

Guidance Concerning Local Authority Participation In Immigration Enforcement And Model Sanctuary Provisions



New York State Attorney General
Eric T. Schneiderman

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&

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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

EXECUTIVE OFFICE

January 19, 2017

Dear Colleague:

As the chief law enforcement officer in our state, I have heard from many New Yorkers who have questions about what this week's transfer of power in Washington, D.C. means for federal immigration enforcement. Local elected officials and law enforcement agencies rightly want to promote public safety while protecting vulnerable communities. I write today to set forth what the US Constitution and federal law currently require and describe concrete steps that local governments and law enforcement agencies can immediately take to achieve these important dual objectives.

The enclosed *Guidance Concerning Local Authority Participation In Immigration Enforcement and Model Sanctuary Provisions* first describes the legal landscape governing local jurisdictions' involvement in immigration investigation and enforcement, so that local officials understand the extent to which they may decline to participate in such activities. The *Guidance* follows the letter that I sent on December 2, 2014 to police chiefs and sheriffs throughout the state, but provides much greater detail and context for law enforcement officials and local policymakers. The *Guidance* also provides model language that localities can voluntarily enact—consistent with current federal law—to limit law enforcement and local agency participation in federal immigration activities. The model language is based on an extensive review of provisions from the numerous states, cities, and towns around the country—including many in New York State—that have already have acted to protect this vulnerable population.

The Attorney General's Office recognizes that by protecting the rights and well-being of immigrant families, we build trust in law enforcement and other public agencies, thus enhancing public safety for all. As you know, justice cannot be served when a victim of domestic violence or a witness to a shooting does not call the police because she fears that doing so will attract the attention of officials who wish to deport her family members. That's why standing together in this time of uncertainty is our most effective tool for keeping our communities safe.

Sincerely yours,

ERIC T. SCHNEIDERMAN

GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS

PART I: PURPOSE AND PRINCIPLES

The purpose of this guidance is two-fold: (1) to describe for local governments in New York State the legal landscape governing the participation of local authorities in immigration enforcement; and (2) to assist local authorities that wish to become “sanctuary” jurisdictions by offering model language that can be used to enact local laws or policies that limit participation in immigration enforcement activities.¹

As the United States Supreme Court recognized in *Arizona v. United States*, “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States.”² In addition, undocumented aliens—like other New Yorkers—are afforded certain rights by the New York State and United States Constitutions. As explained in detail in Part II, local law enforcement agencies (“LEAs”) retain significant discretion regarding whether and how to participate in federal immigration enforcement. LEAs nonetheless must adhere to the requirements and prohibitions of the New York State and United States Constitutions and federal and state law in serving the public, regardless of whether an individual is lawfully present in the U.S.

In light of concerns expressed by many local governments about protecting immigrants’ rights while appropriately aiding federal authorities, Part III of this guidance offers model language that can be used to enact laws and policies on how localities can and should respond to federal requests for assistance with immigration enforcement. Several states and hundreds of municipalities—including New York City and other local governments throughout New York State—have enacted sanctuary laws and policies that prohibit or substantially restrict the involvement of state and local law enforcement agencies with federal immigration enforcement. See Appendix B. The Office of the Attorney General believes that effective implementation of the policies set forth in this guidance can help foster a relationship of trust between law enforcement officials and immigrants that will, in turn, promote public safety for all New Yorkers.

This guidance recommends eight basic measures:

1. LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

¹ “Sanctuary” is not a legal term and does not have any fixed or uniform legal definition, but it is often used to refer to jurisdictions that limit the role of local law enforcement agencies and officers in the enforcement of federal immigration laws.

² 132 S. Ct. 2492, 2505 (2012) (citation omitted).

2. Absent a judicial warrant, LEAs should honor U.S. Immigration and Customs Enforcement (“ICE”) or Customs and Border Protection (“CBP”) detainer requests only in limited, specified circumstances.
3. Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.
4. LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.
5. LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.
6. Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.
7. Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.
8. LEAs should collect and report data to the public regarding detainer and notification requests from ICE or CBP in order to monitor their compliance with applicable laws.

As explained in Part II below, state and federal law permit localities to adopt these proposed measures.

PART II: LAWS GOVERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT

A. The Tenth Amendment to the U.S. Constitution

The Tenth Amendment to the U. S. Constitution³ limits the federal government’s ability to mandate particular action by states and localities, including in the area of federal immigration law enforcement and investigations. The federal government cannot “compel the States to enact or administer a federal regulatory program,”⁴ or compel state employees to participate in the administration of a federally enacted regulatory scheme.⁵ Importantly, these Tenth Amendment protections extend not only to states but to localities and their employees.⁶ *Voluntary* cooperation with a federal scheme does not present Tenth Amendment issues.⁷

B. The N.Y. Constitution and Home Rule Powers

Under the home rule powers granted by the New York State Constitution,⁸ as implemented by the Municipal Home Rule Law,⁹ a local government may adopt a local law relating to the “government, protection, order, conduct, safety, health and well-being of persons” therein, as long as its provisions are not inconsistent with the state constitution or a general state law.¹⁰

The model provisions for localities outlined in Part III are consistent with both the state constitution and existing state law.

³ The Tenth Amendment to the United States Constitution provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., Am. X.

⁴ *New York v. United States*, 505 U.S. 144, 188 (1992). The compelled conduct invalidated in *New York v. United States* was a federal statutory requirement that States enact legislation providing for the disposal of their radioactive waste or else take title to that waste. *See id.* at 152-54.

⁵ *Printz v. United States*, 521 U.S. 898, 935 (1997). The compelled conduct invalidated in *Printz* was the Brady Handgun Violence Prevention Act’s requirement that state and local law enforcement officers perform background checks on prospective firearm purchasers. *See id.* at 903-04.

⁶ *See id.* at 904-05 (allowing county-level law enforcement officials to raise Tenth Amendment claim); *see also Lomont v. O’Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002) (same); *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) (city may raise a Tenth Amendment claim), *cert. denied*, 528 U.S. 1115 (2000).

⁷ *See Lomont*, 285 F.3d at 14.

⁸ N.Y. Const., Art. IX, § 2(c)(ii)(10).

⁹ Municipal Home Rule Law § 10(1)(ii)(a)(12).

¹⁰ *See, e.g., Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015).

C. Laws Governing Treatment of ICE and CBP Detainer Requests

ICE and CBP have a practice of issuing detainer or immigration-hold requests to LEAs, asking that the LEA keep an individual in its custody for up to 48 hours beyond that individual's normal release date (i.e., the date the individual is scheduled for release in whatever matter brought that person into the LEA's custody) while ICE determines whether to take custody of the individual to pursue immigration enforcement proceedings. LEAs have the authority to honor or decline an ICE or CBP request to detain, transfer, or allow access to any individual within their custody for immigration enforcement purposes. As the Attorney General's December 2, 2014 letter to police chiefs and sheriffs across New York State explained, an LEA's compliance with ICE detainers or requests for immigration holds is *voluntary*—not mandatory—and compliance with such requests remains at the discretion of the LEA.¹¹

This guidance recommends that LEAs honor ICE or CBP detainers or requests for immigration holds only when (1) ICE or CBP presents a judicial warrant or (2) there is probable cause to believe that the individual committed a limited number of criminal offenses, including terrorism related offenses. *See infra* Part III, Objective 2. Such an approach promotes public safety in a manner that also respects the constitutional rights of individuals and protects LEAs from potential legal liability.

All LEAs in New York State must comply with the Fourth Amendment to the U.S. Constitution's prohibition on unreasonable searches and seizures, as well as with the similar provision in Article I, § 12 of the New York State Constitution.¹² This mandate does not change simply because ICE or CBP has issued a detainer request to an LEA. Should an LEA choose to comply with an ICE or CBP detainer request and hold an individual beyond his or her normal release date, this constitutes a new "seizure" under the Fourth Amendment. That new seizure must meet all requirements of the Fourth Amendment, including a showing of probable cause that the individual committed a criminal offense.¹³

A judicial warrant would fulfill the Fourth Amendment's requirements. Absent a judicial warrant, however, further detention is permissible only upon a showing of probable cause that

¹¹ See Letter from New York Attorney General Eric T. Schneiderman to New York State Police Chiefs and Sheriffs (Dec. 2, 2014) (available at https://ag.ny.gov/pdfs/AG_Letter_And_Memo_Secure_Communities_12_2.pdf).

¹² Article I, § 12 of the New York State Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹³ *Cf. Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure "can become unlawful if it is prolonged beyond the time reasonably required" to achieve its purpose); *see also Dunaway v. New York*, 442 U.S. 200, 213 (1979) (noting general rule that "Fourth Amendment seizures are 'reasonable' only if based on probable cause").

the individual committed a crime or that an exception to the probable cause requirement applies.¹⁴

The mere fact that an individual is unlawfully in the U.S. is not a criminal offense.¹⁵ Therefore, unlawful presence in the U.S., by itself, does not justify continued detention beyond that individual's normal release date. This applies even where ICE or CBP provide an LEA with administrative forms that use terms such as "probable cause" or "warrant."¹⁶ A determination of whether the LEA had probable cause to further detain an individual will turn on all the facts and circumstances, not simply words that ICE or CBP places on its forms.

Accordingly, in several different lawsuits, federal courts have held that an LEA violated the Fourth Amendment rights of an individual whom the LEA held past his or her normal release date in response to an ICE detainer request.¹⁷ The courts reasoned that the ICE detainer requests did not constitute probable cause to believe that the individual had committed a crime; therefore further detention was unconstitutional. Indeed, LEAs that detain individuals in the absence of a judicial warrant or probable cause may be liable for monetary damages.¹⁸ For these reasons, this guidance recommends that LEAs respond to ICE or CBP detainer requests only when they are accompanied by a judicial warrant, or in other limited circumstances in which there is probable cause to believe a crime has been committed.

D. Laws Governing Information Sharing with Federal Authorities

In addition to issuing detainer requests, ICE and CBP have historically sought information about individuals in an LEA's custody. For example, ICE may request notification of an individual's release date, time, and location to enable ICE to take custody of the individual upon release.

¹⁴ See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975).

¹⁵ See *Arizona*, 132 S. Ct. at 2505.

¹⁶ For example, a "Warrant of Removal" is issued by immigration officials, and not by a neutral fact-finder based on a finding of probable cause that the individual committed a crime. See 8 C.F.R. § 241.2. In addition, DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF>, includes a check-box for ICE to designate that "Probable Cause Exists that The Subject is a Removable Alien." It is not a crime to be in the U.S. unlawfully. See *supra* at 4. Thus, ICE's checking of a "probable cause" box on the I-247D does not constitute probable cause to believe that an individual has committed a crime, and cannot on its own justify continued detention.

¹⁷ See, e.g., *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013); *Miranda-Olivares v. Clackamas Cnty.*, 12-CV-02317, 2014 U.S. Dist. LEXIS 50340, at *32-33 (D. Or. April 11, 2014); see also *Gerstein*, 420 U.S. at 111-12 (discussing underlying basis of Fourth Amendment's probable cause requirement).

¹⁸ See, e.g., *Santos*, 725 F.3d at 464-66, 470 (holding that municipality was not entitled to qualified immunity in § 1983 lawsuit seeking, *inter alia*, compensatory damages, where deputies violated arrestee's constitutional rights by detaining her solely on suspected civil violations of federal immigration law).

This guidance recommends that, unless presented with a judicial warrant, LEAs should not affirmatively respond to ICE or CBP requests for sensitive information that is not generally available to the public, such as information about an individual’s release details or home address. *See infra* Part III, Objective 3. This approach enables LEAs to protect individual privacy rights and ensure positive relationships with the communities they serve, which in turn promotes public safety.

(1) 8 U.S.C. § 1373 and the Tenth Amendment

Federal law “does not require, in and of itself, any government agency or law enforcement official to communicate with [federal immigration authorities].”¹⁹ Rather, federal law limits the ability of state and local governments to enact an outright ban on sharing certain types of information with federal immigration authorities. Specifically, 8 U.S.C. § 1373 provides that state and local governments *cannot prohibit* employees or entities “from sending to, or receiving from, [federal immigration authorities] information regarding *the citizenship or immigration status, lawful or unlawful, of any individual.*”²⁰ In addition, federal law bars restrictions on “exchanging” information regarding “*immigration status*” with “any other Federal, State, or local government entity” or on “maintaining” such information.²¹ By their own language, these laws apply only to information regarding an individual’s “citizenship or immigration status.”

Section 1373 thus does not impose an affirmative mandate to share information—nor could it, for the reasons discussed below. Instead, this law simply provides that localities may not forbid or restrict their employees from sharing information regarding an individual’s “citizenship or immigration status.”²² Nothing in Section 1373 restricts a locality from declining to share other information with ICE or CBP, such as non-public information about an individual’s release, her next court date, or her address.

In addition, Section 1373 places no affirmative obligation on local governments to *collect* information about an individual’s immigration status. Thus, local governments can adopt

¹⁹ H.R. Rep. No. 104-725, Subtitle B, § 6, at 383 (1996).

²⁰ 8 U.S.C. § 1373(a)-(b) (emphasis added).

²¹ 8 U.S.C. § 1373(b) (emphasis added).

²² It should be noted that the U.S. Department of Justice’s Office of the Inspector General, which monitors compliance with various federal grant programs, has interpreted Section 1373 to preclude not just express restrictions on information disclosure, but also “actions of local officials” that result in “restrictions on employees providing information to ICE.” *See* United States Department of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), at 7 n.9 (available at <https://oig.justice.gov/reports/2016/1607.pdf>).

policies prohibiting their officers and employees from inquiring about a person's immigration status except where required by law.²³

The Tenth Amendment may further limit Section 1373's reach. The Tenth Amendment's reservation of power to the states prohibits the federal government from "compel[ling] the States to enact or administer a federal regulatory program" or "commandeering" state government employees to participate in the administration of a federally enacted regulatory scheme.²⁴ As noted above, these Tenth Amendment protections extend to localities and their employees.

Although the United States Court of Appeals for the Second Circuit has rejected a facial Tenth Amendment challenge to Section 1373, that court has recognized that a city may be able to forbid voluntary information sharing where such information sharing interferes with the operations of state and local government.²⁵ As the Second Circuit has observed, "[t]he obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved," and "[p]reserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees."²⁶ Accordingly, the Tenth Amendment may be read to limit the reach of Section 1373 where a state or locality can show that the statute creates "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees"—such as the impairment of the entity's ability to collect information necessary to its functioning—"if some expectation of confidentiality is not preserved."²⁷

Some jurisdictions have adopted policies expressly restricting the disclosure of immigration-status information to any third parties, including federal authorities, on the grounds that confidentiality is necessary to gather this information and the information is crucial to various governmental functions. For these reasons, New York City, for example, prohibits its employees from "disclos[ing] confidential information"—including information relating to "immigration status"—except under certain circumstances (e.g., suspicion of illegal activity unrelated to

²³ Under a New York City Executive Order, for example, officers and employees (other than law enforcement officers) are not permitted to inquire about a person's immigration status "unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of . . . services; or (2) Such officer or employee is required by law to inquire about such person's immigration status." N.Y.C. Exec. Order No. 41, § 3(a) (2003).

²⁴ *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 916.

²⁵ *City of New York*, 179 F.3d at 35-37.

²⁶ *Id.*

²⁷ *Id.* at 36, 37.

undocumented status or the investigation of potential terrorist activity), or if “such disclosure is required by law.”²⁸

(2) Freedom of Information Law

Disclosure of information held by the government is also governed by New York’s Freedom of Information Law (“FOIL”). While FOIL generally requires state agencies to make publicly available upon request all records not specifically exempt from disclosure by state or federal statute,²⁹ FOIL also mandates that an agency withhold such records where disclosure would “constitute an unwarranted invasion of personal privacy.”³⁰ Non-public information about an individual, such as home address, date and place of birth, or telephone number, would likely be exempt from disclosure on personal privacy grounds.³¹

²⁸ N.Y.C. Exec. Order No. 41, Preamble, § 2 (2003).

²⁹ Public Officers Law § 87(2).

³⁰ *Id.* § 89(2)(b); *see also In re Massaro v. N.Y. State Thruway Auth.*, 111 A.D.3d 1001, 1003-04 (3d Dep’t 2013) (records containing employee names, addresses, and Social Security numbers subject to personal privacy exemption under FOIL).

³¹ These examples are illustrative, not exhaustive.

PART III: MODEL SANCTUARY PROVISIONS³²

This Part describes eight core objectives and proposes model language that jurisdictions can use to enact local laws and/or policies to achieve these objectives.

1. Objective: LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

Model Language:

- (a) [The LEA] shall not stop, question, interrogate, investigate, or arrest an individual based solely on any of the following:
 - (i) Actual or suspected immigration or citizenship status; or
 - (ii) A “civil immigration warrant,” administrative warrant, or an immigration detainer in the individual’s name, including those identified in the National Crime Information Center (NCIC) database.
- (b) [The LEA] shall not inquire about the immigration status of an individual, including a crime victim, a witness, or a person who calls or approaches the police seeking assistance, unless necessary to investigate criminal activity by that individual.
- (c) [The LEA] shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law--whether pursuant to Section 1357(g) of Title 8 of the United States Code or under any other law, regulation, or policy.

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Model Language:

[The LEA] may respond affirmatively to a “civil immigration detainer” from ICE or CBP to detain or transfer an individual for immigration enforcement or investigation purposes for up to 48 hours ONLY IF the request is accompanied by a judicial warrant,

- (i) EXCEPT THAT local police may detain a person for up to 48 hours on a “civil immigration detainer” in the absence of a judicial warrant IF

³² See Appendix A for definitions of key terms used in this Part.

See Appendix B for a compilation of states and localities with similar provisions.

- (1) there is probable cause to believe that the individual has illegally re-entered the country after a previous removal or return as defined by 8 U.S.C. § 1326 and (2) the individual has been convicted at any time of (i) a specifically enumerated set of serious crimes under the New York Penal Law (e.g., Class A felony, attempt of a Class A felony, Class B violent felony, etc.)³³ or (ii) a federal crime or crime under the law of another state that would constitute a predicate felony conviction, as defined under the New York Penal Law, for any of the preceding felonies; or
- there is probable cause to believe that the individual has or is engaged in terrorist activity.

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Model Language:

- (a) [The LEA] may respond affirmatively to an ICE or CBP request for non-public information about an individual—including but not limited to non-public information about an individual’s release, home address, or work address—**ONLY IF** the request is accompanied by a judicial warrant,
- (i) EXCEPT THAT nothing in this law prohibits any local agency from:
- sending to or receiving from any local, state, or federal agency—as per 8 U.S.C. § 1373—(i) information regarding an individual’s country of citizenship or (ii) a statement of the individual’s immigration status; or
 - disclosing information about an individual’s criminal arrests or convictions, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order; or
 - disclosing information about an individual’s juvenile arrests or delinquency or youthful offender adjudications, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order.
- (b) [The LEA] shall limit the information collected from individuals concerning immigration or citizenship status to that necessary to perform agency duties and

³³ See, e.g., N.Y.C. Admin. Code § 14-154(a)(6) for a list of designated felonies in New York City’s law.

shall prohibit the use or disclosure of such information in any manner that violates federal, state, or local law.

4. **Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.**

Model Language:

[The LEA] shall not provide ICE or CBP with access to an individual in their custody or the use of agency facilities to question or interview such individual if ICE or CBP's sole purpose is enforcement of federal immigration law.

5. **Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.**

Model Language:

- (a) [The LEA] shall not delay bail and/or release from custody upon posting of bail solely because of (i) an individual's immigration or citizenship status, (ii) a civil immigration warrant, or (iii) an ICE or CBP request—for the purposes of immigration enforcement—for notification about, transfer of, detention of, or interview or interrogation of that individual.
- (b) Upon receipt of an ICE or CBP detainer, transfer, notification, interview or interrogation request, [the LEA] shall provide a copy of that request to the individual named therein and inform the individual whether [the LEA] will comply with the request before communicating its response to the requesting agency.
- (c) Individuals in the custody of [the LEA] shall be subject to the same booking, processing, release, and transfer procedures, policies, and practices of that agency, regardless of actual or suspected citizenship or immigration status.

6. **Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.**

Model Language:

[Local agency] may not use agency or department monies, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, ethnicity, or national origin.

7. Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.

Model Language:

- (a) [Local agency] personnel shall not inquire about or request proof of immigration status or citizenship when providing services or benefits, except where the receipt of such services or benefits are contingent upon one's immigration or citizenship status or where inquiries are otherwise lawfully required by federal, state, or local laws.
- (b) [Local agencies] shall have a formal Language Assistance Policy for individuals with Limited English Proficiency and provide interpretation or translation services consistent with that policy.³⁴

8. Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs' compliance with all applicable laws.

Model Language:

- (a) [The LEA] shall record, solely to create the reports described in subsection (b) below, the following for each immigration detainer, notification, transfer, interview, or interrogation request received from ICE or CBP:
- The subject individual's race, gender, and place of birth;
 - Date and time that the subject individual was taken into LEA custody, the location where the individual was held, and the arrest charges;
 - Date and time of [the LEA's] receipt of the request;
 - The requesting agency;
 - Immigration or criminal history indicated on the request form, if any;
 - Whether the request was accompanied any documentation regarding immigration status or proceedings, e.g., a judicial warrant;
 - Whether a copy of the request was provided to the individual and, if yes, the date and time of notification;
 - Whether the individual consented to the request;
 - Whether the individual requested to confer with counsel regarding the request;

³⁴ Under Title VI of the Civil Rights Act of 1964, any agency that is a direct or indirect recipient of federal funds must ensure meaningful or equal access to its services or benefits, regardless of ability to speak English. See 42 U.S.C. § 2000d *et seq.*; *Lau v. Nichols*, 414 U.S. 563 (1974).

- [The LEA's] response to the request, including a decision not to fulfill the request;
 - If applicable, the date and time that ICE or CBP took custody of, or was otherwise given access to, the individual; and
 - The date and time of the individual's release from [the LEA's] custody.
- (b) [The LEA] shall provide semi-annual reports to the [designate one or more public oversight entity] regarding the information collected in subsection (a) above in an aggregated form that is stripped of all personal identifiers in order that [the LEA] and the community may monitor [the LEA's] compliance with all applicable law.

APPENDIX A DEFINITION OF KEY TERMS

- “Civil immigration detainer” (also called a “civil immigration warrant”) means a detainer issued pursuant to 8 C.F.R. § 287.7 or any similar request from ICE or CPB for detention of a person suspected of violating civil immigration law. See DHS Form I-247D (“Immigration Detainer—Request for Voluntary Action”) (5/15), available at <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF>.
- “Judicial warrant” means a warrant based on probable cause and issued by an Article III federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant. A judicial warrant does not include a civil immigration warrant, administrative warrant, or other document signed only by ICE or CBP officials.
- “Probable cause” means more than mere suspicion or that something is at least more probable than not. “Probable cause” and “reasonable cause,” as that latter term is used in the New York State criminal procedure code, are equivalent standards.³⁵
- “Local law enforcement agencies” or “LEAs” include, among others, local police personnel, sheriffs’ department personnel, local corrections and probation personnel, school safety or resource officers, and school police officers.

³⁵ *People v. Valentine*, 17 N.Y.2d 128, 132 (1966).

APPENDIX B
COMPILATION OF SIMILAR PROVISIONS FROM OTHER STATES AND LOCALITIES

1. Objective: LEAs should not engage in certain activities that are solely for the purpose of enforcing federal immigration laws.

N.Y.C. Exec. Order 41 (2003): “Law enforcement officers shall not inquire about a person’s immigration status unless investigating illegal activity other than mere status as an undocumented alien.”

N.Y.C. Exec. Order 41 (2003): It is the “policy of the Police Department not to inquire about the immigration status of crime victims, witnesses or others who call or approach the police seeking assistance.”

Illinois Executive Order 2 (2015): “No law enforcement official . . . shall stop, arrest, search, detain, or continue to detain a person solely based on an individual’s citizenship or immigration status or on an administrative immigration warrant entered into [NCIC or similar databases].”

Oregon State Law § 181A.820 (2015): “No [state or local] law enforcement agency shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws,” subject to certain exceptions including where a person is charged with criminal violation of federal immigration laws.

LAPD Special Order 40 (1979): “Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest or book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).”

Washington D.C. Mayor’s Order 2011-174: Public safety agencies “shall not inquire about a person’s immigration status . . . for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation.”

Washington D.C. Mayor’s Order 2011-174: “It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.”

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Philadelphia, PA Executive Order No. 5-2016: “No person in the custody of the City who would otherwise be released from custody shall be detained pursuant to an ICE civil

immigration detainer request pursuant to 8 C.F.R. Sec. 287.7 . . . unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer is supported by a judicial warrant.”

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Illinois Executive Order 2 (2015): LEAs may not “communicat[e] an individual’s release information or contact information” “solely on the basis of an immigration detainer or administrative immigration warrant.”

Philadelphia, PA Executive Order No. 5-2016: Notice of an individual’s “pending release” shall not be provided “unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer is supported by a judicial warrant.”

California Values Act, SB No. 54 (Proposed) (2016):

An LEA may not (a) “[r]espond[] to requests for nonpublicly available personal information about an individual,” including, but not limited to, information about the person’s release date, home address, or work address for immigration enforcement purposes,” or (b) “make agency or department databases available to anyone . . . for the purpose of immigration enforcement or investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, immigration status, or national or ethnic origin.”

An LEA may (a) share information “regarding an individual’s citizenship or immigration status” and (b) respond to requests for “previous criminal arrests and convictions” as permitted under state law or when responding to a “lawful subpoena.”

4. Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning for solely immigration enforcement purposes.

Vermont Criminal Justice Training Council Policy: “Unless ICE or Customs and Border Patrol (CBP) agents have a criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive to the enforcement of immigration laws, ICE or CBP agents shall not be given access to individuals in [Agency’s] custody.”

Santa Clara, CA Board of Supervisor Resolution No. 2011-504 (2011): ICE “shall not be given access to individuals or be allowed to use County facilities” for investigative interviews or other purposes unless ICE has a judicial warrant or officials have a “legitimate law enforcement purpose” not related to immigration enforcement.

California Values Act, SB No. 54 (Proposed) (2016): LEAs may not “[g]iv[e] federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes.”

5. **Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.**

Connecticut Department of Correction, Administrative Directive 9.3 (2013): “If a determination has been made to detain the inmate, a copy of Immigration Detainer – Notice of Action DHS Form I-247, and the Notice of ICE Detainer form CN9309 shall be delivered to the inmate.”

6. **Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.**

California Values Act, SB No. 54 (Proposed) (2016): State and local law enforcement shall not “[u]se agency or department moneys, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, or national or ethnic origin.”

7. **Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.**

N.Y.C. Exec. Order 41 (2003): “Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.”

N.Y.C. Exec. Order 41 (2003): “A City officer or employee, other than law enforcement officers, shall not inquire about a person’s immigration status unless: (1) Such person’s immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or (2) Such officer or employee is required by law to inquire about such person’s immigration status.”

8. **Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs’ compliance with all applicable laws.**

N.Y.C. Local Law Nos. 58-2014 and 59-2014 (N.Y.C. Admin Code § 9-131 and § 14-154) (2014): By October 15 each year, NYPD and NYC DOC “shall post a report on the department’s website” that includes, among other things, the number of detainer

requests received, the number of persons held or transferred pursuant to those requests, and the number of requests not honored.

King County (Seattle), WA, Ordinance 17706 (2013): The detention department “shall prepare and transmit to the [county] council a quarterly report showing the number of detainees received and descriptive data,” including the types of offenses of individuals being held, the date for release from custody, and the length of stay before the detainee was executed.

**SUPPLEMENTAL MEMORANDUM TO
GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN
IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS**

**NEW YORK STATE ATTORNEY GENERAL
MARCH 12, 2017**

This Memorandum supplements the *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions* (the “Guidance”) released by the Office of the New York State Attorney General (the “NYAG”) on January 19, 2017.¹ The NYAG issued the Guidance to assist local governments and law enforcement agencies (“LEAs”) in fulfilling our joint responsibilities to promote public safety and protect vulnerable communities. To that end, the Guidance describes the legal landscape governing local involvement in federal immigration enforcement, so that local officials and LEAs understand the extent to which they may decline to participate in those activities.

Within a week of releasing the Guidance, the President of the United States issued three executive orders relating to immigration and immigration enforcement.² The January 25 Executive Orders, as well as implementing memoranda issued by the U.S. Department of Homeland Security (“DHS”) on February 20, 2017,³ dramatically alter the United States’

¹ The Guidance is available at https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf.

² On January 25, 2017, President Trump signed two executive orders:

- (1) the “Enhancing Public Safety in the Interior of the United States” Executive Order (available at <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>) (the “Interior Executive Order”); and
- (2) the “Border Security and Immigration Enforcement Improvements” Executive Order (available at <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>) (the “Border Security Executive Order,” together with the Interior Executive Orders, the “January 25 Executive Orders”).

On January 27, 2017, President Trump signed a third executive order, “Protecting the Nation from Foreign Terrorist Entry into the United States.” Sections of this Order were temporarily enjoined by two federal courts. And this Order was replaced with an Executive Order with the same title on March 6, 2017. Neither the January 27 nor the March 6 executive orders are addressed in this supplemental memorandum.

³ On February 20, 2017, DHS published two memoranda implementing the Interior Executive Order and the Border Security Executive Order, respectively. The first memorandum, “Enforcement of the Immigration Laws to Serve the National Interest” (the “DHS Interior Memorandum”), is available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. The second memorandum, “Implementing the

immigration enforcement priorities. The Interior Executive Order and DHS Interior Memorandum state that the federal government seeks to vastly increase the number of deportations by, among other things, prioritizing the deportation of “removable aliens”⁴ who have engaged in any criminal activity—even if the individual has not been charged or convicted of a crime.⁵ In contrast, the prior federal administration’s policy prioritized the removal of aliens who had committed serious criminal offenses.⁶ Moreover, the Border Security Executive Order directs DHS to detain aliens apprehended for immigration violations to the extent permitted by law,⁷ which will likely lead to a greater number of detentions. Both the January 25 Executive Orders and DHS Memoranda state that the federal government will seek increased cooperation from state and local governments in pursuit of these goals.⁸

Following issuance of the January 25 Executive Orders and DHS Memoranda, local governments and local LEAs have contacted the NYAG with questions regarding state and local involvement in federal immigration enforcement. The Executive Orders and DHS Memoranda also discuss certain topics that were addressed in the NYAG’s earlier Guidance, including compliance with the federal information-sharing requirements in 8 U.S.C. § 1373 and agreements between federal immigration officials and LEAs regarding immigration enforcement. After closely reviewing the Executive Orders and DHS Memoranda, the NYAG has concluded that none of the provisions contained therein alter or invalidate the analysis and model provisions set forth in the Guidance. Localities still retain substantial discretion to limit their involvement in federal immigration enforcement. The NYAG issues this Supplemental Memorandum to assure localities that they may continue to consult the Guidance to keep our communities—including our immigrant neighbors—safe and secure.

President’s Border Security and Immigration Enforcement Improvements Policies” (the “DHS Border Security Memorandum,” together with the DHS Interior Memorandum, the “DHS Memoranda”), is available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

⁴ A removable alien is a noncitizen who is deportable under federal immigration laws.

⁵ See Interior Executive Order § 5. The Executive Order does not delineate how it will be determined—or by whom—that a removable alien has committed an act constituting a chargeable offense, where that individual has not been convicted or even charged with that offense.

⁶ Interior Executive Order § 5; DHS Interior Memorandum § A.

⁷ See Border Security Executive Order § 6.

⁸ See Interior Executive Order § 8; Border Interior Order § 10; DHS Interior Memorandum § B; DHS Border Memorandum § D.

PART I: KEY PROVISIONS IN THE EXECUTIVE ORDERS AND DHS MEMORANDA REGARDING LOCAL PARTICIPATION IN FEDERAL IMMIGRATION ENFORCEMENT

This Part summarizes and analyzes those provisions in the January 25, 2017 Interior and Border Security Executive Orders, and the implementing DHS Memoranda, that pertain to local government and LEA involvement in federal immigration enforcement. As discussed below (*infra* Part I.A.), the Interior Executive Order defines a “sanctuary jurisdiction” as a jurisdiction that willfully refuses to comply with the information-sharing requirements in 8 U.S.C. § 1373, and describes certain actions the federal government may seek to take against such jurisdictions. The remaining sections in Part I discuss other provisions in the Executive Orders that pertain to local participation in federal immigration enforcement, including LEA practices in response to Immigration and Customs Enforcement (“ICE”) detainer requests, and voluntary agreements between federal and state or local LEAs regarding immigration enforcement.

A. Defining “Sanctuary Jurisdictions” as Jurisdictions that Violate 8 U.S.C. § 1373

As the Guidance noted, the term “sanctuary jurisdiction”—which has no legal definition—is used to generally describe state and local efforts to limit their participation in federal activities related to immigration enforcement. The Interior Executive Order specifically defines “sanctuary jurisdictions” as “jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373,” and states that it is the executive branch’s policy to ensure that states and localities fully comply with 8 U.S.C. § 1373. To that end, the Order grants the U.S. Attorney General and the DHS Secretary authority to (1) designate localities as “sanctuary jurisdictions,” and (2) ensure that jurisdictions so designated are ineligible for federal grants, “except as deemed necessary for law enforcement purposes.”⁹ The Interior Executive Order further directs the Attorney General to take “appropriate enforcement action” against any jurisdiction that either violates Section 1373 or “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”¹⁰ Neither the Interior Executive Order nor the DHS Interior Memorandum lists the federal grants that the federal government may seek to withhold from “sanctuary jurisdictions”; indeed, the language of the Interior Executive Order suggests that all federal grants may be targeted.¹¹ As discussed more fully *infra* in Part II, however, there are limits on the federal government’s powers to condition grant funding.

⁹ Interior Executive Order § 9. The fact that a jurisdiction refers to itself as a “sanctuary” has no bearing on whether that jurisdiction is in compliance with Section 1373 or other applicable federal laws. Therefore, such self-identification should not, in the NYAG’s view, affect whether a jurisdiction is designated as a “sanctuary jurisdiction” as defined by the Interior Executive Order.

¹⁰ *Id.* To date, at least four jurisdictions have challenged the constitutionality of this provision of the Interior Executive Order. See *City and Cnty. Of San Francisco v. Trump*, 17-cv-485 (N.D. Cal. Jan. 31, 2017); *Cnty of Santa Clara v. Trump*, 17-cv-574 (N.D. Cal. Feb. 3, 2017); *City of Chelsea, City of Lawrence v. Trump*, 17-cv-10214 (D. Mass. Feb. 8, 2017).

¹¹ See Interior Executive Order §9(a) (stating that “[sanctuary jurisdictions] are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the [DHS] Secretary,” and §9(c) (directing the Director of the Office of Management and Budget

Section 1373 provides that state and local governments cannot prohibit employees or entities “from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹² By its terms, Section 1373 relates only to sharing “information” regarding “immigration status.” Nothing in Section 1373 restricts a locality from declining to share other information with ICE or Customs and Border Protection (“CBP”), such as non-public information about an individual’s release, her next court date, or her address. Nor does Section 1373 place an affirmative obligation on local governments to collect information about an individual’s immigration status.¹³ The model provision at Part III.3 of the Guidance that addresses information sharing is consistent with the terms of 8 U.S.C. § 1373, and permits restrictions on sharing information that are not covered by that federal statute.

B. Reinstating the Secure Communities Program and the Issuance of ICE Detainer Requests

The Interior Executive Order and DHS Interior Memorandum direct DHS to immediately terminate the “Priority Enforcement Program” (“PEP”) and reinstate the “Secure Communities Program,” which was in effect from 2007-2014.¹⁴ Under Secure Communities, ICE regularly issued detainer requests (sometimes referred to as “immigration holds”) for individuals arrested by state and local LEAs. The detainer requests asked LEAs to hold individuals for up to 48 hours beyond their scheduled release date in order to permit ICE to transfer those individuals to federal custody for deportation proceedings. Secure Communities was widely viewed as having eroded trust between law enforcement and immigrant communities.¹⁵ In addition, multiple federal courts have held that state and local LEAs violated the Fourth Amendment to the U.S. Constitution by detaining certain individuals pursuant to federal detainer requests issued under the Secure Communities Program.¹⁶

(“OMB”) to provide information “on all Federal grant money that currently is received by any sanctuary jurisdiction.”) The language of the Order does not specify to whom the OMB Director must supply the information.

¹² 8 U.S.C. § 1373.

¹³ Section 1373 contains no provisions requiring local governments to comply with detainer requests or to enter into 287(g) agreements with the federal government. *See infra* Part II.B; *see also* Guidance at Part II.D.1.

¹⁴ Interior Executive Order § 10; DHS Interior Memorandum § B.

¹⁵ *See, e.g.*, Kate Linthicum, *Obama ends Secure Communities program as part of immigration action*, *L.A. Times*, November 21, 2014, <http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html> (last visited March 6, 2017).

¹⁶ *See* Memorandum from Jeh Charles Johnson, Sec’y of DHS, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

In 2014, DHS terminated Secure Communities and adopted PEP, which prioritized the transfer of immigrants in local or state custody who had been convicted of specifically enumerated crimes.¹⁷ Under PEP, ICE was instructed to request notification of when an individual in state or local custody was to be released, and to only seek detainers of individuals in specific, limited circumstances.¹⁸ When ICE opted to issue a detainer request, it was required to specify either that the target individual was subject to a final order of removal or that there was probable cause to find that the subject was a removable alien.¹⁹

As described in detail at Part II.C of the Guidance, LEAs that comply with detainer requests must also comply with the Fourth Amendment to the U.S. Constitution and the similar provision in Article I, § 12 of the New York State Constitution. Thus, absent a judicial warrant, an LEA may only hold an individual in custody if the LEA officer has probable cause to believe that the person has committed a crime. LEAs may be found liable for damages if, in response to an ICE or CBP detainer, they hold an individual past his or her normal release date under circumstances that violate the Fourth Amendment or New York State Constitution Article I, § 12. The Executive Orders do not alter these constitutional requirements.

As a result of this shift back to Secure Communities, LEAs will likely see an increase in ICE detainer requests.²⁰ Nonetheless, as discussed in Part II.C of the Guidance, LEAs have the authority to decline a request by ICE or CBP to detain, transfer, or allow access to an individual in their custody for federal immigration enforcement purposes absent a judicial warrant.

To achieve the dual goals of promoting public safety while complying with constitutional requirements, the Guidance provides model language that LEAs may use to limit their compliance with ICE or CBP detainers to circumstances in which (1) ICE or CBP presents a judicial warrant or (2) there is probable cause to believe that (i) the individual has illegally re-entered the country and has been previously convicted of certain serious criminal offenses, or (ii) the subject has engaged in terrorist activity.²¹

C. Federal Reporting Requirements Regarding Jurisdictions That Limit Their Participation in Immigration Enforcement

The Interior Executive Order also requires certain federal agencies to report information about “sanctuary jurisdictions.” Specifically, the Order states that “[t]o better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the [DHS] Secretary

¹⁷ *Id.* § A.

¹⁸ See Priority Enhancement Program (archived content), <https://www.ice.gov/pep> (last visited March 6, 2017).

¹⁹ *Id.*

²⁰ DHS intends to replace its current notification and detainer forms (i.e., forms I-247D, I-247, and I-247X). See DHS Interior Memorandum § B.

²¹ See Guidance at Part III.2.

shall utilize the Declined Detainer Outcome Report or its equivalent” and publicize a list of criminal actions committed by immigrants and of jurisdictions that ignored or failed to honor detainer requests with respect to those immigrants.²² The Order further instructs the Director of the federal Office of Management and Budget (“OMB”) to “obtain and provide relevant and responsive information on all Federal grant money that is currently received by any sanctuary jurisdiction.”²³

D. Directing DHS to Enter into 287(g) Agreements

The January 25 Executive Orders direct DHS to enter into voluntary agreements with state and local officials under Section 287(g) of the Immigration and Nationality Act, which would permit designated state and local law enforcement officers to enforce certain aspects of federal immigration law “at the expense of the State or political subdivision and to the extent consistent with State and local law.”²⁴ Section 287(g) authorizes such agreements provided that the officers receive appropriate training and are supervised by ICE officers.²⁵ Although federal law provides that the enforcement activities of state and local governments will be “at the expense of the State or political subdivision,”²⁶ it appears that ICE sometimes has agreed to cover certain, limited expenses for equipment, training, and legal representation.²⁷ According to ICE’s published materials, ICE currently has 287(g) agreements with 32 LEAs in 16 states; none of these agencies are located in New York.²⁸

²² Interior Executive Order § 9.

²³ *Id.* As noted in footnote 11, *supra*, the Order does not specify to whom the OMB Director is to provide this information.

²⁴ Specifically, 8 U.S.C. § 1357(g)(1) provides that:

Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See <https://www.ice.gov/factsheets/287g#wcm-survey-target-id> (last visited March 6, 2017).

²⁸ DHS Interior Memorandum § B.

As the Executive Orders and DHS Memoranda acknowledge, cooperation agreements under Section 287(g) are strictly voluntary.²⁹ Refusing to enter into such an agreement should not, therefore, jeopardize the receipt of federal grants. (*See infra* Part II.)

E. Excluding Noncitizens and Other Immigrants from Privacy Act Protections

Section 14 of the Interior Executive Order directs federal agencies to “ensure that their privacy policies exclude persons who are not U.S. citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.”³⁰ Under the Privacy Act, 5 U.S.C. § 552a, a federal agency must protect personally identifiable information that is collected, maintained, and used by a federal agency. By its terms, the Privacy Act only applies to U.S. citizens and legal permanent residents. However, in 2009 DHS issued a Privacy Policy Guidance Memorandum declaring that, as a matter of policy, DHS would apply the Privacy Act to all personally identifiable information, regardless of the subject’s immigration status.³¹ The DHS Interior Memorandum explicitly rescinds the 2009 DHS policy directive.³²

Notably, this policy shift pertains only to the Privacy Act which, in turn, applies only to federal agencies. The Interior Executive Order’s directive does not affect the continued obligation of state and local governments to comply with other federal privacy requirements, such as those included in the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA), and the Federal Drug and Alcohol Confidentiality Laws and Regulations, as well as any confidentiality provisions in state and local laws and regulations.³³

PART II: LIMITS ON THE FEDERAL GOVERNMENT’S POWER TO CONDITION FEDERAL GRANTS

States and localities are understandably concerned about the possible loss of federal funding if the U.S. Attorney General finds that they have violated 8 U.S.C. § 1373, or have “in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”³⁴ Indeed, the federal government provides New York State and its localities with numerous grants in areas ranging from education and health care to social services and criminal justice. Each grant is governed by different statutory and regulatory schemes. The requirements and provisions of

²⁹ 8 U.S.C. § 1357(g) (“Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.”).

³⁰ Interior Executive Order § 14.

³¹ DHS Interior Memorandum § G.

³² *Id.*

³³ *See, e.g.* Public Officers Law, Article 6-A, sections 91-99 (New York’s “Personal Privacy Protection Law”).

³⁴ *See* Interior Executive Order § 9. Some jurisdictions already have filed lawsuits challenging this provision of the Interior Executive Order, arguing that it is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *See supra* n. 10.

those schemes may restrict the federal government's ability to withhold funding and thus should be closely and individually analyzed.

Moreover, although the federal government has wide latitude to condition its funding to states and localities on their fulfillment of certain conditions, the U.S. Supreme Court has established some limitations on that authority. First, the federal government cannot use its spending power "to induce the States to engage in activities that would themselves be unconstitutional"; for example, it cannot condition a grant of federal funds on invidiously discriminatory state action.³⁵ Second, any funding conditions must be reasonably related to the federal interest in the program at issue.³⁶ Third, the condition must be stated "unambiguously" so that the recipient can "voluntarily and knowingly" decide whether to accept those funds and the associated requirements.³⁷ And finally, the amount of federal funding that a noncomplying State would forfeit cannot be so large that the State would be left with "no real option but to acquiesce" and accept the condition.³⁸ Depending on the amount and nature of any federal funding cut, states and localities may be able to challenge the defunding on one or more of these grounds.

³⁵ *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

³⁶ In *Dole*, the Supreme Court held that Congress could permissibly withhold 5% of certain highway funds from states that failed to raise their drinking age to 21 because raising the drinking age was "directly related to one of the main purposes for which highway funds are expended," namely "safe interstate travel." *Id.* at 208-209.

³⁷ *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

³⁸ *See, e.g., Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012); *Dole*, 483 U.S. at 209.