D.

29. APPLESEED, *supra* note 16, at 17.

30. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 183 (2005) (“[S]tate and local officers are the eyes and ears of law enforcement across the United States . . . Federal immigration officers simply cannot cover the same ground.”).

31. *Infra* Part II.A.1.

booking process into state prisons.<sup>32</sup> Subsection 3 elaborates on the primary mechanism ICE uses to seek the help of local and state law enforcement.<sup>33</sup>

1. *Unrestricted Information Sharing Between State and Local Law Enforcement and Federal Immigration Authorities and the 287(g) Program*

In 1996, amidst a “flurry of activity on immigration reform,” Congress passed two laws that gave state and local agencies the authority and discretion to cooperate and share information with federal immigration authorities: the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>34</sup> Together, IIRIRA section 642 and PRWORA section 434 provide that local, state, and federal entities or officials may not restrict or prohibit their employees from communicating with federal immigration agencies about a person’s immigration status.<sup>35</sup> Congress passed both laws primarily in response to a growing sanctuary movement throughout America.<sup>36</sup> While neither of these provisions require a state or local agency to *cooperate* with federal immigration authorities, both create and expressly require an *open channel* between federal and state officials on this issue.<sup>37</sup>

Further, IIRIRA created the “287(g) program,” which allows the Department of Homeland Security (DHS) and states, cities, or localities to enter into agreements whereby local and state police forces are “deputized . . . to perform certain immigration monitoring and enforcement functions.”<sup>38</sup> The 287(g) program permits local and state police forces to perform nearly the same functions as a federal immigration officer, which includes “investigat[ing],

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32. *Infra* Part II.A.2.

33. *Infra* Part II.A.3.

34. APPLESEED, *supra* note 16, at 17; Amdur, *supra* note 20, at 98–99 (IIRIRA “expanded the conviction-based grounds for deportation, enlarged the definition of aggravated felonies, and cut off some avenues for deportation relief” and also “introduced a system of mandatory detention, . . . new procedures . . . to accelerate formal deportations . . . and new approaches to securing local participants.”); KEVIN JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 82–83 (2d ed., 2015) (enacted by President Clinton, PRWORA was a social welfare law that restricted legal immigrants’ ability to access federally-funded public benefits).

35. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 1373); 8 U.S.C.A. § 1373 (West 2017); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1644); 8 U.S.C.A. § 1644 (West 2017).

36. Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 169 (2016).

37. *Id.*

38. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009–546, 3009-573–64 (codified at 8 U.S.C.A. § 1357(g)); APPLESEED, *supra* note 16, at 7.

apprehen[ding], or det[aining] aliens in the United States.”<sup>39</sup> Currently, 60 LEAs in 18 states have active 287(g) agreements.<sup>40</sup>

## 2. *Information Sharing Under the Secure Communities Program*

In 2008, the George W. Bush administration introduced the Secure Communities program (S-Comm).<sup>41</sup> S-Comm is an “information-sharing partnership between DHS and the Federal Bureau of Investigation [FBI].”<sup>42</sup> When an officer books a person into a prison, electronic fingerprint records are created.<sup>43</sup> Officers send those records to the FBI and DHS, and if the inmate is deemed a priority for deportation, DHS relays their information to ICE.<sup>44</sup> From there, ICE initiates an enforcement action, which generally takes the form of an immigration detainer notice wherein ICE requests that the agency with custody either detain the person or notify ICE before releasing them.<sup>45</sup> In 2014, Secretary of DHS, Jeh Charles Johnson, discontinued S-Comm in response to an onslaught of criticism and outrage from politicians and law enforcement officials around the country.<sup>46</sup> On January 25, 2017, President Donald Trump reactivated the program.<sup>47</sup>

## 3. *ICE Immigration Detainers to State and Local Law Enforcement*

Under existing federal law, any authorized immigration officer has the authority to issue a detainer to any federal, state, or local LEA if there is probable

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39. 8 U.S.C.A. § 1357(g) (West 2006).

40. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGR. & CUSTOMS ENFORCEMENT DEP’T HOMELAND SECURITY*, <http://www.ice.gov/factsheets/287g> (last visited Nov. 26, 2017) [hereinafter *Fact Sheet for 287(g) Program*] (on file with *The University of the Pacific Law Review*) (LEAs in the following states have current 287(g) agreements with ICE: Alabama, Arizona, Arkansas, California (Orange County Sheriff’s Office), Florida, Georgia, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Virginia).

41. Armacost, *supra* note 10, at 1208.

42. *Secure Communities FAQ*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT DEP’T HOMELAND SECURITY, <https://www.ice.gov/secure-communities> (last visited June 1, 2017) (on file with *The University of the Pacific Law Review*).

43. *Id.*

44. *Id.*

45. *Id.*; Jazmine Ulloa, *What You Need to Know About California’s ‘Sanctuary State’ Bill and How It Would Work*, L.A. TIMES (Apr. 13, 2017), <http://www.latimes.com/politics/la-pol-sac-sanctuary-state-bill-explained-20170413-htmlstory.html> (on file with *The University of the Pacific Law Review*).

46. Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep’t. of Homeland Sec., to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enf’t. 1–2 (Nov. 20, 2014) (on file with *The University of the Pacific Law Review*).

47. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

cause that “the subject is a removable alien.”<sup>48</sup> A detainer is a notification that authorized immigration officers send to state or local agencies to inform them that DHS intends to assume custody of someone in their possession and requests the agency notify them before releasing that person from detention.<sup>49</sup> It also requests the LEA “maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours.”<sup>50</sup> Because it is merely a request and compliance is voluntary, LEAs have discretion to choose whether or not to comply.<sup>51</sup>

*B. California Legislation: A Shift Away from Collaboration*

In recent years, California cities and counties have distanced themselves from the collaborative approach reflected in federal legislation.<sup>52</sup> Across the state, an increasing number of cities have enacted sanctuary policies, such as Los Angeles, San Francisco, and Oakland.<sup>53</sup> Taken as a whole, these sanctuary policies reflect a common desire to limit information sharing and communication between federal immigration authorities and state and local LEAs.<sup>54</sup>

In California, existing law requires an arresting agency to notify federal immigration authorities when it has reason to believe a person arrested on drug-related charges might not be a citizen of the United States.<sup>55</sup> Further, in October 2013, “Governor Jerry Brown signed the Transparency and Responsibility Using State Tools (TRUST) Act.”<sup>56</sup> Assembly Member Ammiano introduced the TRUST Act in response to the S-Comm program’s attempt to “set a minimum standard for elective compliance with ICE detainer requests to protect detainees

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48. 8 C.F.R. § 287.7(a) (2017); DEP’T OF HOMELAND SECURITY, IMMIGRATION DETAINER – NOTICE OF ACTION 1 (2017), available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> (on file with *The University of the Pacific Law Review*). Probable cause exists where there is a “‘reasonable ground for belief of guilt,’ and . . . the belief of guilt [is] particularized with respect to the person searched or seized.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

49. 8 C.F.R. § 287.7(a) (2017).

50. *Id.* § 287.7(d).

51. *Id.* § 287.7(a).

52. Kuipers, *supra* note 14; *see supra* Part II.A (discussing the collaborative approach followed in federal legislation).

53. Kuipers, *supra* note 14.

54. *Id.*

55. CAL. HEALTH & SAFETY CODE § 11369 (repealed by Chapter 495) (the offenses under this section included, for example, unlawful possession of various controlled substances, operating a place for drug trafficking, possession of marijuana for sale, and transportation and sale of marijuana to a minor).

56. Ulloa, *supra* note 45; *Immigration Law – Criminal Justice and Immigration Enforcement—California Limits Local Entities’ Compliance with Immigration and Customs Enforcement Detainer Requests*, 127 HARV. L. REV. 2593 (2014) [hereinafter *Criminal Justice and Immigration Enforcement*].

from being held after they are eligible for release.”<sup>57</sup> The TRUST Act added California Government Code sections 7282 and 7282.5, which provide the targeted person must have been convicted of an enumerated crime in order for local law enforcement officials to enforce a detainer and hold a person sought by ICE.<sup>58</sup> Existing law also sets ICE cooperation guidelines by requiring the local agency, before any interview between ICE and a person in local custody, to provide the person with a “form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed.”<sup>59</sup>

### C. *Constitutional Issues*

Refusing to offer state and local resources for the enforcement of federal immigration laws, as many sanctuary policies do, raises serious constitutional concerns.<sup>60</sup> Subsection 1 discusses the doctrine of preemption as a primary constitutional challenge facing sanctuary policies, and Subsection 2 elaborates on the anti-commandeering doctrine as well as state police power as a counter to potential concerns of preemption.<sup>61</sup>

#### 1. *Federal Preemption of State Laws*

Under the preemption doctrine, “state and local governments are deprived of their power to act in a given area, whether or not the state or local law, rule or action is in direct conflict with federal law.”<sup>62</sup> The doctrine is rooted in the Supremacy Clause of the Constitution, which states the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”<sup>63</sup> Most often, preemption issues arise when a “sub-federal entity legislates in . . . area[s] . . . traditionally reserved to the federal government.”<sup>64</sup> The federal government’s exclusive immigration authority is rooted in the Constitution and judicial precedent.<sup>65</sup>

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57. Carrie Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 484, 486 (2015).

58. 2013 Cal. Stat. 570 (enacting CAL. GOV’T CODE §§ 7282–7282.5) (West 2017). These offenses include, among other things, obstruction of justice, gang-related crimes, murder, voluntary manslaughter, rape, carjacking, and robbery. CAL. GOV’T CODE § 7282.5(a) (West 2017).

59. CAL. GOV’T CODE § 7283.1(a) (West 2017).

60. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 250 (2012).

61. *Infra* Part II.C.1–2.

62. JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION, AND LITIGATION I* (2006).

63. U.S. CONST. art. VI, cl. 2.

64. Rosenbaum, *supra* note 57, at 486.

65. *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably

There are two forms of sanctuary laws relevant to preemption challenges: don't-ask and don't-tell.<sup>66</sup> Jurisdictions with don't-ask laws “prohibit government employees from inquiring about the immigration status of an individual,” while those with don't tell laws “prohibit government employees from disclosing or communicating an individual's immigration information to the federal government.”<sup>67</sup> *City of New York v. United States* and *Sturgeon v. Bratton* are particularly relevant to whether sanctuary policies are preempted because they reveal a crucial distinction between don't ask and don't tell policies.<sup>68</sup> *City of New York* involved a policy that “prohibit[ed] City officials from sharing with federal authorities information about the immigration status of aliens”; in other words, a don't tell policy.<sup>69</sup> The court found that federal law preempted local policy.<sup>70</sup> *Sturgeon*, on the other hand, involved an Los Angeles Police Department policy that “prohibited officers from engaging with members of the community for the sole purpose of uncovering civil immigration violations”—in other words, a don't ask policy.<sup>71</sup> There, the court concluded that the don't-ask policy was not in “total and fatal conflict” with federal law and was therefore not preempted.<sup>72</sup>

Express preemption “requires a clear statement from Congress of its intent to preempt a particular sort of state law.”<sup>73</sup> Field preemption is a form of implied preemption that “requires an inquiry into whether the federal government has occupied the field such that there is no room for the exercise of state authority.”<sup>74</sup> Finally, conflict preemption exists where it is impossible to comply with both federal and state laws and where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>75</sup>

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exclusively a federal power.”); *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (“The Government of the United States has broad, undoubted power over . . . immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to ‘establish a uniform Rule of Naturalization’ . . . and its inherent power as sovereign to control and conduct relations with foreign nations.”).

66. Papazian, *supra* note 16, at 290–91.

67. *Id.*

68. See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 732–33 (Cal. Ct. App. 2009) (finding that federal law did not preempt the sanctuary policy at issue); see also *City of New York v. United States*, 971 F. Supp. 789, 797 (S.D.N.Y. 1997) (finding that federal law did preempt the sanctuary policy at issue); Hing, *supra* note 61, at 263–273.

69. *City of New York*, 971 F. Supp. at 791.

70. McCormick, *supra* note 36, at 188.

71. *Id.* at 196–97; *Sturgeon*, 95 Cal. Rptr. 3d at 718.

72. *Sturgeon*, 95 Cal. Rptr. 3d at 731–33.

73. Cristina M. Rodríguez, Muzaffar Chishti & Kimberly Nortman, *Legal Limits on Immigration Federalism*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 31, 34 (Monica W. Varsanyi ed., 2010).

74. *Id.*

75. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67

## 2. Police Power and the Anti-Commandeering Doctrine

In *Arizona v. United States*, the Supreme Court reiterated that federal law should not supersede the “historic police powers of the States” absent a clear, contrary intention by Congress.<sup>76</sup> A state’s police power includes “the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.”<sup>77</sup>

The Tenth Amendment embodies the anti-commandeering doctrine, which 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.”<sup>78</sup> As interpreted by the courts, the anti-commandeering doctrine prohibits the federal government from forcing states or localities to regulate a specific issue.<sup>79</sup> It rests upon our system of dual sovereignty, where national and state governments each possess their own share of sovereignty that must respect the other.<sup>80</sup> Under this system, it is unconstitutional for a federal law to intrude into an area of state sovereignty (and vice versa).<sup>81</sup>

### D. Social and Political Context

The Trump administration’s harsh rhetoric concerning its plans for dealing with illegal immigrants has brought immigration to the forefront of American politics.<sup>82</sup> Throughout Donald Trump’s campaign, “aggressive denunciations of

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(1941)).

76. *Id.* at 400.

77. *John Thorpe v. Rutland and Burlington R.R. Co.*, 27 Vt. 140, 149 (1855). As interpreted by various legislatures, a state’s police powers include ensuring access to public education and arresting individuals for engaging in criminal activity. Yule Kim, *The Limits of State and Local Immigration Enforcement and Regulation*, 3 ALB. GOV’T L. REV. 242, 248 (2010); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400 (2006).

78. U.S. CONST. amend. X.

79. Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 141 (2014); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (“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.”); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

80. Cimini, *supra* note 79, at 139.

81. Hing, *supra* note 60, at 273; see also *New York v. United States*, 505 U.S. at 156 (explaining that “if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress”).

82. See Cody Derespina, *Trump: Illegal Immigrant Criminals Are ‘Getting the Hell Out,’* FOX NEWS (Apr. 18, 2017), <http://www.foxnews.com/politics/2017/04/18/trump-illegal-immigrant-criminals-are-getting-hell-out.html> (on file with *The University of the Pacific Law Review*) (describing the impact of Trump’s immigration policies in America); see also Lawrence Hurley, *Trump Travel Ban Fight Heads Toward Supreme*

illegal immigrants” were commonplace.<sup>83</sup> Largely catalyzed by the death of Kathryn Steinle at the hands of an illegal immigrant in 2015, this “sentiment segued into an attack on ‘sanctuary cities.’”<sup>84</sup> In response to the growing sanctuary movement throughout America, the Trump administration continues to reiterate its belief that sanctuary jurisdictions violate federal law and, therefore, should not receive federal funding.<sup>85</sup> On January 25, 2017, President Trump vowed to make good on the administration’s prior threats by issuing Executive Order 13768.<sup>86</sup> The order requires the Attorney General and Secretary to “ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.”<sup>87</sup> To date, both President Trump and Attorney General Jeff Sessions have repeatedly reiterated their plan to block federal funding for sanctuary jurisdictions.<sup>88</sup> Thus far, however, the administration has not yet followed through with those threats.<sup>89</sup>

While some cities and states have scaled back their sanctuary policies in response to the order, others have leveraged the conflict as “providing a platform for challenging the . . . administration” and increasing the urgency of protecting their immigrant communities.<sup>90</sup> In California specifically, “the nationwide wave of resistance to President Donald Trump’s anti-immigrant executive orders has

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*Court Showdown*, REUTERS (May 27, 2017), <http://www.reuters.com/article/us-usa-immigration-court-idUSKBN18M2C7> (on file with *The University of the Pacific Law Review*) (reporting the Supreme Court will hear the case regarding the federal court’s blocking of Trump’s travel ban); Kirk Semple, *Central Americans, ‘Scared of What’s Happening’ in U.S., Stay Put*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/world/americas/honduras-migration-border-wall.html> (on file with *The University of the Pacific Law Review*) (explaining that Trump’s immigration policies have already led to fewer Central American migrants).

83. Christopher Dunn, *The Constitutional Wall Between Trump and Sanctuary Cities; Civil Rights and Civil Liberties*, N.Y. L. J., May 31, 2017 (on file with *The University of the Pacific Law Review*).

84. *Id.*

85. Octavio Blanco, *Becoming a Sanctuary State Could Help California Protect Its Economy, Too*, CNN MONEY (May 18, 2017), <http://money.cnn.com/2017/05/18/news/economy/sanctuary-state-california-undocumented/> (on file with *The University of the Pacific Law Review*).

86. Tal Kopan, *On Immigration, Trump Has Plenty to Show in 100 Days*, CNN POL. (Apr. 27, 2017), <http://www.cnn.com/2017/04/27/politics/trump-100-days-immigration/> (on file with *The University of the Pacific Law Review*); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, ATLANTIC (Jan. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427/> (on file with *The University of the Pacific Law Review*).

87. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

88. Blanco, *supra* note 85.

89. *See County of Santa Clara v. Donald J. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at \*29 (N.D. Cal. Apr. 25, 2017) (issuing a nationwide injunction against enforcing section 9(a) of the order threatening to rescind federal funding to sanctuary jurisdictions).

90. Dunn, *supra* note 83; Andy J. Semotiuk, *Dispute Over Illegal Immigrants Threatens Federal Funding for Sanctuary Cities*, FORBES (Apr. 18, 2017), <https://www.forbes.com/sites/andysemotiuk/2017/04/18/dispute-over-illegal-immigrants-threatens-federal-funding-for-sanctuary-cities/> (on file with *The University of the Pacific Law Review*).

become a tsunami.”<sup>91</sup> One way the President’s immigration policy has been challenged is through litigation.<sup>92</sup> Just days after President Trump issued the executive order, San Francisco County, the City of San Francisco, and Santa Clara County challenged its constitutionality in the courts.<sup>93</sup> On April 25, 2017, a district court judge ordered a nationwide injunction against the enforcement of the order’s vow to withdraw funding from sanctuary jurisdictions.<sup>94</sup> Across the country, politicians, lawmakers, and civilians continue to challenge the President’s immigration policy in the courts, in the legislature, and on the streets.<sup>95</sup>

### III. CHAPTER 495

Chapter 495 is a targeted response to the overlap between federal immigration enforcement and state and local agencies.<sup>96</sup> Taken as a whole, it “seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of California citizens, and to direct the state’s limited resources to matters of greatest concern to state and local governments.”<sup>97</sup> Section A explains Chapter 495’s ban on using state and local agency resources for immigration enforcement purposes.<sup>98</sup> Section B clarifies the exceptions to Chapter 495’s limitations on state and local cooperation and describes Chapter 495’s creation of “safe zones.”<sup>99</sup>

#### A. *Chapter 495 Forbids Local and State Law Enforcement Agencies from Using State Resources for Immigration Enforcement Purposes*

Chapter 495 prohibits California LEAs from using agency resources, including “moneys or personnel [to] investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes.”<sup>100</sup> State and local LEAs

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91. Kuipers, *supra* note 14.

92. See Katy Steinmetz, *California Lawyers Say President Trump’s Sanctuary City Order Is a ‘Gun to Your Head,’* TIME (Apr. 14, 2017), <http://time.com/4740823/donald-trump-sanctuary-city-california-san-francisco-santa-clara/> (on file with *The University of the Pacific Law Review*) (describing the recent lawsuits filed by San Francisco and Santa Clara County against Trump).

93. Complaint for Declaratory and Injunctive Relief at 33–41, *County of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017); Complaint for Declaratory and Injunctive Relief at 21–22, *City and County of San Francisco v. Donald Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

94. *County of Santa Clara v. Donald J. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at \*29 (N.D. Cal. Apr. 25, 2017).

95. Kuipers, *supra* note 14.

96. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 2 (Jan. 30, 2017).

97. CAL. GOV’T CODE § 7284.2(f) (enacted by Chapter 495).

98. *Infra* Part III.A.

99. *Infra* Part III.B.

100. CAL. GOV’T CODE § 7284.6(a) (enacted by Chapter 495).

may not: (1) inquire into a person's immigration status; (2) detain a person based on an ICE hold request; (3) provide release dates; (4) provide personal information about a person not publicly available; (5) arrest persons based on civil immigration warrants; (6) help or collaborate with federal immigration authorities under 8 U.S.C. § 1357; or (7) perform the functions of an immigration officer.<sup>101</sup>

Chapter 495 prohibits California LEAs from transferring a person in their custody to ICE without a judicial probable cause determination or judicial warrant.<sup>102</sup> LEAs are also prohibited from “contract[ing] with the federal government for use of ... [LEA] facilities to house individuals as federal detainees” and may not dedicate office space to ICE within state or local law enforcement facilities.<sup>103</sup>

*B. Chapter 495 Carves out Exceptions Relating to Criminal Activity, Creates “Safe Zones” for Immigrant Communities, and Repeals Section 11369 of the Health and Safety Code*

Chapter 495 does not bar collaboration in all circumstances and creates several exceptions to its ban against using agency resources for immigration enforcement.<sup>104</sup> One exception is when an LEA detects, during an unrelated police activity, an undocumented immigrant who had previously been deported after an aggravated felony conviction.<sup>105</sup> California LEAs are also free to respond to requests about a person's criminal history.<sup>106</sup> These exceptions give LEAs leeway for collaboration regarding violent criminals.<sup>107</sup> Further, Chapter 495 creates “safe zones” by requiring that all public schools, public libraries, state-operated health facilities, courthouses, and shelters adopt policies limiting collaboration with immigration enforcement “to the fullest extent possible.”<sup>108</sup> By

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101. *Id.* § 7284.6(a)(1); *see also* 8 U.S.C.A. § 1357 (West 2017) (setting a framework for the powers of immigration officers and employees, including, for example, guidelines for conduct without a warrant, detaining aliens for violation of controlled substances laws, and for protecting abused juveniles).

102. CAL. GOV'T CODE § 7284.6(a)(4) (enacted by Chapter 495); *Id.* § 7284.4(h) (“Judicial probable cause determination” means a “determination made by a federal judge or federal magistrate judge that probable cause exists that an individual has violated federal criminal immigration law and that authorizes a law enforcement officer to arrest and take into custody that individual.”); *Id.* § 7284.4(i) (a judicial warrant is a warrant issued by a federal judge or federal magistrate judge and must be based on “probable cause for a violation of federal criminal immigration law.”).

103. CAL. GOV'T CODE § 7284.6(a)(5)–(6) (enacted by Chapter 495).

104. *See id.* § 7284.6(b)(1)–(5) (listing activities that Chapter 495 does not prevent LEAs from engaging in); *Id.* § 7284.6(e) (providing that LEAs are still permitted to comply with federal law codified at 8 U.S.C. §§ 1373, 1644).

105. *Id.* § 7284.4(b)(1).

106. *Id.* § 7284.6(b)(2).

107. *Id.* § 7284.6(a)(1).

108. *Id.* § 7284.8(a). While the language of Chapter 495 does not refer to the creation of “safe zones,” the

creating these “safe zones,” Chapter 495 guarantees immigrants the ability to access these vital services without fearing deportation.<sup>109</sup> Chapter 495 also repeals Health and Safety Code section 11369, which required the arresting agency to notify ICE if it had reason to believe a person arrested for various enumerated controlled substance offenses was not a citizen of the United States.<sup>110</sup>

#### IV. ANALYSIS

Chapter 495, which the Washington Post has referred to as the “highest-profile act of defiance to Trump’s nascent presidency,” is indicative of the many ways in which opposition parties have declared war against Trump’s immigration policies.<sup>111</sup> Also known as the California Values Act, legislators introduced Chapter 495 in an attempt to build a “wall of justice” that would “protect the safety, well-being, and constitutional rights of the people of California, and . . . direct the state’s limited resources to matters of greatest concern to state and local governments.”<sup>112</sup>

Section A discusses whether strengthening the relationship between immigrant communities and local law enforcement will be enough to achieve Chapter 495’s lofty aspirations.<sup>113</sup> Section B addresses how Chapter 495 helps shift local and state resources away from immigration enforcement and towards protecting our communities.<sup>114</sup> Section C evaluates the challenges preemption may present to Chapter 495.<sup>115</sup> Section D analyzes the extent to which Chapter 495 aligns with state sovereignty and Tenth Amendment concerns.<sup>116</sup> Section E elaborates on Chapter 495’s fiscal impact in light of federal threats to withhold funding from sanctuary jurisdictions.<sup>117</sup>

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media has adopted that term to refer to these provisions. Ulloa, *supra* note 46.

109. CAL. GOV’T CODE § 7284.8(a) (enacted by Chapter 495).

110. SB 54, 2017 Leg., 2016–2017 Sess., § 4 (Cal. 2017); CAL. HEALTH & SAFETY CODE § 11369 (repealed by Chapter 495).

111. Amber Phillips, *California Is in a War with Trump on ‘Sanctuary Cities.’ It Just Won Its First Major Battle*, WASH. POST (Apr. 25, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/04/25/california-is-in-a-war-with-trump-on-sanctuary-cities-and-it-just-won-its-first-major-battle/?utm\\_term=.cdd88c92c792](https://www.washingtonpost.com/news/the-fix/wp/2017/04/25/california-is-in-a-war-with-trump-on-sanctuary-cities-and-it-just-won-its-first-major-battle/?utm_term=.cdd88c92c792) (on file with *The University of the Pacific Law Review*).

112. CAL. GOV’T CODE §§ 7284, 7284.2(f) (enacted by Chapter 495); Alexei Koseff, *California Bill Creates Deportation ‘Safe Zones’ for Undocumented Immigrants*, SACRAMENTO BEE (Dec. 6, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article119467653.html> (on file with *The University of the Pacific Law Review*).

113. *Infra* Part IV.A.

114. *Infra* Part IV.B.

115. *Infra* Part IV.C.

116. *Infra* Part IV.D.

117. *Infra* Part IV.E.

A. *Will Chapter 495 Actually Protect the Safety of All Californians By Building Trust in the Community?*

California legislators hotly debate whether Chapter 495 will actually promote public safety—a key element of the potential success or failure of this new law.<sup>118</sup> Subsection 1 discusses whether Chapter 495 protects only immigrants or if it protects *all* those living in California.<sup>119</sup> Subsection 2 explains how Chapter 495’s success depends on whether legislation can actually rebuild trust between law enforcement and immigrants considering the multitude of other historical, social, and political factors that contribute to this mistrust.<sup>120</sup> Finally, Subsection 3 explores the notion that Chapter 495’s ability to promote public safety also depends on whether an increased ICE presence on the streets, rather than in prisons, will actually have the opposite effect than intended.<sup>121</sup>

1. *Will it Promote the Safety of All Californians or Just a Few?*

Chapter 495’s supporters argue that entangling local law enforcement with the “dirty business of deportations” threatens the safety of *all* Californians because it deteriorates the relationship of trust between law enforcement and immigrant communities.<sup>122</sup> When immigrants hear about neighbors or loved ones who call the police to report a crime and end up being deported, this undoubtedly diminishes their trust in law enforcement.<sup>123</sup> Because of this entanglement, “immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school” out of concern they will be taken into custody or even deported.<sup>124</sup> In a 2013 University of Illinois study, researchers found “70 percent of undocumented immigrants reported they are less likely to contact law enforcement if they were victims of a crime.”<sup>125</sup>

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118. See SENATE FLOOR, FLOOR ANALYSIS OF SB 54, at 13 (Mar. 17, 2017) (summarizing arguments opposing the California Values Act).

119. *Infra* Part IV.A.1.

120. *Infra* Part IV.A.2.

121. *Infra* Part IV.A.3.

122. SENATE FLOOR, FLOOR ANALYSIS OF SB 54, at 12 (Mar. 17, 2017).

123. See Thomas Kennedy, *Despite Promises, Florida Police Are Acting Like Immigration Agents and Separating Families*, HUFFINGTON POST (July 6, 2017) [http://www.huffingtonpost.com/entry/despite-promises-florida-police-are-acting-like-immigration\\_us\\_595e8ebae4b0cf3c8e8d572d](http://www.huffingtonpost.com/entry/despite-promises-florida-police-are-acting-like-immigration_us_595e8ebae4b0cf3c8e8d572d) (on file with *The University of the Pacific Law Review*) (describing the fear of being detained or deported after a traffic stop).

124. CAL. GOV’T CODE § 7284.2(f) (enacted by Chapter 495); Al-Khatib, *supra* note 13, at 157–158.

125. NIK THEODORE, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT i (May 2013), available at [https://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF) (on file with *The University of the Pacific Law Review*).

This is a very real problem in immigrant communities.<sup>126</sup> Even so, while the effects of this mistrust are felt primarily by immigrants, mistrust threatens the health and safety of a much wider population.<sup>127</sup> This population includes legal and illegal immigrants as well as non-immigrants, albeit to a more limited extent.<sup>128</sup> Both of these groups are impacted because “millions are affected when law enforcement officers, who may be untrained in immigration law, stop and question Latinos and other Americans who ‘look’ or ‘sound’ like they might be foreign.”<sup>129</sup> This profiling erodes trust within communities because it spreads both racial bias and discrimination throughout those communities.<sup>130</sup> In this sense, Chapter 495 could positively affect the health and safety of *all* Californians by helping counteract the discrimination and racial bias that results from untrained law enforcement trying to perform the complex task of immigration enforcement.<sup>131</sup>

For some segments of the general population, community mistrust of law enforcement is simply not an issue, and whether other communities—namely those of immigrants—are mistrustful of police does not impact them.<sup>132</sup> Because neither racial bias nor discrimination impacts these segments’ health or safety, the extent to which Chapter 495 is even capable of promoting the health and safety of *all* Californians is limited.<sup>133</sup> Therefore, while the effects of Chapter 495 will likely reverberate, to an extent, through all segments of California’s population, it will primarily impact immigrant communities because they are the ones who fear reporting crimes and are more likely to experience the effects of profiling.<sup>134</sup>

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126. Al-Khatib, *supra* note 13, at 157.

127. *Id.* at 157–58; Michele Waslin, *Immigration Enforcement by State and Local Police: The Impact on the Enforcers and Their Communities*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 97, 106 (Monica W. Varsanyi ed., 2010).

128. Hing, *supra* note 60, at 307 (“Sanctuary policies . . . promote public safety for everyone.”).

129. Waslin, *supra* note 127, at 106.

130. *Id.*

131. Hing, *supra* note 60, at 307.

132. See Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 *WASH. & LEE J. CIV. RTS. & SOC. JUST.* 25, 43–44 (2011) (“[T]he perception in many poor and minority communities is that the law, as exemplified by the police, is illegitimate, a perception that encourages non-compliance.’ It follows that areas in need of the greatest amount of law enforcement protection are also likely to have a large proportion of residents who distrust law enforcement.”).

133. *Id.*

134. See *id.* at 41 (explaining the problem in Latino communities by noting that “[o]fficers create an environment where Latinos are ‘cast as foreigners,’ and those of the working class in emerging Latino communities are questioned more often since they might bear a resemblance to the ‘stereotypical image of what illegal immigrants supposedly look like.’”).

2. *Can Legislation Rebuild the Trust Between Immigrants and Law Enforcement, and Is Chapter 495, On Its Own, Equipped to Do That?*

To a certain extent, Chapter 495 overlooks the possibility that disentangling police from immigration enforcement might not have any impact on these trust issues.<sup>135</sup> While police involvement in immigration may factor into the mistrust, there are undoubtedly other factors that cause this fear.<sup>136</sup> These may include, for example, the current administration's pledges to crack down on immigration that have saturated the media in recent months and racial bias and hate crimes that have permeated American culture for centuries.<sup>137</sup> The International Association of Chiefs of Police pointed out another, often overlooked, factor that contributes to this mistrust:

[T]he majority now entering [the U.S.] are from developing countries, where the image of law enforcement is drastically different than within the United States. Often the police in some of these countries are perceived as violent, corrupt and ineffective. These perceptions are often transferred to the immigrants' perception of the American police as well.<sup>138</sup>

Their report further noted that language barriers stand as "the strongest obstacle in building cohesive relationships with the immigrant community."<sup>139</sup> Taken together, these factors suggest that rebuilding trust is a nuanced process.<sup>140</sup> Ultimately, while it will be difficult to rebuild the trust between immigrants and

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135. Joel Rose, *In A 'Sanctuary City,' Immigrant Residents Still Fear Police*, NPR ALL THINGS CONSIDERED (Mar. 12, 2017), <http://www.npr.org/2017/03/12/519925246/in-a-sanctuary-city-immigrant-residents-still-fear-police> (on file with *The University of the Pacific Law Review*) (discussing the fact that even in sanctuary cities which have "disentangled" this relationship, immigrants' fear of law enforcement persists).

136. See Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, GUARDIAN (Mar. 23, 2017), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation> (on file with *The University of the Pacific Law Review*) (explaining the "chilling effect" resulting from ICE's recent "aggressive tactics"); see also Vivian Yee, *Immigrants Hide, Fearing Capture on 'Any Corner'*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html> (on file with *The University of the Pacific Law Review*) (discussing the reality that "with the Trump administration intent on curbing illegal immigration . . . that threat, for many people, has now begun to distort every movement").

137. Dart, *supra* note 136; JOHNSON ET AL., *supra* note 34, at 33; Jessica Weiss, *'Go Back to Your Country': Immigrants Report a Wave of Insults and Slurs*, UNIVISION (Feb. 22, 2017) <http://www.univision.com/univision-news/united-states/go-back-to-your-country-immigrants-report-a-wave-of-insults-and-slurs> (on file with *The University of the Pacific Law Review*) (reporting on the wave of anti-immigrant hate crimes and bias incidents since the recent election).

138. INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 21 (2007), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf> (on file with *The University of the Pacific Law Review*).

139. *Id.*

140. Rose, *supra* note 135.

law enforcement because of the many factors affecting this relationship, it is still possible.<sup>141</sup>

Chapter 495 has the potential to make *progress* toward rebuilding trust between immigrants and law enforcement, as some reports suggest that sanctuary policies may have a direct impact on public health and safety via lower crime rates.<sup>142</sup> For example, one study suggested that there are “33.5 fewer crimes committed per 10,000 people in sanctuary counties compared to non-sanctuary counties.”<sup>143</sup> While this report is not determinative of the correlation between crime rates and sanctuary states, it supports the idea that disentangling LEAs from immigration enforcement results in safer communities, which may encourage immigrants to alter their perception of LEAs in sanctuary jurisdictions.<sup>144</sup> That said, after many years of police and ICE entanglement, and in the midst of Trump’s “immigration crackdown,” it is doubtful that one piece of California legislation can rebuild this trust on its own.<sup>145</sup> Ultimately, although Chapter 495 takes a step in the right direction, it is likely not quite enough, on its own, to achieve its goal.<sup>146</sup>

### 3. *Will Chapter 495 Build Trust or Endanger Immigrant Communities by Pushing ICE onto the Streets?*

Warning of the dangerous unintended consequences of the new law, critics of Chapter 495 believe that the measure will actually threaten the safety of local communities and “create more fear . . . by forcing federal immigration operations out of . . . jails and into . . . communities.”<sup>147</sup> The root of these concerns are

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141. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 138, at 21 (highlighting the importance of rebuilding this trust by proposing strategies for law enforcement like daily contact and outreach programs).

142. Gene Demby, *Why Sanctuary Cities Are Safer*, NPR (Jan. 29, 2017), <http://www.npr.org/sections/codeswitch/2017/01/29/512002076/why-sanctuary-cities-are-safer> (on file with *The University of the Pacific Law Review*).

143. Tom Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS, (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> (on file with *The University of the Pacific Law Review*). This study compared “all sanctuary counties to all nonsanctuary counties . . . across a range of social and economic indicators.” *Id.* Sanctuary counties are those that ICE had previously identified “as not willing to accept detainees.” *Id.* The crime data for each of these counties was pulled from the FBI Uniform Crime Reporting Program. *Id.* The study also used coarsened exact matching, or CEM, which “statistically matches sanctuary counties to comparable nonsanctuary counties.” *Id.*

144. *Id.*; Demby, *supra* note 142.

145. Daniel Denvir, *The False Promise of Sanctuary Cities*, SLATE (Feb. 17, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/02/the\\_false\\_promise\\_of\\_sanctuary\\_cities.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_false_promise_of_sanctuary_cities.html) (on file with *The University of the Pacific Law Review*); Rose, *supra* note 135 (reporting that even in jurisdictions with sanctuary policies in place, fear of law enforcement among immigrants persists).

146. Denvir, *supra* note 145.

146. Rose, *supra* note 135.

147. Letter from California Police Chiefs Association to Kevin de Leon, Senate President pro Tempore,

Chapter 495's extensive limitations on an LEA's ability to use money and personnel for immigration enforcement purposes, such as detaining a person on the basis of an ICE hold request or providing release dates to ICE; uses which it was previously permitted to devote resources to.<sup>148</sup> Ultimately, while Chapter 495 will likely hurt immigrant communities by leading to more collateral arrests and frequent ICE raids, that harm will be limited by the lack of available federal resources necessary to conduct those raids.<sup>149</sup>

If Chapter 495 forces ICE to pursue these individuals themselves by going into communities rather than relying on LEAs to cooperate regarding individuals already in custody, the amount of collateral arrests will probably increase.<sup>150</sup> A collateral arrest may occur, for example, when ICE detains an "undocumented individual at the scene of an arrest."<sup>151</sup> The primary concern here is ICE's heightened presence on the street will further reduce the already low trust immigrants have in law enforcement and cause innumerable problems in local communities.<sup>152</sup>

With more ICE agents on the streets, an increasing number of raids are inevitable.<sup>153</sup> As one journalist reports, "In anticipation of [ICE] crackdowns, people say they have stopped driving, stopped shopping, stopped sending remittances to countries of origin."<sup>154</sup> In other sanctuary jurisdictions, increasing "operational activity" is "one of the ways ICE is turning up . . . the heat on local authorities and part of a broader strategy to coerce cooperation."<sup>155</sup> The fear of an ICE raid, where agents storm into your home and take loved ones away, may in reality be even greater than the fear that accompanies seeing a police officer on the street.<sup>156</sup> The chances that an ICE agent will target a person never convicted of a crime will also rise because it will be more difficult for ICE to obtain

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Cal. State Senate (June 6, 2017), <http://www.californiapolicechiefs.org/assets/SB%2054%20Oppose%206.6.pdf> [hereinafter California Police Chiefs Letter] (on file with *The University of the Pacific Law Review*).

148. *Id.*

149. Alejandro Molina & Brenda Gazzar, *How California's 'Sanctuary State' Bill Would Further Limit ICE's Ability to Arrest Immigrants*, L.A. DAILY NEWS (July 21, 2017), <http://www.dailynews.com/general-news/20170721/how-californias-sanctuary-state-bill-would-further-limit-ices-ability-to-arrest-immigrants> (on file with *The University of the Pacific Law Review*); Waslin, *supra* note 127, at 111.

150. California Police Chiefs Letter, *supra* note 147.

151. *Id.*

152. *Id.*

153. *Id.*

154. Delphine Schrank, *Trump's Season of Fear: Inside the Devastation Left by Immigration Raids*, GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/us-news/2017/mar/13/undocumented-immigration-raids-ice-impact> (on file with *The University of the Pacific Law Review*).

155. Maria Santana, *ICE is Targeting 'Sanctuary Cities' with Raids*, CNN (Mar. 25, 2017), <http://www.cnn.com/2017/03/23/politics/sanctuary-city-ice-raids/index.html> (on file with *The University of the Pacific Law Review*).

156. Schrank, *supra* note 154.

custody of those already in local prisons and jails.<sup>157</sup> This injects an element of uneasiness into immigrant communities and, on a macro level, does not necessarily protect the health and safety of these individuals.<sup>158</sup>

Even so, federal resources will undoubtedly limit this potentially detrimental impact.<sup>159</sup> The primary reason federal authorities involved state and local law enforcement in the first place was that they needed resources, manpower, and close ties to the situation on the ground, which they themselves lacked.<sup>160</sup> Disentangling LEAs from federal immigration agencies will shift a significant financial burden onto ICE.<sup>161</sup> As the sanctuary movement spreads throughout the United States, it will stretch federal resources very thin.<sup>162</sup> An exponential increase in ICE raids is likely not a sustainable practice; therefore, the extent to which ICE can actually perform its duties without the resources of state and local LEAs would limit the risks associated with Chapter 495.<sup>163</sup>

*B. Is Chapter 495 a Solution in Search of a Problem, and Will It Actually Promote Public Safety by Safeguarding the State's Limited Resources?*

Chapter 495 aims to increase public safety by allowing local law enforcement to spend their time, energy, and resources protecting everyone in the community (including immigrants) rather than helping enforce federal immigration laws at their own expense.<sup>164</sup> The underlying assumption of Chapter 495 is that LEAs use resources for immigration purposes.<sup>165</sup> The reality is that

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157. See Jennifer Medina & Miriam Jordan, *A Broader Sweep*, N.Y. TIMES (July 21, 2017) <https://www.nytimes.com/interactive/2017/07/21/us/immigration-enforcement-california-trump.html> (on file with *The University of the Pacific Law Review*) (reporting on the prevalence of collateral, “unplanned” arrests that often unfold during ICE raids).

158. Schrank, *supra* note 154.

159. Henry Grabar, *Not in Our Town*, SLATE (Nov. 20, 2016), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2016/11/how\\_cities\\_could\\_thwart\\_donald\\_trump\\_s\\_deportation\\_plan.html](http://www.slate.com/articles/news_and_politics/cover_story/2016/11/how_cities_could_thwart_donald_trump_s_deportation_plan.html) (on file with *The University of the Pacific Law Review*) (“ICE is the largest investigative agency in DHS . . . [b]ut its numbers are tiny compared with the nation’s full-time law enforcement officers.”).

160. Armacost, *supra* note 10, at 1205.

161. Alex Kotlowitz, *The Limits of Sanctuary Cities*, NEW YORKER (Nov. 23, 2016), <http://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities> (on file with *The University of the Pacific Law Review*).

162. *Id.* (“[W]ithout the cooperation of local law enforcement, finding immigrants would be a difficult task”).

163. *Id.*

164. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 7 (June 12, 2017).

165. CAL. GOV’T CODE § 7284.2 (enacted by Chapter 495) (listing the need to shift or redirect California’s resources to matters of “greatest concern to state and local governments”); see also Press Release, Kevin De León, Cal. State Senate, The State of California Will Be Your Wall of Justice (Dec. 7, 2016), <http://sd24.senate.ca.gov/print/news/2016-12-07-senate-leader-de-le%C3%B3n-introduces-bill-%E2%80%9Cfreeze-out-ice%E2%80%9D> [hereinafter December 7, 2016 Press Release] (on file with *The University of the Pacific Law Review*).

California already has many sanctuary policies in place that do significantly similar things as Chapter 495.<sup>166</sup> Still, Chapter 495 is unique because it expands on and unifies these piecemeal local sanctuary policies into one state-wide regulation, making the entire state of California a “sanctuary state.”<sup>167</sup> Currently, Orange County is the only California county that has an active 287(g) agreement with ICE.<sup>168</sup> Further, “none of the sheriffs in California’s 58 counties [are] willing to [honor ICE immigration holds by] hold[ing] inmates past their release dates.”<sup>169</sup> This is largely due to a 2014 federal court decision wherein the court found a violation of Fourth Amendment rights when officers held a woman “in jail for close to 20 hours after her case . . . settled so that ICE could ascertain her immigration status.”<sup>170</sup> Recent statewide legislation, like the TRUST Act, demonstrates California’s shift away from the collaborative approach taken by the federal government.<sup>171</sup>

On the other hand, however, although statewide sanctuary policies already exist, it is difficult to say that Chapter 495 is a solution without a problem.<sup>172</sup> After all, there are still jurisdictions that actively collaborate with ICE in varying capacities.<sup>173</sup> Stanislaus County, for instance, gives ICE agents “unfettered access” to jails, “where they interview inmates and scroll through computer databases.”<sup>174</sup> Therefore, even though California has recently taken strides toward disentangling local and state LEAs from immigration enforcement, various cooperation tactics evidence that those efforts have been insufficient to address the issue.<sup>175</sup> In that sense, Chapter 495 is not a solution in search of a problem because it directs its focus toward the very real problem of local and state LEA involvement with ICE.<sup>176</sup>

Chapter 495 will promote public safety by limiting state spending in this area because it will better equip our law enforcement and provide them with more resources on hand to protect communities from violent criminals.<sup>177</sup> State and

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166. Joel Rubin & Paloma Esquivel, *For Some California Sheriffs, It’s Not Politics Stopping Them From Fully Helping ICE: It’s the Legal Risk*, L.A. TIMES (Mar. 31, 2017), <http://www.latimes.com/local/lanow/la-me-ice-detainers-sheriffs-20170330-story.html> (on file with *The University of the Pacific Law Review*).

167. Ulloa, *supra* note 45.

168. *Fact Sheet for 287(g) Program*, *supra* note 40.

169. Rubin & Esquivel, *supra* note 166.

170. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*1, \*11 (D. Or., Apr. 11, 2014); Molina & Gazzar, *supra* note 149.

171. *Criminal Justice and Immigration Enforcement*, *supra* note 56, at 2594–95.

172. Rubin & Esquivel, *supra* note 166.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Press Release, Kevin De León, Cal. State Senate, California Values Act Heads to Appropriations, Assembly Member Cooper Joins as Principal Co-Author (Mar. 10, 2017), <http://sd24.senate.ca.gov/print/news/2017-03-10-california-values-act-heads-appropriations-assemblymember-cooper-joins->

local LEA involvement in federal immigration enforcement is expensive.<sup>178</sup> ICE does not cover the cost of enforcing its immigration detainers; instead, those costs go to the state or local agency that chooses to help ICE by enforcing its detainers.<sup>179</sup> Chapter 495 also helps limit immigration law's complex legal implications.<sup>180</sup> When LEAs enforce immigration laws, they run the risk of being subject to "civil liability . . . for improper enforcement."<sup>181</sup> The disentanglement required by Chapter 495 would allow LEAs to better manage their risks and eliminate legal costs.<sup>182</sup>

### *C. Is Chapter 495 Preempted by Federal Law?*

Those opposed to sanctuary policies argue that federal law preempts them.<sup>183</sup> The preemption doctrine prevents states from regulating in a field that is under the control of the federal government.<sup>184</sup> Existing federal law prohibits state or local government entities, agencies, officials, and persons from restricting their employees' ability to voluntarily report information regarding a person's immigration status to federal immigration authorities.<sup>185</sup> Chapter 495 may face preemption challenges based on this federal restriction.<sup>186</sup> On a practical level, if a court finds Chapter 495 conflicts with federal law and is preempted, then Chapter 495 must yield to the federal law, meaning a court may invalidate it.<sup>187</sup>

Subsection 1 discusses whether the characterization of Chapter 495 as either a don't-ask or a don't-tell policy influences the preemption analysis.<sup>188</sup>

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principal-co [hereinafter March 10, 2017 Press Release] (on file with *The University of the Pacific Law Review*).

178. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 7 (June 12, 2017) (reporting that "when the Secure Communities program was still active, California taxpayers spent an estimated \$65 million annually to detain people for ICE.").

179. Al-Khatib, *supra* note 13, at 161–62; *see also* 8 C.F.R. § 287.7(e) (2011) ("No detainer issued as a result of a determination made under this chapter . . . shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department" except where an LEA has agreed to temporarily detain an individual at the department's request.).

180. Waslin, *supra* note 127, at 104.

181. Papazian, *supra* note 16, at 287–92.

182. Waslin, *supra* note 127, at 104 (litigation costs); March 10, 2017 Press Release, *supra* note 177.

183. Jennifer L. Gregorin, *Hidden Beneath the Waves of Immigration Debate: San Francisco's Sanctuary Ordinance*, 6 LIBERTY U. L. REV. 175, 189 (2011).

184. Al-Khatib, *supra* note 13, at 140.

185. 8 U.S.C.A. § 1373 (West, Westlaw through P.L. 115–43); *Id.* § 1644 (West, Westlaw through P.L. 115–43).

186. *See* Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1691 (2009) (discussing whether San Francisco's sanctuary policy might be preempted by 8 U.S.C. § 1373); *see also* Hing, *supra* note 60, at 278 (discussing whether §§ 1644 and 1373 may preempt sanctuary policies).

187. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992); Hing, *supra* note 60, at 281.

188. *Infra* Part IV.D.1.

Subsection 2 describes the challenges posed by express preemption.<sup>189</sup> Subsection 3 explores whether federal law preempts Chapter 495 under a field preemption theory.<sup>190</sup> Subsection 4 explores the applicability of conflict preemption.<sup>191</sup> Subsection 5 details the important role of the state's police power in protecting state legislation like Chapter 495 under the Tenth Amendment.<sup>192</sup>

1. *Is Chapter 495 a Don't Ask or a Don't Tell Policy, and Does It Matter?*

While there is no bright-line rule for determining whether the preemption doctrine will invalidate a state or local law, the extent to which legislators will characterize Chapter 495 as a don't-ask as opposed to a don't-tell policy matters, and will be critical to its ability to survive a preemption challenge.<sup>193</sup> *City of New York* and *Sturgeon* demonstrate the diverging outcomes that may unfold depending on whether the state construes a policy as don't-ask or don't-tell.<sup>194</sup> It is important to note that "the federal government has yet to proactively challenge a single don't tell sanctuary law."<sup>195</sup> In *City of New York*, the city initiated litigation, not the federal government.<sup>196</sup> This is instructive insofar as it suggests the federal government is unlikely to institute a legal challenge against such policies.<sup>197</sup>

While people may construe it either way, Chapter 495's language aligns more closely with a don't-ask approach than don't-tell because it does not explicitly prevent communication to ICE regarding a person's immigration status, nor does it prevent using resources to that end.<sup>198</sup> In *City of New York*, the local policy at issue did just that.<sup>199</sup> That said, one could argue that by limiting the extent to which LEAs can use their resources to help with immigration enforcement in other ways (like revealing release dates or home addresses), they are, in effect, operating under a don't-tell policy.<sup>200</sup> On the other hand, that line of reasoning ignores what a don't-tell policy is meant to do: prohibit government employees from disclosing or communicating an individual's *immigration*

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189. *Infra* Part IV.D.2.

190. *Infra* Part IV.D.3.

191. *Infra* Part IV.D.4.

192. *Infra* Part IV.D.5.

193. Hing, *supra* note 60, at 280; Papazian, *supra* note 16, at 295.

194. Papazian, *supra* note 16, at 295.

195. *Id.*

196. *Id.*

197. *Id.*

198. CAL. GOV'T CODE § 7284.6(f) (enacted by Chapter 495); *Id.* § 7284.6(a)(1).

199. *City of New York v. United States*, 971 F. Supp. 789, 791 (S.D.N.Y. 1997).

200. *See* CAL. GOV'T CODE § 7284.6(a)(1)(C)–(E) (enacted by Chapter 495) (preventing local and state LEAs from using resources to communicate the release date or personal information, such as home addresses, to federal immigration enforcement agencies).

information to the federal government.<sup>201</sup> Therefore, we cannot easily construe Chapter 495 as a don't-tell policy because it does not prevent information sharing regarding a person's immigration status.<sup>202</sup>

Chapter 495 does, however, contain an explicit don't-ask provision that forbids state and local LEAs from using resources to *inquire* into an individual's immigration status.<sup>203</sup> Therefore, based on the diverging outcomes between *City of New York* and *Sturgeon*, and because Chapter 495 most closely aligns with a don't-ask policy, Chapter 495 is less vulnerable to a preemption challenge.<sup>204</sup> That said, it is not immune from the possibility of preemption because it concerns a federal matter (immigration).<sup>205</sup>

## 2. *Express Preemption*

Express preemption "requires a clear statement from Congress of its intent to preempt a particular sort of state law."<sup>206</sup> When looking at the plain language of both 8 U.S.C. §§ 1644 and 1373, neither appear to contain any language indicating an intention to preempt state or local laws that limit the use of resources for communications with federal immigration agencies.<sup>207</sup> On the other hand, section 1373 does include the language "notwithstanding any other provision of Federal, State or local law," which may suggest that Congress intended to preempt any state or local laws.<sup>208</sup> The scope of that clause is crucial in assessing whether it expressly preempts Chapter 495.<sup>209</sup>

Because the plain language of Chapter 495 does not explicitly forbid communication of an individual's immigration status, it is not necessarily an obvious express preemption target.<sup>210</sup> Chapter 495 prevents using state resources to communicate release dates and personal information, such as a home or work address.<sup>211</sup> It also does not limit an LEAs ability to relay an individual's criminal history, nor does it restrict the ability to report a person's immigration status to federal agencies.<sup>212</sup>

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201. Papazian, *supra* note 16, at 291–292.

202. CAL. GOV'T CODE § 7284.6(f) (enacted by Chapter 495).

203. *Id.* § 7284.6(a)(1)(A).

204. Papazian, *supra* note 16, at 295.

205. *Id.*

206. Rodríguez, *supra* note 73, at 31, 34.

207. 8 U.S.C.A. § 1644 (West 2017); *Id.* § 1373.

208. *Id.* § 1373(b), (d); Gulasekaram, *supra* note 186, at 1700.

209. Pham, *supra* note 77, at 1392.

210. *Id.* at 1393.

211. CAL. GOV'T CODE. § 7284.6(a)(1) (enacted by Chapter 495).

212. *Id.* § 7284.6(f); *Id.* § 7284.6(b)(1).

On the other hand, Chapter 495 does contain a don't-ask provision that prevents LEAs from using resources to inquire into an individual's immigration status.<sup>213</sup> If courts interpret a state law that prohibits "local government employees from inquiring about citizenship . . . as restricting their ability to cooperate with federal immigration authorities" based on the idea that it bars state and local LEAs "from obtaining the information that makes their cooperation possible," then federal law could preempt Chapter 495 on that ground.<sup>214</sup> A narrow reading may stretch the plain language of the federal law too far.<sup>215</sup> Therefore, the lack of clarity relating to Congress' intent on this issue, coupled with "the starting assumption . . . that a local law is valid unless it is 'the clear and manifest purpose of Congress' to preempt it," suggests that preemption is unlikely on this basis.<sup>216</sup>

### 3. Field Preemption

When Congress determines it exclusively governs a field, states may not regulate conduct in that field.<sup>217</sup> As previously noted, the federal government has traditionally exercised exclusive authority over immigration law.<sup>218</sup> Despite this, however, state and local actors have undoubtedly played a key role in the enforcement of immigration law.<sup>219</sup> The law even permits them to perform the same functions as an immigration officer in limited circumstances.<sup>220</sup> Therefore, while the federal government stands at the frontline of immigration enforcement, it is not alone.<sup>221</sup> Enforcing immigration laws on the ground, however, is different from regulation.<sup>222</sup> While enforcing immigration laws involves LEAs to a certain extent, they are not authorized to pass laws regulating the flow of people into and out of the United States.<sup>223</sup> The federal government may consider

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213. *Id.* § 7284.6(a)(1)(A).

214. Pham, *supra* note 77, at 1393.

215. Hing, *supra* note 60, at 281 ("Congressional intent must be clear to find preemption because of a desire, stemming from federalism concerns, to minimize invalidation of state and local laws.").

216. Pham, *supra* note 77, at 1392; *see also* Rodríguez, *supra* note 73, at 34 (explaining the need for a clear expression of Congressional intent to find preemption).

217. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

218. *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

219. *Armacost*, *supra* note 10, at 1206.

220. *Arizona v. United States*, 567 U.S. at 408; *see* 8 U.S.C.A. § 1357(g) (West 2006) (establishing the 287(g) program, which authorizes the Attorney General to enter into formal agreements with state or local governments to allow police officers to perform the functions of immigration officers).

221. *Armacost*, *supra* note 10, at 1206.

222. *Kim*, *supra* note 77, at 246 ("[E]stablishing the regulatory regime for the entry and removal of aliens is exclusively a federal power . . . [h]owever, enforcement of the federal immigration law need not be a solely federal activity.").

223. *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The

this delegation of power to the states as simply permitting limited state participation in the federal system rather than authorizing states to exercise independent authority in that field without any role for the federal government.<sup>224</sup> In that sense, the federal government certainly has a strong argument that it exclusively governs the field of immigration law and that federal laws should preempt all state laws trying to regulate immigration.<sup>225</sup>

On the other hand, however, there is a real question about whether Chapter 495 regulates immigration or merely sets limits on how state resources should be spent.<sup>226</sup> As the Supreme Court pointed out in *De Canas*, immigration regulation 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.”<sup>227</sup> From the plain language of Chapter 495, it certainly does not regulate immigration, as the Supreme Court defines the term.<sup>228</sup> Instead, it appears to serve important state and local interests: public safety and allocating public resources.<sup>229</sup> The new law will do that by indirectly protecting immigrant communities from crime within the United States—not by regulating whether they may remain in the country.<sup>230</sup> Further, the Supreme Court has expressed distaste for federal attempts to dictate how states spend their money and manage police force priorities.<sup>231</sup> Therefore, if we accept that sanctuary policies like Chapter 495 are indeed “about public safety and represent economic decisions on how to spend policing resources and are not about regulating immigrants,” they appear to escape the clutches of preemption.<sup>232</sup>

#### 4. Conflict Preemption

Conflict preemption exists where it is impossible to comply with both federal and state laws, and where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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authority to control immigration – to admit or exclude aliens – is vested solely in the Federal Government.”).

224. Kim, *supra* note 77, at 251, 254.

225. *Id.*

226. Lilia Luciano, *Is a ‘Sanctuary State’ Constitutional?*, KXTV (Apr. 7, 2017), <http://www.abc10.com/news/investigations/is-a-sanctuary-state-constitutional/429430584> (on file with *The University of the Pacific Law Review*).

227. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

228. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 9 (June 12, 2017) (emphasizing that “this bill seeks to place limits on the use of law enforcement resources to investigate or detain persons for federal immigration enforcement purposes,” and says nothing about the bill’s intent on regulating the flow of people in and out of the state or country).

229. SB 54, 2017 Leg., 2016–2017 Sess., § 1.

230. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 9 (June 12, 2017).

231. Gulasekaram & Villazor, *supra* note 186, at 1702.

232. Hing, *supra* note 60, at 290.

Congress.”<sup>233</sup> Chapter 495’s plain language suggests it is possible to comply with both federal and state laws.<sup>234</sup> This is because while Chapter 495 does limit an LEA’s ability to use state and local resources to collaborate with ICE, it does not limit an LEA’s ability to voluntarily communicate regarding an individual’s immigration status.<sup>235</sup> Instead, it prevents LEAs from using state resources to ask a person about their immigration status, honor ICE hold requests, provide information relating to release dates and personal data that is not publicly available, and enter into 287(g) agreements.<sup>236</sup> Because these restrictions do not apply to communications with ICE regarding a person’s immigration status, Chapter 495 does not appear to conflict with the requirements set forth in sections 1644 and 1373.<sup>237</sup>

That said, the question of whether Chapter 495 impedes a federal objective carries with it a significant degree of subjectivity and discretion.<sup>238</sup> Courts may narrowly construe federal objectives to avoid preemption by interpreting the “state goal as different from or consistent with the federal purpose.”<sup>239</sup> Alternatively, courts could broadly define the federal objective, resulting in preemption of a wider range of state laws.<sup>240</sup> This discretion will be left to the court if a party brings a preemption challenge.<sup>241</sup>

##### 5. Generally, Federal Law Should Not Supersede State Police Powers

In *Arizona v. United States*, the Supreme Court reiterated that federal law should not supersede the “historic police powers of the States” absent a clear, contrary intention of Congress.<sup>242</sup> The stated focal points of sanctuary policies like Chapter 495 are public safety and prioritizing the allocation of public funds and resources.<sup>243</sup> Sanctuary policies are not about regulating immigration.<sup>244</sup> If federal law preempts sanctuary policies like Chapter 495, “local governments

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233. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

234. CAL. GOV’T CODE § 7284.6(f) (enacted by Chapter 495) (providing that nothing in Chapter 495 should be construed as preventing compliance with federal law mandating communication of immigration status).

235. *Id.* § 7284.6(f); *Id.* § 7284.6(a)(1).

236. *Id.* § 7284.6(a)(1).

237. 8 U.S.C.A. § 1373 (West 2017); *Id.* § 1644.

238. Hing, *supra* note 60, at 290.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Arizona v. United States*, 567 U.S. 387, 400 (2012).

243. Hing, *supra* note 60, at 263.

244. *Id.*

could experience substantial harm to their public safety police power.”<sup>245</sup> Preemption of sanctuary policies could threaten public safety because without such policies, “immigrants, already vulnerable to extortion and organized crime, may refuse to report crimes or participate in criminal investigations for fear of the immigration consequences.”<sup>246</sup> Therefore, because of the strength of this police power defense to preemption challenges and because judicial precedent recognizes that police powers belong to the *states*, California has a strong argument that Chapter 495 is not preempted.<sup>247</sup> In its entirety, legislators framed Chapter 495 in such a way that it may avoid preemption problems due to its careful wording and reiterated purposes of public safety and prioritizing resources.<sup>248</sup>

*D. Is Chapter 495 Merely an Exercise of State Sovereignty Under the Tenth Amendment?*

On the other side of the preemption argument are those who contend that sanctuary policies are merely an exercise of state sovereignty under the Tenth Amendment.<sup>249</sup> Along this thread, local policing, public safety, and the health of Californians are matters that should be left to the state and not to the federal government.<sup>250</sup> The anti-commandeering doctrine is the root of these concerns and provides that it is unconstitutional for a federal law to intrude into an area of state sovereignty (and vice versa).<sup>251</sup> As interpreted by jurisprudence, it prohibits the federal government from forcing states or localities to regulate a specific issue.<sup>252</sup> As one scholar points out, “If the irreducible sovereignty of states . . . means anything, it must at least mean that states . . . can decide how to distribute their revenues.”<sup>253</sup> This argument rests on the (correct) assumption that Chapter 495 is about public safety, local policing, and the health of Californians and not about regulating immigration.<sup>254</sup>

In a letter sent in support of Chapter 495, over 100 law professors across the country agreed that “there is ‘no better example of the police power . . . than the suppression of violent crime and vindication of its victims.’ Policing is squarely

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245. Pham, *supra* note 77, at 1399.

246. *Id.*

247. *Id.* at 1398–99.

248. Hing, *supra* note 60, at 296.

249. Gregorin, *supra* note 183, at 189.

250. Cimini, *supra* note 79, at 139.

251. Hing, *supra* note 60, at 273.

252. Cimini, *supra* note 79, at 141; *see also* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

253. Gulasekaram & Villazor, *supra* note 186, at 1701–02.

254. *Id.*

within a State's 'proper sphere of authority,' and the California Values Act 'seeks to ensure effective policing' and 'protect the safety' of Californians."<sup>255</sup> Chapter 495 does not regulate immigrants or the rights of non-citizens.<sup>256</sup> Instead, legislators crafted it in a way that focuses on a desire to have control over how states expend state and local resources, to protect the public (which includes immigrants) by building trust, and to encourage law enforcement to focus on making their communities safer.<sup>257</sup> Because of this focus, concerns revolving around anti-commandeering are proper.<sup>258</sup>

The complaint filed in *City and County of San Francisco v. Donald Trump* emphasized that sanctuary policies are simply an exercise of state sovereignty to develop policies to protect their communities and ensure the safety and well-being of all.<sup>259</sup> In Judge Orrick's decision, he noted that it was a blatant violation of the prohibition against commandeering established by the Tenth Amendment for the federal government to pull grants from jurisdictions simply because they do not adopt and honor *voluntary* federal programs.<sup>260</sup> This decision certainly bolsters the idea that sanctuary policies like Chapter 495 are merely an exercise of state sovereignty and, therefore, the federal government should respect them.<sup>261</sup> As evidenced by Chapter 495's creation of immigrant safe zones, the law primarily "seek[s] to ensure that immigrant community members can avail themselves of public services and schools without fear."<sup>262</sup> This purpose aligns neatly with the general police powers that both the Supreme Court and the Constitution have recognized belong to the states.<sup>263</sup>

*E. What is the Fiscal Impact of Chapter 495, and What Does California's Wallet Have to Lose?*

Many are concerned that Chapter 495 will result in the loss of significant amounts of federal funding.<sup>264</sup> President Trump exacerbated this concern with Executive Order 13768, wherein he pledged to rescind federal funding for

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255. Letter from Christopher Lasch et al., to Kevin de Leon, Senate President pro Tempore, Cal. State Senate 3 (May 17, 2017) [hereinafter Letter from Law Professors] (on file with *The University of the Pacific Law Review*).

256. *Id.*

257. *Id.*

258. Gulasekaram & Villazor, *supra* note 186, at 1701–02.

259. Complaint for Declaratory and Injunctive Relief at 3, *City and County of San Francisco v. Donald Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

260. *County of Santa Clara v. Donald J. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at \*4, \*24 (N.D. Cal. Apr. 25, 2017) (order granting preliminary injunction).

261. *Id.*

262. Letter from Law Professors, *supra* note 255.

263. *John Thorpe v. Rutland and Burlington Railroad Co.*, 27 Vt. 140, 150 (1855).

264. Ulloa, *supra* note 45.

sanctuary jurisdictions across the country.<sup>265</sup> In response to this order, a federal district court judge issued a nationwide injunction to prevent this pledge.<sup>266</sup> The recent injunction has largely put to rest any immediate concerns over federal funding cuts that would inevitably reach California in the wake of Chapter 495.<sup>267</sup> That said, if the administration can find a way to bring these threats to fruition, Chapter 495 places a huge target on California's back.<sup>268</sup> Nationally, it could result in a loss of \$870 million this year in sanctuary cities throughout 32 states if the federal government is permitted to enforce the order.<sup>269</sup> California expects to receive \$105 billion from the federal government next year.<sup>270</sup> This is about one-third of the state's entire budget.<sup>271</sup> Even if a court lifts the injunction and enforcement of the order proceeds, it remains unclear precisely what type of federal funding the executive order would withhold from California.<sup>272</sup> The most likely scenario would be that it withholds "federal funds related to immigration enforcement," which ultimately is a relatively small amount and accounts for roughly one five-thousandth of the overall state budget.<sup>273</sup>

## V. CONCLUSION

For decades, disagreements over immigration enforcement have permeated nearly every level and branch of government.<sup>274</sup> A tidal wave of federal, state, and local legislation and policies that appear to regulate immigration has revealed a deep, foundational divide among the American people and attracted the attention of millions.<sup>275</sup> This conflict is symptomatic of a "clash of sovereignties

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265. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

266. *County of Santa Clara v. Donald J. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at \*1 (N.D. Cal. Apr. 25, 2017) (order granting preliminary injunction).

267. Sara Kimberlin, *Federal Funds for Sanctuary Cities Protected for Now – Though Limited Grants Could Still Be at Risk*, CAL. BUDGET & POL. CTR. (Apr. 28, 2017), <http://calbudgetcenter.org/blog/federal-funds-sanctuary-cities-protected-now-through-limited-grants-stil-risk/> [hereinafter April 28, 2017 Kimberlin] (on file with *The University of the Pacific Law Review*).

268. Sara Kimberlin, *Sanctuary Cities and Federal Funds: How Will California Be Affected?*, CAL. BUDGET & POL. CTR. (Mar. 13, 2017), <http://calbudgetcenter.org/blog/sanctuary-cities-federal-funds-will-california-affected/> [hereinafter March 13, 2017 Kimberlin] (on file with *The University of the Pacific Law Review*).

269. Semotiuk, *supra* note 90.

270. SCOTT GRAVES, CAL. BUDGET & POL. CTR., FACT SHEET: FEDERAL FUNDS COMPRISE OVER ONE-THIRD OF CALIFORNIA'S STATE BUDGET, SUPPORTING A BROAD RANGE OF PUBLIC SERVICES AND SYSTEM (2017), available at [http://calbudgetcenter.org/wp-content/uploads/Fact-Sheet\\_Federal-Funds-Comprise-Over-One-Third-Californias-Budget.pdf](http://calbudgetcenter.org/wp-content/uploads/Fact-Sheet_Federal-Funds-Comprise-Over-One-Third-Californias-Budget.pdf) (on file with *The University of the Pacific Law Review*).

271. Kimberlin, *supra* note 268.

272. *Id.*

273. *Id.* (reporting that "funds for immigration detention total only \$50.6 million, or one-five-thousandth of the overall state budget.").

274. Amdur, *supra* note 20, at 88.

275. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86

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in which the relationship between noncitizens and subnational government depends upon the survival or demise of the age-old rule of exclusive federal control of immigration.”<sup>276</sup> Chapter 495 represents California’s attempt to revive the separation between the proper roles of state and federal actors in enforcing immigration laws and ensure that state resources “are not used to fuel the mass deportations” that the current Administration pledges to pursue.<sup>277</sup>

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N.C. L. REV. 1557, 1559 (2008).

276. *Id.* at 1616.

277. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 54, at 2 (Jan. 30, 2017).