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"Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation

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Summary

There is no official or agreed-upon definition of what constitutes a "sanctuary" jurisdiction, and there has been debate as to whether the term applies to particular states and localities. Moreover, state and local jurisdictions have varied reasons for opting not to cooperate with federal immigration enforcement efforts, including reasons not necessarily motivated by disagreement with federal policies, such as concern about potential civil liability or the costs associated with assisting federal efforts. But traditional sanctuary policies are often described as falling under one of three categories. First, so-called "don't enforce" policies generally bar state or local police from assisting federal immigration authorities. Second, "don't ask" policies generally bar certain state or local officials from inquiring into a person's immigration status. Third, "don't tell" policies typically restrict information sharing between state or local law enforcement and federal immigration authorities.

One legal question relevant to sanctuary policies is the extent to which states, as sovereign entities, may decline to assist in federal immigration enforcement, and the degree to which the federal government can stop state measures that undermine federal objectives. The Tenth Amendment preserves the states' broad police powers, and states have frequently enacted measures that, directly or indirectly, address aliens residing in their communities. Under the doctrine of preemption—derived from the Supremacy Clause—Congress may displace many state or local laws pertaining to immigration. But not every state or local law touching on immigration matters is necessarily preempted; the measure must interfere with, or be contrary to, federal law to be rendered unenforceable. Further, the anti-commandeering doctrine, rooted in the Constitution's allocation of powers between the federal government and the states, prohibits Congress from forcing state entities to perform regulatory functions on the federal government's behalf, including in the context of immigration. A series of Supreme Court cases inform the boundaries of preemption and the anti-commandeering doctrine, with the Court most recently opining on the issue in *Murphy v. NCAA*.

These dueling federal and state interests are front and center in numerous lawsuits challenging actions taken by the Trump Administration to curb states and localities from implementing sanctuary-type policies. Notably, Section 9(a) of Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," directs the Secretary of Homeland Security and the Attorney General to withhold federal grants from jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373—a statute that bars states and localities from prohibiting their employees from sharing with federal immigration authorities certain immigration-related information. The executive order further directs the Attorney General to take "appropriate enforcement action" against jurisdictions that violate Section 1373 or have policies that "prevent or hinder the enforcement of federal law." To implement the executive order, the Department of Justice added new eligibility conditions to the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program and grants administered by the Justice Department's Office of Community Oriented Policing Services (COPS). These conditions tied eligibility to compliance with Section 1373 and other federal immigration priorities, like granting federal authorities access to state and local detention facilities housing aliens and giving immigration authorities notice before releasing from custody an alien wanted for removal.

Several lawsuits were filed challenging the constitutionality of the executive order and new grant conditions. So far the courts that have reviewed these challenges—principally contending that the executive order and grant conditions violate the separation of powers and anti-commandeering principles—generally agree that the Trump Administration acted unconstitutionally. For instance, the Ninth Circuit Court of Appeals upheld a permanent injunction blocking enforcement of

Section 9(a) against California. Additionally, two separate district courts permanently enjoined the Byrne JAG conditions as applied to Chicago and Philadelphia. In doing so, these courts concluded that the Supreme Court's most recent formulation of the anti-commandeering doctrine in *Murphy* requires holding Section 1373 unconstitutional. These lawsuits notwithstanding, the courts still recognize the federal government's pervasive, nearly exclusive role in immigration enforcement. This can be seen in the federal government's lawsuit challenging three California measures governing the state's regulation of private and public actors' involvement in immigration enforcement within its border. Although a district court opined that several measures likely were lawful exercises of the state's police powers, it also concluded that two provisions regulating private employers are likely unlawful under the Supremacy Clause. This ruling was mostly upheld on appeal, in which the Ninth Circuit additionally opined that a provision requiring the California attorney general to review the circumstances surrounding detained aliens' apprehension and transfer to detention facilities within the state also violates the Supremacy Clause.

Contents

Introduction 1
What Is a Sanctuary Jurisdiction? 3
Legal Background 4
The Supremacy Clause and Preemption 4
The Anti-Commandeering Doctrine 7
Congress's Spending Powers and the Anti-Commandeering Doctrine 10
Select State and Local Limitations on Immigration Enforcement Activity 10
Limiting Arrests for Federal Immigration Violations 11
Limiting Police Inquiries into Immigration Status 12
Limiting Information Sharing with Federal Immigration Authorities 13
Federal Measures to Counteract Sanctuary Policies 14
PRWORA and IIRIRA 14
Executive Order 13768 and Related Litigation 16
Section 9 of Executive Order 13768 16
DOJ Implementation of EO 13768 17
Litigation Challenging EO 13768 and its Implementation 19
City & Cty. of San Francisco v. Trump and Cty. of Santa Clara v. Trump 20
City of Richmond v. Trump 21
City of Seattle & City of Portland v. Trump 22
City of Chelsea & City of Lawrence v. Trump 23
City of Chicago v. Sessions 23
City of Evanston v. Sessions 25
City of Philadelphia v. Sessions 26
City & Cty. of San Francisco v. Sessions 28
States of New York v. Department of Justice 29
City of Los Angeles v. Sessions 31
Justice Department Lawsuit Against California 32
The Challenged California Laws 33
United States v. California 35
Conclusion 38

Contacts

Author Information 39

Introduction

The federal government is vested with the exclusive power to create rules governing alien entry and removal.[1] However, the impact of alien migration—whether lawful or unlawful—is arguably felt most directly in the communities where aliens reside. State and local responses to unlawfully present aliens within their jurisdictions have varied considerably, particularly in determining the role that state or local police should play in enforcing federal immigration law. At one end of the spectrum, some states and localities actively assist federal immigration authorities in identifying and apprehending aliens for removal.[2] For example, jurisdictions sometimes enter into "287(g) Agreements" with the federal government, in which state or local law enforcement are deputized to perform certain immigration enforcement activities.[3] Some states and localities have attempted to play an even greater role in immigration enforcement, in many cases because of perceptions that federal efforts have been inadequate.[4] In the past, some have adopted measures that criminally sanction conduct believed to facilitate the presence of unlawfully present aliens and have also instructed police to actively work to detect such aliens as part of their regular duties.[5] The adoption of these kinds of measures has waned considerably, though, after the Supreme Court's 2012 ruling in *Arizona v. United States* held that several provisions of one such enactment, Arizona's S.B. 1070, were preempted by federal immigration law.[6] Subsequent lower court decisions struck down many other state and local measures that imposed criminal or civil sanctions on immigration-related activity.[7]

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[1] *See, e.g.,* Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and status of aliens."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); Hampton v. Mow Sun Wong, 426 U.S. 88, 95 (1976) ("Congress and the President have broad power over immigration and naturalization which the States do not possess.").

[2] *See* Immigration Legal Resource Center, *National Map of 287(g) Agreements* (Nov. 6, 2018), https://www.ilrc.org/national-map-287g-agreements.

[3] *See* 8 U.S.C. § 1357(g) (authorizing the Department of Homeland Security (DHS) to enter into written agreements with state and local jurisdictions that enable specially trained state or local officers to perform specific functions related to the investigation, apprehension, or detention of aliens, while under federal supervision for a predetermined time); *see also* ICE, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last visited Nov. 8, 2018); ICE, *Updated Facts on ICE's 287(g) Program*, https://www.ice.gov/factsheets/287g-reform (last visited Nov. 8, 2018).

[4] *See, e.g.,* Marisa S. Cianciarulo, *The "Arizonafication" of Immigration Law: Implications of* Chamber of Commerce v. Whiting *for State & Local Immigration Legislation,* 15 HARV. LATINO L. REV. 85, 88 (2012); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674 (2011).

[5] Kevin J. Fandl, *Putting States out of the Immigration Law Enforcement Business,* 9 HARV. L. & POL'Y REV. 529, 533-35 (2015); Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform through Subfederal Regulation,* 115 COLUM. L. REV. 2219, 2219-20 (2015).

[6] 567 U.S. 387 (2012); *see* Stella Burch Elias, *The New Immigration Federalism,* 74 OHIO ST. L.J. 703, 704 (2013).

[7] *See, e.g.,* Ariz. Dream Act Coal. v. Brewer, 855 F.3d 957 (9th Cir. 2017) (applying *Arizona*'s preemption principles to conclude that Arizona cannot independently classify persons as being without "authorized presence" in the United States because the federal government is vested with the exclusive authority to classify aliens); Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013) (upholding preliminary injunction barring enforcement of Arizona statute, which prohibited harboring unlawfully present aliens by certain persons, on preemption and vagueness grounds), *cert. denied*, 134 S. Ct. 1876 (2014); United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) (applying the Supreme Court's ruling in *Arizona*; affirming enjoinment of South Carolina criminal provisions for (1) an unlawful alien to conceal, harbor, or shelter him or herself from detection; (2) for a third party to conceal, shelter, or transport an unlawfully present person; (3) failing to carry an alien registration card; and (4) possessing a false identification card for proving lawful presence); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) (enjoining several Alabama laws, including those that penalize (1) failing to carry registration documents; (2) working without authorization; (3)

At the other end of the spectrum, some states and localities have been less willing to assist the federal government with its immigration enforcement responsibilities. Often dubbed "sanctuary jurisdictions," some states and localities have adopted measures that limit their participation in enforcing federal immigration laws, including, for example, prohibiting police officers from assisting with federal efforts to identify and apprehend unlawfully present aliens within the state or locality's jurisdiction.[8] That said, there is debate over both the meaning and application of the term "sanctuary jurisdiction."[9] Additionally, state and local jurisdictions have varied reasons for choosing not to cooperate with federal immigration enforcement efforts, including reasons not necessarily motivated by disagreement with federal immigration enforcement policies, such as concern about potential civil liability or the availability of state or local resources to assist federal immigration enforcement efforts.[10] During President Donald Trump's first month in office, he issued an executive order, "Enhancing Public Safety in the Interior of the United States," which, in part, seeks to encourage state and local cooperation with federal immigration enforcement and disincentivize state and local adoption of sanctuary policies.[11]

This report discusses legal issues related to state and local measures limiting law enforcement cooperation with federal immigration authorities, as well as the federal government's efforts to counter those measures. It begins by providing a general explanation of the term "sanctuary jurisdiction" for the purpose of this report. Next, it provides an overview of constitutional principles underlying the relationship between federal immigration laws and related state and local measures, namely, preemption and the anti-commandeering doctrine. Then, it discusses various types of laws and policies adopted by states and localities to limit their participation with federal immigration enforcement efforts, which may give rise to a label of "sanctuary jurisdiction," and federal efforts to counter those measures. Finally, the report concludes with a discussion of the lawsuits challenging the executive order targeting sanctuary jurisdictions and certain executive branch actions to implement the executive order.

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concealing, harboring, or shielding an unlawfully present alien from detection; (4) transporting an unlawfully present alien; (5) harboring an unlawfully present alien by entering into a rental agreement with that alien; and (6) deducting as a business expense on state tax filings any compensation paid to unauthorized aliens, based on the Supreme Court's ruling in *Arizona*), *cert. denied*, 133 S. Ct. 2022 (2013); Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012) (enjoining criminal provisions in Georgia for (1) transporting or moving an illegal alien; (2) concealing or harboring an illegal alien; and (3) inducing an illegal alien to enter Georgia, based on the Supreme Court's ruling in *Arizona*); Sol v. Whiting, No. CV-10-01061-PHX-SRB, 2015 WL 12030514, at *1 (D. Ariz. Sept. 4, 2015) (discussing the resolution of legal challenges to various provisions of Arizona immigration enforcement measure in the aftermath of *Arizona*).

[8] *See, e.g.*, Steven Papazian, Note, *Secure Communities, Sanctuary Laws, & Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 S. CAL. REV. L. & SOC. JUST. 283, 290-91 (2012); Rose Cuison Villazor, *What is a "Sanctuary"?,* 61 SMU L. REV. 133, 147-48 & n.91 (2008).

[9] *See infra* section *What Is a Sanctuary Jurisdiction?*

[10] *See, e.g.*, Matthew Feeney, *Walling Off Liberty: How Strict Immigration Enforcement Threatens Privacy and Local Policing*, CATO INSTITUTE (Nov. 1, 2018), https://www.cato.org/publications/policy-analysis/walling-liberty-how-strict-immigration-enforcement-threatens-privacy#full ("But there are also sound law enforcement reasons for declining to enforce immigration law. Sanctuary policies help police, allowing them to secure cooperation from crime victims and witnesses who don't wish to disclose their immigration status or the immigration status of a friend, spouse, or family member."); Raina Bhatt, Note, *Pushing an End to Sanctuary Cities: Will it Happen*, MICH. J. RACE & L. 139, 144-45 (2016) (collecting various rationales for states and localities adoption of sanctuary policies).

[11] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

What Is a Sanctuary Jurisdiction?

State or local measures limiting police participation in immigration enforcement are not a recent phenomenon.[12] Indeed, many of the recent "sanctuary"-type initiatives can be traced back to church activities designed to provide refuge—or "sanctuary"—to unauthorized Central American aliens fleeing civil unrest in the 1980s.[13] A number of states and municipalities issued declarations in support of these churches' actions.[14] Others went further and enacted more substantive measures intended to limit police involvement in federal immigration enforcement activities.[15] These measures have included, among other things, restricting state and local police from arresting persons for immigration violations, limiting the sharing of immigration-related information with federal authorities, and barring police from questioning a person about his or her immigration status.[16]

Still, there is no official definition of a "sanctuary" jurisdiction in federal statute or regulation.[17] Broadly speaking, sanctuary jurisdictions are commonly understood to be those that have laws or policies designed to substantially limit involvement in federal immigration enforcement

[12] For example, in 1979 the Los Angeles Police Department issued Special Order 40, which (1) barred police officers from arresting persons for suspected violations of the federal statute criminalizing illegal entry, (2) prohibited the initiation of police action "with the objective of discovering the alien status of a person," and (3) established a process and criteria for notifying federal immigration officials when an unlawfully present alien was arrested on criminal charges. OFFICE OF THE CHIEF OF POLICE, LOS ANGELES, SPECIAL ORDER 40: UNDOCUMENTED ALIENS (1979), [hereinafter LAPD ORDER], http://www.lapdonline.org/assets/pdf/SO_40.pdf; *see also* Doug Smith, *How LAPD's Law-and-Order Chief Revolutionized the Way Cops Treated Illegal Immigration*, LOS ANGELES TIMES (Feb. 5, 2017, 3:00 AM), http://www.latimes.com/local/lanow/la-me-ln-special-order-40-retrospective-20170205-story.html.

[13] *See, e.g.*, Susan Gzesh, *Central Americans & Asylum Policy in the Reagan Era*, MIGRATION POLICY INST. (Apr. 1, 2006), http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era (describing the "network of religious congregations that became known as the Sanctuary Movement" and that provided humanitarian assistance to foreign nationals from Central America fleeing civil unrest in the 1980s).

[14] *See generally* Jorge L. Carro, *Municipal & State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (1989) (identifying and distinguishing various state and local responses in support of church actions).

[15] *See* Villazor, *supra* note 8 at 142 ("In due course, what originally began with churches as proactive efforts to provide shelter and food to immigrants led to state and local governmental efforts to assure immigrants that they too will be safe within their borders.").

[16] *See* Orde F. Kittrie, *Federalism, Deportation, & Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006) (surveying local sanctuary policies and describing them as doing "one or more of the following: (1) limit[ing] inquiries about a person's immigration status unless investigating illegal activity other than mere status as an unauthorized alien ('don't ask'); (2) limit[ing] arrests or detentions for violation of immigration laws ('don't enforce'); and (3) limit[ing] provision to federal authorities of immigration status information ('don't tell')").

[17] The term "sanctuary" jurisdiction is not defined by federal statute or regulation, though it has been used on occasion by federal agencies to refer to state or local entities that have particular types of immigration-related laws or policies. Most recently, in an executive order targeting public safety within the U.S. interior, President Trump referred to "sanctuary jurisdictions" as those that "willfully refuse to comply with 8 U.S.C. 1373," which, as discussed in great detail later in this report, imposes restrictions on state and local limitations on the sharing of certain information with immigration authorities. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Before that, in a 2007 report by the Office of the Inspector General at the U.S. Department of Justice, the agency used the term "sanctuary" to reference "jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws." U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 N.44 (Jan. 2007), https://oig.justice.gov/reports/OJP/a0707/final.pdf (redacted public version).

activities,[18] though there is not necessarily a consensus as to the meaning of this term.[19] Some jurisdictions have self-identified as a sanctuary (or some other similar term).[20] For other jurisdictions, there might be disagreement regarding the accuracy of such a designation, particularly if state or local law enforcement cooperates with federal immigration authorities in some areas but not others.[21] Any reference by this report to a policy of a particular jurisdiction is intended only to provide an example of the type of measure occasionally referenced in discussions of "sanctuary" policies.[22] These references should not be taken to indicate CRS is of the view that a particular jurisdiction is a "sanctuary" for unlawfully present aliens.

Legal Background

The heart of the debate surrounding the permissible scope of sanctuary jurisdictions centers on the extent to which states, as sovereign entities, may decline to assist in federal efforts to enforce federal immigration law, and the degree to which the federal government can stop state action that undercuts federal objectives in a manner that is consistent with the Supremacy Clause and constitutional principles of federalism.

The Supremacy Clause and Preemption

The federal government's power to regulate immigration is both substantial and exclusive.[23] This authority derives from multiple sources, including Congress's Article I powers to "establish a

[18] *See, e.g.,* H.B.C., *What are Sanctuary Cities,* THE ECONOMIST (Nov. 22, 2016), http://www.economist.com/blogs/economist-explains/2016/11/economist-explains-13 ("There is no specific legal definition for what constitutes a sanctuary jurisdiction but the term is widely used to refer to American cities, counties or states that protect undocumented immigrants from deportation by limiting cooperation with federal immigration authorities."); Dr. Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism,* 42 CAP. U. L. REV. 583, 610 (2014) ("The modern concept of sanctuary cities now refers to jurisdictions that have adopted formal or informal policies limiting cooperation with federal immigration authorities." (internal quotation marks, alteration, and citations omitted)).

[19] *See, e.g.,* Davidson, *supra* note 18, at 610.

[20] *See, e.g.,* S.F. CAL. ADMIN. CODE §§ 12H.1, 12H.2 (declaring San Francisco a "City and County of Refuge" and restricting cooperation with federal immigration enforcement efforts); *City of Philadelphia Action Guide: Immigration Policies,* CITY OF PHILADELPHIA (Jan. 8, 2018), https://www.phila.gov/2018-01-08-immigration-policies/ (describing Philadelphia as a "Welcoming City" in its policies toward immigrants); *see also* Ruairí Arrieta-Kenna, *Sanctuary Cities Stand Firm against Trump,* POLITICO (Dec. 12, 2016 5:14 AM), http://www.politico.com/story/2016/12/sanctuary-cities-trump-immigration-232449 (listing cities where municipal and police leaders have publicly affirmed or reaffirmed sanctuary status).

[21] *See Sanctuary City? Not L.A.,* L.A. TIMES (Aug. 26, 2011), http://articles.latimes.com/2011/aug/26/opinion/la-ed-sanctuary-20110825 (disputing characterization of Los Angeles as a "sanctuary" jurisdiction and noting areas in which local police cooperate with federal immigration authorities); Villazor, *supra* note 8 at 154-56 (describing some jurisdictions' resistance to being labeled a "sanctuary").

[22] *See, e.g.,* Villazor, *supra* note 8 (discussing the term "sanctuary" as applied to contemporary immigration issues); Kittrie, *supra* note 16 (discussing and describing various state and local law enforcement "sanctuary" policies).

[23] *See, e.g.,* Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and status of aliens."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Hampton v. Mow Sun Wong, 426 U.S. 88, 95 (1976) ("Congress and the President have broad power over immigration and naturalization which the States do not possess."); Sandoval-Luna v. Mukasey, 526 F.3d 1243, 1247 (9th Cir. 2008) ("Federal authority in the areas of immigration and naturalization is plenary." (internal quotation marks, alteration, and citation omitted)).

uniform Rule of Naturalization"[24] and to "regulate commerce with foreign nations, and among the several states,"[25] as well as the federal government's "inherent power as sovereign to conduct relations with foreign nations."[26] Rules governing the admission and removal of aliens, along with conditions for aliens' continued presence within the United States, are primarily contained in the Immigration and Nationality Act of 1952, as amended (INA).[27] The INA further provides a comprehensive immigration enforcement regime that contains civil and criminal elements.[28]

Arizona v. United States reinforced the federal government's pervasive role in creating and enforcing the nation's immigration laws. The ruling invalidated several Arizona laws designed "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States"[29] as preempted by federal law.[30] In doing so, the Court declared that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[31]

As *Arizona* highlights, the doctrine of preemption is relevant in assessing state policies related to immigration. The preemption doctrine derives from the Constitution's Supremacy Clause, which states that the "Constitution, and the laws of the United States ... shall be the supreme law of the land."[32] Therefore, Congress, through legislation, can preempt (i.e., invalidate) state law.[33] Preemption can be express or implied. Express preemption occurs when Congress enacts a law that explicitly expresses the legislature's intent to preempt state law.[34] Preemption may be implied in two ways: (1) when Congress intends the federal government to govern exclusively, inferred from a federal interest that is "so dominant" and federal regulation that is "so pervasive" in a particular area (called "field preemption");[35] or (2) when state law conflicts with federal law so that it is impossible to comply with both sovereigns' regulations, or when the state law prevents the "accomplishment and execution" of Congress's objectives (called "conflict preemption").[36] Accordingly, any preemption analysis of the relationship between a federal statute and a state measure must be viewed through the lens of congressional intent.

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[24] U.S. CONST. art. I., § 8, cl. 4

[25] U.S. CONST. art. I., § 8, cl. 3.

[26] *See Arizona*, 567 U.S. at 394-95; *see also Toll*, 458 U.S. at 10 (citing the Naturalization Clause and Commerce Clause, along with the federal government's broad authority over foreign affairs, as three of the primary sources for federal authority to regulate the status of aliens); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (identifying the powers to "declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship" as authorizing Congress to enact legislation barring certain aliens from admission).

[27] 8 U.S.C. §§ 1101-1537.

[28] In some cases, criminal and civil enforcement measures may be relevant to similar activities. For instance, unlawful entry into the United States is a criminal offense subject to imprisonment. *See* 8 U.S.C. §§ 1325-1326. But the removal proceedings that may follow an unlawful entry (or any violation of U.S. immigration laws) are civil in nature, *see Arizona*, 567 U.S. at 396, designed "to put an end to a continuing violation of the immigration laws," rather than "to punish an unlawful entry," *see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

[29] *See* ARIZ. S.B. 1070 § 1, amended by H.B. 2162 (2010), http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF.

[30] *Arizona*, 567 U.S. at 416.

[31] *Id.* at 394.

[32] U.S. CONST. art. VI, cl. 2.

[33] Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015).

[34] *Id*. at 1595.

[35] *Arizona*, 567 U.S. at 399 (internal quotation marks and citations omitted).

[36] *Id*.

The Supremacy Clause establishes that lawful assertions of federal authority may preempt state and local laws, even in areas that are traditionally reserved to the states via the Tenth Amendment.[37] One notable power reserved to the states is the "police power" to promote and regulate public health and safety, the general welfare, and economic activity within a state's jurisdiction.[38] Using their police powers, states and municipalities have frequently enacted measures that, directly or indirectly, address aliens residing in their communities.[39]

Yet despite the federal government's sweeping authority over immigration, the Supreme Court has cautioned that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted" by the federal government's exclusive power over immigration.[40] Accordingly, in *Arizona* the Supreme Court reiterated that, "[i]n preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress."[41] For example, in *Chamber of Commerce of the United States v. Whiting,* the Supreme Court upheld an Arizona law—related to the states' "broad authority under their police powers to regulate the employment relationship to protect workers within the State"[42]—that authorized the revocation of licenses held by state employers that knowingly or intentionally employ unauthorized aliens.[43] Even though the Immigration Reform and Control Act of 1986 (IRCA) expressly preempted "any State or local law imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for

[37] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). For example, Congress, acting under its Commerce Clause power, may displace state and local laws that were enacted under their police powers. *See, e.g.,* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 291-92 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.").

[38] *See, e.g.,* Bond v. United States, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'"); Kelley v. Johnson, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power."); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("States are accorded wide latitude in the regulation of their local economies under their police powers."); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) ("Decisions of this court ... recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people.").

[39] *See* NAT'L CONFERENCE OF STATE LEGISLATORS, IMMIGRANT POLICY PROJECT, REPORT ON 2015 STATE IMMIGRATION LAWS [hereinafter NCSL 2015 REPORT], http://www.ncsl.org/research/immigration/report-on-2015-state-immigration-laws.aspx (discussing state legislation enacted in 2015 concerning non-U.S. citizens).

[40] De Canas v. Bica, 424 U.S. 351, 355 (1976) (holding—before the INA was amended to comprehensively regulate alien employment and expressly preempt most state sanctions for unauthorized alien employment—that a state law regulating employment of unauthorized aliens was not preempted by federal law); *see also Arizona*, 567 U.S. at 407-16 (finding many provisions of an Arizona immigration enforcement law preempted but rejecting facial preemption challenge to provision requiring police to verify immigration status of lawfully stopped persons who were suspected of unlawful status); Chamber of Commerce of the United States v. Whiting, 563 U.S. 582 (2011) (holding that federal law did not preempt an Arizona law that authorized or required the suspension or termination of business licenses for employers that knowingly or intentionally hired unauthorized aliens); Lopez-Valenzuela v. Cty. of Maricopa, 719 F.3d 1054, 1070-73 (9th Cir. 2013) (upholding Arizona law that barred state courts from setting bail for unlawfully present aliens charged with certain felonies).

[41] *Arizona*, 567 U.S. at 400 (internal quotation marks and citations omitted).

[42] *Whiting*, 563 U.S. at 588 (quoting *De Canas*, 424 U.S. at 356).

[43] *Id*. at 611.

employment, unauthorized aliens," the Supreme Court concluded that Arizona's law fit within IRCA's savings clause for state licensing regimes and thus was not preempted.[44]

The Anti-Commandeering Doctrine

Although the federal government's power to preempt state or local activity touching on immigration matters is extensive, this power is not absolute. The U.S. Constitution establishes a system of dual sovereignty between the federal government and the states, including by creating a national legislature with enumerated powers and reserving most other legislative powers to the states by way of the Tenth Amendment.[45] The anti-commandeering doctrine derives from this structural allocation of power, which "withholds from Congress the power to issue orders directly to the [s]tates"[46] and prevents Congress from directly compelling states "to enact and enforce a federal regulatory program."[47] Thus, the federal government cannot "issue directives requiring the [s]tates to address particular problems, nor command the [s]tates' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[48]

Several Supreme Court rulings inform the boundaries of the anti-commandeering doctrine. First, in *New York v. United States*, the Court reviewed a constitutional challenge to provisions of a federal law that created a series of incentives for states to dispose of radioactive waste.[49] The statute provided states the option of (1) regulating according to Congress's direction, or (2) taking title to, and possession of, the low-level radioactive waste generated within their borders and becoming liable for all damages suffered by waste generators resulting from the state's failure to timely do so.[50] The law, in the Court's view, gave states a "choice" between two options concerning their maintenance of radioactive waste disposal, neither of which the Constitution authorized Congress, on its own, to impose on the states.[51] By offering this "choice," Congress had, in the Court's view, "crossed the line distinguishing encouragement from coercion," and in doing so acted "inconsistent[ly] with the federal structure of our Government established by the Constitution."[52] In so holding, the Court declared that "[t]he Federal Government may not *compel* the States to enact or administer a federal regulatory program."[53]

Then, in *Printz v. United States,* the Supreme Court reviewed whether certain interim provisions of the Brady Handgun Violence Prevention Act (Brady Act)[54] violated the anti-commandeering doctrine.[55] The relevant provisions required state and local law enforcement officers to conduct background checks (and other related tasks) on prospective handgun purchasers.[56] The Court

[44] 8 U.S.C. § 1324(a)(h)(2); *Whiting,* 563 U.S. at 587.

[45] *See generally* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[46] Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018).

[47] New York v. United States, 505 U.S. 144, 175, 176-78 (1992).

[48] *See* Printz v. United States, 521 U.S. 898, 935 (1997).

[49] *New York,* 505 U.S. at 149-51, 169-77 (discussing the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240, 99 Stat. 1842).

[50] *New York,* 505 U.S. at 174-175.

[51] *Id*. at 174-76 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

[52] *Id*. at 177.

[53] *Id*. at 188 (emphasis added).

[54] P.L. 103-159, 107 Stat. 1536 (1993).

[55] Printz v. United States, 521 U.S. 898 (1997).

[56] *Id*. at 902-04.

rejected the government's position that the challenged Brady provisions—which directed states to implement federal law—were distinguishable from the law at issue in *New York*—which directed states to create a policy—and thus was constitutionally permissible.[57] Rather, the Court concluded that a federal mandate requiring state and local law enforcement to perform background checks on prospective handgun purchasers violated the anti-commandeering doctrine.[58] Accordingly, the Court announced that "Congress cannot circumvent" the Constitution's prohibition against compelling states to enact or enforce a federal regulatory scheme "by conscripting the State's officers directly."[59]

But not every federal requirement imposed on the states necessarily violates the anti-commandeering principles identified in *Printz* and *New York*. A number of federal statutes provide that certain information collected by state entities must be reported to federal agencies.[60] And the Court in *Printz* expressly declined to consider whether these kinds of requirements were constitutionally impermissible, distinguishing reporting requirements from the case before it, which involved "the forced participation of the States ... in the actual administration of a federal program."[61]

Additionally, in *Reno v. Condon*, the Supreme Court unanimously rejected an anti-commandeering challenge to the Driver's Privacy Protection Act (DPPA),[62] which barred states from disclosing or sharing a driver's personal information without the driver's consent, subject to specific exceptions.[63] The Court distinguished the DPPA from the federal laws struck down in *New York* and *Printz* because, in the Court's view, the DPPA sought to regulate states "as owners of databases" and did not "require the States in their sovereign capacity to regulate their own citizens ... [or] enact any laws or regulations ... [or] require state officials to assist in the enforcement of federal statutes regulating private individuals."[64] The Court declined to address the state's argument that Congress may only regulate the states through generally applicable laws

[57] *Id*. at 926-30.

[58] *Id*. at 933.

[59] *Id.* at 935.

[60] *See, e.g.*, 42 U.S.C. § 5779 (providing that, when a missing child report is submitted to state or local law enforcement, the agency shall report the case to the National Crime Information Center of the Department of Justice). For discussion of various federal reporting requirements applicable to states, see Robert A. Mikos, *Can States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

[61] *Printz*, 521 U.S. at 918; *see also id.* at 936 (O'Connor, J., concurring) (describing the Court as having refrained "from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid"). For criticism of the distinction made in *Printz* between reporting requirements and situations where the federal government directly compels states to administer federal regulatory programs, see generally Mikos, *supra* note 60.

[62] 18 U.S.C. §§ 2721 to 2725.

[63] Reno v. Condon, 528 U.S. 141, 143-45 & n.1 (2000).

[64] *Reno*, 528 U.S. at 151.The Court also noted that, even though compliance with the DPPA would require "time and effort" by state officials, this did not mean that the law violated anti-commandeering principles. *Id.* at 150. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace [situation] that presents no constitutional defect." *Id.* at 150-51 (quoting South Carolina v. Baker, 485 U.S. 505, 514-515 (1988) (upholding federal prohibition on states' issuance of unregistered bonds in the face of a Tenth Amendment challenge)); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that extending overtime and minimum wage requirements of the Fair Labor Standards Act to public transit authority did not violate the Tenth Amendment).

that apply to individuals as well as states, given that the Court deemed the DPPA to be a generally applicable law.[65]

The Supreme Court recently clarified the scope of the anti-commandeering doctrine in its 2018 ruling, *Murphy v. National Collegiate Athletic Association*.[66] *Murphy* involved a challenge under the anti-commandeering doctrine to the Professional and Amateur Sports Protection Act (PASPA), which, as relevant here, prohibited states from "authorizing" sports gambling "by law."[67] (This is sometimes referred to as PASPA's "anti-authorization" provision.[68]) In 2012—20 years after PASPA's enactment—New Jersey eliminated its constitutional ban on sports gambling and then, two years later, repealed state laws that prohibited certain sports gambling.[69] Invoking PASPA's civil-suit provision, several sports leagues sued to enjoin New Jersey from enforcing its new law, arguing that it violated PASPA.[70] The Third Circuit Court of Appeals, sitting en banc, agreed.[71] Further, the Third Circuit rejected New Jersey's counterargument that PASPA unlawfully commandeered state legislatures.[72]

The Supreme Court concluded otherwise, holding that PASPA's anti-authorization provision violated the anti-commandeering doctrine.[73] The sports leagues (and the United States, which appeared as *amicus curiae*) had argued that under the anti-commandeering doctrine, Congress cannot compel states to enact certain measures, but it *can* prohibit states from enacting new laws, as PASPA does.[74] The Court described this distinction as "empty," emphasizing that "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."[75] Further, the Court elucidated two situations in which the anti-commandeering doctrine is not implicated. First, the doctrine does not apply "when Congress evenhandedly regulates an activity in which both States and private actors engage" (as the Court characterized the situation in *Reno*).[76] Second, the federal government does not commandeer states when it enacts a scheme involving "cooperative federalism," in which a state is given a choice either to implement, on its own, a federal program, or opt-out and yield to the federal government's administration of that program.[77]

Finally, the Court rejected the sports leagues and the government's contention that PASPA validly preempts state and local gambling laws.[78] The Court announced that "regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law

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[65] *Reno*, 528 U.S. at 151.

[66] 138 S. Ct. 1461 (2018).

[67] Professional and Amateur Sports Protection Act, P.L. 102-559, 106 Stat. 4227 (Oct. 28, 1992); *Murphy*, 138 S Ct. at 1468.

[68] *See Murphy*, 138 S. Ct. at 1473.

[69] *Id*. at 1471-72. The law does not permit placing bets on a New Jersey college team of a college event taking place in New Jersey. 2014 N.J. Laws p. 602.

[70] *Murphy*, 138 S. Ct. at 1471-72; 28 U.S.C. § 3703.

[71] NCAA v. Governor of N.J., 832 F.3d 389, 395-98 (3d Cir. 2016).

[72] *Id*. at 398-402.

[73] *Murphy*, 138 S. Ct. at 1478.

[74] *Id*. The sports leagues and the United States also unsuccessfully argued that the anti-authorization provision was a valid preemption provision under the Constitution's Supremacy Clause. *See id*. at 1479.

[75] *Id*. at 1478.

[76] *Id*. at 1478-79.

[77] *Id*. at 1479 (relying on Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)).

[78] *Id*. at 1479-81.

that regulates the conduct of private actors, *not the States*."[79] But PASPA neither imposes federal restrictions, nor confers federal rights, on private actors, and so, the Court concluded, PASPA can be construed only as a law that regulates state actors and not as a valid preemption provision.[80]

Congress's Spending Powers and the Anti-Commandeering Doctrine

Congress does not violate the Tenth Amendment or anti-commandeering principles more generally when it uses its broad authority to enact legislation for the "general welfare" through its spending power,[81] including by placing conditions on funds distributed to the states that require those accepting the funds to take certain actions that Congress otherwise could not directly compel the states to perform.[82] However, Congress cannot impose a financial condition that is "so coercive as to pass the point at which 'pressure turns into compulsion.'"[83] For example, in *National Federation of Independent Business v. Sebelius*, the Supreme Court struck down a provision of the Patient Protection and Affordable Care Act of 2010 (ACA) that purported to withhold Medicaid funding to states that did not expand their Medicaid programs.[84] The Court found that the financial conditions placed on the states in the ACA (withholding all federal Medicaid funding, which, according to the Court, typically totals about 20% of a state's entire budget) were akin to "a gun to the head" and thus unlawfully coercive.[85]

Select State and Local Limitations on Immigration Enforcement Activity

Several states and municipalities have adopted measures intended to limit their participation in federal immigration enforcement efforts. These limitations take several forms.[86] For example, some states and localities have sought to restrict police cooperation with federal immigration

[79] *Id*. at 1481 (emphasis added).

[80] *Id*.

[81] *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States."); Agency for Int'l Dev. v. All. for Open Society Int'l, Inc., 570 U.S. 205, 213 (2013) (noting that the Spending Clause "provides Congress broad discretion to tax and spend for the 'general Welfare,' including by funding particular state or private programs or activities"); Nat'l Fed'n of Indep. Bus. v. Sebelius [NFIB], 567 U.S. 519, 579 (2012) ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds."); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("Congress has broad power to set the terms on which it disburses federal money to the States."); Sabri v. United States, 541 U.S. 600, 605 (1941) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare.").

[82] *See NFIB*, 657 U.S. at 536 ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions," which "may well induce the state to adopt policies that the federal Government itself could not impose"); *see also* South Dakota v. Dole, 483 U.S. 203, 201-11 (1987).

[83] *See Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[84] *NFIB*, 567 U.S. at 588.

[85] *NFIB*, 132 S. Ct. at 2604.

[86] *See, e.g.*, Tal Kopan, *What are Sanctuary Cities, & Can They be Defunded?*, CNN POLITICS (Jan. 25, 2017, 5:09 PM), http://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/; IMMIGRANT LEGAL RESOURCE CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA'S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf; NAT'L COUNCIL OF STATE LEGISLATURES, WHAT'S A SANCTUARY POLICY? FAQ ON FEDERAL, STATE, AND LOCAL ACTION ON IMMIGRATION ENFORCEMENT (July 28, 2017), http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx; NCSL 2015 REPORT, *supra* note 39; CTR. FOR IMMIGRATION STUDIES, *Maps: Sanctuary Cities, Counties and State* (last updated May 30, 2018), http://cis.org/Sanctuary-Cities-Map.

authorities' efforts to apprehend removable aliens, sometimes called "don't enforce" policies.[87] Other measures may restrict certain state officials from inquiring about a person's immigration status, sometimes referred to as "don't ask" policies.[88] Still others restrict information sharing between local law enforcement and federal immigration authorities, sometimes described as "don't tell" policies.[89] The following sections discuss some state and local restrictions on law enforcement activity in the field of immigration enforcement along those lines, including the relationship between these restrictions and federal law.

Limiting Arrests for Federal Immigration Violations

Violations of federal immigration law may be criminal or civil in nature. Removal proceedings are civil,[90] although some conduct that makes an alien removable may also warrant criminal prosecution.[91] For example, an alien who knowingly enters the United States without authorization is not only potentially removable,[92] but could also be charged with the criminal offense of unlawful entry.[93] Other violations of the INA are exclusively criminal or civil in nature. Notably, an alien's unauthorized immigration status makes him or her removable but, absent additional factors (e.g., having reentered the United States after being formally removed),[94] unlawful presence on its own is not a criminal offense.

Some jurisdictions have adopted measures that restrict its police officers from making arrests for violations of federal immigration law. In some jurisdictions restrictions prohibit police from detaining or arresting aliens for civil violations of federal immigration law, like unlawful presence.[95] Other jurisdictions prohibit police from making arrests for some criminal violations of federal immigration law, like unlawful entry.[96] Still others prohibit law enforcement from assisting federal immigration authorities with investigating or arresting persons for civil *or* criminal violations of U.S. immigration laws.[97] And some other jurisdictions have prohibitions

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[87] *See, e.g.,* JESSICA SAUNDERS, NELSON LIM & DON PROSNITZ, ENFORCING IMMIGRATION LAW AT THE STATE AND LOCAL LEVELS: A PUBLIC POLICY DILEMMA, RAND CTR. OF QUALITY POLICING (2010), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP273.pdf (describing types of limited-cooperation policies); Kittrie, *supra* note 16, at 1455.

[88] Kittrie, *supra* note 16, at 1455.

[89] *See id*.

[90] *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

[91] For more information on criminal grounds for removal, see CRS Report R45151, *Immigration Consequences of Criminal Activity*, by Sarah Herman Peck and Hillel R. Smith.

[92] *See* INA § 212(a)(6)(A)(i); 8 U.S.C. §1182(a)(6)(A)(i) (providing that an alien is inadmissible and subject to removal if present in the United States without have been admitted or paroled, or if the alien arrives in the United States at any time or place other than as designated).

[93] 8 U.S.C. § 1325.

[94] 8 U.S.C. § 1326.

[95] *See, e.g.,* SAN JOSE, CA, POLICE DEP'T DUTY MANUAL 581 (2018) (public version) ("Officers will not detain or arrest any person on the basis of the person's citizenship or status under civil immigration laws."), http://www.sjpd.org/Records/DutyManual.asp; Washington, DC, Mayor's Order 2011-174 (Oct. 19, 2011) (hereinafter "DC Mayor's Order") ("No person shall be detained solely on the belief that he or she is not present legally in the United States or that he or she has committed a civil immigration violation."), http://www.dclc.org/docs/10-18-2011%20Mayors%20oder.pdf; OR. REV. STAT. §181A.820 ("No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.").

[96] *See, e.g.,* LAPD ORDER, *supra* note 12 (barring arrests for federal crime of unlawful entry).

[97] TAKOMA PARK, MD MUN. CODE § 9.04.010 ("No agent, officer or employee of the City, in the performance of

that are broader in scope, such as a general statement that immigration enforcement is the province of federal immigration authorities, rather than that of local law enforcement.[98]

State or local restrictions on police authority to arrest persons for federal immigration law violations do not appear to raise significant legal issues. Even though the INA expressly allows state and local law enforcement to engage in specified immigration enforcement activities,[99] nothing in the INA *compels* such participation. Indeed, any such requirement likely would raise anti-commandeering issues.[100] Moreover, after *Arizona*, it appears that states and localities are generally preempted from making arrests for civil violations of the INA in the absence of a specific federal statutory authorization or the "request, approval, or other instruction from the Federal Government."[101]

Limiting Police Inquiries into Immigration Status

Many sanctuary-type policies place restrictions on police inquiries or investigations into a person's immigration status.[102] Some policies provide that police may not question a person about his or her immigration status except as part of a criminal investigation.[103] Others bar law enforcement from initiating police activity with an individual for the sole purpose of discovering

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official duties, shall assist the United States Bureau of Immigration and Customs Enforcement in the investigation or arrest of any persons for civil or criminal violation of the immigration and nationality laws of the United States.").

[98] PHOENIX, AZ POLICE DEP'T OPERATIONS ORDER MANUAL 1.4 (rev. 2015) ("The investigation and enforcement of federal laws relating to illegal entry and residence in the United States is specifically assigned to [Homeland Security Investigations]"), https://www.phoenix.gov/policesite/Documents/operations_orders.pdf.

[99] *See e.g.*, INA § 287(g); 8 U.S.C. § 1357(g).

[100] *See supra* section "The Anti-Commandeering Doctrine."

[101] Arizona v. United States, 567 U.S. 387, 410 (2012); *see also* Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 464 (4th Cir. 2013) ("Lower federal courts have universally—and we think correctly—interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations."). *Arizona*'s discussion of state authority to enforce federal immigration law was related to arrests for noncriminal, immigration status violations. *Arizona*, 567 U.S. at 407-11. The Supreme Court did not opine on whether state law enforcement agencies are also precluded from making arrests for criminal violations of federal immigration law. However, some lower courts have generally recognized that state and local police are not constitutionally forbidden from making such arrests. *See, e.g.*, United States v. Argueta-Mejia, 615 F. App'x 485, 488 (10th Cir. 2015) ("The federal constitution allows a state law enforcement officer to make an arrest for any crime, including federal immigration offenses."); Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 530-31 (5th Cir. 2013) (observing that 8 U.S.C. § 1324(c), a federal statute that criminalizes harboring unlawfully present aliens, permits state and local law enforcement to make arrests for criminal violations); Gonzales v. City of Peoria, 722 F.2d 468, (9th Cir. 1983) ("We therefore hold that federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Nationality] Act."), *overruled on other grounds in* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999); United States v. Vasquez-Alvarez, 176 F.3d 1294, 1299 n.4 (10th Cir. 1999) ("[S]tate law-enforcement officers have the general authority to investigate and make arrests for criminal violations of federal immigration laws.").

[102] *See, e.g.*, *City of Philadelphia Action Guide: Immigration Policies*, CITY OF PHILADELPHIA (Jan. 8, 2018), https://www.phila.gov/2018-01-08-immigration-policies/ ("We do not allow our City employees, including police officers, to ask about the documentation status of people they encounter."); Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 602 (2008) (describing New York City's sanctuary policies).

[103] DC Mayor's Order, *supra* note 95 (declaring that public safety employees "shall not inquire about a person's immigration status ... for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation"); N.Y.C. Exec Order No. 34, http://www1.nyc.gov/site/immigrants/about/local-laws-executive-orders.page ("Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien.").

immigration status.[104] And other policies prohibit law enforcement from questioning crime victims and witnesses about their immigration status.[105] Still other policies more broadly limit officials from gathering information about persons' immigration status, except as required by law.[106]

Restricting the authority of police to question a person about his or her immigration status helps ensure that law enforcement lacks any information that could be shared with federal immigration authorities. As explained in the "PRWORA and IIRIRA" section below, two federal laws prevent state or local restrictions on sharing information about a person's immigration status with federal immigration authorities, but the provisions do not require state or local police to actually collect such information.[107] *Murphy* has raised questions, though, about the continuing constitutional viability of these statutes.[108]

Limiting Information Sharing with Federal Immigration Authorities

Some states and localities have restricted government agencies or employees from sharing information with federal immigration authorities.[109] For instance, some jurisdictions prohibit law enforcement from notifying federal immigration authorities about the release status of incarcerated aliens, unless the alien has been convicted of certain felonies.[110] Similarly, other jurisdictions prohibit their employees from disclosing information about an individual's immigration status unless the alien is suspected of engaging in illegal activity that is separate from unlawful immigration status.[111] Some jurisdictions restrict disclosing information except as

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[104] *See, e.g.*, LAPD ORDER, *supra* note 12 ("Officers shall not initiate police action with the objective of discovering the alien status of a person.").

[105] *See, e.g.*, DC Mayor's Order, *supra* note 92 ("It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance."); New Haven Dep't of Police Service General Order 06-2 (2006) ("Police officers shall not inquire about a person's immigration status unless investigation criminal activity."), https://www.newhavenct.gov/gov/depts/nhpd/division/internal_affairs/general_orders.htminternal_affairs/general_orders.htm; N.Y.C. Exec Order No. 34, *supra* note 103 ("It shall be the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.").

[106] *See, e.g.*, CHI., ILL. MUN. CODE ch. 2-173-020 (declaring that "[n]o agent or agency shall request information about or otherwise investigate or assist in the investigation of the citizenship or immigration status of any person," subject to exceptions, including as required by law).

[107] *See* 8 U.S.C. §1373(b) (barring state or local restrictions on sending, maintaining, or exchanging immigration status information with federal immigration authorities).

[108] *See supra* notes 62 to 72 and accompanying text.

[109] *See, e.g.*, S.F. ADMIN CODE § 12H.2 ("No department, agency, commission, officer, or employee of the City and County of San Francisco shall use City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any such personal information . . . unless such assistance is required by Federal or State statute, regulation, or court decision."); N.Y.C. Executive Order 124 (Aug. 7, 1989) [hereinafter 1989 New York City Order] (limiting transmission of information about an alien to federal immigration authorities except in certain circumstances, including when the alien was suspected of criminal activity), http://www.nycourts.gov/library/queens/PDF_files/Orders/ord124.pdf (revoked and replaced in 2003 by N.Y.C. Executive Order 34, as amended by N.Y.C. Executive Order 41, to permit information sharing in a broader range of circumstances, but not on the basis of alien's unlawful immigration status); Governor of Maine Executive Order 13 FY 04/05, Concerning Access to State Services By All Entitled Maine Residents (Apr. 9, 2004) (limiting the sharing of information about aliens with federal immigration authorities, except when an alien is involved in illegal activity other than unlawful status; rescinded by Exec. Order 08 FY 11/12 (Jan. 6, 2011)).

[110] *See, e.g.*, S.F. ADMIN CODE §§ 12H.2, 12I.3.

[111] *See, e.g.*, N.Y.C. Exec Order No. 41 (Sept. 17, 2003), http://www1.nyc.gov/site/immigrants/about/local-laws-

required by federal law[112]—sometimes referred to as a "savings clause"—although it appears that the Department of Justice has interpreted those provisions as conflicting with federal information-sharing provisions.[113]

Federal Measures to Counteract Sanctuary Policies

Over the years the federal government has enacted measures designed to counter certain sanctuary policies. Notably, in 1996 Congress enacted Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), to curb state and local restrictions on information sharing. Most recently, the President issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," which, as relevant here, seeks to encourage state and local cooperation with federal immigration enforcement and disincentivize state and local adoption of sanctuary policies that hinder federal immigration enforcement. These federal initiatives—and related legal issues—are described below.

PRWORA and IIRIRA

In 1996 Congress sought to end state and local restrictions on information sharing through provisions in PRWORA[114] and IIRIRA.[115] Neither PRWORA nor IIRIRA *requires* state or local government entities to share immigration-related information with federal authorities.[116] Instead, these provisions bar restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration authorities regarding a person's immigration status.[117]

IIRIRA § 642, codified at 8 U.S.C. § 1373, bars any restriction on a federal, state, or local governmental entity or official's ability to send or receive information regarding "citizenship or immigration status" to or from federal immigration authorities.[118] It further provides that no person or agency may prohibit a federal, state, or local government entity from (1) sending information regarding immigration status to, or requesting information from, federal immigration authorities; (2) maintaining information regarding immigration status; or (3) exchanging such information with any other federal, state, or local government entity.[119] PRWORA § 434, codified

executive-orders.page.

[112] CHI., ILL. MUN. CODE ch. 2-173-030 ("Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian.").

[113] *See* MICHAEL R. HOROWITZ, INSPECTOR GENERAL, DEP'T OF JUSTICE REFERRAL OF ALLEGATIONS OF POTENTIAL VIOLATIONS OF 8 U.S.C. § 1373 BY GRANT RECIPIENTS (May 31, 2016), https://oig.justice.gov/reports/2016/1607.pdf.

[114] P.L. 104-193, § 434 (1996); 8 U.S.C. § 1644.

[115] P.L. 104-208, § 642 (1996); 8 U.S.C. § 1373.

[116] Whether Congress could permissibly *require* states and localities to submit collected information to federal immigration authorities is an open question. As previously noted, the Supreme Court in *Printz* distinguished federal laws requiring states to report certain information to federal agencies from those that compel state authorities to administer a federal regulatory program as to private parties, and declined to opine on whether reporting requirements violated the anti-commandeering doctrine. *See* Printz v. United States, 521 U.S. 898, 918 (1997).

[117] 8 U.S.C. §§ 1373, 1644.

[118] 8 U.S.C. § 1373(a).

[119] *Id*. § 1373(b). Federal immigration authorities are also required to respond to immigration status or citizenship

at 8 U.S.C. § 1644, similarly bars state and local governments from prohibiting or restricting state or local government entities from sending or receiving information, to or from federal immigration authorities, regarding the "immigration status" of an individual.[120]

Related Litigation

Shortly after Congress enacted these information-sharing restrictions, New York City, which had a policy limiting information sharing with federal immigration authorities,[121] brought suit challenging the constitutionality of Sections 1373 and 1644. Among other things,[122] New York City alleged that the provisions facially violated the Tenth Amendment by barring states and localities from controlling the degree to which their officials may cooperate with federal immigration authorities.[123] A federal district court dismissed this claim in *City of New York v. United States*,[124] and the U.S. Court of Appeals for the Second Circuit affirmed the judgment.[125]

The Second Circuit observed that, unlike the statutes struck down on anti-commandeering grounds in *New York* and *Printz*, the information-sharing provisions in PRWORA and IIRIRA did not directly compel state authorities to administer and enforce a federal regulatory program.[126] Instead, the court reasoned, these provisions prohibited state and local governments from restricting "the voluntary exchange" of immigration information between federal and state authorities.[127] Further, the court added, "informed, extensive, and cooperative interaction of a voluntary nature" between states and federal authorities is an integral feature of the American system of dual sovereignty, and, in any event, the Supremacy Clause "bars states from taking actions that frustrate federal laws and regulatory schemes."[128] Accordingly, the Second Circuit concluded that the Tenth Amendment does not provide states and municipalities with the "untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs."[129] The court therefore rejected New York City's constitutional challenge to the information-sharing provisions of PRWORA and IIRIRA, holding that that they did not violate the Tenth Amendment or principles of federalism.[130]

New York City sought to appeal the decision to the Supreme Court, but its petition for certiorari was denied.[131] A few months later, though, the Court handed down *Reno*, which, as explained

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verification requests made by state or local authorities pertaining to persons within their jurisdiction. *Id*. § 1373(c).

[120] *Id*. § 1644.

[121] 1989 New York City Order, *supra* note 109.

[122] New York City also unsuccessfully argued that the information-sharing provisions in PRWORA and IIRIRA violated the Guarantee Clause of the Constitution, U.S. CONST. art. IV, § 4, by interfering with the city's oversight of its employees, City of New York v. United States [City of New York I], 971 F. Supp. 789 (S.D.N.Y. 1997) (holding that Guarantee-Clause claim was nonjusticiable); City of New York v. United States [City of New York II], 179 F.3d 29 (2d Cir. 1999) (assuming that Guarantee-Clause claim was justiciable and concluding that PRWORA and IIRIRA information-sharing provisions were permissible).

[123] *City of New York I*, 971 F. Supp. at 791.

[124] *Id*. at 789.

[125] *City of New York II*, 179 F.3d 29 (2d Cir. 1999).

[126] *See id*. at 34-35.

[127] *Id*. at 35.

[128] *Id*.

[129] *Id.*

[130] *Id.* at 31.

[131] 528 U.S. 1115 (2000).

earlier, held that the DPPA (a federal statute regulating the dissemination of certain personal information collected by state authorities) did not violate federalism principles embodied in the Tenth Amendment.[132]

Since the Second Circuit's ruling, questions about Section 1373's constitutionality remained relatively quiet until President Trump issued the executive order targeting jurisdictions that do not comply with Section 1373. This sparked new litigation challenging Section 1373, some of which invoked *Murphy* after the ruling came down.

Executive Order 13768 and Related Litigation

Shortly after taking office, President Trump issued Executive Order (EO) 13768, "Enhancing Public Safety in the Interior of the United States,"[133] which, in Section 9, addresses sanctuary jurisdictions. Specifically, Section 9(a) of the EO seeks to encourage state and local cooperation with federal immigration enforcement and disincentivize—by threatening to withhold federal grant money—state and local adoption of sanctuary policies.[134] Although EO 13768 did not explicitly define "sanctuary jurisdiction," later interpretive guidance from the Department of Justice (DOJ or Justice Department) defined the term, as it is used in the executive order, as a jurisdiction that willfully refuses to comply with 8 U.S.C. § 1373 (IIRIRA § 642).[135]

This section discusses recent litigation concerning efforts by the Trump Administration to deter the implementation of state or local "sanctuary" policies. It begins by providing a brief description of Section 9(a) of EO 13768 and the DOJ's implementation of its requirements. Next, it discusses ongoing litigation involving challenges to Section 9(a). Several of these cases involve direct challenges to the executive order. Other lawsuits involve challenges to the Justice Department's decision, in implementing the executive order, to attach new conditions for grant eligibility under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program and Community Oriented Policing Services (COPS) program,[136] all of which are designed to encourage state and local law enforcement cooperation with federal immigration enforcement. Finally, this section discusses a lawsuit filed by the United States against California, claiming that three new state laws obstruct the federal government's immigration enforcement efforts and, as a result, violate the Constitution's Supremacy Clause.[137]

Section 9 of Executive Order 13768

On January 25, 2017, the President signed EO 13768, "Enhancing Public Safety in the Interior of the United States."[138] Section 9 of the executive order seeks to encourage state and local

[132] 528 U.S. 141 (2000).

[133] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

[134] *Id*.

[135] Memorandum from Att'y Gen. Jeff Sessions, *Implementation of Executive Order 13768, "Enhancing Pub. Safety in the Interior of the U.S."* (May 22, 2017) [hereinafter DOJ Implementation Memo], https://www.justice.gov/opa/press-release/file/968146/download.

[136] *See* Dep't of Justice, Office of Justice Programs, *Edward Byrne Memorial Justice Assistance Grant Program*, https://www.bja.gov/jag/ (last visited Nov. 7, 2018); CRS In Focus IF10691, *The Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by Nathan James.

[137] "This Constitution, and the laws of the United States . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI.

[138] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

cooperation with federal immigration enforcement and disincentivize state and local adoption of sanctuary policies.[139] In particular, Section 9 declares that "[i]t is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or political subdivision of a State, shall comply with 8 U.S.C. 1373."[140]

To implement the policy set forth in the executive order, the President instructs the Attorney General and the Secretary of the Department of Homeland Security (DHS) under Section 9(a) to ensure that jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants," subject to limited exception.[141] The executive order authorizes the DHS Secretary to designate a jurisdiction she determines to be a "sanctuary," and directs the Attorney General to take "appropriate enforcement actions" against "any entity" that violates Section 1373 or that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[142] Under Section 9(b), the President directs the DHS Secretary to publish, weekly, a list of jurisdictions that ignore or fail to honor detainer requests for incarcerated aliens, "[t]o better inform the public regarding the public safety threats associated with sanctuary jurisdictions."[143]

DOJ Implementation of EO 13768

A few months later, on May 22, 2017, Attorney General Sessions issued a memorandum interpreting EO 13768.[144] First, he announced that "sanctuary jurisdictions," for the purposes of enforcing the executive order, are "jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'"[145] Further, the Attorney General stated that the executive order applies only to grants that the DOJ or DHS administer. As a result, the Attorney General announced that the DOJ would "require jurisdictions applying for certain Department grants to certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award."[146] In addition, the certification requirement would apply to all existing grants administered by the DOJ's Office of Justice Programs and Office of Community Oriented Policing Services (COPS) that expressly contain the certification condition, and to future grants for which the DOJ has statutory authority to impose such conditions.[147] Further, the Attorney General added that "[s]eparate and apart from the Executive Order, statutes may authorize the Department to tailor grants or to impose additional conditions on grantees to advance the Department's law enforcement priorities."[148] Accordingly, "[g]oing forward," the Attorney General announced, "the Department, where authorized, may seek to tailor grants to promote a lawful system of immigration."[149]

As a follow up to that interpretive memorandum, two months later on July 25, 2017, the DOJ issued a press release and accompanying background document announcing new conditions for

[139] *Id*. at 8,801.

[140] *Id*.

[141] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

[142] *Id*.

[143] *Id*.

[144] DOJ Implementation Memo, *supra* note 135; 8 U.S.C. § 1373.

[145] *Id*. (quoting Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017)).

[146] *Id*.

[147] *Id*.

[148] *Id*.

[149] *Id*.

recipients of the Byrne JAG program.[150] The Byrne JAG program provides federal funds to the states, District of Columbia, Puerto Rico, and other territories for various nonfederal criminal justice initiatives.[151] The press release announced three new conditions:

1. **Compliance Condition.**[152] Byrne JAG program grant recipients must certify compliance with Section 1373, which would notify the federal government that the jurisdiction does not restrict its offices and personnel from sending or receiving citizenship or immigration status to or from federal immigration authorities.[153]
2. **Access Condition.** Grant recipients that have detention facilities housing aliens (e.g., local jails or state prisons where aliens may be confined) must permit DHS immigration enforcement personnel (i.e., enforcement officers with DHS's U.S. Immigration and Customs Enforcement [ICE]) to access those facilities to meet with housed aliens and inquire into their eligibility to remain in the country.
3. **Notice Condition.** When DHS believes that an alien in state or local custody is removable from the United States for a violation of federal immigration law, ICE officers may issue a "detainer" requesting that the state or local entity give notice of the alien's pending release from custody so that ICE may take control of the alien for possible removal proceedings.[154] To be eligible for grants under the Byrne JAG program, DOJ announced that recipients generally must give DHS 48 hours' advance notice before releasing from custody an alien wanted for removal.[155]

These requirements were made applicable to Byrne JAG applications that were due six weeks later, on September 5, 2017, meaning that applying jurisdictions would need to be in compliance with all three conditions within six weeks.

Additionally, the Justice Department announced a requirement for applicants seeking grants administered by the COPS Office to certify compliance with Section 1373.[156] COPS grants are used to advance community policing, for example, through training, technical assistance, and developing "innovative policing strategies"[157] in a number of "topic areas" selected by the DOJ.[158] For FY2018, in the topic area for "Field Initiated Law Enforcement," priority

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[150] Press Release, Dep't of Justice, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs* (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[151] *See* CRS In Focus IF10691, *The Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by Nathan James.

[152] For the sake of brevity and clarity, throughout the memorandum the conditions will be referred to as the "compliance condition," the "access condition," and the "notice condition."

[153] 8 U.S.C. § 1373(a). In March 2016, the DOJ had previously notified grant recipients under the Byrne JAG program that they had an obligation to comply with Section 1373, but the agency did not establish a formal certification requirement. *See* Dep't of Justice, *Backgrounder on Grant Requirements* (attached to July 25, 2017 press release) https://www.justice.gov/opa/press-release/file/984346/download [hereinafter Grant Requirement Backgrounder].

[154] U.S. Immigration & Customs Enforcement, *Detainer Policy*, https://www.ice.gov/detainer-policy (last visited Nov. 8, 2018).

[155] Grant Requirement Backgrounder, *supra* note 153.

[156] *See* Dep't of Justice, Office of Community Oriented Policing Services, *Certification of Compliance with 8 U.S.C. 1373*, https://cops.usdoj.gov/pdf/2017AwardDocs/cpd/Certification_of_Compliance.pdf.

[157] *See* Dep't of Justice, *Grants*, https://www.justice.gov/grants (last visited Nov. 8, 2018).

[158] *See* U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, FY 2018 COMMUNITY POLICING DEVELOPMENT (CPD) APPLICATION GUIDE 2, 67, https://cops.usdoj.gov/pdf/2018AwardDocs/cpd/App_Guide.pdf

consideration could be given to applicants that cooperate with federal immigration authorities "to address illegal immigration."[159] Further, the COPS Office notified potential applicants that additional consideration would be given to applicants that partner with federal law enforcement to combat illegal immigration.[160] To obtain that special consideration, applicants could sign a form certifying that they follow practices mirroring those of the notice and access conditions of Byrne JAG program: (1) allowing federal immigration authorities to access detention facilities where they may question known or suspected aliens about their immigration status; and (2) providing at least 48 hours' notice of those persons' expected custodial release.[161]

Litigation Challenging EO 13768 and its Implementation

The lawsuits challenging Section 9(a) of EO 13768 and its implementation came in two waves. The first wave came shortly after President Trump signed the executive order, when several jurisdictions sued for injunctive relief. The second, larger wave of litigation came after the DOJ announced the new Byrne JAG and COPS conditions. In the litigation challenging the EO's implementation, the various challengers have brought arguments raising similar statutory and constitutional concerns, chiefly

- the DOJ lacked statutory authority to impose the new conditions;
- the DOJ imposed the conditions arbitrarily and capriciously in violation of the Administrative Procedure Act;
- the executive branch violated principles of separation of powers by usurping the legislature's spending power; and
- the government violated the anti-commandeering doctrine by unconstitutionally conscripting the states into federal immigration enforcement.

The County and City of San Francisco and the County of Santa Clara (collectively, the "Counties"), for example, filed suit within days of each other, and those lawsuits were considered jointly by a district judge in the Northern District of California.[162] The district court presiding over the Counties' challenges ultimately issued an injunction blocking nationwide enforcement of Section 9(a).[163] The Ninth Circuit agreed with the lower court that Section 9(a) violates the Constitution's principles of separation of powers.[164] However, while agreeing that the injunction was appropriate to prevent Section 9(a) from having effect in California, the appellate court concluded that the current factual record was insufficient to support a nationwide injunction and remanded the case to the district court for further factfinding.[165]

(2018) (listing topic areas).

[159] *See id.* at 2, 67. Application solicitations for the Field-Initiated Law Enforcement Microgrants topic area is currently on hold, however, on account of ongoing litigation. *Id.* at 2; *see also* U.S. DEP'T OF JUSTICE, *Community Policing Development (CPD)*, https://cops.usdoj.gov/cpd (last visited Nov. 8, 2018).

[160] *See* City of Los Angeles v. Sessions, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018).

[161] *Id.*

[162] Complaint, City & Cty. Of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); Complaint, Cty. of Santa Clara v. Trump, No. 3:17-cv-00574-WHO, (N.D. Cal. Feb. 3, 2017).

[163] Order Granting Motion for Summary Judgment, City & Cty. of San Francisco v. Trump, No. 3:17-cv-00485-WHO & Cty. Of Santa Clara v. Trump, No. 17-cv-00574-WHO (N.D. Cal. Nov. 20, 2017).

[164] City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1231-35 (9th Cir. 2018).

[165] *Id.* at 1245.

As for the litigation challenging new Byrne JAG and COPS conditions, in one case, the U.S. District Court of the Northern District of Illinois enjoined the Byrne JAG conditions as applied to Chicago.[166] The court held that, in imposing those conditions, the DOJ exceeded the statutory authority Congress delegated to implement the Byrne JAG program.[167] In another case, the U.S. District Court for the Eastern District of Pennsylvania enjoined the federal government from enforcing the three Byrne JAG conditions against Philadelphia.[168] The district court concluded, among other things, that the conditions were imposed arbitrarily and capriciously in violation of the Administrative Procedure Act (APA) because the government had failed to adequately justify imposing the new conditions.[169] For reasons similar to the federal district courts in Chicago and Pennsylvania, a district court in New York enjoined the government from enforcing the new conditions against the City of New York and the States of New York, Connecticut, New Jersey, Rhode Island, Washington, Massachusetts, and Virginia (the collective plaintiffs in that case).[170] Notably, all of the district judges held, post-*Murphy*, that Section 1373 violates the anti-commandeering doctrine.[171] Finally, in another lawsuit brought by the City of Los Angeles, California, a district judge permanently enjoined the new considerations for COPS grant selections, concluding that they were imposed without statutory authority, violated the Spending Clause, and were arbitrarily and capriciously imposed in violation of the APA.[172]

City & Cty. of San Francisco v. Trump and Cty. of Santa Clara v. Trump

Shortly after President Trump issued EO 13768, the City and County of San Francisco and the County of Santa Clara, California, filed suit, asking a federal court to enjoin Section 9(a) of the order.[173] The Counties principally argued that Section 9(a) is unconstitutional in three ways.[174] First, the Counties contended that the funding restrictions, by purporting to withhold, or impose new eligibility conditions on, congressional appropriations, violated the separation of powers by usurping the legislature's spending power granted in Article I, Section 8 of the Constitution.[175] Alternatively, even assuming that the President had lawful authority to withhold, or impose conditions on, congressionally appropriated funds, the Counties argued that Section 9(a) would still violate the Spending Clause because it surpasses the constitutional limits of the Spending

[166] City of Chicago v. Sessions, 321 F. Supp. 3d 855 (E.D. Ill. 2018). The district court technically issued a nationwide injunction but stayed its nationwide effect until the Seventh Circuit rules. *Id*. at 880.

[167] *Id.* at 873-76.

[168] City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 296 (E.D. Pa. 2018).

[169] *Id*. at 323-25. Under the Administrative Procedure Act, a court may set aside executive actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

[170] States of New York v. Dep't of Justice, 343 F.Supp.3d 213, 245-46 (S.D.N.Y. 2018).

[171] *City of Philadelphia*, 309 F. Supp. 3d at 329-31; *City of Chicago*, 321 F. Supp. 3d at 872; *States of New York*, 343 F.Supp.3d at 234-38.

[172] City of Los Angeles v. Sessions, 293 F. Supp. 3d. 1087, 1095-1100 (C.D. Cal. 2018).

[173] Complaint, City & Cty. Of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); Complaint, Cty. of Santa Clara v. Trump, No. 3:17-cv-00574-WHO, (N.D. Cal. Feb. 3, 2017). These cases were filed separately but considered together.

[174] Motion for Summary Judgment, City & Cty. of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Aug. 30, 2017); Motion for Summary Judgment, Cty. of Santa Clara v. Trump, No. 3:17-cv-00574-WHO (N.D. Cal. Aug. 30, 2017).

[175] Motion for Summary Judgment at 12-13, City & Cty. Of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Aug. 30, 2017) ("The Constitution grants *Congress*—not the President—the federal spending power, including the power to impose conditions on federal funds."). The Spending Clause states that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ...." U.S. CONST. art I, § 8, cl. 1.

Clause set forth by the Supreme Court.[176] Finally, the Counties argued that Section 9(a) violates the anti-commandeering doctrine, contending, for instance, that Section 9(a) coerces jurisdictions into complying with ICE-issued immigration detainers by threatening to withhold federal funding and take unspecified enforcement action against jurisdictions that "'hinder the enforcement of federal law.'"[177]

The district judge ultimately agreed with all three arguments and permanently enjoined—nationwide—Section 9(a) of the executive order.[178] The Ninth Circuit, in a 2-1 ruling, affirmed the district court's judgment on the ground that Section 9(a) violates the separation of powers by usurping Congress's spending power.[179] The Ninth Circuit vacated the injunction's nationwide application, however, and remanded for further factfinding on whether the injunction ought to be nationwide in scope.[180]

In holding that EO Section 9(a) violates the separation of powers, the Ninth Circuit recounted that "when it comes to spending, the President has none of his own constitutional powers to rely upon."[181] That power, the court explained, is exclusively Congress's domain, subject to delegation.[182] Yet, the court opined, Congress had not authorized the executive branch "to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies."[183] Further, the court pointed to nearly a dozen failed congressional proposals to do just that during the 114th Congress.[184] Thus, the Ninth Circuit concluded, "[n]ot only has the Administration claimed for itself Congress's exclusive spending power, it also attempted to coopt Congress's power to legislate."[185]

City of Richmond v. Trump

Another California city unsuccessfully tried to challenge EO 13768 as it relates to sanctuary jurisdictions. Richmond, California, like Santa Clara and San Francisco, argued that (1) the President exceeded his constitutional authority by purporting to appropriate federal funds; (2) even assuming that the President has such spending authority, the conditions set forth in the executive order violate the Spending Clause's lawful parameters; and (3) the executive order unlawfully commandeers the states.[186] The district court denied Richmond's request for injunctive

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[176] Motion for Summary Judgment at 13-17, City & Cty. Of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Aug. 30, 2017).

[177] *Id.* at 18-20 (quoting Section 9(a) of EO 13768).

[178] Cty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017).

[179] City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1231-35 (9th Cir. 2018). In dissent, Judge Fernandez disagreed with the majority's characterization of Section 9(a)'s savings clause—directing the Attorney General or Secretary of Homeland Security to take actions "consistent with law" to ensure compliance with Section 1373—as "implausible, or boilerplate." *Id*. at 1249-50 (Fernandez, J., dissenting). Judge Fernandez also contended that the plaintiffs' claims were not ripe for review. *Id*. at 1247-48.

[180] *Id.* at 1231.

[181] *Id.* at 1233-34 (internal quotation marks and citation omitted).

[182] *Id.* at 1233.

[183] *Id.* at 1234.

[184] *Id.* at 1234 & n.4.

[185] *Id.* at 1234.

[186] Complaint for Injunctive & Declaratory Relief at 18-21, City of Richmond v. Trump, No. 3:17-cv-01535 (N.D. Cal. Mar. 21, 2017). The same judge presided over this case and the lawsuits brought by San Francisco and Santa Clara. The Richmond lawsuit was resolved after the judge issued a preliminary injunction in the cases brought by San Francisco and Santa Clara but before the permanent injunction was issued in that case.

relief, however, after concluding that the city could not establish pre-enforcement standing to challenge the executive order.[187]

In dismissing Richmond's suit, the district court applied the framework that the Supreme Court set forth in *Babbitt v. Farm Workers National Union* to determine whether a plaintiff has standing to challenge a statute *before* it is enforced against the plaintiff.[188] Under *Babbitt,* the plaintiff must demonstrate "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."[189] The district court assumed without deciding that Richmond had policies proscribed by the executive order, could lose federal funding if the order was enforced against it, and put forward claims that implicated constitutional interests. So the ruling on whether Richmond had pre-enforcement standing ultimately hinged on whether Richmond had demonstrated a "well-founded fear" that the executive order would be enforced against it, and the court concluded the city had not.[190] The court opined that "[t]he likely targets of enforcement under the [Executive] Order are jurisdictions that have actually refused to cooperate with ICE and that ICE believes are hindering its immigration enforcement efforts."[191] But according to Richmond's own complaint, the court found, the federal government had never asked Richmond to assist in enforcing immigration policy, nor had it been identified as a locality that restricts cooperation with ICE or regularly declines immigration detainers.[192] Thus, the court decided that Richmond had "no real-world friction with ICE or the defendants over its policies" and thus was unlikely to be subjected to the executive order's funding restrictions.[193]

City of Seattle & City of Portland v. Trump

The Cities of Seattle, Washington, and Portland, Oregon, jointly challenged President Trump's executive order.[194] The cities asked a district court to declare that Section 9(a) of EO 13768 is unconstitutional under the Tenth Amendment, the Spending Clause, and separation-of-power principles, principally for the same reasons as the other jurisdictions challenging the executive order.[195] Soon after the plaintiffs brought suit, though, the district court stayed the case, pending the resolution of the appeal in the Ninth Circuit of the injunction issued in the Santa Clara/San Francisco litigation.[196] After the Ninth Circuit concluded that Section 9(a) was unconstitutional, the district judge in this case also ruled that Section 9(a) unconstitutionally violated the separation of powers.[197]

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[187] Order Granting Motion to Dismiss at 1, City of Richmond v. Trump, No. 3:17-cv-01535 (N.D. Cal. Aug. 21, 2017).

[188] *Id.* at 4.

[189] Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

[190] Order Granting Motion to Dismiss at 4, City of Richmond v. Trump, No. 3:17-cv-01535 (N.D. Cal. Aug. 21, 2017).

[191] *Id*. at 5.

[192] *Id*.

[193] *Id*. at 6.

[194] First Amended Complaint, City of Seattle v. Trump & City of Portland v. Trump, No. 2:17-cv-00497-RAJ (W.D. Wash. June 26, 2017).

[195] *Id*. at 37-49.

[196] Order, City of Seattle v. Trump & City of Portland v. Trump, No. 2:17-cv-00497-RAJ (W.D. Wash. Oct. 31, 2017).

[197] Order & Judgment Granting Declaratory Relief, City of Seattle v. Trump & City of Portland v. Trump, No. 2:17-cv-00497-RAJ (W.D. Wash. Oct. 24, 2018). The parties stipulated to this result. Stipulation & Proposed Order & Judgment Granting Declaratory Relief, City of Seattle v. Trump & City of Portland v. Trump, No. 2:17-cv-00497-RAJ (W.D. Wash. Oct. 19, 2018).

City of Chelsea & City of Lawrence v. Trump

Two cities in Massachusetts, Chelsea and Lawrence, also filed suit shortly after President Trump issued EO 13768, challenging Section 9(a). Chelsea and Lawrence principally argued that that Section 9(a) violates the Tenth Amendment and the Constitution's separation-of-power principles, for reasons substantially similar to those argued by Santa Clara, San Francisco, and Richmond.[198] However, after the district court in the Santa Clara/San Francisco litigation issued a nationwide preliminary injunction blocking the executive order, the parties agreed to stay the proceedings unless and until the injunction is lifted.[199]

City of Chicago v. Sessions

After the Justice Department announced the new Byrne JAG conditions, the City of Chicago, Illinois, sued, asking a district court to enjoin the Attorney General from imposing them.[200] Chicago's suit challenged each of the three conditions that the Justice Department imposed for grant eligibility (compliance with the information-sharing requirements of Section 1373, DHS access to state and local detention facilities, and providing notice to DHS when an alien wanted for removal is released from custody).[201]

First, Chicago argued that the DOJ lacked statutory authority to impose the new conditions because the Byrne JAG statute does not confer agency discretion to add substantive conditions to the receipt of those federal funds.[202] And even though the Byrne JAG statute requires that recipients certify compliance with "all other applicable Federal laws,"[203] Chicago contended that conditioning the receipt of the grant on state and local compliance with Section 1373 is a new condition nevertheless.[204] This is so because, Chicago asserted, Section 1373 is not an "applicable" law as intended by the JAG statute; rather, Chicago argued that the word "applicable" necessarily narrows the phrase from one that includes the entire body of federal law, to one that includes a subset of laws that "make[s] clear to grant recipients that their receipt of money is conditioned on compliance."[205] In Chicago's view, the correct set of "applicable" laws is "the specialized body of statutes that govern federal grantmaking."[206]

Second, Chicago argued that the notice and access conditions violate the Constitution's separation-of-power principles because the DOJ—an executive branch agency—unlawfully exercised the spending authority exclusively granted to the legislative branch.[207] Third, Chicago

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[198] Complaint at 38-41, City of Chelsea & City of Lawrence v. Trump, No. 1:17-cv-10214-GAO (D. Mass. Feb. 8, 2017).

[199] Plaintiff's Unopposed Motion to Stay Proceedings, City of Chelsea & City of Lawrence v. Trump, No. 1:17-cv-10214-GAO (D. Mass. May 2, 2017). The case was administratively closed on December 29, 2017. Order, City of Chelsea & City of Lawrence v. Trump, No. 1:17-cv-10214-GAO (D. Mass. Dec. 29, 2017).

[200] Complaint at 1, City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill. Aug. 7, 2017).

[201] *Id*. at 19-23.

[202] Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 10-13, City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill. Aug. 10, 2017) (citing 42 U.S.C. § 3752(a), subsequently reclassified as 34 U.S.C. § 10153(a)).

[203] 34 U.S.C. § 10153(a)(5)(D).

[204] Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 19, City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill. Aug. 10, 2017).

[205] *Id*.

[206] *Id*.

[207] *Id*. at 17-18.

asserted that, even if the DOJ had been given the discretion to condition grant eligibility, the notice and access conditions exceeded constitutional spending authority.[208] According to Chicago, the new conditions (1) are not germane to the federal interest in the Byrne JAG funds Chicago receives,[209] and (2) by requiring grant recipients to provide immigration authorities with 48 hours' notice before releasing an alien in custody, would induce Chicago to engage in activities that violate the Fourth Amendment because, in practice, Chicago would have to hold detainees longer than constitutionally permitted.[210] Finally, Chicago alleged that Section 1373, on its face, violates the Tenth Amendment, and thus the DOJ cannot condition the receipt of federal funds on state and local compliance with it.[211]

The district court initially granted a nationwide, preliminary injunction concerning the notice and access conditions.[212] The Seventh Circuit upheld this ruling on interlocutory appeal[213] but stayed its nationwide effect,[214] making the injunction applicable to only Chicago.[215] Before the district court made its final ruling, the Supreme Court issued *Murphy*, prompting the court to reconsider its earlier conclusion that the compliance condition was lawful.[216] Ultimately, the court issued a nationwide, permanent injunction, holding that Section 1373 is unconstitutional on its face and blocking the enforcement of all three Byrne JAG conditions.[217] However, because the en banc Seventh Circuit previously had stayed the nationwide effect of the preliminary injunction, the district court stayed the nationwide effect of the permanent injunction, pending appeal, in deference to the Seventh Circuit's earlier order.[218]

Turning to the merits of the district court's order, the court first concluded that Section 1373 violates the anti-commandeering doctrine.[219] The court recounted that in *Murphy,* the Supreme Court held that, under the anti-commandeering doctrine, "Congress cannot issue direct orders to state legislatures" through a federal law that compels state action or that prohibits state action.[220] Thus, because Section 1373 *prohibits* state policymakers from forbidding its employees to share immigration-status information with immigration authorities, the court concluded that this federal

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[208] Id. at 13-17. For more information on the Spending Clause, see CRS Report R44797, *The Federal Government's Authority to Impose Conditions on Grant Funds*, by Brian T. Yeh.

[209] Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 13-14, City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill. Aug. 10, 2017). In particular, Chicago asserted that "the sweeping tools for federal immigration enforcement imposed by the new conditions are not reasonably relevant to the objectives of the Byrne JAG program." *Id*. at 14.

[210] *Id*. at 14-17. For instance, Chicago asserted that "[a] warrantless arrest initially reasonable for Fourth Amendment purposes becomes unreasonable once the 'mission' that occasioned the original seizure is complete." *Id*. at 16 (citing Illinois v. Caballes, 543 U.S. 405, 407 (2005)). Chicago declared that those subject to a warrantless arrest are usually released from custody within 24 hours. *Id*. at 15. Accordingly, Chicago argued that holding warrantless arrestees longer than necessary to complete the "mission" of the original arrest to allow DHS to investigate unrelated immigration violations would violate the arrestee's Fourth Amendment rights. *Id*. at 15-16.

[211] *Id*. at 20-21. Chicago argued that "Section 1373 is particularly problematic because it prohibits state and local governments from engaging in a core aspect of governing: controlling the actions of their employees." *Id*. at 20.

[212] City of Chicago v. Sessions [City of Chicago I], 264 F. Supp. 3d 933 (N.D. Ill. 2017).

[213] City of Chicago v. Sessions [City of Chicago II], 888 F.3d 272 (7th Cir. 2018).

[214] City of Chicago v. Sessions, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018).

[215] City of Chicago v. Sessions [City of Chicago III], 321 F. Supp. 3d 855, 880 (N.D. Ill. 2018).

[216] *Id*. at 866-67.

[217] *Id*. at 882.

[218] *Id*. at 881-82.

[219] *Id*. at 872.

[220] *Id*. at 867 (quoting Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018)).

prohibition on state action runs afoul of the anticommandeering doctrine.[221] The court further rejected the government's request to carve out an exception to the anti-commandeering doctrine for laws requiring states to share information with the federal government "in the face of clear guidance from *Murphy*" and without the Supreme Court ever creating such an exception.[222]

Next, the district court concluded that the notice, access, and compliance conditions were imposed without statutory authority and thus unlawful.[223] The court's conclusion that Section 1373 is unconstitutional doomed the compliance condition. The Byrne JAG statute requires compliance with "all other applicable Federal laws."[224] But, "[a]s an unconstitutional law," the court explained, "Section 1373 automatically drops out of the possible pool of 'applicable Federal laws.'"[225]

For the notice and access conditions, the court principally relied on the Seventh Circuit's reasoning in its order affirming the preliminary injunction, adding that "the Attorney General ha[d] not mustered any other convincing argument in support of greater statutory authority" and that "nothing ha[d] shaken this Court from the opinion it expressed at the preliminary injunction stage."[226] For instance, the Seventh Circuit had rejected the government's contention that the conditions are authorized by 34 U.S.C. § 10102(a)(6), which sets forth the duties and functions of the *Assistant* Attorney General (AAG) in running the Office of Justice Programs, which administers the Byrne JAG program.[227] The government had pointed to the statutory text granting the AAG the authority to exercise "powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants."[228] But, according to the Seventh Circuit, "[t]he inescapable problem here is that the Attorney General does not even claim that the power exercised here is authorized anywhere in the chapter, nor that the Attorney General possesses that authority and therefore can delegate it to the Assistant Attorney General."[229]

City of Evanston v. Sessions

The City of Evanston, Illinois (City), and the United States Conference of Mayors (Conference),[230] together, brought a lawsuit that mirrored Chicago's and requested preliminary injunctive relief.[231] The case was assigned to the same district judge who had presided over

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[221] *Id*. at 869. The court further described Section 1373 as a "federally-imposed restructuring of power within state government" because, according to the court, it "redistributes local decision-making power by stripping it from local policymakers and installing it instead in line-level employees who may decide whether or not to communicate with [immigration authorities]." *Id*. at 870.

[222] *Id*. at 871-72.

[223] *Id*. at 873-76.

[224] 34 U.S.C. § 10153(a)(5)(D).

[225] *City of Chicago III*, 321 F. Supp. 3d at 875.

[226] *Id*. at 874.

[227] City of Chicago v. Sessions, 888 F.3d 272, 284-85 (7th Cir. 2018).

[228] City of Chicago II, 888 F.3d 272, 284 (7th Cir. 2018) (emphasis in original omitted) (quoting 34 U.S.C. § 10102(a)(6)).

[229] *Id*. at 285.

[230] The United States Conference of Mayors is "a non-partisan organization of cities with populations of 30,000 or more, with each city being represented by its mayor. *See* The U.S. Conference of Mayors, *About the Conference*, https://www.usmayors.org/the-conference/about/ (last visited Jan. 11, 2019)

[231] Order at 1-2, City of Evanston & the U.S. Conference of Mayors v. Sessions, 1:18-cv-04853 (N.D. Ill. Aug. 9,

Chicago's lawsuit.[232] For that reason, when considering whether the plaintiffs were likely to succeed on the merits of their claims, the district court relied on its earlier opinions and those of the Seventh Circuit.[233] The district judge observed that, "though the plaintiffs at bar have changed, the legislation proscribing which conditions the Attorney General may attach has not."[234] Accordingly, because the Seventh Circuit described as "untenable" the government's arguments for its statutory authority to impose the Byrne JAG conditions, the district court concluded that the City and Conference were likely to prevail.[235] Consequently, the district court enjoined the government from enforcing the conditions against the plaintiffs.[236]

City of Philadelphia v. Sessions

The City of Philadelphia, Pennsylvania, also sued to stop the Attorney General from imposing the new Byrne JAG conditions.[237] Like Chicago, Philadelphia argued that the DOJ lacked statutory authority to impose the new conditions, violated constitutional principles of separation of powers, violated the Spending Clause, and unconstitutionally conscripted the states into federal immigration enforcement.[238] Philadelphia also argued that the conditions were arbitrarily and capriciously imposed in violation of the APA.[239]

Initially, the district court found that all three of the conditions were unlawfully imposed and preliminarily blocked their enforcement against Philadelphia.[240] Then, after a bench trial, the court permanently enjoined the DOJ from enforcing against Philadelphia the three new Byrne JAG conditions.[241] The district court concluded that the Byrne JAG Statute contained no explicit authority for the notice and access conditions.[242] The court further held that the Justice Department's decision to impose all three conditions was arbitrary and capricious in violation of

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2018).

[232] *Id*. at 2.

[233] *Id*. at 8.

[234] *Id*.

[235] *Id*.

[236] *Id*. at 1. The district court initially stayed the application of the preliminary injunction as it applied to the Conference. *Id*. at 11-12. The court reasoned that "[e]ven in its most limited form, any injunction issued in their favor will have the effects throughout the country and certainly far beyond the border of the Seventh Circuit, which, the court continued, "engenders many of the same concerns that agitated against entering a nationwide injunction in the *Chicago* case." *Id*. at 9-10. The Conference then filed an emergency motion with the Seventh Circuit asking it to lift the stay of injunctive relief. Emergency Motion, U.S. Conference of Mayors v. Sessions, 18-2734 (7th Cir. Aug. 10, 2018). The Seventh Circuit granted the motion and lifted the stay. Order at 2, U.S. Conference of Mayors v. Sessions, 18-2734 (7th Cir. Aug. 29, 2018). The Seventh Circuit reasoned that, unlike in the Chicago case, applying the injunction to the Conference in this case would be appropriate because the injunction would still be "limited to the parties actually before the court who have demonstrated a right to relief." *Id*.

[237] Complaint, City of Philadelphia v. Sessions, 2:17-cv-03894-MMB (E.D. Pa. Aug. 30, 2017).

[238] Amended Complaint at 43-44, City of Philadelphia v. Sessions, 2:17-cv-03894-MMB (E.D. Pa. Jan. 8, 2018).

[239] Complaint at 40, City of Philadelphia v. Sessions, 2:17-cv-03894-MMB (E.D. Pa. Aug. 30, 2017).

[240] Memorandum Re: Motion for Preliminary Injunction, at 52-58, 126-28, City of Philadelphia v. Sessions, 2:17-cv-03894-MMB (E.D. Pa. Nov. 15, 2017).

[241] City of Philadelphia v. Sessions [City of Philadelphia II], 309 F. Supp. 3d 289, 296 (E.D. Pa. 2018).

[242] In holding that the notice and access conditions were imposed without statutory authority, the district court relied on its reasoning for granting a preliminary injunction. *Id*. at 321 ("Because the DOJ has presented no argument, beyond those previously considered by the Court at the Preliminary Injunction stage, which dictates a different result, the Court reaches the same result now: the Access and Notice Conditions exceed the authority delegated by Congress in 34 U.S.C. § 10102(a)(6).").

the APA.[243] The court reasoned that the DOJ did not adequately justify imposing the new conditions.[244] For instance, the court found that, before imposing the certification condition, the government had not "assess[ed] the benefits or drawbacks of imposing a condition, but instead merely assessed whether jurisdictions would be compliant were such a condition imposed."[245] Finally, the district court in Philadelphia concluded that *Murphy* mandates holding Section 1373 unconstitutional.[246]

The Third Circuit affirmed the district court's ruling but on narrower grounds: The court held that the conditions were imposed without statutory authority and thus are unlawful.[247] The circuit court first concluded that the JAG statute did not authorize any of the challenged conditions. In support of the notice and access conditions, the government pointed to two provisions of the statute requiring the Attorney General to direct grant applicants (1) to report "data, records, and information (programmatic and financial)" that he may "reasonably require," and (2) to certify that "there *has been* appropriate coordination with affected agencies."[248] In the government's view, "information" the Attorney General may "reasonably require" includes notification of an alien's release from custody from law-enforcement and corrections programs funded by the JAG grant.[249] But the court disagreed, explaining that JAG statute explicitly limits information to programmatic and financial information, meaning "information regarding the handling of federal funds and the programs to which those funds are directed" and not "priorities unrelated to the grant program."[250]

The court also rejected the government's argument that the coordination provision authorizes access to aliens in Philadelphia's custody because that would amount to "appropriate coordination" with immigration authorities affected by those same JAG-funded law-enforcement and corrections programs.[251] Because the statute refers to instances where "there *has been*" coordination, which the court understood to reference past coordination, the court concluded that the statutory language "does not serve as a basis to impose an *ongoing* requirement to

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[243] *Id*. at 323-25. In so holding, the court principally relied on its analysis in its preliminary injunction order. *Id* at 323 ("Given the nearly perfect overlap between the items considered at the two stages, it should come as no surprise to the litigants that the Court's opinion at the Summary Judgment stage closely aligns with its opinion from the Preliminary Injunction stage, as to the arbitrary and capricious nature of the Challenged Conditions. There is no need to fully reproduce the Court's prior opinion on this point, which is extensively discussed in 280 F.Supp.3d at 619-625.").

[244] City of Philadelphia v. Sessions [City of Philadelphia I], 280 F. Supp. 3d 579, 621, 625 (E.D. Pa. 2017).

[245] *Id*. at 624.

[246] City of Philadelphia II, 309 F. Supp. 3d 289, 329-31 (E.D. Pa. 2018). The district court here further concluded that the certification condition, *itself*, is unconstitutional because it requires compliance with an unconstitutional statute. *Id*. at 329. The court did not explain the constitutional underpinnings for this conclusion (or provide supporting case law), but contended that Congress cannot "pass blatantly unconstitutional statutes—including statutes already struck down as unconstitutional by court—but essentially require state and localities to adhere to those statutes by tying a 'certification' of compliance" with that statute to federal grants. *Id*. The veracity of this conclusion is unclear, given that, had the Byrne JAG statute given the DOJ discretion to add substantive conditions to the receipt of federal funds, the Spending Clause likely would have permitted the DOJ to independently require recipients to share immigration-related information with federal authorities. *See* NFIB v. Sebelius, 657 U.S. 519, 536 (2012) ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions," which "may well induce the state to adopt policies that the federal Government itself could not impose").

[247] City of Philadelphia v. Attorney General of the U.S. [City of Philadelphia III], 916 F.3d 276, 279 (3d Cir. 2019).

[248] *Id*. at 285 (quoting 34 U.S.C. § 10153(a)(4), (a)(5)(C) (emphasis added)).

[249] Brief for Appellant at 34, City of Philadelphia III, 916 F.3d 276 (3d Cir. 2019).

[250] *City of Philadelphia III*, 916 F.3d at 285.

[251] Brief for Appellant at 34, City of Philadelphia III, 916 F.3d 276 (3d Cir. 2019); *City of Philadelphia III*, 916 F.3d at 285.

coordinate."[252] As for the lawfulness of the compliance condition, the government invoked another JAG statute provision, this one requiring applicants to certify compliance with "all other applicable Federal laws."[253] The government contended that Section 1373 is an applicable federal law. The court rejected the government's expansive view of the term, however. The court reasoned, for instance, that if the Attorney General could condition funds based on compliance with any law in the *U.S. Code*, this practice would essentially turn the JAG formula grant—which is awarded to a jurisdiction through a formula that considers only population and violent crime statistics—into a discretionary grant.[254]

Next, the court rejected the government's other asserted source of statutory authority for imposing the conditions: the provision establishing the duties and functions of the AAG in 34 U.S.C. § 10102.[255] This statute directs the AAG to "exercise such other powers and functions as may be vested in the [AAG] pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants."[256] The court emphasized, however, that this provision authorizes the AAG to place conditions on grants *only if* that power has been vested by Title 34 of the *U.S. Code* or delegated by the Attorney General, and neither of those predicates had occurred.[257] All told, based on the sole ground that the Attorney General lacked statutory authority to impose the notice, access, and compliance conditions, the Third Circuit affirmed the district court's order enjoining those conditions as applied to Philadelphia, and declined to address Philadelphia's additional arguments.[258]

City & Cty. of San Francisco v. Sessions

In separate lawsuits considered together, the State of California and the City and County of San Francisco sued the Justice Department seeking to block the three new Byrne JAG conditions.[259] The California plaintiffs argued that the notice and access conditions were imposed without statutory authority and, thus, violate the separation of powers, invoking the conclusions reached by the district courts who had enjoined those conditions.[260] The plaintiffs further argued that, post-*Murphy*, Section 1373 is constitutionally unenforceable against the states.[261] They contended that Section 1373 "dictates what a state legislature may and may not do," and *Murphy* forecloses Congress's ability to do that.[262]

The district court concluded that the Byrne JAG conditions violate the separation of powers and that Section 1373 is unconstitutional, declaring that he is "[i]n agreement with every court that has looked at these issues."[263] And "follow[ing] the lead of the district court in *City of Chicago*," the district judge entered a nationwide injunction, staying the nationwide aspect until the Ninth

[252] *City of Philadelphia III*, 916 F.3d at 285.

[253] *Id*. at 288.

[254] *Id*. at 290.

[255] *Id*. at 287-88.

[256] 34 U.S.C. § 10102(a)(6).

[257] *City of Philadelphia III*, 916 F.3d at 257.

[258] *Id*. at 291.

[259] City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018).

[260] California's Motion for Summary Judgment at 11-14, Becerra v. Sessions, 17-cv-04701 (N.D. Cal. July 9, 2018).

[261] *Id*. at 19-20.

[262] California's Motion for Summary Judgment at 19, Becerra v. Sessions, 17-cv-04701 (N.D. Cal. July 9, 2018) (quoting Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018)).

[263] *City & Cty. of San Francisco*, 349 F. Supp. 3d at 934.

Circuit has an opportunity to review the order on appeal.[264] Like the district courts in Chicago and Philadelphia, the district court here concluded that the Byrne JAG statute does not authorize the Justice Department to impose the notice and access conditions, given the sparse, inapplicable discretion the statute delegates.[265] Without that delegated authority, the court continued, the Justice Department unlawfully exercised Congress's exclusive Spending Power and violated the separation of powers.[266] Next, the court held that Section 1373 violates principles of federalism.[267] The court explained that post-*Murphy*, "[t]here is no distinction for anti-commandeering purposes . . . between a federal law that affirmatively commands States to enact new laws and one that prohibits States from doing the same."[268] And even if the Supreme Court eventually were to carve out an exception for federally required information-sharing, the district court opined that Section 1373 impacts jurisdictions much more than "a ministerial information-sharing statute."[269] For example, the court found that Section 1373 "takes control over the State's ability to command its own law enforcement."[270]

States of New York v. Department of Justice

The States of New York, Connecticut, New Jersey, Rhode Island, Washington, Massachusetts, and Virginia and the City of New York (collectively, the "States and City") sued the DOJ, challenging the three new Byrne JAG conditions.[271] Like other jurisdictions, these plaintiffs contended that the conditions violate the separation of powers and the APA, and, further, that Section 1373 violates the anti-commandeering doctrine.[272] A district judge in the Southern District of New York enjoined the Justice Department from imposing the notice, access, and compliance conditions on the States and City.[273]

The court first concluded that the conditions were imposed without statutory authority and thus, as the APA directs, must be set aside.[274] Agreeing with the other courts, the district judge rejected the government's arguments that the statutory provision authorizing the Assistant Attorney General to exercise powers delegated by the Attorney General to impose grant conditions. Specifically, the government had contended that 34 U.S.C. § 10102(a)(6) authorizes the imposition of the conditions, and Department's compliance condition is authorized by the Byrne JAG statute's requirement, under 34 U.S.C. § 10153(a)(5)(D), to certify compliance with "all other applicable Federal laws."[275] Concerning § 10102(a)(6), the district court concluded that the Assistant Attorney General could not impose the conditions because the Attorney General had no statutory authority to do so, and thus had no authority to delegate.[276] As for § 10153(a)(5)(D), the court concluded that the term "all other *applicable* Federal laws" is ambiguous and thus violates

[264] *Id*.

[265] *Id*. at 945-47.

[266] *Id*. at 944.

[267] *Id*. at *949-53.

[268] *Id*. at *953.

[269] *Id*.

[270] *Id*.

[271] States of New York v. Dep't of Justice, 343 F.Supp.3d 213, 225 (S.D.N.Y. 2018).

[272] *See id*.

[273] *Id*. at 245.

[274] *Id*. at 227-232.

[275] *See id.* at 229-231 (quoting 34 U.S.C. § 10153(a)(5)(D)).

[276] *See id.* at 230-31.

the tenet that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[277] Accordingly, the court viewed the language "'from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds,' and 'must ask whether such a state official would clearly understand that one of the obligations of the Act is the [purported] obligation.'"[278] From that perspective, the court concluded that the applicable federal laws are limited to those applicable grant, given that the rest of § 10153 concerns requirements for the application and grant itself.[279]

Additionally, the district court concluded that the conditions constitute arbitrary and capricious agency action in violation of the APA.[280] The court reasoned that, notwithstanding the government's evidence in support of the benefits of withholding Byrne JAG funds from jurisdictions that fail to comply with the three conditions, "[c]onspicuously absent" from the government's evidence "is any discussion of the negative impacts that may result from imposing the conditions, and the record is devoid of any analysis that the perceived benefits outweigh these drawbacks."[281]

Next, the district court concluded that Section 1373 violates the anti-commandeering doctrine and thus is unconstitutional.[282] The court acknowledged that the Second Circuit—whose opinions are binding precedent on the Southern District of New York—held that Section 1373 is constitutional in *City of New York v. United States*.[283] But the court concluded that the Second Circuit's earlier ruling "cannot survive the Supreme Court's decision in *Murphy*."[284] *City of New York*, the court explained, had relied on a distinction between affirmative commands, which were considered unconstitutional, and affirmative prohibitions, which the circuit court had considered permissible. But, the Second Circuit continued, the Supreme Court in *Murphy* described that distinction as "empty."[285] Because *Murphy* concluded that the anti-commandeering doctrine forbids the federal government from imposing a direct prohibition on state legislatures, the district court held that Section 1373—by dictating what a state legislature may not do—is unconstitutional.[286]

The district court additionally held that the three Byrne JAG conditions violate the separation of powers.[287] Harking back to its earlier analysis of the Byrne JAG statute provisions, the court explained that when Congress delegated spending authority to the executive branch in the statute, it did not delegate the authority to impose the new conditions.[288] The Byrne JAG statute, the court

[277] *See id*. at 231 (emphasis added) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[278] *Id*. (alteration in original) (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006)).

[279] *Id*.

[280] *Id*. at 239-41.

[281] *Id*. at 240.

[282] *Id*. at 233-38. Based on this conclusion, the court additionally opined that Section 1373 could not be an "applicable federal law" for the purposes of complying with Section 10153. *Id*. at 231.

[283] *Id*. at 233-34. For a discussion of *City of New York v. United States*, see *supra* Subsection "Related Litigation" under Section "Federal Measures to Counteract Sanctuary Policies."

[284] *States of New York*, 343 F.Supp.3d 213, 234.

[285] *Id*. (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018)).

[286] *Id*.

[287] *Id*. at 238.

[288] *Id*.

continued, authorizes the distribution of funds "according to statutorily prescribed criteria" that the executive branch is powerless to disturb.[289]

City of Los Angeles v. Sessions

The City of Los Angeles, California, separately challenged the new conditions attached to the Byrne JAG program and the additional consideration factors for the COPS program.[290] Initially focusing on the COPS program, Los Angeles first asked the U.S. District Court for the Central District of California to enjoin the DOJ from implementing the new COPS considerations in any future grant solicitations, contending, among other things, that they were imposed without statutory authority, violate the Spending Clause, and are invalid under the APA.[291]

The district court agreed with Los Angeles and granted a permanent injunction.[292] The court first concluded that the DOJ lacked statutory authority to consider the degree to which applying jurisdictions cooperate with federal immigration enforcement when assessing applications.[293] The court pointed to 34 U.S.C. § 10381(c)—the statute authorizing the COPS program for community-policing grants—which identifies when the DOJ "may give preferential consideration" to applicants, and explained that none of the scenarios listed apply to federal immigration enforcement.[294]

Next, the court concluded that the challenged COPS considerations violate the Spending Clause.[295] The federal government had contended that the challenged "considerations" on grant funding were not subject to the same Spending Clause requirements as grant "conditions" because compliance with the considerations was not required to receive the grant.[296] But the court found no meaningful distinction between grant "conditions" and the challenged "considerations," declaring that "compliance *is* required in order for applicants to compete on a level playing field."[297] Further, the court remarked, if the government's assertion were correct, "it would be simple for federal agencies to avert Spending Clause requirements by labeling all considerations 'plus factors.'"[298] And because the COPS *statute* does not identify as a factor for preferential treatment a jurisdiction's cooperation with federal immigration enforcement, the court concluded that Congress did not, as the Spending Clause requires, "unambiguously condition" the receipt of

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[289] *Id*.

[290] Complaint, City of Los Angeles v. Sessions, 2:17-cv-07215-R-JC (C.D. Cal. Sept. 29, 2017).

[291] Memorandum in Support of Motion for Partial Summary Judgment, City of Los Angeles v. Sessions, 2:17-cv-07215-R-JC (C.D. Cal. Nov. 21, 2017). Initially, Los Angeles had sought to preliminarily enjoin the DOJ from implementing the new considerations during the grant application cycle for the 2017 fiscal year. City of Los Angeles v. Sessions, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018). But less than two weeks later, the DOJ notified Los Angeles that it had already selected the recipients, that Los Angeles was not one of them, and that the City would not have received a grant even had it received the extra consideration for certifying that it provided the requested notice and access to federal immigration authorities. *Id*. at 1093-94. Los Angeles then withdrew its motion for preliminary relief and, instead, asked the district court to enjoin the DOJ from implementing the new consideration factors in future grant cycles. *Id*. at 1094.

[292] *City of Los Angeles*, 293 F. Supp. at 1095-1101.

[293] *Id*. at 1095-98.

[294] *Id*. at 1096-97 ("In the Court's view, subsection (c) does not plainly or even arguably authorize the Attorney General to give preferential treatment to competitors based on compliance with the Challenged Considerations.").

[295] *Id*. at 1098-99.

[296] *Id*. at 1098.

[297] *Id*. at 1098-99 (emphasis added) (noting that 80% of selected recipients complied with the added conditions).

[298] *Id*. at 1099.

funds on the recipients' compliance with federal authorities.[299] "It is irrelevant" that the DOJ's COPS Office was forthcoming about the conditions because, the court added, it is Congress—not the agency—that "must be clear in its directives."[300] Additionally, the added considerations violate the Spending Clause because, the court concluded, they are not germane to the goals of the COPS program: "[C]ommunity policing is about developing partnerships between local authorities and the community," and, in the court's view, "there is no relationship between local police partnerships with federal authorities and *community* policing."[301]

Finally, the district court concluded that the added considerations are arbitrary and capricious in violation of the APA because the government put forth no evidence, nor did it argue, that its explanation for adding the considerations—that "'[c]ities and states that cooperate with federal law enforcement make all of us safer by helping remove dangerous criminals from our communities,' including by ending 'violent crime stemming from illegal immigration'"—was based on any findings or data.[302] Thus the court concluded that the government had no reasonable basis for adding the new conditions.[303]

Concerning the Byrne JAG notice and access conditions, the district court later entered a preliminary injunction blocking the government from enforcing those conditions against Los Angeles. In doing so, the court pointed to the text of the Byrne JAG statute, explaining that "[t]he authority explicitly granted to the Attorney General . . . is limited."[304] That limited authority, the court concluded, does not include requiring states or localities to assist in immigration enforcement.[305]

Justice Department Lawsuit Against California

On the other side of the coin, the Justice Department has sued California, seeking to invalidate three laws governing the state's regulation of private and public actors' involvement in immigration enforcement within its border.[306] The government contends that these laws "reflect a deliberate effort by California to obstruct the United States' enforcement of federal immigration law, to regulate private entities that seek to cooperate with federal authorities consistent with their obligations under federal law, and to impede consultation and communication between federal and state law enforcement officials," and, thus, violate the Supremacy Clause.[307] The government is challenging parts of the following three California laws: (1) The Immigrant Worker Protection Act, Assembly Bill 450 (AB 450); (2) Section 12 of Assembly Bill 103 (AB 103); and (3) the California Values Act, Section 3 of Senate Bill 54 (SB 54).[308] In particular, the federal government principally contends that these laws violate the Supremacy Clause in two ways. First, the DOJ argues that the state measures violate the doctrine of intergovernmental immunity—a doctrine that derives from the Supremacy Clause and provides that "a State may not regulate the

[299] *Id*.

[300] *Id*.

[301] *Id*.

[302] *Id*. at 1099-1100 (alteration in original).

[303] *Id*.

[304] Order Granting Plaintiff's Application for Preliminary Injunction at 2, City of Los Angeles v. Sessions, 2:17-cv-07215 (C.D. Cal. Sept. 13, 2018).

[305] *Id*. at 3.

[306] Complaint, United States v. California, 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018).

[307] *Id*. at 2.

[308] *Id*.

United States directly or discriminate against the Federal Government or those with whom it deals."[309] Second, the government asserts that the California laws are preempted because they create an obstacle for the federal government's enforcement of certain immigration laws.[310]

The Challenged California Laws

The Immigrant Worker Protection Act (AB 450)

AB 450 imposes on public and private employers in California several requirements related to federal immigration enforcement actions taking place at the worksite.[311] First, AB 450 prohibits an employer from allowing an immigration enforcement officer to enter any nonpublic areas of a worksite, unless the officer has a judicial warrant or "as otherwise required by federal law."[312] Second, AB 450 bars employers from permitting immigration enforcement officers to access, review, or obtain employee records without a subpoena or judicial warrant, or "as otherwise required by federal law" (together, the "consent" provisions).[313] Third, "[e]xcept as otherwise required by federal law," AB 450 requires employers to provide employees with written notice of any I-9 employment eligibility inspection[314] (or other employment record inspections) within 72 hours after receiving notice of the inspection (the "notice" provision).[315] Fourth, AB 450 prohibits an employer (or a person acting on the employer's behalf) from reverifying the employment eligibility of a current employee unless as required by 8 U.S.C. § 1324a(b)[316] or "as otherwise required by federal law" (the "reverification" provision).[317]

Section 12 of AB 103

Section 12 of AB 103—part of California's omnibus budget bill—requires, for the next 10 years, the California Attorney General (or a designee) to review and report on county, local, and private detention facilities that house aliens in immigration proceedings, including those housing minors on behalf of, or by contract with, the U.S. Office of Refugee Resettlement or ICE.[318] The review must include the conditions of confinement, standard of care, due process provided, and the circumstances surrounding the aliens' apprehension and transfer to the facility.[319]

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[309] United States v. California, 314 F. Supp. 3d 1077, 1088 (E.D. Cal. 2018) (citing North Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality op.)).

[310] Plaintiff's Motion for Preliminary Injunction & Memorandum of Law in Support at 9-18, United States v. California, No. 2:18-cv-00490-JAM-KJN, 2018 WL 1473199 (E.D. Cal. Mar. 6, 2018).

[311] A.B. 450, 2017-2018 Cal. State Assembly (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450.

[312] *Id*. § 1(a).

[313] *Id*. § 2(a). However, this section of AB 450 does not apply to the federal I-9 Employment Eligibility Verification forms and other documents for which a notice of inspection has been provided. *Id*.

[314] All employers within the U.S. must complete an I-9 form for every person they hire—U.S. citizens and noncitizens alike—to verify the identity and employment authorization for each hired person. U.S. Citizenship & Immigration Servs., *I-9, Employment Eligibility Verification*, https://www.uscis.gov/i-9 (last visited Nov. 8, 2018).

[315] A.B. 450, § 4; Complaint, United States v. California, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018).

[316] Section 1321a(b) lays out the process for verifying the employment eligibility for persons hired by agricultural employers or farm laborer contractors. 8 U.S.C. § 1324a(a)(1)(B), (b).

[317] A.B. 450, § 5.

[318] A.B. 103, § 12(a), 2017-2018 Cal. State Assembly (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB103.

[319] A.B. 103 § 12(b)(1).

California Values Act (Section 3 of SB 54)

SB 54 enacts the California Values Act, which regulates to California's participation in federal immigration enforcement.[320] As relevant here, the California Values Act generally prohibits law enforcement agencies from using agency money or personnel to investigate, interrogate, detain, detect, or arrest persons for the purpose of immigration enforcement, including

- inquiring into immigration status;
- detaining a person subject to a hold request;
- providing information about a person's release date;
- providing personal information such as a person's home or work address, unless it is publicly available;
- making or participating in arrests based on civil immigration warrants; or
- performing any functions of an immigration officer.[321]

The Act also prohibits California law enforcement agencies from placing their officers under the supervision of federal agencies or employing officers who are deputized as special federal officer for purposes of immigration enforcement.[322] Further, under the Act, California law enforcement agencies may not use immigration authorities as "interpreters" for law enforcement matters relating to persons in custody.[323] Nor may California law enforcement agencies transfer a person to immigration authorities unless authorized to do so by judicial warrant, a judicial probable cause determination, or otherwise in accordance with California law.[324] Additionally, subject to limited exception, the agencies may not contract with the federal government to use California law enforcement facilities to house federal detainees.[325]

However, the Act specifies that it does not prevent California law enforcement from enforcing violations of 8 U.S.C. § 1326, which makes it a criminal offense to unlawfully enter the United States after being denied admission to, or being removed from, the United States.[326] Nor does the Act prevent California law enforcement from responding to requests for information about a person's criminal history.[327] Further, the Act does not prevent California law enforcement from engaging in certain joint law enforcement task force activities.[328] Additionally, California law enforcement may still give immigration authorities access to interview an individual in custody, in compliance with California law, and to make inquiries related to determining whether a person is a potential crime or trafficking victim and thus eligible for certain visas.[329]

[320] S.B. 54, § 3, 2017-2018 Cal. Senate (Cal. 2017).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] S.B. 54 § 3.

[328] *Id.*

[329] *Id.*

United States v. California

On March 6, 2018, the United States sued California, requesting an injunction to preliminarily block the three California laws described above.[330] In particular, the government contends that the contested California laws violate the Supremacy Clause.[331] The government asserts that the California laws "reflect a deliberate effort by California to obstruct the United States' enforcement of federal immigration law, to regulate private entities that seek to cooperate with federal authorities consistent with their obligations under federal law, and to impede consultation and communication between federal and state law enforcement officials."[332] Further, the United States contends that the California laws "have the purpose and effect of making it more difficult for federal immigration officers to carry out their responsibilities in California," and "[t]he Supremacy Clause does not allow California to obstruct the United States' ability to enforce laws that Congress has enacted or to take actions entrusted to it by the Constitution."[333] The district court granted the government's request, in part, concluding only that parts of California's Immigrant Worker Protection Act (AB 450), as applied to private employers,[334] violates the Supremacy Clause.[335] The government appealed, arguing that the other challenged California provisions, too, likely are unconstitutional. But the Ninth Circuit sustained all but one of the district court's rulings, concluding that one subsection within Section 12 of AB 103 violates the doctrine of intergovernmental immunity.[336]

AB 450

The district court concluded that the United States was likely to succeed on its claim challenging AB 450's consent and reverification provisions. The court concluded that consent provision violates the doctrine of intergovernmental immunity because it imposes monetary penalties on employers for voluntarily consenting to immigration officers entering nonpublic areas of the worksite and to access employment records, and thus, the provision "impermissibly discriminates against those who choose to deal with the Federal Government."[337] Concerning the reverification provision, the court reasoned that the government was likely to succeed on the merits of its claim that the provision is preempted by IRCA. The court concluded that the reverification provision likely stands as an obstacle to enforcing IRCA's continuing obligation imposed on employers to avoid knowingly employing an unauthorized alien.[338]

But the court concluded that the government was unlikely to succeed on its claim that AB 450's notice provision violates the Supremacy Clause.[339] The court first concluded that this provision does not violate the intergovernmental immunity doctrine because, the court explained, it

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[330] Complaint, United States v. California, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018); Plaintiff's Motion for Preliminary Injunction & Memorandum of Law in Support, United States v. California, No. 2:18-cv-00490-JAM-KJN, 2018 WL 1473199 (E.D. Cal. Mar. 6, 2018).

[331] Complaint at 16-17, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018).

[332] *Id*. at 2.

[333] *Id*. at 3.

[334] The government did not challenge AB 450 as applied to public employers. United States v. California, 314 F. Supp. 3d 1077, 1094 (E.D. Cal. 2018).

[335] *Id*. at 1086.

[336] United States v. California, —F.3d—, No. 18-16496, 2019 WL 1717075, at *2 (9th Cir. Apr. 18, 2019).

[337] United States v. California, 314 F. Supp. 3d 1077, 1096 (E.D. Cal. 2018).

[338] *Id*. at 1098.

[339] *Id*. at 1096-97.

punishes employers for failing to communicate with its employees and not for choosing to deal with the federal government.[340] The Ninth Circuit agreed, adding that "intergovernmental immunity attaches only to state laws that discriminate against the federal government *and burden it in some way*."[341] And the Ninth Circuit accepted California's contention that "[t]he mere fact that those notices" required by AB 450 "contain information about federal inspections does not convert them into a burden on those inspections."[342]

The district court also rejected the government's argument that the notice provision prevents an obstacle to enforcing IRCA's prohibition on employing unauthorized aliens because, the government asserted, if investigation targets are warned, investigations will be less effective.[343] But the court opined that IRCA imposes obligations and penalties on *employers*, not employees, and so the "target" of any investigation is the *employer*, not the employee.[344] Likewise, the Ninth Circuit concluded that AB 450's notice requirement does not impose "additional or contrary obligations that undermine or disrupt the activities of federal immigration authorities" in implementing IRCA.[345]

AB 103

The district court declined to preliminarily enjoin Section 12 of AB 103. The government had argued that California's "efforts to assess the process afforded to immigrant detainees" through the review and reporting requirements in AB 103, create an obstacle to administering the federal government's exclusive discretion in deciding whether and how to pursue an alien's removal.[346] The court disagreed, though, opining that the California Attorney General's review would not give the state a role in determining whether an alien should be detained or removed from the United States.[347] Rather, the court characterized the provision as one that harnesses power California's Attorney General lawfully possesses to investigate matters related to state law enforcement.[348]

Nor, the court concluded, would the government likely succeed on its claim Section 12 of AB 103 violates the doctrine of intergovernmental immunity.[349] The court recognized that the law imposes inspections only on facilities that contract with the federal government.[350] But the court opined that the burden imposed on the federal contractors is minimal, and the government had not shown that the burden imposed under AB 103 is higher than burdens imposed under independent California laws governing inspections of other detention facilities within the state.[351]

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[340] *Id*. at 1097.

[341] United States v. California, —F.3d—, No. 18-16496, 2019 WL 1717075, at *8-9 (9th Cir. Apr. 18, 2019) (emphasis added).

[342] *Id*. at *8.

[343] *California*, 314 F. Supp. 3d at 1097; Plaintiff's Motion for Preliminary Injunction & Memorandum of Law in Support at 9-10, United States v. California, 18-cv-00490, 2018 WL 1473199 (E.D. Cal. Mar. 6, 2018).

[344] *California*, 314 F. Supp. 3d at 1097.

[345] United States v. California, —F.3d—, No. 18-16496, 2019 WL 1717075, at *9 (9th Cir. Apr. 18, 2019).

[346] *California*, 314 F. Supp. 3d at 1091.

[347] *Id*. at 1091.

[348] *Id*. at 1091-92.

[349] *Id*. at 1093.

[350] *Id*.

[351] *Id*.

On appeal, however, the Ninth Circuit concluded that part of Section 12 of AB 103 (the requirement for the California Attorney General to review the circumstances surrounding detained aliens' apprehension and transfer to each facility) violates the doctrine of intergovernmental immunity.[352] The Ninth Circuit characterized the district court's ruling as creating a "de minimis exception" to the doctrine of intergovernmental immunity.[353] But the Ninth Circuit rejected this new exception, opining that "[*a*]*ny* economic burden that is discriminatorily imposed on the federal government is unlawful."[354] Still, the court decided that only the provision requiring state inspectors to examine the circumstances surrounding the immigration detainees' apprehension and transfer to the facility likely violates the doctrine of intergovernmental immunity.[355] In the Ninth Circuit's view, this "unique" requirement appeared distinct from any other inspection imposed under California law, and, thus, the Ninth Circuit concluded that the district court erred in finding that the review appears no more burdensome than other legally mandated inspections.[356]

SB 54

Finally, the district court rejected the government's argument that SB 54 acts as an obstacle to immigration enforcement and, thus, is preempted.[357] The government had asserted that SB 54's limitations on information sharing and transferring to federal custody certain alien inmates "impede immigration enforcement from fulfilling its responsibilities regarding detention and removal because officers cannot arrest an immigrant upon the immigrant's release from custody and have a more difficult time finding immigrants after the fact without access to address information."[358] The court opined, however, that "refusing to help is not the same as impeding."[359] A state's refusal to help with federal immigration enforcement will always make obtaining the federal objective more difficult than if the state voluntarily assists, but, the court explained, "[s]tanding aside does not equate to standing in the way."[360]

The Ninth Circuit upheld the district court's ruling.[361] First, the court concluded that SB 54 does not obstruct the government's implementation of the INA.[362] The court reasoned that the INA (with the exception of Section 1373) "provides state and localities the *option*, not the *requirement*, of assisting federal immigration authorities," and "SB 54 simply makes that choice for California law enforcement agencies."[363] Further, invoking the Supreme Court's ruling in *Murphy*, the Ninth Circuit opined that invalidating SB 54 under the principles of conflict preemption "would, in effect, 'dictate[] what a state legislature may and may not do,' because it would imply that a state's otherwise lawful decision *not* to assist federal authorities is made unlawful when it is

[352] United States v. California, —F.3d—, No. 18-16496, 2019 WL 1717075, at *10 (9th Cir. Apr. 18, 2019).

[353] *Id*. at *11.

[354] *Id*.

[355] *Id*. at *12.

[356] *Id*.

[357] United States v. California, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018).

[358] *Id*. at 1104.

[359] *Id*.

[360] *Id*. at 1104-05.

[361] United States v. California, —F.3d—, No. 18-16496, 2019 WL 1717075, at *13-19 (9th Cir. Apr. 18, 2019).

[362] *Id*. at *13-17.

[363] *Id*. at *16.

codified as state law."[364] Nor does Section 1373 preempt the information-sharing provisions of SB 54 because, the court concluded, the state measure expressly permits the type of information required by Section 1373, specifically, citizenship or information status.[365] Moreover, the Ninth Circuit, again relying on *Murphy*, concluded that anti-commandeering principles likely precluded a preemption challenge to the information-sharing provisions.[366] The court described the exception to the anti-commandeering doctrine for reporting requirements as existing only when the "Congress evenhandedly regulates an activity in which both States and private actors engage."[367] But here, Section 1373 regulates only state actors, and therefore anti-commandeering principles preclude the government from requiring California to exchange information with it.[368]

Conclusion

Ongoing lawsuits concerning sanctuary jurisdictions may offer clarity on some unsettled and cross-cutting issues involving immigration and federalism. The Tenth Amendment reserves for the states the "police power" to regulate and protect the health, safety, and welfare of the public,[369] and, in adopting sanctuary policies, jurisdictions have sometimes invoked public safety concerns as a justification for enacting those measures.[370] But the federal government's power to regulate immigration-related matters is substantial and exclusive,[371] and on occasion the exercise of this power has been found to render unenforceable state or local initiatives that conflict with federal immigration enforcement priorities.[372] Additionally, Congress generally may condition the receipt of federal funds on compliance with specific conditions that achieve federal goals.[373] Still, the anti-commandeering doctrine restricts the federal government from compelling the states to administer or enforce a federal regulatory program,[374] like the immigration laws, whether through direct compulsion or prohibition, or indirectly, through monetary incentives that are unduly coercive.

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[364] *Id*. (quoting Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018)).

[365] *Id*. at *17.

[366] *Id*.

[367] *Id*. (quoting *Murphy*, 138 S. Ct. at 1478).

[368] *Id*.

[369] *See* Ndioba Niang v. Carroll, 879 F.3d 870, 873-74 (8th Cir. 2018); Siena Corp. v. Mayor & City Council of Rockville, Md., 873 F.3d 456, 464 (4th Cir. 2017); Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 591 (10th Cir. 1999); Sinclair Refining Co. v. City of Chicago, 178 F.2d 214, 216 (7th Cir. 1949).

[370] For example, the California Values Act begins by declaring that "[a] relationship of trust between California's immigrant community and state and local agencies is central to *the public safety* of the people of California. S.B. 54 § 3, 2017-2018 Cal. Senate (Cal. 2017) (emphasis added).

[371] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and status of aliens."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Hampton v. Mow Sun Wong, 426 U.S. 88, 95 (1976) ("Congress and the President have broad power over immigration and naturalization which the States do not possess.")

[372] *See Arizona*, 567 U.S. at 416 (holding the many provisions of an Arizona statute aimed at deterring the presence of aliens in the state who committed violations of federal immigration laws were preempted).

[373] *See* NFIB v. Sebelius, 567 U.S. 519, 579 (2012) ("Congress may attach appropriate conditions to federal . . . spending programs to preserve its control over the use of federal funds."); CRS Report R44797, *The Federal Government's Authority to Impose Conditions on Grant Funds*, by Brian T. Yeh.

[374] Printz v. United States, 521 U.S. 898, 935 (1997).

With that background, the heart of the debate in the lawsuits challenging EO 13768 and its implementation has principally centered on what constitutionally permissible methods are available to the federal government to stop or deter state and local adoption of sanctuary policies, which the government views as hindering federal immigration enforcement objectives, and, on the flip side, whether and when state and local sanctuary policies do, in fact, undercut federal immigration enforcement efforts in a manner that contravenes the Supremacy Clause.

In *City & County of San Francisco v. Trump* and *County of Santa Clara v. Trump*, for example, the district court's ruling that enjoined Section 9(a) hinged, in part, on its conclusion that the executive branch lacked statutory authority from Congress to withhold and create new conditions for federal grants, and that purporting to withhold all federal grants from what it labeled as sanctuary jurisdictions was unconstitutionally coercive, given the sheer amount of money a sanctuary jurisdiction would stand to lose if it didn't dispense with its policies.[375] Congress could step in to ratify Section 9(a), at least in part, using its spending power to incentivize states to cooperate with immigration enforcement, so long as it doesn't threaten to withhold an amount of money that could be deemed coercive. And in *City of Chicago v. Sessions* and *City of Philadelphia v. Sessions,* the district courts and one appellate court concluded that the executive branch lacked statutory authority to impose some of the spending conditions that the DOJ attached to the Byrne JAG program.[376] Likewise, Congress could amend the Byrne JAG statute to give the Attorney General, as it has done for other grant programs, the discretion to impose conditions on the receipt of the federal grant.

Moreover, since *Murphy,* the courts considering the challenges to Section 1373 have concluded that the statute is no longer constitutionally viable, given the Supreme Court's application of the anti-commandeering doctrine to a federal statute that prohibits states from enacting certain kinds of laws.[377] Accordingly, to achieve Section 1373's goals, Congress may consider using its power of the purse to incentivize states and localities to share immigration-related information with federal immigration authorities.

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[375] *See supra* section *City & Cty. of San Francisco v. Trump and Cty. of Santa Clara v. Trump*.

[376] *See supra* sections *City of Chicago v. Sessions* and *City of Philadelphia v. Sessions*.

[377] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (holding Section 1373 unconstitutional); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 329-31 (E.D. Pa. 2018) (same); City & Cty. of San Francisco v. Sessions, Nos. 17-cv-04642-WHO & 17-cv-04701-WHO, 2018 WL 4859528, at *1 (N.D. Cal. Oct. 5, 2018) (same).

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