

RECENT LEGISLATION

IMMIGRANT RIGHTS — DATA PRIVACY — CALIFORNIA MAKES ID CARDS AVAILABLE TO UNDOCUMENTED RESIDENTS. — A.B. 1766, 2021-2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

In response to the federal government’s vast immigration detention and deportation machine,¹ state and local governments have found ways to protect undocumented residents, including by making driver’s licenses available to all. Recently, California went one step further by enacting Assembly Bill 1766² (AB 1766), which makes state identification cards (IDs) available to all Californians, regardless of immigration status.³ As the first legislation to make state IDs — and not just driver’s licenses — available to undocumented residents, AB 1766 should serve as a model for other states. But its privacy protections fall short, exposing undocumented ID holders to a heightened risk of detention and deportation. California, and other states like it, can and must supplement universal-ID legislation with comprehensive privacy protections for data held by the Department of Motor Vehicles (DMV).

Without a state ID,⁴ it is difficult, or even impossible, to open a bank account, register a child for school, sign a lease, or access basic services.⁵ To ensure that all residents can access these services, some state and local governments have made city IDs⁶ and driver’s licenses⁷ available

¹ For statistics on deportations, see *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, DEP’T HOMELAND SEC. (Dec. 13, 2022), <https://www.dhs.gov/immigration-statistics/yearbook/2019/table39> [<https://perma.cc/42QX-LPBA>]. For statistics on detention, see EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 2–3 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [<https://perma.cc/K39E-ZJEX>].

² 2021-2022 Leg., Reg. Sess (Cal. 2022) (enacted).

³ Heather Navarro, *Governor Signs “CA ID for All” Bill. Here’s All About AB 1766*, NBC L.A. (Sept. 28, 2022, 11:25 AM), <https://www.nbclosangeles.com/news/local/governor-signs-ca-id-for-all-bill-heres-all-about-ab-1766/2992790> [<https://perma.cc/98F2-BMKP>].

⁴ Because federal law requires states to verify immigration status before issuing REAL IDs, NAT’L IMMIGR. L. CTR., *THE REAL ID ACT: QUESTIONS AND ANSWERS* 4 (2023), <https://nilc.org/wp-content/uploads/2023/01/REAL-ID-Act-Q-and-A-2023-1-31.pdf> [<https://perma.cc/4GHM-AALJ>], many states do not allow undocumented residents to apply for IDs at all, see *States (and DC) that Allow Undocumented Immigrants to Obtain Driver’s Licenses*, PROCON (Nov. 14, 2022), <https://immigration.procon.org/states-and-dc-that-allow-drivers-licenses-for-people-in-the-country-illegally> [<https://perma.cc/TX6Y-5JB9>].

⁵ See Amanda R. Cheong & Latin Am. Legal Def. & Educ. Fund, *How Driver’s Licenses Matter for Undocumented Immigrants*, CONTEXTS, Summer 2021, at 22, 25–26; Shirley Lin, *States of Resistance: The REAL ID Act and Constitutional Limits upon Federal Deputization of State Agencies in the Regulation of Non-citizens*, 12 N.Y.C. L. REV. 329, 345 (2009); Navarro, *supra* note 3.

⁶ See, e.g., *About IDNYC*, N.Y.C., <https://www.nyc.gov/site/idnyc/about/about.page> [<https://perma.cc/4GH3-ZVDL>].

⁷ See, e.g., Steve LeBlanc, *With Senate Override Vote, Driver’s License Bill Becomes Law*, WBUR (June 10, 2022), <https://www.wbur.org/news/2022/06/10/immigrant-drivers-license-bill-massachusetts-passage> [<https://perma.cc/2S5G-28XW>].

regardless of immigration status. For example, in 2013 California passed AB 60, making driver's licenses available to all residents.⁸ While AB 60 was crucial in providing many undocumented Californians with a state ID and a means to drive without fear of criminalization,⁹ it excluded approximately 1.6 million undocumented Californians who were otherwise ineligible for a license.¹⁰

In September 2022, California filled this gap with AB 1766, becoming the first state to make non-driver's license state IDs available to undocumented residents.¹¹ AB 1766 was the product of organizing on the part of a number of immigrant-rights groups, including the California Immigrant Policy Center, Asian Americans Advancing Justice-California, the Coalition for Humane Immigrant Rights, and the Immigrant Legal Resources Center, all of which cosponsored the bill.¹² The California Assembly was overwhelmingly in favor of the bill, with only fourteen members — all Republicans — voting no.¹³

Although AB 1766 provides important protections for undocumented Californians, it also puts undocumented residents at risk of detention and deportation. U.S. Immigration and Customs Enforcement (ICE) relies heavily on a vast network of state and private databases to surveil and arrest immigrants.¹⁴ ICE has used DMV databases, in particular, both to identify immigrants to target for deportation, and to find the addresses and license plate numbers of individuals who the agency has already identified.¹⁵ Applying for an ID means giving the California government a host of information — including a picture and a home

⁸ Press Release, Off. of Governor Edmund G. Brown, Jr., Governor Brown Signs AB 60 (Oct. 3, 2013), <https://www.ca.gov/archive/gov39/2013/10/03/news18246/index.html> [<https://perma.cc/Q6TH-PJZP>].

⁹ Cf. Kimberly Cataudella & Alexia Fernández Campbell, *Undocumented Immigrants Can Get Licenses. ICE Can Get Their Data.*, CTR. FOR PUB. INTEGRITY (July 14, 2021, 5:15 PM), <https://publicintegrity.org/inequality-poverty-opportunity/immigration/undocumented-immigrants-licenses-ice-data> [<https://perma.cc/RER7-SJUJ>] (highlighting the importance of access to driver's licenses).

¹⁰ Mathew Miranda & Lindsey Holden, *Gavin Newsom Signs a Law Giving Undocumented Immigrants Another Way to Get a California ID*, SACRAMENTO BEE (Sept. 27, 2022, 3:58 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article266275751.html> [<https://perma.cc/WN7P-6S52>].

¹¹ Navarro, *supra* note 3.

¹² Press Release, Immigrant Legal Res. Ctr., Lawmakers & Coalition of Advocates Urge CA Legislature to Pass the CA IDs For All Bill — AB 1766 (Aug. 5, 2022), <https://www.ilrc.org/lawmakers-coalition-advocates-urge-ca-legislature-pass-ca-ids-all-bill-%E2%80%93-ab-1766> [<https://perma.cc/ME6Q-AR8P>].

¹³ *Vote on AB 1766 — AB 1766 Stone Concurrence in Senate Amendments*, OPENSTATES (Aug. 30, 2022), <https://openstates.org/vote/8293ec9d-7636-462d-82df-2384cb99387b> [<https://perma.cc/UBV9-C7F4>].

¹⁴ NINA WANG ET AL., GEO. L. CTR. ON PRIV. & TECH., AMERICAN DRAGNET: DATA-DRIVEN DEPORTATION IN THE 21ST CENTURY I (2022), https://www.americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf [<https://perma.cc/WLQ9-TTPH>].

¹⁵ *Id.* at 3, 21–24.

address — that could be used for immigration enforcement.¹⁶ Although California law contains some protections for this data, gaps persist.

Today, the data collected by California’s DMV (including the data that will be submitted in AB 1766 applications) is accessible to the Department of Homeland Security (DHS) in four ways.¹⁷ First, government agencies can create Government Requestor Accounts with the DMV, allowing them to request information directly.¹⁸ Second, DMV information is part of the California Law Enforcement Telecommunications System (CLETS), a network of California law enforcement databases to which ICE has access.¹⁹ Third, DHS can request some information from the National Law Enforcement Telecommunications System (Nlets) — a database created and maintained by the fifty states.²⁰ Finally, DHS can access DMV data if it is made available to commercial requestors, such as LexisNexis, which aggregate data and sell it to ICE.²¹ Internal documents showed in 2020 that the California DMV was passing data to 98,000 commercial and government entities.²²

There are limits to the data DHS can request through these avenues. First, government agencies cannot make “bulk” requests (requests for the information of all individuals in a particular category) through CLETS, Nlets, or the DMV system.²³ This means that the agency must

¹⁶ See NAT’L IMMIGR. L. CTR. & ACLU OF N. CAL., HOW CALIFORNIA DRIVER’S LICENSE RECORDS ARE SHARED WITH THE DEPARTMENT OF HOMELAND SECURITY 4 (2018), <https://www.nilc.org/wp-content/uploads/2019/01/DMV-PRA-report-2018-12.pdf> [<https://perma.cc/8A6T-3P64>] [hereinafter NILC & ACLU Report].

¹⁷ See *id.* at 3; WANG ET AL., *supra* note 14, at 30.

¹⁸ NILC & ACLU Report, *supra* note 16, at 4; *Government Requester Accounts*, CAL. DMV, <https://www.dmv.ca.gov/portal/vehicle-industry-services/motor-carrier-services-mcs/motor-carrier-services-mcs-records-and-information/government-requester-accounts> [<https://perma.cc/S2YM-CE44>].

¹⁹ NILC & ACLU Report, *supra* note 16, at 7; CAL. L. ENF’T TELECOMM. SYS., POLICIES, PRACTICES, AND PROCEDURES (AND STATUTES) 12 (2018), <https://saccoprobation.saccounty.gov/Documents/Resources/Additional%20Resources/CLETS%20PPP%20clets-ppp-062018.pdf> [<https://perma.cc/3YAR-5TCR>].

²⁰ NILC & ACLU Report, *supra* note 16, at 7; NAT’L IMMIGR. L. CTR., NLETS: QUESTIONS AND ANSWERS 2 (2020), <https://www.nilc.org/wp-content/uploads/2020/11/Nlets-Q-and-A.pdf> [<https://perma.cc/R89A-LHU6>]. California’s DMV does not share driver’s license photographs with Nlets, *Initiatives and Projects*, NLETS, <https://www.nlets.org/resources/maps/initiatives/key> [<https://perma.cc/X3CP-5LFT>] (including a map of states that share driver’s license images through Nlets, labeled “NISP — DL Photo Sharing”), but does share other personal information including home addresses, NILC & ACLU Report, *supra* note 16, at 8.

²¹ WANG ET AL., *supra* note 14, at 35–36, 36 n.194.

²² Joseph Cox, *California DMV Is Selling Drivers’ Data to Private Investigators*, VICE (Aug. 18, 2020, 12:17 PM), <https://www.vice.com/en/article/dyzeza/california-dmv-data-private-investigators> [<https://perma.cc/X5ZU-C59C>].

²³ NILC & ACLU Report, *supra* note 16, at 4. Documents obtained by the National Immigration Law Center show that in other states, ICE agents have requested lists of all individuals with temporary or restricted licenses. NAT’L IMMIGR. L. CTR., DOCUMENTS OBTAINED UNDER FREEDOM OF INFORMATION ACT: HOW U.S. IMMIGRATION & CUSTOMS

already have some information about an individual to request more. Second, because DHS's stated purpose in creating a Requester Account and seeking access to CLETS is criminal investigations,²⁴ it should only request information for that purpose. But neither the DMV nor CLETS require DHS to provide a justification for individual data requests, raising significant compliance concerns.²⁵ Furthermore, because there is very little publicly accessible information about access to Nlets,²⁶ it is unclear whether there are even nominal limits on the purposes for which DHS can use DMV data accessed through that database.

AB 1766, like California's earlier "driver's licenses for all" law, contains data-privacy provisions, which provide some additional protection from immigration enforcement. First and foremost, the DMV does not keep a record of who has an AB 1766 or a non-AB 1766 ID.²⁷ It also does not keep scans of the IDs and licenses it issues, or data on the documents individuals submit as part of their application for licenses.²⁸ While the DMV does keep copies of the documents applicants submit with their license and ID applications, these documents can only be accessed with a court order, criminal subpoena, or "certification from law enforcement attesting to an urgent health or safety need."²⁹ But key pieces of information, such as addresses, license plate numbers, and photographs, are collected by the DMV and accessible without a judicial order or law enforcement certification.³⁰

One final state-level source of privacy protection is the California Values Act³¹ (SB 54). Under SB 54, California law enforcement agencies are barred from informing federal immigration enforcement of an individual's release date from custody, or from sharing an "individual's home address or work address unless that information is available to the public" for purposes of *civil* immigration enforcement.³² The original version of SB 54 would have prohibited law enforcement databases from being made "available to anyone or any entity for the purpose of

ENFORCEMENT AND STATE MOTOR VEHICLE DEPARTMENTS SHARE INFORMATION 2 (2016), <https://www.nilc.org/wp-content/uploads/2016/06/Info-Sharing-FOIA-Summary-2016-5.pdf> [<https://perma.cc/5SWT-ATYG>].

²⁴ NILC & ACLU Report, *supra* note 16, at 3.

²⁵ See Maya Srikrishnan, *How California Laws Meant to Integrate Immigrants Can Open a Backdoor for ICE*, VOICE SAN DIEGO (Feb. 19, 2019), <https://voiceofsandiego.org/2019/02/19/how-california-laws-meant-to-integrate-immigrants-can-open-a-backdoor-for-ice> [<https://perma.cc/9EA9-LCG2>].

²⁶ See, e.g., NAT'L IMMIGR. L. CTR., *supra* note 20, at 1; see also WANG ET AL., *supra* note 14, at 34.

²⁷ See NILC & ACLU Report, *supra* note 16, at 4.

²⁸ *Id.*

²⁹ Srikrishnan, *supra* note 25 (quoting DMV officials).

³⁰ NILC & ACLU Report, *supra* note 16, at 3-4.

³¹ CAL. GOV'T CODE §§ 7284-7284.12 (West 2018).

³² *Id.* § 7283.4(a)(1)(D); see also Jerome Ma & Nicholas Pavlovic, *California Divided: The Restrictions and Vulnerabilities in Implementing SB 54*, 26 ASIAN AM. L.J. 127, 136-38 (2019).

immigration enforcement.”³³ As a result of significant law enforcement pressure, however, this provision was removed from the final bill.³⁴

Gaps in SB 54’s protection and a lack of compliance have placed undocumented Californians at risk. But there are solutions. California should adopt legislation to prevent the federal government from using local and state data to police undocumented immigrants. Such laws are constitutional as a matter of law and necessary as a matter of policy.

The risks of AB 1766 are not hypothetical: California’s driver’s-licenses-for-all program has already been used to target undocumented immigrants. In 2019, San Diego news outlets reported that undocumented Californians were being pulled over by ICE agents holding copies of their AB 60 license pictures.³⁵ Journalists reported, based on interviews with DMV officials, that if DHS agents already had an individual’s name, they could use a Requestor Account or CLETS searches to identify that person’s address and license information.³⁶ Allowing ICE to access this information “is a profound betrayal of . . . trust”³⁷ that deters undocumented residents from accessing basic services and puts people at risk of deportation.³⁸

States should opt out of this vast surveillance network. In California, protecting AB 1766 ID applicants would require repealing the state’s blanket DMV-data-access provision for all law enforcement, which the agency has relied on to justify information sharing with immigration enforcement,³⁹ and passing affirmatively protective legislation that covers all information sharing, including through databases and third parties. Furthermore, because criminal prosecutions of immigration violations are rising,⁴⁰ information sharing restrictions must encompass more than just “civil” immigration enforcement.⁴¹

³³ S.B. No. 54, 2017–2018 Reg. Sess. (Cal. 2016); see also Christopher A. Galeano, *Senate Bill 54 (2017): California Versus the Law Enforcement Lobby*, 68 UCLA L. REV. 1446, 1471–72 (2022) (“The [2016] bill would have barred [law enforcement agencies] from . . . using state and local databases for immigration enforcement.”).

³⁴ See Galeano, *supra* note 33, at 1491, 1494.

³⁵ Sergio Flores & Tom Jones, *DMV Confirms ICE Has Limited Access to AB 60 License Information*, NBC SAN DIEGO (Feb. 20, 2019, 1:49 PM), <https://www.nbcsandiego.com/news/local/dmv-confirms-ice-has-limited-access-to-ab-60-license-information/3225> [<https://perma.cc/Z7GQ-XGEG>]; see also Srikrishnan, *supra* note 25.

³⁶ Srikrishnan, *supra* note 25 (quoting DMV officials).

³⁷ WANG ET AL., *supra* note 14, at 3.

³⁸ *Id.* at 5.

³⁹ *Id.* at 72; see CAL. VEH. CODE § 1810.5 (West 2018).

⁴⁰ NAT’L IMMIGR. PROJECT & NAT’L IMMIGRANT JUST. CTR., IMMIGRATION PROSECUTIONS BY THE NUMBERS 1 (2022), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2022-11/2022_Nov-13256_fact_sheet-NIPNLG_NIJC.pdf [<https://perma.cc/EZU5-P8W6>]. Before the federal government began relying on Title 42 to summarily expel anyone who crosses the U.S.-Mexico border, prosecutions for immigration-related offenses made up over sixty percent of federal criminal prosecutions. *Id.* at 2. And even in 2022, as Title 42 was in full effect, immigration-related offenses were the “most charged category of federal crimes.” *Id.*

⁴¹ WANG ET AL., *supra* note 14, at 71.

Unsurprisingly, however, the federal government insists that states must cooperate with immigration enforcement. In its view, state efforts to restrict information sharing violate 8 U.S.C. § 1373,⁴² which forbids state and local governments from “prohibit[ing], or in any way restrict[ing], any government entity or official from sending to . . . [immigration enforcement] information regarding the citizenship or immigration status . . . of any individual.”⁴³ In *United States v. California*,⁴⁴ the Ninth Circuit held that § 1373 applies only to “a person’s legal classification under federal law,” and therefore does not cover the kind of information the DMV stores, such as addresses, images, and license plate numbers.⁴⁵ But that question remains open in other circuits.

Even assuming that § 1373 is constitutional, states can protect DMV data. In *City of New York v. United States*,⁴⁶ the Second Circuit upheld § 1373,⁴⁷ becoming the only circuit court to do so.⁴⁸ But *City of New York* left open the possibility of creating a broad confidentiality policy that includes, but is not limited to, immigration status, so long as it is “necessary to the performance of legitimate municipal functions.”⁴⁹ There are a host of state and municipal functions that states may invoke in support of confidentiality. First, states like California have an interest in ensuring that all individuals living within the state can access basic services, including education, housing, and health care. Because these services are often inaccessible without an ID,⁵⁰ and because privacy concerns are likely to deter immigrant residents from applying for universal

⁴² See, e.g., *County of Ocean v. Grewal*, 475 F. Supp. 3d 355, 371 (D.N.J. 2020); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 333 (E.D. Pa. 2018), *aff’d in part, vacated in part on other grounds sub nom.* *City of Philadelphia v. Att’y Gen.*, 916 F.3d 276 (3d Cir. 2019). The other provision of federal law that the government has relied on is 8 U.S.C. § 1644, which has been understood to be “interchangeable” with § 1373. *City & County of San Francisco v. Garland*, 42 F.4th 1078, 1083 (9th Cir. 2022); see also *City of Chicago v. Barr*, 961 F.3d 882, 889 (7th Cir. 2020) (“The Attorney General concedes that the two compliance conditions are equivalent . . .”); *County of Ocean*, 475 F. Supp. 3d at 371 n.13 (noting that “[t]he parties’ arguments relating to sections 1644 and 1373 are identical,” and addressing them “in tandem”).

⁴³ 8 U.S.C. § 1373(a).

⁴⁴ 921 F.3d 865 (9th Cir. 2019).

⁴⁵ *Id.* at 891. For other decisions affirming this interpretation of § 1373, see *County of Ocean*, 475 F. Supp. 3d at 375; *Philadelphia v. Sessions*, 309 F. Supp. 3d at 333. The federal government has argued that § 1373 encompasses virtually all information about undocumented residents. See, e.g., *County of Ocean*, 475 F. Supp. 3d at 375 (finding that the reading of § 1373 advocated by the United States “would impermissibly expand the scope of these statutes to sweep in any information, including personal identifying data, concerning an alien in the United States”); *Philadelphia v. Sessions*, 309 F. Supp. 3d at 332–33; *Steinle v. City & County of San Francisco*, 230 F. Supp. 3d 994, 1014–15 (N.D. Cal. 2017).

⁴⁶ 179 F.3d 29 (2d Cir. 1999).

⁴⁷ *Id.* at 35.

⁴⁸ See Alyssa Garcia, *Much Ado About Nothing?: Local Resistance and the Significance of Sanctuary Laws*, 42 SEATTLE U. L. REV. 185, 205 (2018).

⁴⁹ *City of New York*, 179 F.3d at 37.

⁵⁰ See Lin, *supra* note 5, at 345.

IDs under legislation like AB 1766,⁵¹ a generalized confidentiality policy would increase access to resources. In the context of driver's licenses, states also have a strong interest in ensuring all drivers are licensed to improve road safety.⁵² Furthermore, data sharing with immigration enforcement undermines trust between immigrant communities and state and local governments.⁵³ This trust is crucial to advancing legitimate governmental goals, including public health initiatives like COVID-19 vaccination.⁵⁴ Thus, under *City of New York*, states can implement broad confidentiality policies protecting DMV data.

Now consider § 1373's constitutionality. The court in *City of New York* affirmed § 1373 based on an understanding of the anticommandeering doctrine⁵⁵ that is now outdated. To uphold § 1373, the Second Circuit distinguished between "invalid federal measures that seek to *impress* state and local governments into the administration of federal programs" and "valid federal measures that *prohibit* states from compelling passive resistance to particular federal programs."⁵⁶ But in 2018, the Supreme Court decided *Murphy v. National Collegiate Athletic Ass'n*,⁵⁷ explicitly rejecting that rationale.⁵⁸ Assessing the constitutionality of a federal law that prohibited states from authorizing sports gambling, the Court held that the distinction between "precluding state action and affirmatively command[ing] it . . . is empty."⁵⁹ Writing for the majority, Justice Alito declared that "[t]he basic principle — that Congress cannot issue direct orders to state legislatures — applies in either event."⁶⁰ As the Ninth Circuit and other courts have since held, *Murphy*'s rejection of a distinction between federal laws that prohibit and those that command renders § 1373 unconstitutional.⁶¹

⁵¹ Cf. John Zens, *Face IT: Only Congress Can Preserve Privacy from the Pervasive Use of Facial Recognition Technology by Police*, 58 SAN DIEGO L. REV. 143, 163 (2021).

⁵² MONIQUE CHING, MASS. BUDGET & POL'Y CTR., DRIVER'S LICENSES FOR IMMIGRANTS WITHOUT STATUS — HOW WOULD IT AFFECT MASSACHUSETTS? 2 (2021), https://massbudget.org/wp-content/uploads/2021/04/DriversLic4briefs_2021_FINAL.pdf [<https://perma.cc/X9HY-5NX6>].

⁵³ Zens, *supra* note 51, at 345.

⁵⁴ See Natalia V. Navarro, *Immigration Advocates Say DMV Shared Data with ICE that Led to Arrests. Colorado Lawmakers Don't Want It to Happen Again*, CPR NEWS (Feb. 11, 2021, 3:45 PM), <https://www.cpr.org/2021/02/11/immigration-dmv-shared-data-ice-arrests-colorado-lawmakers> [<https://perma.cc/TXL2-6F2E>].

⁵⁵ *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

⁵⁶ *Id.* (emphasis added).

⁵⁷ 138 S. Ct. 1461 (2018).

⁵⁸ *Id.* at 1478.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *United States v. California*, 921 F.3d 865, 889–90 (9th Cir. 2020); see also *Chicago v. Sessions*, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) (holding § 1373 unconstitutional under the anti-commandeering doctrine, as clarified in *Murphy*), *aff'd on other grounds sub nom.* *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329–31 (E.D. Pa. 2018) (same), *aff'd in part on other grounds, vacated in part on other grounds sub nom.* *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276 (3d Cir. 2019).

In arguing that § 1373 remains constitutional, the United States has relied on *Reno v. Condon*.⁶² There, the Supreme Court held that the Driver's Privacy Protection Act of 1994, which restricted "the disclosure and resale of personal records contained in the records of state DMVs,"⁶³ was constitutional because it applied to private parties as well as states.⁶⁴ The Supreme Court affirmed this principle in *Murphy*: "The anticommandeering doctrine does not apply when Congress evenhandedly regulates . . . States and private actors."⁶⁵ As established in *California*, however, this reasoning does not apply to § 1373 because "it is the state's responsibility to help enforce federal law . . . that is at issue."⁶⁶

A policy protecting the confidentiality of DMV data is crucial to ensuring that undocumented residents can safely apply for identification cards under legislation like AB 1766, and is well within the states' power. To make the protections of universal ID provisions meaningful, a privacy policy must restrict not only direct data sharing, but also sharing through databases and third parties, both private and public. And the need for data privacy does not end with DMV data. States can exert control over other data as well, including utility company records, which are routinely sold to ICE via large data corporations like LexisNexis and Thompson Reuters.⁶⁷ If state governments are serious about protecting undocumented communities, they must ensure that ICE cannot take advantage of the vast networks of data within state control to target immigrant communities.

⁶² 528 U.S. 141 (2000); see *California*, 921 F.3d at 890.

⁶³ *Reno*, 528 U.S. at 143.

⁶⁴ *Id.* at 151.

⁶⁵ *Murphy*, 138 S. Ct. at 1478.

⁶⁶ *California*, 921 F.3d at 890; see also *Ocean Cnty. Bd. of Comm'rs v. Att'y Gen.*, 8 F.4th 176, 181–82 (3d Cir. 2021). As the Third Circuit has noted, 8 U.S.C. § 1644 "does not specify *who* may not prohibit or restrict state action." *Ocean Cnty. Bd. of Comm'rs*, 8 F.4th at 182. But the court held that "the best reading of the provision is that it does not regulate private actors . . . because private actors can neither 'prohibit[]' state action nor 'restrict[]' it." *Id.* (alteration in original) (quoting 8 U.S.C. § 1644).

⁶⁷ See Drew Harwell, *Utility Giants Agree to No Longer Allow Sensitive Records to Be Shared with ICE*, WASH. POST (Dec. 8, 2021, 2:39 PM), <https://www.washingtonpost.com/technology/2021/12/08/utility-data-government-tracking/> [<https://perma.cc/8V3J-4CGB>]; Chris Mills Rodrigo, *LexisNexis Under Growing Pressure to Sever Ties with ICE*, THE HILL (July 19, 2022, 6:00 AM), <https://thehill.com/policy/technology/3564893-lexisnexis-under-growing-pressure-to-sever-ties-with-ice/> [<https://perma.cc/5HC8-JDWQ>].