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State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement

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Summary

The federal government is vested with the exclusive power to create rules governing which aliens may enter the United States and which aliens may be removed. 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 as to the role that state and local police should play in enforcing federal immigration law. While some states and municipalities actively participate in or cooperate with federal immigration enforcement efforts, others have actively opposed federal immigration authorities' efforts to identify and remove certain unlawfully present aliens within their jurisdictions. Entities that have adopted such policies are sometimes referred to as "sanctuary" jurisdictions. There is no official, formal, 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 might have varied reasons for opting not to cooperate with federal immigration enforcement efforts, including for reasons not necessarily motivated by disagreement with federal policies, such as concern about potential civil liability or the costs associated with assisting federal efforts.

Having said that, traditional sanctuary policies are often described as falling under one of three categories. First, so-called "don't enforce" policies generally bar the 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. This report provides examples of various state and local laws and policies that fall into one of these sanctuary categories. The report also discusses federal measures designed to counteract sanctuary policies. For instance, 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) were enacted to curb state and local restrictions on information sharing with federal immigration authorities.

Additionally, the report discusses legal issues relevant to sanctuary policies. In particular, the report examines 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 in a manner that is consistent with the Supremacy Clause and the Tenth Amendment. Indeed, the federal government's power to regulate the immigration and status of aliens within the United States is substantial and exclusive. Under the doctrine of preemption—derived from the Supremacy Clause—Congress may invalidate or displace state laws pertaining to immigration. This action may be done expressly or impliedly, for instance, when federal regulation occupies an entire field or when state law interferes with a federal regulatory scheme. However, not every state or local law related to immigration is preempted by federal law, especially when the local law involves the police powers to promote public health, safety, and welfare reserved to the states via the Tenth Amendment. Further, the anti-commandeering principles derived from the Tenth Amendment prohibit the federal government from directing states and localities to implement a federal regulatory program, like immigration.

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Introduction

The federal government is vested with the exclusive power to create rules governing which aliens may enter the United States and which aliens may be removed.[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 as to the role that state and local police should play in enforcing federal immigration law. At one end of the spectrum, some states and localities have actively sought to deter unlawfully present aliens from settling within their jurisdictions, for example, by assisting federal immigration authorities in identifying and apprehending aliens for removal. Sometimes, this has involved state and local participation in federally coordinated immigration enforcement programs.[2] 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.[3] 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.[4] The adoption of such measures has waned considerably, though, after the Supreme Court's 2012 ruling in *Arizona v. United States*, in which the Court held that many of the provisions of one such enactment, Arizona's S.B. 1070, were preempted by federal immigration law.[5] Subsequent lower court decisions struck down many other state and local measures that imposed criminal or civil sanctions on immigration-related activity.[6]

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[1] *See, e.g.,* Arizona v. United States, 132 S. Ct. 2492, 2498 (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] For instance, under § 287(g) of the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) is authorized 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. 8 U.S.C. § 1357(g).

[3] *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).

[4] 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).

[5] Arizona v. United States, 567 U.S. 387, 132 S. Ct. 2492 (2012); *see also* Stella Burch Elias, *The New Immigration Federalism,* 74 OHIO ST. L.J. 703, 704 (2013).

[6] *See, e.g.,* Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013) (upholding preliminary injunction barring enforcement of Arizona statute, which barred the harboring of 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) 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

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 the enforcement of 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.[7] That said, there may debate as to the both meaning and application of the term "sanctuary jurisdiction."[8] Additionally, state and local jurisdictions may have varied reasons for opting not to cooperate with federal immigration enforcement efforts, including for 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.[9]

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.[10]

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.[11] 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. It concludes with a discussion of 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.

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

(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*).

[7] *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).

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

[9] *See, e.g.,* COLORADO MUNICIPAL LEAGUE, *Sanctuary Cities: Hard to Define,* https://www.cml.org/brief-sanctuary/ (last visited Mar. 22, 2017); CBSMIAMI, *Miami-Dade Mayor: "We Never Claimed to be a Sanctuary City,"* (Jan. 27, 2017 11:25 p.m.), http://miami.cbslocal.com/2017/01/27/miami-dade-sanctuary-city-gimenez-trump/.

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

[11] Other CRS products related to sanctuary jurisdictions include CRS Insight IN10653, *Sanctuary Jurisdictions: Congressional Action and President Trump's Interior Enforcement Executive Order*, by William A. Kandel; CRS Legal Sidebar WSLG1741, *Plan to Restrict Federal Grants to "Sanctuary Jurisdictions" Raises Legal Questions*, by Brian T. Yeh and Brian T. Yeh; and CRS Report R44118, *Sanctuary Jurisdictions and Criminal Aliens: In Brief*, by William A. Kandel.

[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

activities carried out by churches that provided 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 activities,[18] though there is not necessarily a consensus as to the meaning of this term.[19] Some jurisdictions have self-identified as sanctuary cities.[20] For other jurisdictions, there might be

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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], *available at* 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), *available at* 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 7 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. For example, in a 2007 report by the Office of the Inspector General at the U.S. Department of Justice, the term was used 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), *available at* https://oig.justice.gov/reports/OJP/a0707/final.pdf (redacted public version) (defining "sanctuary" policies for purposes of study).

[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); Oakland, Cal. City Council Resolution No. 81310 (May 20, 2008) (reaffirming Oakland's status as a "City of Refuge" for unlawfully present aliens and denouncing certain federal immigration raids); *see also* Ruairí Arrieta-Kenna, *Sanctuary Cities Stand Firm against*

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 the Tenth Amendment.

The Supremacy Clause and Preemption

The federal government's power to regulate immigration is both substantial and exclusive.[23] This authority is derived from multiple sources, including Congress's Article I powers to "establish a uniform Rule of Naturalization" and "regulate commerce with foreign nations, and among the several states,"[24] as well as the federal government's "inherent power as a sovereign to conduct relations with foreign nations."[25] Rules governing the admission and removal of aliens, along with conditions for aliens' continued presence within the United States, are primarily contained in

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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, e.g.*, *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 matters in which local police cooperate with federal immigration authorities); Villazor, *supra* note 7 (discussing various meanings given to the term "sanctuary" when describing policies towards unlawfully present aliens).

[22] *See, e.g.*, Villazor, *supra* note 7 (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, 132 S. Ct. 2492, 2498 (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)).

[24] U.S. CONST. art. I., § 8 cl. 3, 4. *See Arizona*, 132 S. Ct. at 2498 (identifying the Naturalization Clause as one of the sources of federal authority over immigration); *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); Henderson v. Mayor of New York, 92 U.S. 259, 270-71(1876) (identifying Congress's power to regulate foreign commerce as including the power to regulate entry of persons into the United States).

[25] *See Arizona*, 132 S. Ct. at 2498. *See also* Toll, 458 U.S. at 10 (identifying the federal government's "broad authority over foreign affairs" as a component of the federal government's 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).

the Immigration and Nationality Act of 1952, as amended (INA).[26] The INA further provides a comprehensive immigration enforcement regime that contains civil and criminal elements.[27]

The Supreme Court's 2012 ruling in *Arizona v. United States*—which 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"[28] as preempted by federal law—reinforced the federal government's pervasive role in creating and enforcing the nation's immigration laws.[29] "The Government of the United States," the Court said, "has broad, undoubted power over the subject of immigration and the status of aliens."[30]

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."[31] Therefore, Congress, through legislation, can preempt (i.e., invalidate) state law.[32] 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.[33] 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");[34] 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").[35] Accordingly, any preemption analysis of the relationship between a federal statute and a state measure must be viewed through the lens of congressional intent.

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.[36] 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

[26] 8 U.S.C. §§ 1101-1537.

[27] 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*, 132 S. Ct. at 2499, 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).

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

[29] Arizona v. United States, 132 S. Ct. 2492 (2012).

[30] *Id.* at 2498.

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

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

[33] *Id*. at 1595.

[34] *Arizona*, 132 S. Ct. at 2501 (internal quotation marks and citations omitted).

[35] *Id*.

[36] 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 pursuant to its powers granted by the Commerce Clause, 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.").

jurisdiction.[37] Using their police powers, states and municipalities have frequently enacted measures that, directly or indirectly, address aliens residing in their communities.[38]

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.[39] 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."[40] For example, in *Chamber of Commerce of the U.S. 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"[41]—that authorized the revocation of licenses held by state employers that knowingly or intentionally employ unauthorized aliens.[42] 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 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.[43]

The Tenth Amendment and 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 limited by the Tenth Amendment's anti-commandeering principles, which bar Congress from "commandeering" state or local governments into the service of enforcing a federal regulatory program.[44] Thus, the federal

[37] *See, e.g.,* Bond v. United States, 134 S. Ct. 2077, 2086 (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.").

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

[39] 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*, 132 S. Ct. at 2507-11 (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).

[40] *Arizona*, 132 S. Ct. at 2501 (internal quotation marks and citations omitted).

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

[42] *Whiting,* 563 U.S. at 611.

[43] 8 U.S.C. § 1324(a)(h)(2); *Whiting,* 563 U.S. at 587.

[44] *See, e.g.,* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

government cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[45]

Several Supreme Court rulings inform the boundaries of the anti-commandeering doctrine. First, in *New York v. United States*, the Court reviewed a Tenth Amendment challenge to provisions of a federal law that created a series of incentives for states to dispose of radioactive waste.[46] The Court concluded that one of the incentives had "crossed the line distinguishing encouragement from coercion," thus violating the Tenth Amendment, by giving 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.[47] Thus, the Court held that the government had run afoul of the principles of federalism in the Tenth Amendment by effectively requiring state legislatures to enact a particular kind of law.[48] In so holding, the Court declared that "[t]he Federal Government may not *compel* the States to enact or administer a federal regulatory program."[49]

Then, in *Printz v. United States,* the Supreme Court reviewed whether certain interim provisions of the Brady Handgun Violence Prevention Act[50] violated the anti-commandeering doctrine.[51] The relevant provisions required state and local law enforcement officers to conduct background checks (and other related tasks) on prospective handgun purchasers.[52] The Court rejected the government's position that a law like the Brady provisions—which directed states to implement federal law—was distinguishable from the law at issue in *New York*—which directed states to create a policy—and thus was constitutionally permissible.[53] Rather, the Court concluded that a federal mandate requiring state and local law enforcement to perform background checks on prospective handgun purchasers violated the Tenth Amendment.[54] Accordingly, the Court announced that "Congress cannot circumvent" the Tenth Amendment prohibition against compelling states to enact or enforce a federal regulatory scheme "by conscripting the State's officers directly."[55]

But not every requirement imposed by the federal government upon sub-federal government entities and officials 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.[56] And the Court in *Printz* expressly declined to

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[45] *See Printz*, 521 U.S. at 935.

[46] *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).

[47] *New York*, 505 U.S. at 174-76 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all."). The Act provided states the options 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. *Id.* at 174-75.

[48] Reno v. Condon, 528 U.S. 141, 149 (2000).

[49] *New York*, 505 U.S. at 188 (emphasis added).

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

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

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

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

[54] *Id*. at 933.

[55] *Id.* at 935.

[56] *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).

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."[57]

Additionally, in *Reno v. Condon*, the Supreme Court unanimously rejected a Tenth Amendment challenge to the Driver's Privacy Protection Act (DPPA),[58] which barred states from disclosing or sharing a driver's personal information without the driver's consent, subject to specific exceptions.[59] 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."[60] The Court declined to address the state's argument that Congress may only regulate the states through generally applicable laws that apply to individuals as well as states, given that the DPPA was deemed to be such a generally applicable law.[61]

Accordingly, based on current jurisprudence, federal measures that impose direct requirements on state or municipal authorities appear most likely to withstand an anti-commandeering challenge if they (1) are not directed at a state's regulation of the activities of private parties; and (2) apply to the activities of private parties as well as government actors.

Finally, Congress does not violate the Tenth Amendment when it uses its broad authority to enact legislation for the "general welfare" through its spending power,[62] including by placing

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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).

[57] *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 56.

[58] 18 U.S.C. §§ 2721 to 2725.

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

[60] *Condon*, 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 the Tenth Amendment's 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 extension of overtime and minimum wage requirements of the Fair Labor Standards Act to public transit authority did not violate the Tenth Amendment).

[61] *Condon*, 528 U.S. at 151. For further discussion of the evolution of Supreme Court jurisprudence in this area since the 1970s, see CONGRESSIONAL RESEARCH SERVICE, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION (CONSTITUTION ANNOTATED), *Federal Regulations Affecting State Activities and Instrumentalities*, http://www.crs.gov/conan/default.aspx?mode=topic&doc=Amendment10.xml&t=1|2|3.

[62] *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., 133 S. Ct. 2321, 2327-28 (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"); 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."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius [NFIB], 567 U.S. 519, 132 S. Ct. 2566, 2603 (2012) ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the

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.[63] However, Congress cannot impose a financial condition that is "so coercive as to pass the point at which 'pressure turns into compulsion.'"[64] 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.[65] 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.[66]

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.[67] For example, some states and localities have sought to restrict police cooperation with federal immigration authorities' efforts to apprehend removable aliens, sometimes called "don't enforce" policies.[68] Other measures may restrict certain state officials from inquiring about a person's immigration status, sometimes referred to as "don't ask" policies.[69] Still others restrict information sharing between local law enforcement and federal immigration authorities, sometimes described as "don't tell" policies.[70] 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.

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use of federal funds.").

[63] *See* South Dakota v. Dole, 483 U.S. 203, 201-11 (1987); Montgomery Cty., Md. v. FCC, 811 F.3d 121, 128 (4th Cir. 2015).

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

[65] NFIB, 132 S. Ct. at 2608; see generally CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas.

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

[67] *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), *available at* 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 (May. 2016), *available at* http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx; NCSL 2015 REPORT, *supra* note 38; CTR. FOR IMMIGRATION STUDIES, *Map: Sanctuary Cities, Counties and State* (Jan. 2016), http://cis.org/Sanctuary-Cities-Map.

[68] *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), *available at* http://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.

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

[70] *See id*.

Limiting Arrests for Federal Immigration Violations

As previously noted, violations of federal immigration law may be criminal or civil in nature, with alien removal understood to be a civil proceeding.[71] Some immigration-related conduct potentially constitutes a removable offense and also may be subject to criminal sanction. For example, an alien who knowingly enters the United States without authorization is not only potentially subject to removal,[72] but could also be charged with the criminal offense of unlawful entry.[73] 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),[74] unlawful presence on its own is not a criminal offense.

Some jurisdictions have adopted measures that restrict or bar 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.[75] Other jurisdictions prohibit police from making arrests for some criminal violations of federal immigration law, like unlawful entry.[76] Still others prohibit assisting federal immigration authorities with investigating or arresting persons for civil *or* criminal violations of U.S. immigration laws.[77] And some other jurisdictions have prohibitions 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.[78]

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,[79] nothing in the INA *compels* such participation. Indeed, any such requirement likely would raise anti-commandeering issues under the Tenth Amendment.[80] Moreover, following the Supreme Court's decision in *Arizona v. United States*, it appears that states and localities are generally

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

[72] *See* INA § 212(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 he arrives in the United States at any time or place other than as designated by the Attorney General (now the Secretary of Homeland Security)); 8 U.S.C. §1182(a)(6)(A)(i).

[73] INA § 275; 8 U.S.C. § 1325.

[74] INA § 276; 8 U.S.C. § 1326.

[75] *See, e.g.,* SAN JOSE, CA, POLICE DEP'T DUTY MANUAL 551 (2017) (public version) ("Officers will not detain or arrest any person on the basis of the person's citizenship or status under civil immigration laws."), *available at* 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."), *available at* http://dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=1784041; OR. REV. STAT. §181A.850 ("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.").

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

[77] TAKOMA PARK, MD MUN. CODE § 9.04.

[78] PHOENIX, AZ POLICE DEP'T OPERATIONS ORDER MANUAL 1.4 (rev. 2011) ("The investigation and enforcement of federal laws relating to illegal entry and residence in the United States is specifically assigned to [Immigration and Customs Enforcement within DHS]."), *available at* https://www.phoenix.gov/policesite/Documents/089035.pdf.

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

[80] *See supra* section "Tenth Amendment and the Anti-Commandeering Doctrine."

preempted from making arrests for civil violations of the INA in the absence of a specific federal statutory authorization or the "request, approval, or instruction from the Federal Government."[81]

Limiting Police Inquiries into Persons' Immigration Status

Many sanctuary-type policies place restrictions on police inquiries or investigations into a person's immigration status.[82] Some policies provide that police may not question a person about his or her immigration status except as part of a criminal investigation.[83] Others bar police officers from initiating police activity with an individual for the sole purpose of discovering immigration status.[84] And other policies prohibit law enforcement from questioning crime victims and witnesses about their immigration status.[85] Still other policies more broadly limit officials from gathering information about persons' immigration status, except for as required by law.[86]

As explained below in the "PRWORA and IIRIRA" section, 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

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[81] Arizona v. United States, 132 S. Ct. 2492, 2507 (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 non-criminal, immigration status violations. 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 criminalizing the harboring of unlawfully present aliens, permits state and local law enforcement to make arrests for criminal violations); 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."); 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).

[82] *See, e.g.,* 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).

[83] DC Mayor's Order, *supra* note 75 (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, *available at* 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.").

[84] *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.").

[85] DC Mayor's Order, *supra* note 75 ("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."); *See* News Release, City of New Haven, Conn, Office of the Mayor, New Haven Police Issue Executive Order – No Resident Should Be Afraid of Reporting Crime (Dec. 14, 2006) (discussing General Order 06-2, which, among other things, establishes policy of New Haven Police Department not to inquire into the immigration status of crime victims and witnesses), *available at* http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID={874974A9-AC89-465B-A649-57D122E9FAF9}; N.Y.C. Exec Order No. 34, *supra* note 83 ("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.").

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

such information.[87] 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.

Limiting Information Sharing with Federal Immigration Authorities

Some states and localities have restricted government agencies or employees from sharing information with federal immigration authorities, primarily to prevent federal authorities from using the information to identify and apprehend unlawfully present aliens for removal.[88] 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.[89] 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.[90] Some jurisdictions restrict disclosing information except as required by federal law[91]—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,[92] discussed later.

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

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

[88] *See, e.g.*, S.F. ADMIN CODE § 12H.2 (originally enacted in 1989 and subsequently amended to permit communication with federal immigration authorities regarding aliens who have committed felonies); 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), *available at* 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)).

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

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

[91] 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.")

[92] *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), *available at* https://oig.justice.gov/reports/2016/1607.pdf.

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[93] and IIRIRA.[94] Neither PRWORA nor IIRIRA *requires* state or local government entities to share immigration-related information with federal authorities.[95] 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.[96]

PRWORA § 434 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.[97] IIRIRA § 642 is broader and more detailed in scope.[98] First, it 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.[99] Second, 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.[100]

Related Litigation

Shortly after these measures were enacted, New York City, which had a policy limiting information sharing with federal immigration authorities,[101] brought suit challenging the constitutionality of PRWORA § 434 and IIRIRA § 642. Among other things,[102] New York City

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

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

[95] Whether Congress could permissibly *require* states and localities to submit collected information to federal immigration authorities has not been definitively resolved. As previously noted, the Supreme Court in *Printz* distinguished federal laws requiring states to report certain information to federal agencies from instances where it compelled 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).

[96] The provisions expressly apply to restrictions on immigration-related communication between federal, state, and local government entities and employees.

[97] 8 U.S.C. § 1644.

[98] 8 U.S.C. § 1373.

[99] 8 U.S.C. § 1373(a).

[100] 8 U.S.C. § 1373(b). Federal immigration authorities are also required to respond to immigration status or citizenship verification requests made by state or local authorities pertaining to persons within their jurisdiction. 8 U.S.C. § 1373(c).

[101] 1989 New York City Order, *supra* note 88.

[102] 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).

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.[103] A federal district court dismissed this claim in *City of New York v. United States*,[104] and the U.S. Court of Appeals for the Second Circuit (Second Circuit) affirmed the judgment.[105]

The Second Circuit observed that, unlike the statutes struck down for violating the Tenth Amendment 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.[106] Instead, the court reasoned, these provisions prohibited state and local governments from restricting "the voluntary exchange" of immigration information between federal and state authorities.[107] 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."[108] 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."[109] 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 facially violate the Tenth Amendment.[110]

New York City sought to appeal the decision to the Supreme Court, but its petition for certiorari was denied.[111] A few months later, however, the Court held in *Reno v. Condon* (discussed on page 8) that another federal statute—the DPPA—which regulated the dissemination of certain personal information collected by state authorities, did not violate the Tenth Amendment.[112] While it might be argued that *Condon* provides support for the constitutional validity of PRWORA § 434 and IIRIRA § 642,[113] no court appears to have assessed the implications of *Condon* to these measures. Since the Second Circuit's ruling, it appears that there have been no judicial rulings that have questioned the validity of the information-sharing provisions in PRWORA and IIRIRA. Although some state and local measures that purport to limit officials from sharing immigration-related information with federal immigration authorities remain in effect,[114] any attempt by the state or

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

[104] *Id*.at 789.

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

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

[107] *Id*. at 35.

[108] *Id*.

[109] *Id.*

[110] *Id.* at 31.

[111] 528 U.S. 1115 (2000).

[112] 528 U.S. 141 (2000).

[113] Although the federal statute upheld in *Reno v. Condon* is, in some ways, similar to the information-sharing provisions in IIRIRA and PRWORA, the statutes are not wholly analogous. Although each statute regulates information collected by states, the statute upheld in *Condon* was characterized by the Supreme Court as one of general applicability, regulating both states, as suppliers of motor vehicle information, and private parties that resold the information in interstate commerce. Reno v. Condon, 528 U.S. 141, 151 (2000). The information-sharing provisions in IIRIRA and PRWORA, however, appear to address only information collected and shared between government entities. *But see* Dep't of Justice, Br. of Resp't Opposing Pet. for Cert. at 12, *City of New York II*, 528 U.S. 1115 (No. 99-328) (characterizing the information-sharing provisions of IIRIRA and PRWORA as components of larger regulation schemes that also addressed private activity).

[114] *See, e.g.*, N.Y.C. Executive Order 41(2003), *available at* http://www1.nyc.gov/site/immigrants/about/local-laws-

locality to enforce these restrictions on information sharing potentially could be challenged on preemption grounds.

As for the so-called "don't ask" policies, it potentially could be argued that, even though state or local restrictions on police questioning of persons regarding their immigration status is not expressly preempted by federal statute, these measures are nonetheless impliedly preempted by the information-sharing provisions of IIRIRA and PRWORA. But this argument was rejected by a California state appellate court in a challenge to the Los Angeles Police Department's restrictions on investigations into persons' immigration status.[115] The federal courts do not appear to have directly considered this issue. Relatedly, though, in *Arizona v. United States*, the Supreme Court found that a provision of an Arizona statute, which required police to contact federal authorities to verify the immigration status of certain stopped individuals, was not facially preempted.[116] In reaching this conclusion, the Court did not suggest that federal law might preempt states or localities from restricting the circumstances in which police might question individuals about their immigration status.[117] Indeed, given that *Arizona* held that state and local police were largely preempted from making arrests for immigration status violations, it seems unlikely that a federal court would find that state or local measures that limited police questioning of persons about their immigration status would be viewed as preempted by the INA.

Executive Order 13768

On January 25, 2017, the President signed Executive Order 13768, "Enhancing Public Safety in the Interior of the United States."[118] As relevant here, the executive order seeks to encourage state and local cooperation with federal immigration enforcement and disincentivize state and local adoption of sanctuary policies.[119] The executive order 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"—the U.S. Code provision for IIRIRA § 642.[120] To implement that policy, the executive order instructs the Attorney General and the Secretary of Homeland Security 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

executive-orders.page (restricting disclosure of immigration-related information), A common feature of many state and local information-sharing restrictions is language permitting communication when it is required by law. Arguably, such language could be interpreted to allow compliance with the information-sharing provisions of IIRIRA and PRWORA, as these measures "require" voluntary communication to be permitted.

[115] Sturgeon v. Bratton, 95 Cal. Rptr. 3d 718 (Cal. Dist. Ct. App. 2009). *Sturgeon* involved the LAPD Oder, *see supra* note 12, which prohibits Los Angeles police officers from initiating police activity for the sole purpose of discovering a person's immigration status and arresting that person for illegal entry, 95 Cal. Rptr. 3d at 722. In upholding the provision, the California court noted that it "does not address communication with [Immigration and Customs Enforcement within DHS]—which is the heart of the federal information-sharing provisions—but, rather, "it addressed only the initiation of police action and arrests for illegal entry." 95 Cal. Rptr. 3d at 731.

[116] Arizona v. United States, 132 S. Ct. 2492, 2508-10 (2012). The Court left open the question whether immigration status investigations by Arizona police could be subject to as-applied challenges. *Id.* at 2509-10.

[117] To the contrary, in *Arizona* the Supreme Court construed federal immigration law as generally permitting state and local police to play a limited role in immigration enforcement. *Arizona,* 132 S. Ct. at 2506 (noting that state police were generally preempted from arresting aliens for suspected immigration violations in the absence of an authorizing federal statute).

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

[119] *Id*.

[120] *Id*.

exception.[121] Finally, the executive order authorizes the Secretary of Homeland Security to designate a jurisdiction as a "sanctuary," and directs the Attorney General to take "appropriate enforcement actions" against "any entity" that violates 8 U.S.C. § 1373 (IIRIRA § 642) or that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[122]

Shortly after the President signed the executive order, two California localities filed suit in federal district court seeking to halt the executive order's implementation on the ground that it violates the Tenth Amendment. In one suit, the City and County of San Francisco have argued, among other things, that the executive order unlawfully commandeers state and local officials to enforce federal immigration law by penalizing jurisdictions that "fail[] to affirmatively assist federal immigration officials," and as a result, hinders the enforcement of federal law—an activity forbidden by the executive order.[123] Santa Clara County has raised similar Tenth Amendment arguments in its lawsuit.[124] San Francisco and Santa Clara have also argued that conditions placed on the receipt of federal grants are unlawfully coercive, contending that the loss of grant money would total a significant amount of their respective annual operating budgets.[125] In response, the government has countered, among other things, that San Francisco's claims are premature and therefore nonjusticiable,[126] given that the instructions pertaining to sanctuary jurisdictions in the executive order have not yet been implemented.[127] At the time of the publication of this report, the litigation is in its preliminary stages.

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[121] *Id.*

[122] *Id.*

[123] Amended Compl., City & Cty. of San Francisco v. Trump (N.D. Cal. Feb. 27, 2017) (No. 3:17-cv-00485). San Francisco is also seeking a declaratory judgment from that court that it is not in violation of 8 U.S.C. § 1373. *Id.*

[124] Compl., Cty. of Santa Clara v. Trump (N.D. Cal. Feb. 3, 2017) (No. 5:17-cv-00574).

[125] Amended Compl., City & Cty. of San Francisco v. Trump, at 22; Compl., Cty. of Santa Clara v. Trump, at 29.

[126] Under the ripeness doctrine, claims are not justiciable until they are "ripe for adjudication." *See, e.g.,* Texas v. United States, 523 U.S. 296, 300 (1998); Planned Parenthood of Gulf Coast, Inc. v. Gee, 837 F.3d 477, 488 (5th Cir. 2016). In other words, there is no Article III "case or controversy" for a court to decide if the asserted claim "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas,* 523 U.S. at 300; *see also* Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017).

[127] Opp'n to Pl.'s Mot. for Prelim. Inj., Santa Clara v. Trump, at 15-18.

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