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Sanctuary Policies: Local Resistance In The Face Of State Anti-Sanctuary Legislation

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SANCTUARY POLICIES: LOCAL RESISTANCE IN THE FACE OF STATE ANTI- SANCTUARY LEGISLATION

Azadeh Shahshahani and Amy Pont †

ABSTRACT

This article examines the potential for impactful sanctuary policies in Alabama, Georgia, and South Carolina in light of anti-sanctuary and anti-immigrant state laws implemented in the past decade and in the wake of the 2016 presidential election. The article first reviews changes to immigration law which both increased the number of noncitizens subject to removal from the United States. The article also reviews the effects of anti-sanctuary and anti-immigrant laws on areas such as community safety, community-police relations, and state and local civil liability. The article then explores the national resistance to both Secure Communities and other forms of collaboration between localities and ICE, focusing on advocacy efforts that promote sanctuary policies. The article concludes by reviewing the most recent federal efforts to counter sanctuary policies, and discusses the tools that communities can use to limit local law enforcement collaboration with federal enforcement in the current political landscape at the state and federal levels.

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INTRODUCTION

Starting in the 1980s, immigration law in the United States gradually transformed through a patchwork of laws which dramatically increased the number of noncitizens subject to removal from the United States. This patchwork of laws included the War on Drugs and its related legislation.¹

¹ The Anti-Drug Abuse Act (ADAA) of 1986 gave the U.S. Immigration and Naturalization Service (INS) (now the U.S. Immigration and Customs Enforcement) the power to hold noncitizens in local custody for drug offenses. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1302, 100 Stat. 3207, 3207-41 (1986).

Instituted after the Immigration Reform and Control Act of 1986,² the Criminal Alien Program (CAP) and other similar programs allowed for the expeditious deportation of any noncitizen convicted of an enumerated deportable offense.³ The CAP program fostered collaboration between the U.S. Immigration and Nationality Service (INS) and local authorities, enabling INS to utilize state, local, and federal custody as a pipeline for the deportation of noncitizens.⁴

Throughout the 1990s, Congress continued to pass laws that would allow for the deportation of more people by way of contact with the criminal legal system and limit eligibility for relief from removal for noncitizens convicted of certain criminal offenses.⁵ By far, one of the most sweeping and influential pieces of immigration legislation passed in the United States was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which expanded the categories of qualifying crimes that could subject a noncitizen to deportation.⁶ In addition, IIRIRA created the concept of “287(g) agreements,” memoranda of agreement which grant local enforcement authorities the power to carry out certain federal immigration law enforcement tasks.⁷

The landscape of U.S. immigration law again changed in the wake of September 11, 2001, as a result of the United States’ increased focus on national security and deportations. In 2008, a controversial federal program named Secure Communities was created, giving federal immigration authorities further power to detain individuals with certain criminal

² Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

³ AM. IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP) (2013) [hereinafter CAP], <https://perma.cc/8RL3-AJUH>. In 1988, the Alien Criminal Apprehension Program (ACAP) and the Institutional Removal Program (IRP) were formed, and then consolidated in 2006 into CAP. *Id.* at 2. Deportable offenses are enumerated in the Immigration and Nationality Act (INA). INA § 237(a)(2), 8 U.S.C. § 1127(a)(2) (2018).

⁴ See CAP, *supra* note 3, at 1-2, 4.

⁵ The Immigration Act was signed in 1990 by President George H.W. Bush with the stated goal of targeting non-citizens convicted of certain drug offense for removal. *George Bush: Statement on Signing the Immigration Act of 1990*, AM. PRESIDENCY PROJECT (Nov. 29, 1990), <https://perma.cc/TP2Z-HBZR> (“[The Act] meets several objectives of my Administration’s war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country.”); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). For a report dispelling misconceptions of non-citizens as being more prone to commit crimes and detailing the law enforcement tactics used against non-citizens suspected of having committed crimes, see WALTER A. EWING ET AL., AM. IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES (2015), <https://perma.cc/WY5Q-X4LT>.

⁶ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 to -628 (1996).

⁷ INA § 287(g), 8 U.S.C. § 1357(g) (2018).

histories under the auspices of creating safer communities through collaboration with local law enforcement.⁸

During the 2000s, local law enforcement and federal authorities involved with immigration enforcement implemented programs that facilitated cooperation between them. A significant number of state and local governments entered into 287(g) agreements with the federal government,⁹ paving the way for local law enforcement to carry out federal immigration enforcement work. Starting in 2010, a wave of states began to pass laws further aiding federal law enforcement's efforts to deport noncitizens, although courts deemed many provisions were unconstitutional. Among other features, these state laws criminalized applying for work without work authorization, penalized failing to register with the U.S. government, and criminalized the mere status of being undocumented and present in the United States. Leading this state effort, Arizona passed SB 1070.¹⁰ Alabama, Georgia, South Carolina, Indiana, and Utah also passed similar laws.¹¹

In 2011 and 2014, DHS, in a series of memoranda, outlined the prioritization of the deportation of noncitizens with criminal histories.¹² In 2013, the United States deported the highest number of individuals in any one year.¹³ In light of significant opposition to the Secure Communities program, ICE replaced the program with the Priority Enforcement Program (PEP) in 2014.¹⁴ Many of the main tenets of Secure Communities

⁸ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/PB5Y-G5YA> (last updated Jan. 3, 2018); see also MICHELE WASLIN, IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* (2011), <https://perma.cc/9THQ-E7V3>.

⁹ See RANDY CAPPS, ET AL., MIGRATION POLICY INST., *DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 9-12* (2011), <https://perma.cc/Z7CD-5GW2>.

¹⁰ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

¹¹ H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); H.B. 87, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); S.B. 20, 2011-2012 Gen. Assemb., 119th Sess. (S.C. 2011); H.B. 497, 2011 Leg., Gen. Sess. (Utah 2011).

¹² See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Enf't, et al. (Nov. 20, 2014) [hereinafter *Priority Memo*], <https://perma.cc/ESB2-P6FV>; Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enf't, U.S. Dep't of Homeland Sec., to All Chief Counsel, Office of the Principal Legal Advisor (Nov. 17, 2011), <https://perma.cc/72KN-XRFL>.

¹³ See Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), <https://perma.cc/UZM3-MXYV>.

¹⁴ See *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/R6FQ-AVEU> (last visited May 15, 2018).

were still part of the PEP program, such as the use of detainer requests.¹⁵ Shortly after his inauguration, President Trump signed an executive order essentially stating that all immigrants who could be deportable are priorities for deportation.¹⁶ In a memorandum implementing the executive order, the DHS restored the Secure Communities program and ended PEP.¹⁷

While certain states were seeking to criminalize the presence of immigrants and the federal government was deporting people in increasingly larger numbers, localities across the country took the opposite approach in support of community safety and family unity. After 2011, many localities adopted what are now referred to as sanctuary policies or trust policies.¹⁸ For simplicity, we will refer to both types of policies as sanctuary policies throughout the article.

The term “sanctuary” as it relates to sanctuary policies, originates from the United States in the 1980s when religious institutions protected Central American refugees from the threat of deportation.¹⁹ At the end of the 20th century, Central American refugees fled war-ravaged countries such as El Salvador and Guatemala.²⁰ At the time, the Reagan Administration supported the repressive governments from which the individuals were fleeing, and as such, refugees’ asylum claims were not approved.²¹ Religious institutions provided legal assistance, food, medical care, and employment.²²

Current sanctuary policies are a mixture of legislation, ordinances, and policies adopted by states, localities, and sheriffs’ offices across the country.²³ Sanctuary policies impose varying limitations on cooperation

¹⁵ See *id.* (delineating that under PEP, detainers could only be issued where an immigration officer had reason to believe the noncitizen had been *convicted of* various crimes, rather than convicted or *merely charged* as it was under Secure Communities).

¹⁶ Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799 (Jan. 25, 2017) (“We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement.”). The executive order also prioritizes the deportation of any removable noncitizens who “[i]n the judgment of an immigration officer, otherwise pose a risk to public safety or national security.” *Id.* at 8,800.

¹⁷ Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), <https://perma.cc/4UZP-UXFT>.

¹⁸ By the end of 2014, almost 300 states or localities implemented some form of sanctuary policies, including Santa Clara County, California and Cook County, Illinois. CATHOLIC LEGAL IMMIGRATION NETWORK, INC., STATES AND LOCALITIES THAT LIMIT COMPLIANCE WITH ICE DETAINER REQUESTS (2014) [hereinafter CATHOLIC LEGAL, SANCTUARY POLICIES], <https://perma.cc/DZA3-ZGK5>.

¹⁹ Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://perma.cc/RE7P-4N4S>.

²⁰ *Id.*

²¹ See *id.*

²² *Id.*

²³ See CATHOLIC LEGAL, SANCTUARY POLICIES, *supra* note 22.

with ICE, ranging from prohibiting law enforcement agencies from using funds or personnel “to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes”²⁴ to prohibiting the release of any information regarding a person’s release date or court appearance dates in response to federal inquiries.²⁵ Other sanctuary policies limit when a local law enforcement officer or government worker may inquire into the immigration status of an individual. As of December 2017, there were an estimated 760 counties with at least some form of sanctuary policy in place.²⁶ However, the 2016 presidential election unleashed a new era of anti-immigrant and anti-sanctuary policies, as well as sanctuary policies.

I. ANTI-IMMIGRANT AND ANTI-SANCTUARY STATE LAWS

The impact of anti-immigrant and anti-sanctuary legislation in Alabama, Georgia, and South Carolina is a key piece of evidence for why anti-sanctuary policies and other anti-immigrant legislation are bad policy. The laws’ impact on states is apparent in community-police relations and evidenced by the localities’ exposure to civil liability. Moreover, these laws contribute to unconstitutional detention and arrest, discriminatory policing, and decreased trust between communities and local police, which are all effects that sanctuary policies seek to prevent. These experiences should not only guide states and Congress away from passing anti-sanctuary legislation, but also energize community groups to both continue pushing for sanctuary policies and litigate against the unlawful aspects of local law enforcement collaboration with ICE.

In 2010, Arizona initiated a wave of state-level anti-immigrant laws across the country when it enacted S.B. 1070.²⁷ At the time, S.B. 1070 was among the harshest of anti-immigrant laws enacted in recent history. S.B. 1070’s stated goal was to “make attrition [of immigrants] through enforcement a top public policy priority of all state and local government

²⁴ California Values Act, CAL. GOV’T CODE § 7284.6(a)(1) (West 2018).

²⁵ See N.Y.C., N.Y. ADMIN. CODE § 9-131(f)(9) (2018).

²⁶ See KRSNA AVILA ET AL., IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY: GETTING LOCAL OFFICERS OUT OF THE BUSINESS OF DEPORTATIONS IN THE TRUMP ERA 9 (2018) [hereinafter ILRC, THE RISE OF SANCTUARY], <https://perma.cc/KF2Y-LXKL> (reflecting the number of counties that have policies against holding people on ICE detainees). Of the 3,015 U.S. counties reviewed by the report’s authors, 24% had limits to ICE holds, 6% had restrictions on notifications to ICE about individuals’ release dates or other information, 4% had limits on ICE access to local jails and or ICE interrogations of individuals, 4% prohibited inquiries into immigration status and/or place of birth, and 4% prohibited participation generally in immigration enforcement. *Id.*

²⁷ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

agencies in Arizona.”²⁸ The law contained provisions that generally criminalized the presence of undocumented persons.²⁹ In addition, S.B. 1070 criminalized the employment of undocumented persons and the provision of transportation assistance to undocumented persons.³⁰ The law also barred localities from limiting their cooperation with ICE.³¹ Additionally, the law authorized local law enforcement officers to ask individuals for immigration documents establishing their immigration status during routine traffic stops – these provisions, known as “show me your papers,” stoked fears of racial profiling.³²

After Arizona’s legislature passed S.B. 1070, there were approximately twenty-four copycat bills up for debate in state legislatures around the United States.³³ Five states passed copycat anti-immigrant bills, including Alabama,³⁴ Georgia,³⁵ and South Carolina.³⁶ Georgia passed its Arizona copycat law, H.B. 87, the Illegal Immigration Reform and Enforcement Act, in 2011.³⁷ Alabama followed suit by passing copycat law, H.B. 56, in the same year.³⁸ H.B. 56 was heralded as the law that “attacks every aspect” of an undocumented person’s life.³⁹ South Carolina passed S.B. 20 in 2011, which similarly sought to assert state control over immigration matters.⁴⁰ In this article, we distinguish between anti-sanctuary provisions of state laws and anti-immigrant laws generally. Anti-sanctuary provisions of state laws prohibit localities from taking certain actions toward creating and carrying out sanctuary policies and are typically a subset of anti-immigrant laws. Anti-immigrant laws generally promote cooperation between local law enforcement and ICE or criminalize certain actions.

²⁸ *Id.* at § 1.

²⁹ *Id.* at § 3.

³⁰ *Id.* at §§ 5-7.

³¹ *Id.* at § 2.

³² *See Id.*

³³ *Arizona’s S.B. 1070*, ACLU, <https://perma.cc/U85B-A62J> (last visited May 18, 2018).

³⁴ H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

³⁵ H.B. 87, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2011).

³⁶ S.B. 20, 2011-2012 Gen. Assemb., 119th Sess. (S.C. 2011). Indiana and Utah also passed copycat legislation. *See* S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.B. 497, 2011 Leg., Gen. Sess. (Utah 2011).

³⁷ H.B. 87, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2011).

³⁸ H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

³⁹ Justin Cox, *Alabama Under Siege: The Human Costs of H.B. 56*, ACLU (Feb. 27, 2012, 4:17 PM), <https://perma.cc/6SWX-7M2F> (statement of Rep. Micky Hammon, who introduced the bill, during a debate).

⁴⁰ S.B. 20, 2011-2012 Gen. Assemb., 119th Sess. (S.C. 2011).

A. *Case Study: State Legislation Limiting Sanctuary Policies in Alabama, Georgia, and South Carolina*

The consequences of a law's *anti-sanctuary* policies are important to note. When states prohibit sanctuary policies and force localities to cooperate with ICE on matters such as detainer requests and arrests during local law enforcement encounters, they expose themselves to civil liability and erode community trust. Additionally, as evidenced in Georgia, a state oversight mechanism over anti-immigrant and anti-sanctuary legislation can lead to government overreach and a waste of taxpayer dollars.

Within their anti-immigrant laws, Alabama, Georgia, and South Carolina also enacted anti-sanctuary legislative provisions. The State of Alabama specifically adopted provisions aimed at preventing localities from implementing policies which limited cooperation with federal immigration authorities.⁴¹ One provision of Alabama's H.B. 56 explicitly prevents localities from limiting communication with ICE in violation of certain federal statutes.⁴² These federal statutes, 8 U.S.C. § 1373 and 8 U.S.C. § 1644, prohibit localities from restricting local officials' communication with federal authorities regarding an individual's immigration status and prohibit government officials from limiting any official's ability to send or receive information from ICE.⁴³

Alabama's H.B. 56 further imposed financial penalties in the form of limitations on funding to localities deemed non-compliant.⁴⁴ Furthermore, the law created a private right of action for any U.S. citizen, or

⁴¹ H.B. 56, 2011 Leg., Reg. Sess. § 5 (Ala. 2011).

⁴² *Id.* H.B. 56 was codified in the Code of Alabama, and the relevant part states, "No official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may adopt a policy or practice that limits or restricts the enforcement of federal immigration laws by limiting communication between its officers and federal immigration officials in violation of 8 U.S.C. § 1373 or 8 U.S.C. § 1644, or that restricts its officers in the enforcement of this chapter." ALA. CODE § 31-13-5(a) (2018). 8 U.S.C. § 1644 (2018) reads, "[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the [INS] information regarding the immigration status, lawful, or unlawful, of an alien in the United States." 8 U.S.C. § 1373(a)-(b) (2018) reads, "[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [INS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual [N]o person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the [INS]. (2) Maintaining such information. (3) Exchanging such information with any other Federal, State, or local government entity."

⁴³ 8 U.S.C. §§ 1373, 1644 (2018).

⁴⁴ H.B. 56, 2011 Leg., Reg. Sess. § 5 (Ala. 2011) ("If . . . an official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court in

noncitizen lawfully present in the state, and a resident of Alabama, to sue at the trial court level in Alabama state court under this provision.⁴⁵ However, this provision was subsequently amended in 2012 to limit this right.⁴⁶ Now, U.S. citizens and noncitizens lawfully present in the state who are residents of Alabama may petition the Attorney General of Alabama or any local district attorneys to bring forth such a lawsuit.⁴⁷ If a judicial finding is made that an official or head of agency violated this provision, a court must impose a fine of \$1,000 to \$5,000 for each day that a policy or practice is in place.⁴⁸ Effectively, this law gives private citizens a role in enforcing provisions of the anti-sanctuary law legally, a law which could potentially expose a locality to civil liability.⁴⁹

South Carolina's S.B. 20 similarly limited the localities' ability to pass sanctuary policies. S.B. 20 created a private right of action for citizens to enjoin a locality's policies that limit or prohibit local law enforcement's, or other local government employees' ability to enforce state law related to immigration and to communicate with government officials regarding a person's immigration status.⁵⁰ Additionally, the legislation granted courts the permission to impose fines on any locality that the court found to be in willful violation of the law.⁵¹

In 2009, prior to the passage of H.B. 87 in 2011, the Georgia legislature amended its statutes to prohibit local governments from implementing sanctuary policies.⁵² Georgia also created a penalty to withhold funding from localities found in violation of the law.⁵³ If a locality were to be found in violation of the section on sanctuary policies, the locality could

this state, is in violation of this subsection . . . that agency or political subdivision shall not be eligible to receive any funds, grants, or appropriations from the State of Alabama until such violation has ceased and the Attorney General has so certified.”).

⁴⁵ ALA. CODE § 31-13-5(d) (2011) (amended 2012).

⁴⁶ H.B. 658, 2012 Leg., Reg. Sess. § 1 (Ala. 2012) (amending ALA. CODE § 31-13-5(d) (2011)).

⁴⁷ ALA. CODE § 31-13-5(d) (2018).

⁴⁸ *Id.*

⁴⁹ See discussion *infra* Section I.A.2.

⁵⁰ S.B. 20, 2011-2012 Gen. Assemb., 119th Sess. § 1 (S.C. 2011).

⁵¹ *Id.*

⁵² S.B. 20, 2009-2010 Gen. Assemb., Reg. Sess. (Ga. 2009). The Georgia bill states, “No local governing body, whether acting through its governing body or by an initiative, referendum, or any other process, shall enact, adopt, implement, or enforce any sanctuary policy.” *Id.* at § 2. A sanctuary policy is defined in the Georgia code as: “[A]ny regulation, rule, policy, or practice adopted by a local governing body which prohibits or restricts local officials or employees from communicating or cooperating with federal officials or law enforcement officers with regard to reporting immigration status information while such local official or employee is acting within the scope of his or her official duties.” GA. CODE ANN. § 36-80-23(a)(6) (2017).

⁵³ GA. CODE ANN. § 36-80-23(c) (2017).

lose state funding or state administered federal funding, with some exceptions, such as funding related to emergency medical care and certain types of disaster relief.⁵⁴

In Georgia's prohibition on sanctuary policies in H.B. 87, Georgia also sought to control the exchange of information between ICE and localities. Georgia law now states that, unless prohibited by federal law, state employees "shall not be prohibited from receiving or maintaining information relating to the immigration status of any individual or sending or exchanging such information with other federal, state, or local governmental entities or employees for official public safety purposes."⁵⁵ Furthermore, the provision states that localities should not be prohibited from utilizing federal resources such as databases and equipment "related to the enforcement of state and federal immigration laws."⁵⁶ In 2016, Georgia also passed S.B. 269, which requires that when state agencies provide funding to localities certify the localities' compliance with the state's anti-sanctuary law provisions that prohibit limitations on exchange of information regarding immigration status and the localities' use of federal sources for immigration enforcement.⁵⁷

1. A Limited Number of Local Policies Limiting Collaboration with ICE, Exist in Various Locaties in Alabama and Georgia

A limited number of localities in Alabama and Georgia have implemented sanctuary polices. South Carolina has implemented none.⁵⁸ However, there are existing sanctuary policies that could be implemented in these states that would not conflict with the anti-sanctuary provisions of state laws. Georgia, for example, has seven localities that have chosen to limit their cooperation with federal immigration authorities in a way that is not in conflict with state law.⁵⁹ It should be noted that there are a limited number of sanctuary policies in these states, despite the fact that the anti-sanctuary state provisions in Georgia and Alabama do not specifically bar localities from refusing to honor voluntary requests to hold individuals after their time in local custody has ended.

⁵⁴ *Id.* These exceptions include the following scenarios where verification of lawful presence is not required in GA. CODE ANN. § 50-36-1(d) (2017).

⁵⁵ GA. CODE ANN. § 35-1-17(b)(1) (2017).

⁵⁶ *Id.* at § 35-1-17(b)(3).

⁵⁷ S.B. 269, 2015-2016 Gen. Assemb., Reg. Sess. (Ga. 2016).

⁵⁸ As of 2014, there are no cities designated as Sanctuary Cities in South Carolina despite the fact that the state has a thriving immigrant community. *See* CATHOLIC LEGAL, SANCTUARY POLICIES, *supra* note 22. *See generally* AM. IMMIGRATION COUNCIL, IMMIGRANTS IN SOUTH CAROLINA (2017), <https://perma.cc/KN8Y-D7YK> (reporting statistics on South Carolina's immigrant population).

⁵⁹ *See* discussion *infra* Section II.A.1.

As of the date of publication of this article, Tuskegee was the first and only locality in Alabama to limit cooperation with ICE and limit local law enforcement's ability to carry out immigration functions.⁶⁰ Tuskegee passed a resolution that made it improper for law enforcement to discriminate on the basis of race, ethnicity, and immigration status. The Tuskegee resolution states:

[U]nless otherwise provided by the United States Constitution and laws of the United States, and/or the laws and constitution of the State of Alabama, citizenship, immigration status, national origin, race, ethnicity, and the presence of an immigration detainer request, Immigration and Customs Enforcement, notification request, administrative immigration warrant, or other civil immigration custody documents should have no bearing on an individual's treatment in police custody (including but not limited to classification status, eligibility for work programs, or eligibility for pretrial diversion or alternatives to incarceration programs), or on officials' decisions to initiate questioning, stops or make arrests.⁶¹

The Birmingham City Council has also adopted a sanctuary city resolution; however the resolution does not explicitly address limiting Birmingham's cooperation with ICE.⁶²

A number of localities in Georgia have implemented policies that are in compliance with the anti-sanctuary provisions of Georgia law. These include Fulton, Clayton, DeKalb, Fayette, and Clarke counties, as well as the City of Clarkston and the City of Decatur.⁶³ Fulton County Commissioners passed a resolution urging the Fulton County Sheriff to limit cooperation with ICE by not holding individuals beyond their release dates at the expense of Fulton County, not turning over individuals to ICE without a judicial warrant, and not allowing ICE to use county facilities for interviews and investigations.⁶⁴ The sheriff's offices in Clayton, DeKalb, and Clarke counties have implemented policies do not allow for prolonged detention of individuals on the sole basis of ICE detainers in order to protect those jurisdictions from civil liability. These counties require

⁶⁰ Press Release, National Day Laborer Organizing Network, Tuskegee, First City in Alabama to Enact an Immigrant TRUST Policy, Reject Entanglement with Immigration Enforcement (May 27, 2015), <https://perma.cc/S3QA-58TM>. Birmingham, Alabama did pass a resolution naming itself a "Sanctuary City" but did not take any specific steps to do so, such as limiting compliance with ICE detainers. See *Birmingham City Councilors Approve Sanctuary City Resolution*, BIRMINGHAM CITY COUNCIL, <https://perma.cc/2A8D-KN33> (last visited May 18, 2018).

⁶¹ Res. 2015-61, City Council of the City of Tuskegee (2015), <https://perma.cc/K6HC-YVQ6>.

⁶² See *Birmingham City Councilors Approve Sanctuary City Resolution*, *supra* note 71.

⁶³ PROJECT SOUTH ET AL., GEORGIA NON-DETAINDER POLICIES, <https://perma.cc/2ART-MYX7>.

⁶⁴ Res. 14-0683, Fulton Cty. Bd. of Comm'rs (2014), <https://perma.cc/3M2B-LLVT>.

ICE to provide a judicial warrant in order to extend the detention of any individual in local custody.⁶⁵

Localities in Alabama can adopt similar policies to those in Georgia as its state laws do not require local officers to honor ICE detainers and hold individuals in local custody for an ICE detainer.⁶⁶ South Carolina, on the other hand, requires that if an officer determines that a person is unlawfully present in the United States, that officer:

[S]hall determine in cooperation with the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or the United States Immigration and Customs Enforcement, as applicable, whether the officer shall retain custody of the person for the underlying criminal offense for which the person was stopped, detained, investigated, or arrested, or whether the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or the United States Immigration and Customs Enforcement, as applicable, shall assume custody of the person.⁶⁷

As discussed below, practices like this that require localities to honor ICE detainers expose localities to civil liability because such a practice creates the risk that individuals will be held in violation of the Fourth Amendment. Legal challenges to provisions of this type may be necessary to open the door for policies that limit compliance with ICE detainers.⁶⁸

2. Cooperation with ICE Detainer Requests Exposes Localities to Civil Liability

Over 760 counties in the United States limit compliance with ICE detainers.⁶⁹ However, as discussed above, South Carolina has no localities

⁶⁵ Jeremy Redmon, *ICE: Clayton, DeKalb Sheriff's Officials Limiting Cooperation*, ATLANTA J.-CONST. (Mar. 20, 2017, 2:56 PM), <https://perma.cc/AEZ6-V5F5>.

⁶⁶ H.B. 658, 2012 Leg., Reg. Sess. § 3 (Ala. 2012) (amending ALA. CODE § 32-6-9(d) (2011)). The bill removed the following language: “A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. If the person is determined to be an alien unlawfully present in the United States, the person shall be considered a flight risk and shall be detained until prosecution or until handed over to federal immigration authorities.” ALA. CODE § 32-6-9(d) (2011) (amended 2012). As a result, Alabama removed any state law requiring localities to hold an individual pursuant to an ICE detainer.

⁶⁷ S.C. CODE ANN. § 17-13-170(C)(4) (2018).

⁶⁸ A preliminary injunction was initially granted in a legal challenge to this particular South Carolina provision, but was later reversed by the same court. *United States v. South Carolina*, 840 F. Supp. 2d 898 (D.S.C. 2011), *modified*, 906 F. Supp. 2d 463 (D.S.C. 2012), *aff'd*, 720 F.3d 518 (4th Cir. 2013).

⁶⁹ ILRC, *THE RISE OF SANCTUARY*, *supra* note 31, at 9.

that limit compliance with ICE detainers, and Alabama has just one locality that limits its compliance with ICE detainers. ICE detainers are a hallmark of local law enforcement cooperation with federal immigration authorities. As discussed previously, by honoring ICE detainers, localities are agreeing to hold individuals past the period of the individual's arrest. In lawsuits brought against localities that honor detainers, courts around the country are finding that holding an individual past that individual's release date from custody in the absence of a judicial warrant is unconstitutional.⁷⁰ As a result, localities are held liable for having honored detainers. Courts have held that holding an individual beyond the date of release could constitute an arrest and is therefore subject to scrutiny under the Fourth Amendment, which requires a finding of probable cause for a new arrest.⁷¹ The First Circuit stated that ICE must have probable cause to issue a detainer request in order to be compliant with the Fourth Amendment because holding someone pursuant to an ICE detainer is a seizure under the Fourth Amendment.⁷² The Northern District of Illinois found that detainers issued in Chicago were unconstitutional because ICE made no findings of individuals' flight risk prior to issuing the detainers.⁷³ The

⁷⁰ See, e.g., *Santoyo v. United States*, No. 5:16-CV-855-OLG, slip op. at 8 (W.D. Tex. June 5, 2017) (finding that Plaintiff was entitled to partial summary judgment on the issue of liability as the locality held the Plaintiff for forty-eight hours pursuant to an ICE detainer without probable cause that the Plaintiff had committed a criminal offense); see also Shareef Omar, Note, *Breaking the Ice: Reforming State and Local Government Compliance with Ice Detainer Requests*, 40 SETON HALL LEGIS. J. 159, 184 (2015) (discussing various settlements, ranging from \$40,000 - \$145,000, between localities and plaintiffs involving detainers).

⁷¹ In *Morales v. Chadbourne*, the First Circuit held that holding an individual beyond their date of release is an arrest under the Fourth Amendment. *Morales v. Chadbourne*, 793 F.3d 208, 217-18 (1st Cir. 2015). In *Miranda-Olivares v. Clackamas County*, a district court in Oregon held that holding an individual who could have been released on bail was a new arrest which the enforcement officers did not have lawful authority to make. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014). Additionally, the court noted that an ICE detainer on its face states only that an investigation "has been initiated" to determine whether an individual is subject to removal, and so does not provide probable cause for an arrest. *Id.* at 11 (citing *Arizona v. United States*, 567 U.S. 387, 413 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns.")).

⁷² *Morales v. Chadbourne*, 793 F.3d at 216-18.

⁷³ *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008-09 (N.D. Ill. 2016) ("The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."). Statutory authority for detainers is based on 8 U.S.C. § 1226 and 8 U.S.C. § 1357(a)(2). 8 U.S.C. § 1226 grants ICE the authority to arrest an individual pending a decision on removability from the United States with a warrant issued by the Attorney General. 8 U.S.C. § 1226 (2018). Under 8 U.S.C. § 1357(a)(2), there is the exception to arrest without a judicial warrant if an individual is "entering or attempting to enter the United States" or if an ICE officer has "reason to believe"

New York State Office of the Attorney General warned New York localities of the potential exposure to civil liability if they honored ICE detainer requests in the absence of judicial warrants.⁷⁴ The Office of the Attorney General cautioned that there are only a few instances where cooperation with federal immigration law enforcement is reasonable, such as where ICE or CBP provides a judicial warrant, there is probable cause to believe that the person has illegally reentered the country and was previously convicted of a serious criminal offense, or the person has engaged in terrorist activity.⁷⁵ Many localities with sanctuary policies limit compliance with ICE detainers by refusing to detain individuals with non-serious criminal offenses, therefore avoiding some risk of civil liability.⁷⁶

3. Localities without Sanctuary Policies Carry Out Federal Law Enforcement Tasks, yet Remain Uncompensated by the Federal Government

In addition to exposing themselves to civil liability in order to meet an increasing number of detainer requests, localities are paying to detain additional individuals and using their resources without financial assistance from the federal government.⁷⁷ As of December 2017, over 114 counties had policies against using local resources to carry out immigration enforcement.⁷⁸ The costs of complying with detainer requests include the utilization of local resources and the potential expenses related to lawsuits regarding the unconstitutionality of detainers. In addition, some law

that an individual is in the United States “in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.” 8 U.S.C. § 1357(a)(2) (2018).

⁷⁴ N.Y. STATE ATTORNEY GEN. ERIC T. SCHNEIDERMAN, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS 4-5 (2017), <https://perma.cc/SC7D-BN9G>.

⁷⁵ *See id.* at 4, 9-10.

⁷⁶ *See* CATHOLIC LEGAL, SANCTUARY POLICIES, *supra* note 22.

⁷⁷ Letter from David Venturella, Assistant Dir., U.S. Immigration & Customs Enf’t, to Miguel Márquez, Cty. Counsel, Cty. of Santa Clara, <https://perma.cc/JS36-KL3L>; *see also* JUDITH A. GREENE, JUSTICE STRATEGIES, THE COST OF RESPONDING TO IMMIGRATION DETAINERS IN CALIFORNIA (2012), <https://perma.cc/Z94E-BFRS> (finding that Los Angeles County spends \$26 million annually to honor ICE detainers, while California spends a total of \$65 million annually); EDWARD F. RAMOS, FISCAL IMPACT ANALYSIS OF MIAMI-DADE’S POLICY ON “IMMIGRATION DETAINERS,” <https://perma.cc/FV9Z-GQQF> (estimating that Miami-Dade County spends approximately \$12.5 million each year to honor ICE detainers).

⁷⁸ ILRC, THE RISE OF SANCTUARY, *supra* note 31, at 9.

enforcement officials are concerned that taking time away to conduct immigration enforcement will reduce the ability of police to complete tasks necessary for regular police functions.⁷⁹

4. Unlawful and Prolonged Detention During Police Encounters Could Be Prevented or Limited Under Sanctuary Policies

Some of the most concerning provisions of anti-immigrant state laws in Alabama, Georgia, and South Carolina (and antithetical to sanctuary policies) were those that authorized local law enforcement officers to request documents related to an individual's immigration status, due to the attendant risk of law enforcement officers using unlawful and prolonged detention in order to obtain such information.⁸⁰ In *Arizona v. United States*, Justice Anthony Kennedy specifically stated that the "show me your papers" provision of the Arizona anti-immigrant law could raise constitutional concerns if state officers were required to hold individuals for the sole purpose of obtaining information on an individual's immigration status.⁸¹ The Supreme Court was concerned with both unlawful and prolonged detention.⁸²

⁷⁹ The Police Executive Research Forum, an independent research organization on policing issues, noted that "[s]pending time and money on immigration enforcement can hinder the ability of officers to respond to calls for service, conduct criminal investigations, and perform the other duties required by their jobs." POLICE EXEC. RESEARCH FORUM, LOCAL POLICE PERSPECTIVES ON STATE IMMIGRATION POLICIES 17 (2014), <https://perma.cc/3GK3-FFB6>.

⁸⁰ Several civil rights organizations, community groups, and the U.S. federal government challenged the Arizona law and the copycat laws in other states. The U.S. government's legal challenge to Arizona's S.B. 1070 reached the Supreme Court in *Arizona v. United States*, 567 U.S. 387 (2012). While the Court permanently enjoined several provisions of the Arizona law, it allowed the "show me your papers" provision to remain in effect absent indicia of an as-applied showing that detentions are delayed solely to verify an individual's immigration status. *Id.* at 413-16. As a result of legal challenges against the laws in Alabama, Georgia, and South Carolina, courts similarly blocked several provisions, but not others, such as the "show me your papers" provision which remained in effect. See Joint Report Regarding Case Status and Disposition at 3, *Hispanic Interest Coal. of Ala. v. Bentley*, 691 F.3d 1236 (11th Cir. 2012) (No. 11-14535); *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250 (11th Cir. 2012); *United States v. South Carolina*, 906 F. Supp. 2d 463 (D.S.C. 2012) (dissolving preliminary injunction of certain provisions in light of the Supreme Court's decision in *Arizona v. United States*, 567 U.S. 387), *aff'd*, 720 F.3d 518 (4th Cir. 2013); see also Kim Chandler, *Alabama Settles Lawsuit Over Immigration Law*, AL.COM (Oct. 29, 2013, 4:13 PM), <https://perma.cc/ZVY8-R8AZ>; Alan Gomez, *South Carolina Puts Brakes on Immigration Law*, USA TODAY (Mar. 3, 2014, 8:32 PM), <https://perma.cc/9YDP-XNX8>.

⁸¹ *Arizona v. United States*, 567 U.S. at 413.

⁸² For a more robust discussion of the legal implications of this provision, see CHRISTOPHER LASCH, IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS (2013), <https://perma.cc/DZ8X-XMVH>.

Alabama and South Carolina tacitly accepted that it was clear that officers were not allowed to extend traffic stops for the sole purpose of investigating an individual's immigration status.⁸³ Nonetheless, not too long after the release of the Supreme Court's decision in *Arizona v. United States*, a federal district court in Arizona found that the Maricopa County Sheriff's Office's (MCSO) use of traffic stops as a pretext to stop individuals of "Hispanic ancestry or race," in order to form reasonable suspicion that the individual was in the United States without authorization, was in violation of the Fourth Amendment and the Fourteenth Amendment's Equal Protection Clause.⁸⁴ Moreover, the Court noted that MCSO was proceeding under the incorrect assumption that being present without documents in the United States was a criminal violation of immigration law.⁸⁵ The Court ordered MCSO to permanently stop "using Hispanic ancestry or race as [a] factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country."⁸⁶

5. Discriminatory Encounters with Local Law Enforcement and Impact on Community Safety

Sanctuary policies aim to foster trust between local law enforcement and immigrant communities. However, when no sanctuary policy exists and, instead, local law enforcement inquires into an individual's immigration status during routine traffic stops, the prospect of discriminatory encounters with local law enforcement emerges. Some state law enforcement officials from Alabama, Georgia, and South Carolina, among others, are also concerned with the specter of local police utilizing race as a factor to determine "reasonable suspicion" that an individual is undocumented.⁸⁷ A report from the Police Executive Research Forum, which gathered law enforcement officials from around the country and from states most notably impacted by the anti-immigrant laws, noted that "[a]lthough the laws prohibit using race, color, or ethnicity to make the determination, some

⁸³ Joint Report Regarding Case Status and Disposition at 3-4, Hispanic Interest Coal. of Ala. v. Bentley, 691 F.3d 1236 (11th Cir. 2012) (No. 11-14535) (agreeing that such policy would violate the Supremacy Clause); *United States v. South Carolina*, 906 F. Supp. 2d at 471 (stating that Defendants argued that the law could be interpreted to avoid unconstitutional detentions).

⁸⁴ *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), *aff'd*, 784 F.3d 1254 (9th Cir. 2015), *cert. denied sub nom. Maricopa County v. Melendres*, 136 S. Ct. 799 (2016) (mem.).

⁸⁵ *Melendres v. Arpaio*, 989 F. Supp. 2d at 825.

⁸⁶ *Id.* at 826. As of January of 2018, the United States government is also challenging a number of Maricopa County's practices. *United States v. Maricopa*, 151 F. Supp. 3d 998 (D. Ariz. 2015), *appeal filed*, No. 15-17558, 2018 WL 2091242 (9th Cir. Dec. 31, 2015) (Westlaw).

⁸⁷ See POLICE EXEC. RESEARCH FORUM, *supra* note 91, at 1.

police officials worry that the lack of guidance on the reasonable suspicion standard leaves officers little choice but to assume that people they encounter may be in the United States illegally.”⁸⁸

While there is no exact data available on the effects of the anti-immigrant laws across Alabama, Georgia, and South Carolina, studies and anecdotal evidence shed light on the impact of these policies on communities and safety. A 2012 phone study of Latinos’ perspectives on cooperation with law enforcement in Cook County, Illinois, Harris County, Texas, Los Angeles, California, and Maricopa County, Arizona found that 70% of undocumented immigrants surveyed said that they were less likely to contact law enforcement authorities if they were a victim of a crime given local law enforcement’s increased role in federal immigration enforcement.⁸⁹ Additionally, 28% of U.S.-born Latinos surveyed were concerned about the safety of those they knew who were undocumented and, therefore, feared reporting crimes to the police.⁹⁰ The survey respondents shared concerns that individuals who committed crimes were moving into their neighborhoods with the knowledge that their crimes would not be reported.⁹¹

Testimonials of individuals’ interactions with Georgia’s police provided examples of individuals trying to seek the police’s help but either encountering roadblocks or feeling that the police unlawfully detained them rather than investigating the reported crime.⁹² In Georgia, people of color were disproportionately affected by increasing cooperation between ICE and local law enforcement, and the disparity increased over time. In DHS’s Fiscal Year 2013, 96.4% of individuals subject to ICE detainers were defined by ICE as having dark or medium complexion as compared to 66.7% in Fiscal Year 2007.⁹³

Community policing is a policing practice that includes community involvement and consultation, decentralization, and increased officer discretion, in order to increase community participation in problem solving and enhance the legitimacy of the police within the community.⁹⁴ Many

⁸⁸ *Id.* at 17-18.

⁸⁹ NIK THEODORE, DEP’T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT, at i (2013), <https://perma.cc/HQ56-RFWS>.

⁹⁰ *Id.*

⁹¹ *Id.* at ii.

⁹² *See, e.g.*, AM. CIVIL LIBERTIES UNION FOUND. OF GA. ET AL., PREJUDICE, POLICING AND PUBLIC SAFETY: THE IMPACT OF IMMIGRATION HYPER-ENFORCEMENT IN THE STATE OF GEORGIA 9, 11 (2014) [hereinafter ACLU, PREJUDICE, POLICING AND PUBLIC SAFETY], <https://perma.cc/2XW6-CPCU>.

⁹³ *Id.* at 14.

⁹⁴ *Community Policing and Procedural Justice*, CTR. FOR EVIDENCE-BASED CRIME POL’Y, <https://perma.cc/9XQC-UE5N> (last visited May 15, 2018).

local law enforcement officials are concerned with the entanglement between local police and federal immigration authorities because of the negative impact on community policing practices and community safety. In 2015, the Chief of the Salt Lake City Utah Police stated, “[r]equiring police to enforce federal immigration law undermines the trust and cooperation of immigrant communities, which are essential elements of community oriented policing.”⁹⁵

In 2014, the Police Executive Research Forum released a report, *Local Police Perspectives on State Immigration Policies*, after convening police and law enforcement officials from Alabama, Arizona, California, Georgia, South Carolina, Texas and Virginia to discuss the impact of state immigration laws on local law enforcement agencies.⁹⁶ In this report, officials noted that the anti-immigrant laws have led localities to adopt policies that go against “public safety and community policing priorities.”⁹⁷ The President’s Task Force on 21st Century Policing highlighted the importance of having laws, policies, and practices that do not interfere with the ability of local law enforcement to build strong relationships with local communities.⁹⁸

6. Georgia’s Anti-Sanctuary Policy Oversight Mechanism:
Lacking Checks-and-Balances and Procedural Due Process
Protections, While Wasting Taxpayer Dollars

As part of its campaign to prevent and eliminate sanctuary policies, the state of Georgia created a separate regulatory agency purposed with coercing compliance with the state’s anti-sanctuary laws.⁹⁹ The Immigration Enforcement Review Board (“IERB” or “Board”) is a quasi-judicial body designed solely to receive and review complaints about violations

⁹⁵ Lee Davidson, *Two Utah Top Cops Oppose Making Local Police Immigration Agents*, SALT LAKE TRIB. (Aug. 6, 2015, 8:52 AM), <https://perma.cc/RD6V-T6KD> (statement of Salt Lake City Interim Police Chief Mike Brown); see TASKFORCE ON SECURE COMMUNITIES, HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP’T OF HOMELAND SEC., FINDINGS AND RECOMMENDATIONS 24 (2011), <https://perma.cc/K2UX-3GXS> (“When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information.”).

⁹⁶ POLICE EXEC. RESEARCH FORUM, *supra* note 91, at iv.

⁹⁷ *Id.* at 26 (discussing Arizona’s S.B. 1070, but noting that perspectives varied regarding its impact).

⁹⁸ See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 18 (2015), <https://perma.cc/L6DV-H4QB> (“It is the view of this task force that whenever possible, state and local law enforcement should not be involved in immigration enforcement.”).

⁹⁹ See GA. CODE ANN. § 50-36-3(b) (2017).

of Georgia's anti-sanctuary law and violations of other anti-immigrant laws.¹⁰⁰ Where an agency or official is found to be in violation, the IERB has the authority to impose sanctions.¹⁰¹

The IERB has authority to hear complaints concerning public agencies or employees "alleged to have violated or failed to properly enforce [Georgia's anti-sanctuary laws]."¹⁰² Any resident of Georgia,¹⁰³ who is also a registered voter, may submit a complaint.¹⁰⁴ Complainants do not need to show that they have been injured by an agency's or an officer's failure to comply — essentially, complainants do not need to show standing to invoke the process of the Board.

Several of the IERB's characteristics are noteworthy. The IERB is composed of seven members, three members appointed by the state's Governor, two members appointed by the Lieutenant Governor, and two members appointed by the Speaker of the House.¹⁰⁵ This is noteworthy because these positions are currently held by state officials who have long supported anti-immigrant legislation and put forth anti-immigrant statements in Georgia.¹⁰⁶ The IERB is empowered to operate as a tribunal by engaging in trial-like proceedings to investigate and adjudicate complaints, even going so far as to hear appeals of initial decisions made by its own members.¹⁰⁷ It may also promulgate its own rules.¹⁰⁸ The most troubling aspects of the IERB are the processes by which it hears complaints, its power to sanction public agencies and officials, and the lack of oversight and control that may be imposed on its members and actions.

The Board's complaint process is deficient because it lacks oversight and due process procedures that are present in other forms of administrative hearings. The statutory mandate for the IERB neither provides for

¹⁰⁰ § 50-36-3(e).

¹⁰¹ § 50-36-3(g)–(h).

¹⁰² § 50-36-3(e).

¹⁰³ GA. CODE ANN. § 40-2-1(9) (2017) ("‘Resident’ means a person who has a permanent home or domicile in Georgia and to which, having been absent, he or she has the intention of returning.”).

¹⁰⁴ § 50-36-3(e).

¹⁰⁵ § 50-36-3(b).

¹⁰⁶ See, e.g., Jeff Gill, *Ralston Discusses Redistricting, HOPE, Immigration*, GAINESVILLE TIMES (May 31, 2011, 10:33 PM), <https://perma.cc/SPQ6-V7ME>; Jeremy Redmon, *Deal Signs Bill Expanding Immigration Crackdown*, ATLANTA J.-CONST. (Apr. 25, 2013, 10:13 AM), <https://perma.cc/MM78-4D4S>; Dan Whisenhunt, *Lt. Governor Casey Cagle Escalates Fight with Decatur Using State Immigration Board*, DECATURISH (Nov. 7, 2017), <https://perma.cc/XY2F-A4FE>.

¹⁰⁷ § 50-36-3(i).

¹⁰⁸ § 50-36-3(d)(3).

oversight over its decisions, nor a process resembling procedural due process.¹⁰⁹ For one thing, there is no independent state body overseeing the actions of the IERB. As such, the IERB can act, and so far has acted, with impunity.¹¹⁰

The sanctions that the IERB may impose are severe and may be detrimental to a public agency's ability to function. Possible sanctions include "revocation of qualified local government status, loss of state appropriated funds, and a monetary fine of not less than \$1,000.00 or more than \$5,000.00."¹¹¹ The failure to comply with remedial action also authorizes the Attorney General to bring a civil mandamus action against the agency or employee in order to enforce compliance with the law and the Board's recommendations.¹¹² These measures that could be particularly damaging for small localities leave public agencies and employees with little choice but to comply.

Since its adoption, the IERB has engaged in gross overreach.¹¹³ The IERB has also proven that it is willing to go beyond even its own rules' limitations by investigating claims that are insufficiently pled. According to the complaint process rules set by the IERB, a complaint must contain "sufficient facts concerning the alleged violation . . . including a date or range of dates in which this violation or failure to enforce allegedly occurred, to determine if a *prima facie* case exists for finding a violation or failure to enforce."¹¹⁴ The IERB failed to enforce this provision in 2012 when it considered a complaint filed by Michael Dale Smith. Smith's complaint alleged that the city of Vidalia was a sanctuary city.¹¹⁵ The Board expressed concern over the lack of information alleged in Smith's

¹⁰⁹ See § 50-36-3; see also GA. COMP. R. & REGS. 291-2-.01 to 291-2-.05 (2018), <https://perma.cc/A37K-QKK7> (IERB complaint, hearing, and appeals regulations).

¹¹⁰ Also, in a recent meeting where Lieutenant Governor Casey Cagle filed a complaint against the City of Decatur, an IERB member who had made statements to the media about the City of Decatur policy ahead of the hearing refused to recuse himself. *State Immigration Board Will Hear Complaint Against City of Decatur in January*, DECATURISH (Nov. 15, 2017), <https://perma.cc/VDH9-EQ82>. He finally stepped down from the investigation after the city filed a complaint. <http://decaturish.com/2018/03/immigration-board-member-who-called-lt-gov-cagle-a-winner-abstains-from-decatur-case/>

¹¹¹ § 50-36-3(h).

¹¹² § 50-36-3(j).

¹¹³ See, e.g., Jeremy Redmon, *Georgia's Immigration Enforcement Panel Draws Scrutiny*, POLITICALLY GA. (Oct. 23, 2017, 5:32 PM), <https://perma.cc/A3RV-FPXB> (explaining that nearly all of the 20 complaints since 2011 came from one individual with a known animus towards immigrant communities and that the IERB's lack of activity with filed complaints is evidence that its actions are not within the state's purview).

¹¹⁴ GA. COMP. R. & REGS. 291-2-.01(3)(c) (2018) (emphasis in original).

¹¹⁵ See Orlando Montoya, *Officials Probe Immigration in Vidalia*, GA. PUB. BROADCASTING (July 2, 2012, 11:50 AM), <https://perma.cc/K2QB-HLSK>.

complaint¹¹⁶ given the absence of specific names, dates, and locations in the complaint, beyond the naming of the period from 2006-2012, to support the allegations.¹¹⁷ However, instead of dismissing the complaint for a failure to establish sufficient facts, the Board voted unanimously to create a review panel and investigate Smith's allegations, a demonstration of the Board's gross overreach.¹¹⁸ The unanimous approval of such a poorly supported complaint demonstrates both the Board's willingness to depart from its own rules and its lack of regard for public entities' limited time and resources. Ultimately, after finding nothing actionable, the Board decided to dismiss the complaint.¹¹⁹ However, the mere fact that the Board acted on the complaint, despite its substantive misgivings, shows the potential for abuse of power.

Associated with the overreach and checks-and-balance issues that are plaguing the IERB's proceedings is its cost to Georgia's taxpayers. Although IERB members are unpaid, "expenses incurred in connection with the investigation and review of complaints . . ." must still be reimbursed through the state government's appropriations.¹²⁰ In 2015, Georgia appropriated \$20,000 to the IERB.¹²¹ However, appropriations are only a fraction of the actual expenses incurred by all parties involved in complaint proceedings. Even if a complaint is not factually sufficient on its face, public agencies must still waste time and taxpayer money in responding to IERB investigations and defending against allegations by obtaining counsel.¹²² The cost for state agencies to comply with IERB investigations and pay sanctions is likely an acutely felt waste of taxpayer dollars.

Its habit of overreach, its unchecked power, and the resulting wasted resources liken the IERB's proceedings to those of the Salem witch trials; localities are being targeted because of animus toward immigrants.¹²³

¹¹⁶ See Jeremy Redmon, *Panel to Probe Immigration-Related Complaint Against Vidalia*, ATLANTA J.-CONST. (June 29, 2012, 4:51 PM), <https://perma.cc/SWL5-7ALQ>.

¹¹⁷ Azadeh Shahshahani, *Unchecked Power Granted by House Bill 87*, JURIST (Aug. 10, 2012, 1:00 AM), <https://perma.cc/42N3-2BAQ>.

¹¹⁸ See Redmon, *Panel to Probe Immigration-Related Complaint Against Vidalia*, *supra* note 130.

¹¹⁹ Associated Press, *Immigration Panel Dismisses Complaint*, GA. PUB. BROADCASTING (Sept. 20, 2012, 2:45 PM), <https://perma.cc/BH5J-SJ3H>.

¹²⁰ GA. CODE ANN. § 50-36-3(c) (2017).

¹²¹ H.B. 76, 2015-2016 Gen. Assemb., Reg. Sess. § 4 (Ga. 2015).

¹²² See Edgar Treiguts, *Immigration Panel Stirs Controversy*, GA. PUB. BROADCASTING (Sept. 11, 2011, 5:00 AM), <https://perma.cc/KP8U-TMN9> ("If a complaint is filed against you, even if it has no merit, you still have to waste time and money that a lot of counties don't have."). (statement of Karen Weinstock, immigration attorney with the Atlanta firm Siskind Susser).

¹²³ An article from the Atlanta Journal Constitution is revealing. Redmon, *Georgia's Immigration Enforcement Panel Draws Scrutiny*, *supra* note 127 ("Over the next six years the

II. LOCAL RESISTANCE TO SECURE COMMUNITIES AND RELATED PROGRAMS

Immigrant communities not only face unfriendly state policies, but are subjected to harsh federal policies as well. Despite these policies, many local communities, in addition to state governments and localities, have met the challenge with strong opposition. This opposition mainly comes in the form of sanctuary polices that are compliant with anti-sanctuary state legislation. The following is a discussion of some federal anti-immigrant policies adopted and discarded over the last ten years, and the effective opposition toward those policies on the state and local level.

A. Local Policies Passed in Opposition to Secure Communities and “287(g) Agreements”

Sanctuary policies have been a key part of the resistance to recent federal anti-immigrant policies. The first of these recent policies was Secure Communities, which was launched by ICE in 2008.¹²⁴ Secure Communities is an effort to prioritize the removal of noncitizens who were arrested and/or violated criminal laws. To function, Secure Communities relies on fingerprint-based biometric data gathered by the FBI from arrests and bookings made by state and local authorities.¹²⁵ The FBI shares the fingerprints with ICE, and ICE checks the fingerprints against its records to determine the immigration status of individuals.¹²⁶ Under Secure Communities, when fingerprints collected by state and local law enforcement match individuals who could be deportable, ICE then issues a detainer requesting the authorities at the state or local jail to continue holding the individual for up to forty-eight hours, excluding holidays and weekends.¹²⁷ The requested time allows ICE to interview the individual and decide whether to seek the individual’s removal from the United States.¹²⁸

Many localities met ICE’s Secure Communities initiative with resistance and enacted sanctuary policies to mitigate its deleterious effects.

Immigration Enforcement Review Board received 20 complaints to investigate, according to documents obtained through Georgia’s Open Records Act. And all but one came from the same person: D.A. King, a longtime anti-immigration activist from Marietta.”).

¹²⁴ See *Overview, Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/Q9Y3-NL4Z> (last visited May 18, 2018).

¹²⁵ See U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., SECURE COMMUNITIES: STANDARD OPERATING PROCEDURES 3-5 [hereinafter SECURE COMMUNITIES: STANDARD OPERATING PROCEDURES], <https://perma.cc/9J7X-4HA4>.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.* at 8.

Secure Communities purportedly didn't impose "new or additional requirements" on state and local law enforcement agencies.¹²⁹ However, many jurisdictions were opposed to the additional cost of complying with detainers and the constitutional concerns over holding individuals without a warrant or probable cause. As of December 2016, 612 counties, and 3 states, had adopted policies that limited cooperation with ICE on detainers in some way.¹³⁰ As of December 2017, more than 760 counties and five states had adopted policies that limit cooperation with ICE in some way.¹³¹ Localities adopted policies in the form of police and sheriff's department policies, executive orders, jail policies, ordinances, and resolutions.¹³² Two states, California and Connecticut, also passed TRUST Acts, which set statewide restrictions on cooperation with ICE detainers.¹³³ This outcry led ICE to replace Secure Communities.¹³⁴

The 287(g) program was passed as a part of the Illegal Immigration Reform and Responsibility Act of 1996.¹³⁵ This program promotes state and local law officials' collaboration with federal immigration laws by allowing the Department of Homeland Security (DHS) to enter into Memoranda of Agreements (MOAs) with local and state entities.¹³⁶ These MOAs essentially establish that state and local police officers can perform certain functions of federal immigration agents, including issuing detainers, interviewing individuals about their immigration status, and transferring noncitizens into ICE custody.¹³⁷ However, MOAs can be terminated at any time by either DHS or the local law enforcement agency.¹³⁸ Also, once the MOA expires, DHS is not legally obligated to renew it.¹³⁹ Major

¹²⁹ *Process, Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/Q9Y3-NL4Z> (last visited May 18, 2018).

¹³⁰ See LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA'S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 12 (2016), <https://perma.cc/FC6W-38D7> (showing that brackets three through seven include the 612 counties that limit cooperation with ICE).

¹³¹ ILRC, THE RISE OF SANCTUARY, *supra* note 31, at 11, 20.

¹³² For a comprehensive compilation of these local policies, see *Detainer Policies*, IMMIGRANT LEGAL RESOURCE CTR. (Aug. 20, 2015), <https://perma.cc/QB2D-Z2J9>.

¹³³ Sam Dorman, *DHS Designates California and Connecticut as Sanctuary States*, WASH. FREE BEACON (Mar. 31, 2017, 9:40 AM), <https://perma.cc/6969-JL2U>.

¹³⁴ See discussion *supra* INTRODUCTION; Jeremy Redmon, *Immigration Enforcement Program to Be Replaced in Jails Nationwide*, ATLANTA J.-CONST. (Dec. 14, 2014, 5:00 PM), <https://perma.cc/4RFB-8DEJ>.

¹³⁵ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563, to -564 (1996); INA § 287(g), 8 U.S.C. § 1357(g).

¹³⁶ AM. IMMIGRATION COUNCIL, THE 287(G) PROGRAM: AN OVERVIEW 1 (2017), <https://perma.cc/ZB89-4TV3>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

complaints regarding the 287(g) program include that these programs are expensive for state and local agencies and have resulted in racial profiling.¹⁴⁰

1. Case Study: Georgia Localities' Efforts to Enhance Community Trust and Safety

Despite widespread resistance in other states, the response in Georgia was grossly disproportionate to the effect of Secure Communities in the state. Of the 381,406 individuals deported through Secure Communities since its implementation in 2008, 12,525 were living in Georgia.¹⁴¹ It was not until years after the adoption of Secure Communities that Georgia localities began to show opposition to the program.

Seven Georgia localities showed resistance to ICE detainers. Three of the counties, Fulton, Clayton, and DeKalb, are concentrated in Atlanta and the surrounding area.¹⁴² In September 2014, Fulton County became the first Georgia locality to issue a policy of noncompliance in regards to Secure Communities.¹⁴³ Fulton County commissioners issued a resolution to urge the sheriff's office to limit compliance with ICE's voluntary detainers requests and ICE requests generally.¹⁴⁴ The resolution urged the sheriff's office to decline ICE requests for access to individuals and for use of Fulton County facilities, and to prohibit county employees from communicating with ICE about the incarceration or release status of individuals while on duty, unless the federal government agrees to reimburse Fulton County for the cost of compliance, ICE agents have a "criminal warrant" (that meets the standard of probable cause), or the county has "a legitimate law enforcement purpose that is not related to the enforcement of immigration law."¹⁴⁵

DeKalb County and Clayton County soon followed suit.¹⁴⁶ Clayton County and DeKalb County's policies of limited compliance came directly from their sheriffs' offices.¹⁴⁷ In November 2014, the Clayton County Sheriff's office sent an email stating that the office would no

¹⁴⁰ *Id.* at 4-8.

¹⁴¹ Redmon, *Immigration Enforcement Program to Be Replaced in Jails Nationwide*, *supra* note 152.

¹⁴² See Jeremy Redmon & Greg Bluestein, *Georgia Cities Limiting Cooperation with ICE Amid Trump's Crackdown*, ATLANTA J.-CONST. (Oct. 12, 2017, 6:39 PM), <https://perma.cc/D3JE-W96E>.

¹⁴³ *Id.*

¹⁴⁴ See Res. 14-0683, Fulton Cty. Bd. of Comm'rs (2014), <https://perma.cc/3M2B-LLVT>.

¹⁴⁵ *Id.* at 2.

¹⁴⁶ Redmon, *Immigration Enforcement Program to Be Replaced in Jails Nationwide*, *supra* note 152.

¹⁴⁷ See Redmon & Bluestein, *Georgia Cities Limiting Cooperation with ICE Amid Trump's Crackdown*, *supra* note 162.

longer detain or extend the detention of anyone at the request of ICE unless ICE presented the sheriff's office with a judicially issued warrant authorizing the detention.¹⁴⁸ In December 2014, DeKalb County's Sheriff's office also released a memorandum outlining its refusal to honor ICE requests to extend the detention of released DeKalb County jail inmates without a warrant or other sufficient probable cause.¹⁴⁹ Other localities in Georgia, namely Fayette County, Clarke County, the City of Clarkston, and the City of Decatur, also followed suit.¹⁵⁰ Studies have shown that counties with sanctuary policies have lower crimes rates and stronger economies than nonsanctuary counties.¹⁵¹

In contrast to the policies adopted by these seven localities to limit their collaboration with ICE, four other Georgia counties, Cobb,¹⁵² Gwinnett,¹⁵³ Hall,¹⁵⁴ and Whitfield,¹⁵⁵ maintained 287(g) agreements.¹⁵⁶ The 287(g) program allows ICE to partner with local law enforcement agencies and delegate some of their immigration enforcement functions.¹⁵⁷ Governor Nathan Deal encouraged the formation of 287(g) partnerships in an attempt to allay fears of the cost of enforcing HB 87.¹⁵⁸ In reality, the federal government agreed to pay the cost of training local law en-

¹⁴⁸ Jeremy Redmon, *Clayton County Sheriff's Office Stops Complying with ICE Detainers*, ATLANTA J.-CONST. (Nov. 19, 2014, 12:23 PM), <https://perma.cc/Z53D-MNHJ>.

¹⁴⁹ Press Release, Jeffrey L. Mann, Sheriff, DeKalb Cty. Sheriff's Office, DeKalb Sheriff Will Not Hold Released Inmates for Immigrations and Customs Without Warrants (Dec. 4, 2014), <https://perma.cc/V6NN-NMFQ>.

¹⁵⁰ See PROJECT SOUTH ET AL., GEORGIA NON-DETAINDER POLICIES, *supra* note 74.

¹⁵¹ "The data are clear: Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties. Moreover, economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher employment-to-population ratios, and lower unemployment." TOM K. WONG, CTR. FOR AM. PROGRESS & NAT'L IMMIGRATION LAW CTR., THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY 1 (2017), <https://perma.cc/X398-QE3R>.

¹⁵² Memorandum of Agreement between U.S. Immigration & Customs Enf't, Cobb Cty. Bd. of Comm'rs, & Cobb Cty. Sheriff [hereinafter Cobb 287(g)], <https://perma.cc/YB9D-QSME>.

¹⁵³ Memorandum of Agreement between U.S. Immigration & Customs Enf't & Gwinnett Cty. Sheriff's Dep't [hereinafter Gwinnett 287(g)], <https://perma.cc/SD8L-LQ37>.

¹⁵⁴ Memorandum of Agreement between U.S. Immigration & Customs Enf't & Hall Cty. Sheriff's Office [hereinafter Hall 287(g)], <https://perma.cc/4SGA-F4VJ>.

¹⁵⁵ Memorandum of Agreement between U.S. Immigration & Customs Enf't & Whitfield Cty. Sheriff's Office [hereinafter Whitfield 287(g)], <https://perma.cc/8GVL-JVHZ>.

¹⁵⁶ INA § 287(g), 8 U.S.C. § 1357(g) (2018).

¹⁵⁷ *Delegation of Immigration Authority Section 287(g) Immigration & Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/U72B-BL2D> (last visited May 15, 2018).

¹⁵⁸ See Jeanne Bonner, *Who Will Pay for New Immigration Law?*, GA. PUB. BROADCASTING (May 26, 2011, 2:27 AM), <https://perma.cc/Z7BM-CQUL>.

forcement in immigration enforcement through 287(g) partnerships; however, with the exception of providing technology in some instances, it does not cover the cost of enforcement itself.¹⁵⁹ In Gwinnett County, Sheriff Butch Conway credited 287(g) with decreasing the crime rate and the prison population.¹⁶⁰ Immigrant rights activists dispute that claim by arguing that 287(g) merely discouraged undocumented immigrants from reporting crime.¹⁶¹ The true cost of 287(g) has been the loss of trust between law enforcement and the immigrant community.¹⁶² Referred to as a “successful force multiplier,” 287(g) agreements have made a comeback under the Trump administration.¹⁶³

Both Secure Communities and 287(g) have had a devastating effect on communities in Georgia. The local law enforcement in Georgia voluntarily turned over more than 54,000 individuals to ICE between 2007 and June 2013.¹⁶⁴ The number of detainers that ICE issued between 2007 and 2013 grew by 17,169%, indicating the increased cooperation between ICE and local law enforcement.¹⁶⁵ Perhaps the most insidious effect of the cooperation has been the increased reliance on racial profiling by local law enforcement.¹⁶⁶ The overwhelming majority of detainers issued in Georgia were for persons of Latin American origin.¹⁶⁷ Specifically, 97.7% of ICE arrests and 96% of ICE detainers from 2007 to 2013 targeted individuals with medium or dark complexions.¹⁶⁸ U.S. citizens have also been caught up in the frenzy of racial profiling created by the collaboration, as 48 of the 54 ICE detainers issued for U.S. citizens targeted persons of medium to dark complexion.¹⁶⁹

¹⁵⁹ See Cobb 287(g), *supra* note 172, at 5-6; Gwinnett 287(g), *supra* note 173, at 5-6; Hall 287(g), *supra* note 174, at 5-6; Whitfield 287(g), *supra* note 175, at 5-6.

¹⁶⁰ Tyler Estep, *Sherriff: Jail's Dropping Population Due to Controversial Immigration Program*, GWINNETT DAILY POST (Jan. 10, 2014), <https://perma.cc/7BLK-KDQV>.

¹⁶¹ See *id.*

¹⁶² See generally ACLU, PREJUDICE, POLICING AND PUBLIC SAFETY, *supra* note 106.

¹⁶³ See Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), <https://perma.cc/4UZP-UXFT>.

¹⁶⁴ ACLU, PREJUDICE, POLICING AND PUBLIC SAFETY, *supra* note 106, at 10.

¹⁶⁵ *Id.* at 10-11.

¹⁶⁶ *Id.* at 12-14.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 13.

¹⁶⁹ *Id.* at 14.

B. Changes to Secure Communities

ICE responded to nationwide criticism of Secure Communities by retiring the program and replacing it with the Priorities Enforcement Program (“PEP”).¹⁷⁰ The showing of probable cause under PEP did not satisfy the requirements of policies that were put into place by resistant localities. As a doctrine, probable cause originates in the Fourth Amendment.¹⁷¹ Probable cause consists of “facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”¹⁷²

However, the showing of probable cause on the detainer form under the now defunct PEP could consist of a final order of removal, pendency of removal proceedings, biometric match that reflects no lawful status or removability, statements made by the individual to an immigration officer, and/or other reliable evidence.¹⁷³ None of the items listed here indicate an offense under state law. Instead, all the items relate to the enforcement of immigration law. None of the listed items amount to a judicial warrant and, thus, would fall short of a policy such as that present in Clayton County, Georgia.¹⁷⁴ All the listed items would also fall short of a policy such as that urged by commissioners in Fulton County, Georgia, requiring a warrant or a “legitimate law enforcement purpose that is not related to the enforcement of immigration law.”¹⁷⁵ Furthermore, none of the listed items would satisfy California’s TRUST Act,¹⁷⁶ and only a final order of removal would satisfy Connecticut’s TRUST Act.¹⁷⁷

This change was short lived as Secure Communities was revived by the Trump Administration following the November 2016 presidential election. On January 25, 2017, President Trump signed an executive order that dealt with immigration enforcement.¹⁷⁸ On February 20, 2017, then-DHS Secretary, John Kelly, signed two implementation memoranda

¹⁷⁰ See *Priority Enforcement Program*, *supra* note 18.

¹⁷¹ See U.S. CONST. amend. IV (“[A]nd no Warrants shall issue, but upon probable cause . . .”).

¹⁷² *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)) (internal quotations omitted).

¹⁷³ OFFICE OF ENF’T & REMOVAL OPERATIONS, U.S. IMMIGRATION & CUSTOMS ENF’T, PRIORITY ENFORCEMENT PROGRAM 2, <https://perma.cc/5D79-V6TL>.

¹⁷⁴ See Redmon, *Clayton County Sheriff’s Office Stops Complying with ICE Detainers*, *supra* note 168.

¹⁷⁵ Res. 14-0683, Fulton Cty. Bd. of Comm’rs 2 (2014), <https://perma.cc/3M2B-LLVT>.

¹⁷⁶ See California Values Act, CAL. GOV’T CODE § 7284.6(a)(1) (West 2018).

¹⁷⁷ See CONN. GEN. STAT. § 54-192h(b) (2018).

¹⁷⁸ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

which sought to carry out these policies.¹⁷⁹ In one of the implementation memorandum, entitled “Enforcement of the Immigration Laws to Serve the National Interest”, Secretary Kelly ended the PEP program and revived the largely discredited Secure Communities program.¹⁸⁰ Federal Courts have been skeptical about the constitutionality of ICE detainers.¹⁸¹

With the reintroduction of Secure Communities, the same issues which plagued the prior administration will be present once again as the ineffective changes made to Secure Communities from the implementation of PEP would no longer be existent. These issues include the erosion in community trust and, accordingly, a reduction in community safety.

III. THREATS TO SANCTUARY POLICIES AT THE FEDERAL LEVEL

Pending and recently proposed legislation at the national level demonstrates traction in terms of federal efforts to eliminate sanctuary policies. Similar to the anti-sanctuary provisions adopted within anti-immigrant laws, these policies seek to eradicate sanctuary provisions by eliminating localities’ rights to determine: when and with whom to share information, and when to honor ICE’s detainer requests. Nevertheless, since many legal challenges to federal and state anti-sanctuary policies exist and have recently been successful, community groups should remain encouraged to be active in pushing for more sanctuary policies.

A. *Executive Branch Efforts to Defund Sanctuary Cities Before and After the November 2016 Presidential Election*

Both prior to and after the November 2016 presidential election, the Executive Branch has taken steps to assess its power to limit sanctuary policies. In 2016, a memorandum from the U.S. Inspector General concluded that sanctuary policies could violate 8 U.S.C. § 1373,¹⁸² a federal statute prohibiting local and state governments from enacting laws or policies that limit communications regarding the immigration or citizenship

¹⁷⁹ See Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), <https://perma.cc/4UZP-UXFT>; Q&A: *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States*, U.S. DEP’T HOMELAND SECURITY (Feb. 21, 2017), <https://perma.cc/ECT6-376X>.

¹⁸⁰ Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), <https://perma.cc/4UZP-UXFT>.

¹⁸¹ See, e.g., *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015); *Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014).

¹⁸² Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice, to Karol V. Mason, Assistant Attorney Gen., U.S. Dep’t of Justice (May 31, 2016), <https://perma.cc/9LDZ-TZ2G>.

status of individuals with DHS.¹⁸³ The U.S. Department of Justice, Office of Justice Programs (“OJP”) concluded that the authorizing legislation for the Byrne and Jobs for America’s Graduates (“JAG”) grant programs requires the grant recipients to certify their compliance with the “authorizing legislation and all other applicable federal laws,” including 8 U.S.C. § 1373.¹⁸⁴ The OJP further stated that noncompliant programs must take steps to become compliant; the failure to comply could result in “the withholding of grant funds or ineligibility for future OJP grants or subgrants, suspension or termination of the grant, or other administrative, civil, or criminal penalties, as appropriate.”¹⁸⁵

One of the largest challenges to sanctuary policies thus far has been President Trump’s executive order released on January 25, 2017 dealing with immigration enforcement.¹⁸⁶ During his candidacy, President Donald Trump pledged to do away with all federal funding for sanctuary cities.¹⁸⁷ Not even a week into his presidency, President Trump signed the executive order “Enhancing Public Safety in The Interior of the United States” which, among other things, sought to cut off federal funding from cities and states with sanctuary policies.¹⁸⁸ The executive order gave the DHS Secretary the authority to designate a jurisdiction as a sanctuary jurisdiction.¹⁸⁹ The significance of this tool bestowed upon the Secretary is that the executive order failed to give basic instructions on how such a designation would occur, when it could occur, and on what basis. The executive order also failed to instruct localities on how they could refute such a designation and prevent funds from being withdrawn. This provision is particularly troubling given the experience of states, such as Georgia, which have sought to go after localities thought to have sanctuary policies, and have used questionable tactics. The executive order also directed the U.S. Attorney General to “take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”¹⁹⁰ Furthermore, the order directed the Director of the Office

¹⁸³ IMMIGRANT LEGAL RES. CTR. & WASH. DEF. ASS’N, FAQ ON 8 U.S.C. § 1373 AND FEDERAL FUNDING THREATS TO “SANCTUARY CITIES” 1 (2017), <https://perma.cc/E25T-T46D>.

¹⁸⁴ OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, ADDITIONAL GUIDANCE REGARDING COMPLIANCE WITH 8 U.S.C. § 1373, <https://perma.cc/6GV6-994E>.

¹⁸⁵ *Id.*

¹⁸⁶ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

¹⁸⁷ Tami Luhby, *Trump Condemns Sanctuary Cities, but What Are They?*, CNN (Sep. 1, 2016, 10:08 AM), <https://perma.cc/U8FU-H6WF>.

¹⁸⁸ Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799 (Jan. 25, 2017).

¹⁸⁹ *Id.* at 8,801.

¹⁹⁰ *Id.*

of Management and Budget “to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.”¹⁹¹ Already, the Miami-Dade County Commission in Florida, for fear of losing federal funding, voted to end the county’s sanctuary status.¹⁹² Since then, the U.S. Department of Justice has issued a determination that Miami-Dade is no longer designated as a sanctuary city.¹⁹³

Aside from cutting off access to grants, lawsuits are another tool that President Trump could employ to target and punish sanctuary cities.¹⁹⁴ Even going beyond diminishing sanctuary policies, the executive order directed the U.S. Attorney General to take immediate action to develop new 287(g) agreements.¹⁹⁵ These steps will likely result in the erosion of community trust as such agreements have done in the past, as discussed in Section III.

Nonetheless, sanctuary policies remain a valid option in the wake of federal anti-sanctuary policies. Many cities and counties have spoken up against the Trump administration’s plan to increasingly use state and local law officials to enforce immigration laws, such as New York and Chicago.¹⁹⁶ By 2017, five state had enacted statewide policies to limit coop-

¹⁹¹ *Id.*

¹⁹² Alan Gomez, *Miami-Dade Commission Votes to End County’s ‘Sanctuary’ Status*, USA TODAY (Feb. 17, 2017, 3:06 PM), <https://perma.cc/FB8Q-FPEY>.

¹⁹³ See Douglas Hanks, *Miami-Dade Complied with Trump to Change its ‘Sanctuary’ Status. It Worked*, MIAMI HERALD (Aug. 7, 2017, 12:40 PM), <https://perma.cc/PRM4-YQZ3>.

¹⁹⁴ See Alan Gomez, *Trump Can Punish ‘Sanctuary Cities’ that Protect Undocumented Immigrants*, USA TODAY (Jan. 10, 2017, 11:57 AM), <https://perma.cc/X2R5-RNG3>.

¹⁹⁵ See generally Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017). In addition, ICE was ordered to put out a weekly report highlighting the localities that refused to honor ICE detainers. On January 25th, 2017, President Donald J. Trump signed into effect Executive Order 13,767 on “Border Security and Immigration Enforcement Improvements.” In relevant part, this order instructed the Secretary of Homeland Security to “immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA . . .” *Id.* at 8,795. The order further directed the Secretary to “take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary.” *Id.* Since then, the number of law enforcement agencies that have entered into 287(g) agreements with ICE has nearly doubled, totaling 60 as of August 2017. *ICE Announces 18 New 287(g) Agreements in Texas*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 31, 2017), <https://perma.cc/3XQ5-XNL8>. A majority of the increase has come from Texas, where 18 new counties have signed 287(g) agreements since Trump’s election. *Id.*

¹⁹⁶ Liz Robbins, *‘Sanctuary City’ Mayors Vow to Defy Trump’s Immigration Order*, N.Y. TIMES (Jan. 25, 2017), <https://perma.cc/E9RT-UN9G>.

eration with ICE and/or disallow the use of state resources for immigration enforcement (California, Illinois, New York, Oregon, Washington).¹⁹⁷ Indeed, many cities have challenged Trump's executive order both politically and judicially; the cities of San Francisco, Santa Clara, Seattle, Richmond, Lawrence, Chelsea, and Los Angeles have either sued the Trump Administration in federal court or have announced plans to do so.¹⁹⁸

On November 20, 2017, the United States District Court for the Northern District of California granted San Francisco and Santa Clara a nation-wide permanent injunction staying the anti-sanctuary provisions of the executive order.¹⁹⁹ As the injunction applied nationally, the cases brought by other cities have also been stayed.

In Miami-Dade, an individual secured release through a writ of *habeas corpus* when a judge determined that he was detained as a direct result of the President's executive order.²⁰⁰ In this order, which was issued before the Northern California injunction, the judge followed an analogous path of reasoning that concluded that federal coercion of local law enforcement through threats of pulling grants was a violation of the Tenth Amendment.²⁰¹ The Trump administration has appealed the decision to the 9th U.S. Circuit Court of Appeals, where it is currently pending.²⁰²

The Tenth Amendment of the U.S. Constitution prohibits the federal government from commandeering states and localities to perform certain

¹⁹⁷ ILRC, *THE RISE OF SANCTUARY*, *supra* note 31, at 20.

¹⁹⁸ *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (granting permanent injunction for both Santa Clara and San Francisco; Los Angeles also moved to intervene), *appeal filed*, No. 3:17-cv-00574 (9th Cir. Dec. 14, 2017); *City of Seattle v. Trump*, No. 2:17-cv-00497-BAT, 2017 BL 471111 (W.D. Wash. Nov. 1, 2017) (staying proceedings after permanent injunction granted in *County of Santa Clara v. Trump*); *City of Richmond v. Trump*, No. 3:17-cv-01535, 2017 BL 292782 (N.D. Cal. Aug. 21, 2017); *City of Chelsea v. Trump*, No. 1:17-cv-10214-GAO (D. Mass. Feb. 8, 2017) (staying proceedings after permanent injunction granted in *County of Santa Clara v. Trump*).

¹⁹⁹ *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017).

²⁰⁰ *Lacroix v. Junior*, Nos. F17-376, F17-1770, 2017 WL 837477 (Fla. Cir. Ct. Mar. 1, 2017).

²⁰¹ *See id.* at *6.

²⁰² *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *appeal filed*, No. 3:17-cv-00574 (9th Cir. Dec. 14, 2017).

acts.²⁰³ Furthermore, sanctuary policies can be crafted in such a way as to avoid violating 8 U.S.C. § 1373.²⁰⁴

B. National Legislation: House Bill 83

Sanctuary policies faced opposition at the federal level in 2015.²⁰⁵ The murder of Kate Steinle, a young woman from California, in the summer of 2015 by Juan Francisco Lopez-Sanchez, an undocumented immigrant,²⁰⁶ catalyzed U.S. House Republicans to promulgate a bill that would have stripped certain federal funding from local governments that ignored ICE detainers.²⁰⁷ Prior to the murder, a San Francisco sheriff had released Lopez-Sanchez after an old marijuana charge against him was dropped, despite a detainer request from ICE.²⁰⁸ The bill was targeted at preventing sanctuary policies like the one implemented in San Francisco.²⁰⁹ The bill passed the House by a vote of 241-179.²¹⁰ Law enforcement organizations opposed the bill for fear that undocumented immigrants would become less willing to trust the police and, thus, the bill would decrease the effectiveness of law enforcement.²¹¹ Religious leaders also wrote op-eds in opposition to the bill, decrying anti-sanctuary policies as immoral and unjust and calling for immigration reform that mends the negative effects of current policy instead of condemning immigrants.²¹² The opposition, as well as a veto threat from the White House,

²⁰³ U.S. CONST. amend. X; *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 899 (1997) (invalidating the Brady Handgun Violence Prevention Act requirement that state and local law enforcement perform background checks on firearm purchasers); *New York v. United States*, 505 U.S. 144, 189 (1992) (invalidating federal statutory requirement that state and local law enforcement enact legislation providing for disposal of radioactive waste or take title to that waste).

²⁰⁴ N.Y. STATE ATTORNEY GEN. ERIC T. SCHNEIDERMAN, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS, *supra* note 86.

²⁰⁵ *See Senate Dems Block Anti-Sanctuary City Bill*, FOX NEWS (Oct. 20, 2015), <https://perma.cc/EGQ9-JLSN>.

²⁰⁶ *See id.*

²⁰⁷ Mobilizing Against Sanctuary Cities Act, H.R. 83, 115th Cong. (2017).

²⁰⁸ *See Senate Dems Block Anti-Sanctuary City Bill*, *supra* note 226.

²⁰⁹ *See* H.R. 83.

²¹⁰ John Fritze, *House Passes 'Sanctuary City' Bill, Reigniting Immigration Debate*, BALTIMORE SUN (July 23, 2015, 9:46 PM), <https://perma.cc/GP2H-9R6M>.

²¹¹ *See Id.*

²¹² *See, e.g.*, Bishop Minerva G. Carcaño, *Praying for Healing – A Faith Leader's Response to Anti-Immigrant Legislation*, HUFFINGTON POST (July 23, 2015, 2:18 PM), <https://perma.cc/NF3F-MR4J>; Noel Castellanos & Alexia Salvatierra, *Congress: Sanctuary Cities Are Biblical, Don't Scapegoat Them*, CHRISTIAN POST (Oct. 19, 2015, 5:08 AM), <https://perma.cc/XF7H-PZJ8>; *Over 1,000 Religious Leaders Urge Senate to Stop the Attack on Sanctuary Cities*, CHURCH WORLD SERV. (Oct. 19, 2015), <https://perma.cc/U676-LAS2>.

proved effective, and Democrats in the Senate blocked passage of the bill.²¹³

House Republicans have most recently introduced the Mobilizing Against Sanctuary Cities Act.²¹⁴ The Act²¹⁵ would allow the Attorney General to identify the states and localities in violation of Section 1373 of the United States Code.²¹⁶ The cities identified by the Attorney General would be ineligible for federal funding for at least one year and until the Attorney General certifies that they are in compliance with Section 1373.²¹⁷ Nevertheless, this bill, if enacted as law, would have run up against the same legal challenges that are being mounted against the executive branch's efforts to eliminate sanctuary policies, as discussed above.

CONCLUSION

This article has sought to make clear the consequences of forced state and local involvement in the enforcement of federal immigration policy and how sanctuary policies can be an effective tool in combating these consequences. The attempts of the federal government and states, such as Alabama, Georgia, and South Carolina, to coerce localities into cooperating with ICE will exacerbate budget constraints, expose localities to civil liability, and result in unconstitutional policing. Additionally, if Georgia's experience with the IERB is any indication of what is to come with the federal crackdown on localities with sanctuary policies, many localities across the nation could be facing costly battles to maintain these policies that foster community trust and reduce civil liability of localities. Furthermore, Secure Communities and PEP have led to the separation of families, resulting in reduction in community trust. Any such effort risks diminishing trust between law enforcement and immigrant communities and alienating immigrants from cooperating with the local police.

For the state government to take on the regulation of immigration policies, an issue in the federal arena, in such an involved way results in taking away limited local resources from essential state functions. The

²¹³ See *Senate Dems Block Anti-Sanctuary City Bill*, *supra* note 226.

²¹⁴ Mobilizing Against Sanctuary Cities Act, H.R. 83, 115th Cong. (2017).

²¹⁵ Which states in relevant part, "The Attorney General shall determine annually which State or local jurisdictions are not in compliance with [8 U.S.C. § 1373]" *Id.*

²¹⁶ 8 U.S.C. § 1373 (2018) states in relevant part, "Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

²¹⁷ H.R. 83.

return of Secure Communities and 287(g) will break down efforts at community policing and could result in increased reliance on policing practices that open the door to racial profiling. Immigrants will be discouraged from reporting crime, therefore making communities less safe.

Finally, sanctuary cities are in danger of being swept away by anti-sanctuary legislation on the federal and state level, in addition to federal executive branch policy. The 2017 executive orders and implementation memos threaten to pressure sanctuary communities into nonexistence. The memos single out jurisdictions that do not honor detainers, and the executive orders promise to strip federal funding from jurisdictions that adopt policies that limit communication with ICE. Anti-immigrant and anti-sanctuary legislation at the state and local levels have proven to be detrimental to local economies, caused increased risk of exposure to civil liability for localities, and diminished community safety. Communities choose to adopt sanctuary policies in order to minimize the negative consequences of federal policies such as detainers. The continued adoption of sanctuary policies is necessary to avoid the negative consequences of anti-sanctuary state provisions of state laws. Nevertheless, as of this article's publication date, the legal challenges brought against the executive branch's attempts to limit sanctuary policies were promising.

Community groups can still play a large role in shaping policy, despite the state and federal efforts to attack and eliminate sanctuary policies. Community groups can continue to urge localities to adopt sanctuary policies that are compliant with anti-sanctuary laws, as seen in Georgia or Alabama. Additionally, community groups can continue to bring lawsuits challenging the legality of detainers in their respective jurisdictions. Finally, community groups can bring legal challenges to prolonged detention at police stops and prolonged arrest.

For the reasons stated above, state legislatures and congress must avoid passing anti-sanctuary legislation. Instead, this article recommends that localities adopt policies that foster community trust in order to better protect their immigrant communities from abuse and to eliminate civil liability related to unconstitutional practices, such as the honoring of ICE detainers.