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## Pushing an End to Sanctuary Cities: Will it Happen?

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PUSHING AN END TO SANCTUARY CITIES:  
WILL IT HAPPEN?

Raina Bhatt\*

*Sanctuary jurisdictions refer to city, town, and state governments (collectively, localities or local governments) that have passed provisions to limit their enforcement of federal immigration laws. Such local governments execute limiting provisions in order to bolster community cooperation, prevent racial discrimination, focus on local priorities for enforcement, or even to show a local policy that differs from federal policy. The provisions are in the forms of executive orders, municipal ordinances, and state resolutions. Additionally, the scope of the provisions vary by locality: some prohibit law enforcement from asking about immigration status, while others prohibit the use of state resources to enforce federal immigration laws. Despite these variations, such local provisions intend to stifle cooperation with the federal government to adopt a more inclusionary local enforcement policy. Immigration policy is unanimously understood as a federal power, suggesting that federal immigration laws preempt the local governments' provisions. Such preemption challenges have been brought to court, yet sanctuary cities remain largely untouched.*

*The July 2015 murder of Kate Steinle in San Francisco, CA, renewed political discourse on the topic. Juan Francisco Lopez-Sanchez, an undocumented immigrant who had been previously deported five times, was charged for the murder. Mr. Lopez-Sanchez's long history of crime and immigration violations fueled critiques of city policies and put the federal spotlight back onto sanctuary cities. The House of Representatives has since passed H.R. 3009, which would deny some federal assistance to localities that enact provisions prohibiting officers from taking certain actions with respect to immigration. President-elect Donald Trump recently announced his bold plan to cancel all federal funding to such localities.<sup>1</sup> Other immigration-focused measures continue to be introduced and discussed in Congress.*

*If passed, what practical impact would H.R. 3009, or similar legislation, have on local immigration enforcement? The bill still has considerable obstacles to overcome. However, enactment of such legislation has the potential to push local enforcement towards cooperation with federal policy.*

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1. Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants To Do In His First 100 Days*, NPR (Nov. 9, 2016), <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days>.

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## INTRODUCTION

The federal government’s purview over immigration policy was affirmatively restated in *Arizona v. United States*.<sup>2</sup> The Supreme Court held that “[t]he Federal Government’s broad, undoubted power over the subject of immigration and the status of aliens . . . rests, in part, on the National Government’s constitutional power to ‘establish a uniform Rule of Naturalization,’ Art. I, § 8, cl. 4, and on its inherent sovereign power to control and conduct foreign relations.”<sup>3</sup> Despite such an unambiguous declaration, local enforcement policies continue to vary from federal policies stated via the U.S. Immigration and Customs Enforcement (“ICE”) and the Department of Homeland Security (“DHS”).<sup>4</sup> Local provisions control the actions of local law enforcement, and in sanctuary cities, the provisions center around inclusionary efforts (for undocumented immigrants without a criminal record) in order to encourage undocumented members to report crimes.<sup>5</sup> Federal policy, on the other hand, remains largely exclusionary as evidenced by ICE’s primary missions in immigration enforcement: “(1) identifying and apprehending public safety threats—including criminal aliens and national security targets—and other removable individuals within the United States; and (2) detaining and removing individuals apprehended by . . . agents patrolling our Nation’s borders.”<sup>6</sup>

While the local sanctuary provisions are misaligned with federal policy, sanctuary cities use an anti-commandeering defense, maintaining that the federal government “may not compel the States to implement, by legislation or executive action, federal regulatory programs.”<sup>7</sup> This defense

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2. 132 S. Ct. 2492 (2012).

3. *Id.* at 2498.

4. See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 723 (Cal. Ct. App. 2009) (stating “under federal law, matters of immigration are handled by the Office of Immigration and Customs Enforcement (ICE), a branch of the Department of Homeland Security.”).

5. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1475–76 n.168 (2006).

6. *FY 2015 ICE Immigration Removals*, U.S. IMMIGRATION & CUSTOMS ENF’T (2015), <http://www.ice.gov/removal-statistics>; but see *Fixing Our Broken Immigration System Through Executive Action - Key Facts*, DEPT. OF HOMELAND SEC. (2015), <http://www.dhs.gov/immigration-action> (highlighting some key changes made in response to President Obama’s executive action on immigration, which are more inclusionary of non-felon undocumented immigrants).

7. *Printz v. United States*, 521 U.S. 898, 925 (1997).

has successfully held up in court against challenges that federal law preempts sanctuary policies.<sup>8</sup>

To work around the anti-commandeering defense, the House of Representatives' bill uses Congress's spending power to target a loophole exploited by local governments in non-cooperation provisions.<sup>9</sup> Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") makes it unlawful for a local government to "prohibit . . . any government . . . official from sending to, or receiving from, the Immigration and Naturalization Service information regarding citizenship or immigration status, lawful or unlawful, of any individual."<sup>10</sup> Some current sanctuary provisions circumvent this section of the IIRIRA by simply implementing "don't ask" policies, which limit when local enforcement officials can ask about immigration status so there is less information to send.<sup>11</sup> H.R. 3009 attempts to fill this loophole by denying a locality some federal funding if it has any provision that "prohibits State or local law enforcement officials from gathering information regarding the citizenship or immigration status, lawful or unlawful, of any individual."<sup>12</sup> Congress can constitutionally use its spending power to influence state actions and the bill could be a true obstacle for sanctuary policies, if the select federal funding is important enough to local governments.<sup>13</sup>

This Note analyzes the practical relationship between federal immigration policy and local immigration enforcement by tracing how sanctuary cities have continued in spite of congressional action and constitutional challenges. In addition, this Note will analyze Congress' current challenge to local provisions, and whether this challenge will affect sanctuary cities. Part I of this Note traces the development and history of sanctuary cities beginning with the 1980s Sanctuary Movement, continuing with the 9/11 attacks, and ending with the present. This includes a discussion of the motivations for and types of non-cooperation provisions. Part II discusses and analyzes the legal and constitutional challenges faced by local provisions. Finally, Part III presents H.R. 3009, the current legislation threatening the structure of sanctuary cities, and argues that even if the bill becomes law, the practical effects will be very limited and sanctuary cities will endure.

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8. See *e.g.*, *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718 (Cal. Ct. App. 2009).

9. See H.R. 3009, 114th Cong. (2015).

10. 8 U.S.C.A. § 1373(a).

11. *E.g.*, Durham, N.C., Res. 9046 (Oct. 20, 2003) ("Durham Police officers may not request specific documents for the sole purpose of determining a person's civil immigration status, and may not initiate police action based solely on a person's civil immigration status"), <http://durhamnc.gov/documentcenter/view/5536>.

12. H.R. 3009, 114th Cong. § 2 (2015).

13. See *infra* Part III.C.

## I. DEVELOPMENT AND HISTORY OF SANCTUARY CITIES

The sanctuary movement began in the 1980s when churches and religious organizations smuggled, transported, and provided shelter for Central Americans fleeing civil unrest in their countries.<sup>14</sup> These activists argued that they had a humanitarian obligation to help such individuals, drawing on historical rescue practices, like the Underground Railroad.<sup>15</sup> Additionally, local governments began passing ordinances and local laws that provided sanctuary to asylum seekers by severely limiting the cooperation of local authorities with federal immigration agencies.<sup>16</sup> Individual actions such as smuggling and concealing undocumented immigrants were illegal under federal law,<sup>17</sup> and the federal government prosecuted individuals for their involvement.<sup>18</sup> Notably, however, there was never a federal preemption challenge against the local governments for their sanctuary ordinances, despite critiques.<sup>19</sup>

The federal government finally addressed sanctuary provisions in 1996 by passing Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)<sup>20</sup> and Section 434 of the Welfare Reform Act.<sup>21</sup> More immediately, Congress passed the IIRIRA in response to domestic terror attacks (including the 1993 attack on the World Trade Center and the 1995 bombing in Oklahoma City).<sup>22</sup> This legislation nonetheless attempted to counter sanctuary measures that prohibited co-

14. STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1206-07 (4th ed. 2005).

15. *Id.* But see Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 132-34 (1993) (arguing the Sanctuary Movement differed significantly from rescue efforts as the movement was selective of refugees picking only those “who passed political screening”) (internal quotations removed).

16. See, e.g., Cambridge, Mass., City Council Order No. 4 (April 8, 1985), [http://cdn.factcheck.org/UploadedFiles/City\\_of\\_Cambridge\\_1985\\_Sanctuary\\_Resolution.pdf](http://cdn.factcheck.org/UploadedFiles/City_of_Cambridge_1985_Sanctuary_Resolution.pdf) (“[N]o department or employee of the City of Cambridge will violate . . . sanctuaries by officially assisting or voluntarily cooperating with investigations or arrest procedures . . . relating to alleged violations of immigration law by refugees from El Salvador, Guatemala or Haiti . . .”).

17. 8 U.S.C.A. § 1324 (West 2005) (sanctioning criminal penalties for “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.”).

18. See, e.g., *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (convicting defendants of violations of the immigration laws, due to their participation in the smuggling, transporting, and harboring of Central American refugees).

19. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1384 (2006).

20. 8 U.S.C. § 1373 (a)-(b) (barring “don’t tell” sanctuary provisions).

21. 8 U.S.C. § 1644 (barring “don’t tell” sanctuary provisions).

22. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 15 (2012).

operation with federal agencies by requiring that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”<sup>23</sup> The effectiveness of the 1996 cooperation legislation is explored further below, but sanctuary measures remained in place because interest in challenging them faded when Central American refugees were given special status and became able to remain in the United States.<sup>24</sup>

Due to increasing terrorism concerns, 1996 also marked a change in federal ideology regarding state immigration enforcement. Section 287(g) of the Immigration and Naturalization Act (“INA”), among other things, granted authority to the Attorney General to deputize local officials to enforce federal immigration laws.<sup>25</sup> This marked the beginning of a new rhetoric that immigration enforcement was no longer exclusively in the hands of federal officials, but also in the hands of local officials for criminal violations.<sup>26</sup> Following the 1996 legislation, deportations significantly increased, from fewer than 50,000 annually to about 200.<sup>27</sup> Deportations continued to increase as internal policies were revisited in light of attacks during the war on terror.

The September 11, 2001 attacks on the United States brought enforcement of immigration laws, both federal and local, heavily into the spotlight,<sup>28</sup> and the subsequent decade saw a further push to give greater enforcement authority and resources to local law enforcement in order to broaden the number of agencies and personnel focused on immigration enforcement.<sup>29</sup> Local government officers now had authorization to enforce federal immigration laws. This federal push is exemplified in a policy memorandum from the Department of Justice’s (“DOJ”) Office of Legal Counsel (“OLC”) in 2002.<sup>30</sup> The memorandum expressed the view that

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23. 8 U.S.C. § 1644.

24. See Pham, *supra* note 19, at 1385 (noting that while there was an obvious conflict between the 1996 laws and local sanctuary measures, interest in resolving the conflict diminished as the Central American refugees were given special status).

25. 8 U.S.C. §1357(g) (2012).

26. See Memorandum from Teresa Wynn Roseborough, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel, to the U.S. Attorney, Southern Dist. of Cal., Re: Assistance By State and Local Police In Apprehending Illegal Aliens 26-27 (Feb. 5, 1996), <https://www.justice.gov/olc/file/626896/download>.

27. Massey & Pren, *supra* note 22, at 15.

28. See Pham, *supra* note 19, at 1386.

29. *Id.* But see Asli U. Bali, *Chances in Immigration Law and Practice After September 11: A Practitioner’s Perspective*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 161, 168-71 (2003) (arguing that local enforcement initiatives “create a permissive environment for official racial and ethnic profiling” and further isolate immigrant communities from basic services of police).

30. U.S. Dep’t of Justice, Office of Legal Counsel for the Att’y Gen., Memorandum on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 2 (Apr. 3, 2002), <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.

local officials have the authority to arrest and detain undocumented immigrants for civil violations, including immigration violations.<sup>31</sup> This was a direct change in language from OLC's policy in 1996, which extended local enforcement authority only to criminal violations.<sup>32</sup>

Jurisdictions had varied responses in response to the enhanced local enforcement authority. Some states required local municipalities to sign on to the federal policy of greater enforcement in order to protect citizens.<sup>33</sup> Other jurisdictions criminalized landlords or employers to make conditions inhospitable to immigrants, and thus implemented federal policy indirectly.<sup>34</sup> Still other jurisdictions sought to limit local enforcement of immigration laws, despite enhanced enforcement authority.<sup>35</sup>

As of October 2015, there are approximately 300 jurisdictions in the United States that aim to limit local enforcement of immigration laws.<sup>36</sup> These jurisdictions include states (including California and Colorado), counties (including Butler and Finney Counties in Kansas, Cook County in Illinois, Santa Fe County in New Mexico), and cities (including Washington DC, New York City, Denver, and New Orleans).<sup>37</sup>

The localities enacting such sanctuary measures use several rationales to explain their inclusive outlook on immigration enforcement. First, many want to enhance community cooperation and encourage undocumented immigrants to report criminal activity without fear of deporta-

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The 2002 memorandum was released pursuant to a Freedom of Information Act request and contains a number of redactions.

31. *Id.*

32. See Memorandum from Teresa Wynn Roseborough, *supra* note 26.

33. See, e.g., S.B. 90, § 1, 2006 Gen. Assembly Reg. Sess. (Co. 2006) (State of Colorado requiring officers to report suspected unlawful immigrants to ICE).

34. See, e.g., Hazleton, Pa., Ordinance 2006-18 §§ 5, 7.B (2006) (prohibiting landlords from allowing unlawful immigrants to reside at their property). *But see* Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (holding that the housing and employment provisions were preempted by federal law).

35. See e.g., OR. REV. STAT. §181.850(1) (2005) (limiting agency money, equipment, or personnel for the purpose of detecting or apprehending persons whose only violation is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws); see also City of N.Y. Exec. Order No. 41 (Sept. 17, 2003) (restraining city law enforcement from inquiring into immigration status to only when investigating illegal activity other than undocumented status and erecting a presumption against disclosure of immigration status, unless "the individual to whom such information pertains is suspected . . . of engaging in illegal activity, other than mere status as an undocumented alien.").

36. Joshua Breisblatt, *Senate to Vote on "Sanctuary Cities" Legislation*, AM. IMMIGR. COUNCIL (Oct. 19, 2015), <http://immigrationimpact.com/2015/10/19/sanctuary-cities-legislation/>. Note that the final figure varies year to year. *Id.*

37. See Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants for Feds*, TEX. TRIB. (Jan. 15, 2016), <https://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra/> (analyzing ICE data specific to Texas, but includes national ICE data that lists sanctuary jurisdictions).

tion.<sup>38</sup> Without assurances that they will not be arrested for their immigration status, undocumented immigrants are unable to contact local police about crimes witnessed or committed against them.<sup>39</sup> Second, many local governments express concerns about potential discrimination and racial profiling as a result of broad enforcement of immigration policies.<sup>40</sup> Officers investigating violations of immigration laws would be inclined to focus disproportionately on certain races. Third, prioritizing immigration issues would require most, if not all, localities to devote greater fiscal, administrative, and logistical resources to law enforcement, which many local governments are not willing or able to do.<sup>41</sup> Lastly, enacting sanctuary policies can act as a way to promote local policy beliefs.<sup>42</sup> For instance, rapidly growing localities with large, diverse populations may be particularly interested in incorporating immigrants into the local labor market, an interest which differs from that of less diverse localities and from national policies on the presence of undocumented immigrants.<sup>43</sup>

Just as local governments' rationales for sanctuary provisions may vary, the types of provisions also vary. Typically, local governments utilize three distinct types of sanctuary provisions. These include provisions that (1) limit inquiries about a person's immigration status unless investigating another illegal activity other than mere status as an unauthorized alien ("don't ask"); (2) limit arrests or detentions for violation of immigration laws ("don't enforce"); and (3) limit disclosure to federal authorities of immigration status information ("don't tell").<sup>44</sup> New York City, for example, has a "don't ask" policy that restricts city law enforcement officials from inquiring into immigration status unless an officer is investigating illegal activity other than undocumented status.<sup>45</sup> The City of San Fran-

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38. See Kittrie, *supra* note 5; see also Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 579-582 (2009) (discussing the strong empirical support that sanctuary policies support the goal of community cooperation).

39. See Sullivan, *supra* note 38.

40. See Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY (Sep. 2009) (concluding that the Irving Police Department racially profiled Hispanics after the implementation of the Criminal Alien Program, a federal and local partnership "to target serious criminal offenders for deportation").

41. See, e.g., Charlie LeDuff, *Police Say Immigrant Policy is Hindrance*, N.Y. TIMES at A16 (Apr. 7, 2005) (reporting the LA police department is already "stretched so thin" and "immigration jails and courts are so strained" that moving away from a sanctuary policy may not make sense); see also H.R.J. Res. 22, 23d Leg., 1st Sess. (Alaska 2003) (limiting enforcement by withholding "state resources or institutions for the enforcement of federal immigration matters").

42. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 577 (2008).

43. *Id.*

44. See Kittrie, *supra* note 5, at 1455.

45. N.Y.C. Exec. Order No. 41 (Sept. 17, 2003).

cisco has a “don’t enforce” policy under which local law enforcement officers cannot enforce immigration laws against undocumented immigrants unless the individuals have past felony convictions.<sup>46</sup>

Thus far, the only successful challenge to sanctuary policies has eliminated “don’t tell” provisions.<sup>47</sup> Challenges faced by sanctuary jurisdictions, both successful and unsuccessful, are explored further in the following section.

## II. LEGAL CHALLENGES

Sanctuary cities continue to face legal challenges that seek to invalidate or remove their sanctuary provisions. Losing sanctuary provisions would broaden local immigration enforcement in these localities. Legal challenges have come in a variety of forms, from executive actions seeking to ensure local enforcement participation, to cases challenging the legality of sanctuary provisions brought in court, to, perhaps most significantly, congressional action seeking to eliminate sanctuary provisions entirely. Thus far, these challenges generally have not been successful in eliminating sanctuary city status. Local governments have successfully adapted their sanctuary provisions to the few successful challenges.

### A. Executive Programs

The Department of Homeland Security (“DHS”) is tasked with carrying out the executive immigration agenda in accordance with the law, with the U.S. Immigration and Customs Enforcement (“ICE”) as its largest investigative arm.<sup>48</sup> After the strong federal push for local cooperation post-September 11, ICE developed the “Secure Communities” program, which was in operation from 2008 to 2014.<sup>49</sup> Secure Communities sought to identify and remove undocumented immigrants with criminal records, primarily through improved technology and information sharing with local law enforcement officials.<sup>50</sup> Specifically, local law enforcement officials submit fingerprints, taken during the booking, to the Federal Bureau of Investigations (“FBI”), which transmits the information to ICE.<sup>51</sup> Local law enforcement acted as a data-collecting arm of ICE by submitting identification information that was checked against DHS immigration

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46. S.F., CAL., ADMIN. CODE § 12H.2-1 (1993).

47. See *infra* Part II.C.

48. See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 723 (Ct. App. 2009).

49. See Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec. on Secure Communities, to Thomas WInkowski, Acting Dir., U.S. Immigration and Customs Enf’t (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf). Secured Communities program was discontinued in 2014 due to heavy criticism.

50. *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/secure-communities#tab1> (last visited Jan. 17, 2015).

51. *Id.*

records.<sup>52</sup> If the records indicated a match, ICE could request continued detention (up to 48 hours) of the individual until federal resources could take over for an interview focused particularly on enforcement of immigration laws.<sup>53</sup> While there was some confusion about whether local jurisdictions could choose to participate in the program,<sup>54</sup> ICE confirmed, through agency guidance, that local jurisdictions cannot opt out of Secure Communities.<sup>55</sup>

The program was met with heavy criticism from local governments, the public, and members of Congress.<sup>56</sup> One of the principle criticisms of the program was that it was being “used to identify and remove non-criminal and low-level offenders instead of the dangerous criminals that ICE said the program would target.”<sup>57</sup> Additionally, critics argued that the program had a negative impact on community trust in police, resulted in discriminatory practices, and caused confusion about the role of local and federal enforcement authorities.<sup>58</sup> The criticisms were perhaps loudest where sanctuary cities were unable to exercise discretion to prevent the submission of information for undocumented immigrants who had committed petty offenses or were eventually cleared of any wrongdoing.<sup>59</sup> As the program grew and expanded to more jurisdictions, the criticism got stronger, and local government officials announced that they would no longer acquiesce to 48-hour detainer requests from ICE.<sup>60</sup> The program

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52. *Id.*

53. *Id.*

54. See ‘Voluntary’ Immigration Program Not So Voluntary, CBS NEWS (Feb. 16, 2011), <http://www.cbsnews.com/news/voluntary-immigration-program-not-so-voluntary/> (discussing the mixed messages sent by federal officials regarding the electability of the program); see also Letter from Janet Napolitano, DHS Sec’y, Dep’t of Homeland Sec. on Secure Communities, to Zoe Lofgren, U.S. Rep. (Sept. 8, 2010) (giving instructions on whom communities should contact if they wanted to opt out of the program).

55. *Secure Communities*, *supra* note 50; see also Shankar Vedantum, *No Opt-Out for Immigration Enforcement*, WASH. POST (Oct. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html>.

56. Elise Foley, *Obama Faces Growing Rebellion Against the Secure Communities Deportation Program*, HUFFINGTON POST (Apr. 24, 2014), [http://www.huffingtonpost.com/2014/04/24/secure-communities\\_n\\_5182876.html](http://www.huffingtonpost.com/2014/04/24/secure-communities_n_5182876.html) (reporting on criticism by local governments, public, as well as questioning by Rep. Zoe Lofgren).

57. *Secure Communities*, NAT’L IMMIGRATION FORUM (July 11, 2011), <https://immigrationforum.org/blog/secure-communities-2/>.

58. *Id.*

59. See *Secure Communities Criticized For Deporting Non-Criminals In California*, HUFFINGTON POST (Sept. 11, 2013), [http://www.huffingtonpost.com/2013/09/11/secure-communities-non-cr\\_n\\_3906981.html](http://www.huffingtonpost.com/2013/09/11/secure-communities-non-cr_n_3906981.html).

60. See Elise Foley, *Obama Faces Growing Rebellion Against the Secure Communities Deportation Program*, HUFFINGTON POST (Apr. 24, 2014), [http://www.huffingtonpost.com/2014/04/24/secure-communities\\_n\\_5182876.html](http://www.huffingtonpost.com/2014/04/24/secure-communities_n_5182876.html) (reporting that local governments had announced they would stop honoring detainer requests from ICE including the Maryland Governor and a dozen counties in Oregon); see also *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST,

was eventually discontinued in lieu of another program, the Priority Enforcement Program (“PEP”).<sup>61</sup>

Under PEP, much remains the same. Fingerprints are still automatically compared against DHS records, however, PEP seeks voluntary participation by state and local governments, as opposed to mandatory participation under Secure Communities.<sup>62</sup> Voluntary participation largely led local law enforcement agencies throughout the United States to deny holding 18,646 ICE detainees.<sup>63</sup>

While Secure Communities and PEP seek to broaden enforcement despite sanctuary provisions, other executive procedures sought to prevent localities from effectuating specific sanctuary provisions through information sharing. For instance, local enforcement heavily use the National Crime Information Center database (“NCIC”), created in January 1969 by the FBI, which catalogs information such as arrest warrants, wanted persons, and missing property.<sup>64</sup> The database started including immigration records in 1996.<sup>65</sup> Displaying immigration information automatically to local law enforcement “poses a unique threat to sanctuary policies” because it undermines local enforcement discretion to ask about immigration status.<sup>66</sup> While there is speculation about the validity of the claim, programs that target greater information sharing between local and federal officials weaken “don’t ask” sanctuary policies since local officials obtain immigration information despite not asking about one’s immigration status.<sup>67</sup>

### B. Judicial Challenges

Cases brought against sanctuary policies base their claims on the Supremacy Clause, arguing that federal law preempts sanctuary policies. Federalism assures that both the federal government and state governments

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2014 WL 1414305 (D. Or. Apr. 11, 2014) (holding the plaintiff’s Fourth Amendment rights were violated by detaining her in jail 19 hours after her case was settled to allow federal immigration agents to launch an investigation into her residency status).

61. *Priority Enforcement Program*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/pep#> (last visited Jan. 17, 2015).

62. *Id.*

63. Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants for Feds*, TEX. TRIBUNE (Jan. 15, 2016), <https://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra/> (reporting ICE data from Jan. 2014 to Sep. 2015).

64. *National Crime Information Center*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ncic> (last visited Mar. 8, 2016).

65. *See Sullivan*, *supra* note 38, at 568.

66. *Id.* at 584.

67. *Id.* at 574 (discussing how there is limited data to affirm or deny that information sharing undermines sanctuary provisions since the integration of immigration data into NCIC coincided with expanding local enforcement of immigration laws).

have aspects of sovereignty<sup>68</sup> and if their laws are ever in conflict, the Supremacy Clause establishes that “Laws of the United States. . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>69</sup> Federal law will control when local and state laws conflict with federal laws, when Congress expressly notes the scope of preemption, and in an area that Congress enacts federal regulation “so pervasive as to leave no room for supplementary state regulation.”<sup>70</sup> Still, the Supreme Court holds that lower “courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”<sup>71</sup>

Preemption challenges have been successful against some state immigration provisions, although such provisions were exclusionary immigration policies.<sup>72</sup> Exclusionary immigration policies seek broad enforcement of immigration laws, whether directly through criminalizing actions by undocumented immigrants and prioritizing immigration enforcement, or indirectly by limiting access to resources for undocumented immigrants.<sup>73</sup> An analysis of a successful preemption challenge is helpful to understand why federal law does not preempt sanctuary policies.

In *Arizona v. United States*, the Supreme Court held that federal law preempted three out of the four contested provisions of Arizona’s Support Our Enforcement and Safe Neighborhoods Act (S.B. 1070), which generally sought to promote enforcement of immigration laws.<sup>74</sup> The Court specifically analyzed the breadth of federal law addressing the individual Arizona provisions and struck down those that exceeded the scope allotted to localities. The provisions at issue were Sections 2(B), 3, 5(C), and 6 of S.B. 1070. Section 2(B) required officers in some instances to make efforts to verify an individual’s immigration status when conducting a stop detention, or arrest. Section 3 made failure to comply with federal alien-registration requirements a state misdemeanor. Section 5(C) made it a state misdemeanor for an unauthorized alien to seek or engage in work. Section

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68. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (stating that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”).

69. U.S. CONST. art. VI, cl. 2.

70. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 109 (1992) (Kennedy, J., concurring).

71. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

72. See, e.g., *id.* (holding that three separate exclusionary provisions were preempted by federal law); *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down a local ordinance on preemption grounds).

73. Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 710, 722 (2013) (indicating that exclusionary policies include directing local officers to question individuals about their immigration status and limiting immigrants’ access to housing, employment, or language).

74. 132 S. Ct. 2492 (2012).

6 legalized warrantless arrests based on probable cause that the person had committed any public offense that made them removable from the US under state law.<sup>75</sup>

The Court held that Section 3 was preempted as the federal government has occupied the field of alien registration.<sup>76</sup> Section 5(C) was preempted by the Immigration Reform and Control Act of 1986 (“IRCA”), which provided a comprehensive framework for employment of undocumented immigrants and specifically chose not to impose criminal penalties.<sup>77</sup> Section 6 was preempted by the INA, which outlined the amount of discretion given to individual officers to effectuate a warrantless arrest.<sup>78</sup> On the other hand, the Court upheld Section 2(B) since the “federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.”<sup>79</sup> Requiring officers to make efforts to discern an individual’s immigration status was read as being within the state’s purview, so long as it did not infringe on an individual’s due process right by delaying release from detention.<sup>80</sup>

*Arizona* had a critical impact on local provisions because this ruling rejected the “mirror image” theory of preemption, under which local provisions that parroted federal immigration law and policy would be upheld.<sup>81</sup> The Court reaffirmed that the federal government controls immigration policy and federal law would cap local governments’ enforcement discretion for federal immigration laws.<sup>82</sup> On the other hand, *Arizona* did not address any inclusionary policies, which argue instead for limited enforcement such as “don’t ask” policies. Some argue that “[s]anctuary ordinances are, therefore, conceptually distinct from immigrant-exclusionary state immigration enforcement statutes because, while the former involves states and localities deciding how to marshal their resources to investigate violations of their own criminal laws (without reference to immigration regulation), the latter involves states creating their own exclusionary immigration laws.”<sup>83</sup> This argument holds weight since Section 2(B) was found to be within the police powers of the state, and not in conflict with any federal law. Just as Arizona is able to require efforts by

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75. S.B. 1070, 49th Leg., 2d Reg. Sess., Ch. 113 (Ariz. 2010) (as amended by H.B. 2162).

76. See *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (finding that Congress intended its federal registration plan to be a “single integrated and all-embracing system.”).

77. *Arizona*, 132 S. Ct. at 2504-2505.

78. *Id.* at 2506-2507.

79. *Id.* at 2508.

80. *Id.*

81. Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 539 (2012).

82. *Arizona*, 132 S. Ct. at 2510.

83. See Elias, *supra* note 73, at 741 (arguing that the holding in *Arizona* will actually lead to a rise in sanctuary provisions since the Court left space for discretionary enforcement that does not directly conflict with federal law).

local law enforcement to determine an individual's immigration status, another locality is able to require that local law enforcement manage their resources to focus on other crimes and not determine an individual's immigration status.

Sanctuary policies have survived preemption challenges because they are not in direct conflict with federal law and they do not face specific regulation that is so pervasive as to leave no room for supplementary state regulation. "Don't ask" and "don't enforce" policies touch upon the police powers of the state because localities are able to prioritize resources and administration of their enforcement agencies. In *Sturgeon v. Bratton*, the California Court of Appeals held that Special Order 40 ("SO40"), which "prohibits [the] LAPD from initiating police action with the objective of discovering the alien status of a person," is not preempted by federal law.<sup>84</sup> SO40 is a typical "don't ask" policy and the *Sturgeon* court found that this did not conflict with the IIRIRA since there was no prohibition on sending, maintaining, or exchanging information.<sup>85</sup> The *Sturgeon* court read the provision literally and found that SO40 did not include any such prohibition.<sup>86</sup> The IIRIRA does not contain any specific enactment that prevents officers from obtaining the information, and many sources offer a similar opinion that "don't ask" policies do not implicate §1373(a) or (b).<sup>87</sup>

Despite the reasoning of the *Sturgeon* court, a lawsuit was filed on December 4, 2015, on behalf of San Francisco taxpayer Cynthia Cerletti, to challenge a local sanctuary policy.<sup>88</sup> The complaint alleges that then-San Francisco Sheriff Ross Mirkarimi put in place a new policy directive, entitled "Immigration & Customs Enforcement Procedures (ICE) Contact and Communications" that violates of Section 642 of the IIRIRA.<sup>89</sup> The

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84. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 730 (Cal. Ct. App. 2009).

85. *Id.* at 731 (finding that SO40 only addresses the initiation of police action and arrests for illegal entry and not communications with ICE, while Section 1373(b) addresses only communications with ICE).

86. *Id.* at 730.

87. See MICHAEL JOHN GARCIA, "SANCTUARY CITIES": LEGAL ISSUES 4 (2009), <http://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf> (stating that the "don't ask" approach "does not directly conflict with federal requirements that states and localities permit the free exchange of information regarding persons' immigration status"); see also U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 25-26 (2007) (providing verification from the Inspector General that the "don't ask" sanctuary policies do not conflict with federal law).

88. *Judicial Watch Files Taxpayer Lawsuit Against San Francisco Sanctuary Ordinance Expansion*, JUDICIAL WATCH (Dec. 09, 2015), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-files-taxpayer-lawsuit-against-san-francisco-sanctuary-ordinance-expansion/>.

89. Complaint at 7-8, *Cerletti v. Mirkarimi*, No. CGC-15-549250 (Sup. Ct. S.F. Cty. Dec. 4, 2015), <https://www.judicialwatch.org/wp-content/uploads/2015/12/Cerletti-v-Mirkarimi-San-Francisco-ICE-policy-5492501.pdf> (Section 642 of the IIRIRA is cited as 8 U.S.C. § 1373).

policy directive, reference number 2015-036, specifically bars San Francisco Sheriff Department (“SFSD”) officials from transmitting certain types of information.<sup>90</sup> The policy language runs close to “don’t tell” policies, which have been invalidated by the 1996 legislation.<sup>91</sup> On October 20, 2016, a notice for Defendant’s motion for summary judgment was filed with the court, and a hearing will be held on January 6, 2017.<sup>92</sup> Even if the motion for summary judgment is denied and the court eventually finds the local policy contrary to federal law, the decision should not affect “don’t ask” and “don’t enforce” sanctuary policies.

### C. Legislative Challenges

Congress has passed several acts that address local enforcement of immigration law. As discussed above, Congress passed Section 642 of the IIRIRA<sup>93</sup> and Section 434 of the Welfare Reform Act in 1996.<sup>94</sup> Due to the nature of the sanctuary measures in place at the time, the legislation sought to counter sanctuary measures that prohibited cooperation with federal agencies.<sup>95</sup> Specifically, the measures require that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”<sup>96</sup> Section 642 of the IIRIRA additionally required that “no person or agency may prohibit, or in any way restrict . . . (1) Sending [information regarding immigration status] to, or requesting or receiving such information from, the Immigration and Naturalization Service; (2) Maintaining such information; (3) Exchanging such information with any other Federal, State or local government entity.”<sup>97</sup> These congressional acts were coupled with Section 287(g) of the INA, which granted author-

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90. Inter-office Communication from Ross Mirkarimi, Sheriff, San Francisco Sheriff’s Dept., to All Personnel re: Immigration & Customs Enforcement Procedures (ICE) Contact and Communications, (Mar. 13, 2015), [http://www.catrustact.org/uploads/2/5/4/6/25464410/ice\\_contact\\_signed.pdf](http://www.catrustact.org/uploads/2/5/4/6/25464410/ice_contact_signed.pdf) (barring the transmittal of immigration status, access to inmates in jail, access to SFSD computers or SFSD logs, among other items).

91. See *infra* Part II.C.

92. Request for Judicial Notice in Support of Defendant Vicki Hennessy’s Motion for Summary Judgment, *Cerletti v. Hennessy*, No. CGC-15-549250 (Sup. Ct. S.F. Cty. Oct. 20, 2016).

93. 8 U.S.C. § 1373 (a)-(b) (2012).

94. 8 U.S.C. § 1644 (2012).

95. See *supra*, note 16; see also Pham, *supra* note 19, at 1383-84 (citing resolution from Takoma Park, Maryland, which stipulated that no Takoma Park official may assist INS in carrying out immigration-based investigations or arrests).

96. 8 U.S.C. § 1644 (2012); see also 8 U.S.C. § 1373(a) (“[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”).

97. 8 U.S.C. § 1373(b).

ity to the Attorney General to deputize local officials to enforce federal immigration laws following adequate training.<sup>98</sup> The 287(g) program has developed into an immigration enforcement partnership between federal and local law enforcement.<sup>99</sup>

The 1996 legislation successfully tackled “don’t tell” sanctuary provisions enacted by localities in the 1980s. The Second Circuit held that the 1996 legislation is constitutional, as the legislation does not require states and localities to report information to the federal government.<sup>100</sup> Rather, the 1996 legislation seeks to remove restraints on voluntary cooperation and does not implicate the anti-commandeering doctrine.<sup>101</sup>

The anti-commandeering doctrine acts as a limit to federal regulatory measures that require enforcement.<sup>102</sup> The Tenth Amendment provides that “[t]he 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.”<sup>103</sup> The Supreme Court has interpreted the amendment to mean that however plenary the federal government’s power to legislate in a particular area may be, the Tenth Amendment prevents it from commanding states to administer a federal regulatory program.<sup>104</sup> State sovereignty should be protected by maintaining the “heart of representative government,” including the police powers of the state, and should remain free from federal command.<sup>105</sup> For sanctuary cities, the anti-commandeering doctrine serves as a backstop against the federal government requiring enforcement of federal immigration laws and respects the police powers of states to determine their enforcement levels.

As a result of the 1996 legislation, “don’t tell” sanctuary policies slowly disappeared from local ordinances and were typically replaced by “don’t ask” or “don’t enforce” policies. As interpreted in *Sturgeon*, “don’t ask” policies are not preempted by the 1996 legislation since there is no prohibition from coordinating with federal counterparts; the policies sim-

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98. 8 U.S.C. § 1357(g) (2012).

99. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATIONS AND CUSTOMS ENF’T, <https://www.ice.gov/287g> (last visited Jan. 17, 2015).

100. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999) (upholding the constitutionality of the 1996 legislation because the legislation does not require localities to enforce federal laws).

101. *Id.* See also *Reno v. Condon*, 528 U.S. 141 (2000) (upholding a federal law that prohibited states from disclosing personal information of applicants for driver’s licenses because the law did not require state officials to help enforce federal laws).

102. *Id.*

103. U.S. CONST. amend. X.

104. See e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that an obligation to conduct background checks on handgun purchasers imposed an unconstitutional obligation on state officers to execute federal laws).

105. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)) (internal quotation marks omitted).

ply prioritize local resources to focus on major crimes.<sup>106</sup> “Don’t enforce” policies may employ the same rationale and are effectively protected through the anti-commandeering doctrine interpreted through the Tenth Amendment.<sup>107</sup>

### III. PROPOSED LEGISLATION AND ITS EFFECTS

Kate Steinle’s murder in San Francisco, CA played an important role in refueling the debate over sanctuary jurisdictions. Critics of sanctuary cities blamed San Francisco’s sanctuary provisions as primarily responsible, since they allowed Mr. Lopez-Sanchez to remain on the streets despite having been previously deported five times.<sup>108</sup> Such critics include the President-elect Donald Trump, who characterized Steinle’s murder as a “senseless and totally preventable act of violence committed by an illegal immigrant [and] yet another example of why we must secure our border immediately.”<sup>109</sup>

Members of Congress also responded and on July 9, 2015, Representative Duncan Hunter introduced House Bill 3009, Enforce the Law for Sanctuary Cities Act (the “Act”) in order to curb state and local municipalities’ non-enforcement of federal immigration policies.<sup>110</sup> Despite focusing on popular “don’t ask” policies, this legislation provides only a minor threat to sanctuary cities because “don’t enforce” policies remain available to state and local governments, as enforcement resides within

106. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731-34 (Ct. App. 2009).

107. *See City of New York v. United States*, 179 F.3d 29, 35 (“[W]hile Congress may condition federal funding on state compliance with a federal regulatory scheme or preempt state powers in particular areas . . . it may not directly force states to assume enforcement or administrative responsibilities constitutionally vested in the federal government.”).

108. *See* Michael Pearson, *Suspect Tells TV station He Killed San Francisco Woman*, CNN (July 7, 2015, 10:09 PM), <http://www.cnn.com/2015/07/06/us/san-francisco-killing/> (“Critics of such policies say they allow dangerous criminals to remain living in the United States.”).

109. Theodore Schleifer, *Trump: San Francisco Killing Shows Perils of Illegal Immigration*, CNN (July 8, 2015, 1:08 PM), <http://www.cnn.com/2015/07/03/politics/trump-san-francisco-killing/>.

110. H.R. 3009, 114th Cong. (2015). It should be noted that other proposed measures also touch upon the same issue. Introduced by Senator Sessions on June 22, 2015, the Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act, S. 1640, 114th Cong. § 114 (2015), seeks a robust amendment to the Immigration and Nationality Act and its Section 114 specifically addresses state violations of enforcement of immigration laws. The language closely tracks Senator Session’s previously proposed Homeland Security Enhancement Act of 2005. *See* S. 1362, 109th Cong. § 2(a) (2005). On October 6, 2015, Senator Vitter introduced the Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3 (2015), which mimics the penalty-driven language of House Bill 3009. *See* H.R. 3009, § 3(a). On October 20, 2015, the U.S. Senate held a cloture vote on S. 2146 on the motion to proceed, where a 54-45 vote stopped the bill from moving forward. 162 CONG. REC. S7323 (2015). On June 27, 2016, Senator Toomey introduced the Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 3 (2016), which also targets sanctuary jurisdictions through withholding federal funds. On July 6, 2016, the U.S. Senate failed a vote for cloture on S. 3100. 162 CONG. REC. S4798-99 (2016).

their police powers and the federal government cannot command them to enforce federal policy.

This section analyzes House Bill 3009 as an example of what anti-sanctuary-cities legislation could mean for states and local municipalities and concludes that due to a state's or local government's control over its police powers, Congress will always fall short of eliminating sanctuary cities.

#### A. Purpose

The Act would institute financial repercussions for “don't ask” policies to impair sanctuary cities. Bill proponents rely on their spending power to force states into greater cooperation with federal immigration policies. Legislators have proposed using their spending power before to reimburse cooperating localities,<sup>111</sup> however, this Act uniquely seeks to *withhold* certain federal funds from local governments that have inclusive policies, as opposed to providing additional funding for enforcement measures.

“Don't ask” policies work around the 1996 legislation by preventing government officials from obtaining information regarding citizenship in the first place. House Bill 3009 targets these policies. “Don't ask” provisions prevent officers from “initiat[ing] police action with an objective of either discovering the immigration status of a person or of enforcing immigration law.”<sup>112</sup> As explained earlier, Section 642(a) or (b) of the IIRIRA makes it unlawful for a local government to prohibit a government “official from *sending* . . . information regarding citizenship or immigration status, lawful or unlawful, of any individual.”<sup>113</sup> The legislation only prevents state and local municipalities from employing “don't tell” policies.

Statements by Congressman in support of House Bill 3009 make clear that the Act targets “don't ask” policies to stimulate greater enforcement. During House floor debate over the Act, Congressman Bob Goodlatte of Virginia shared his belief that the “legislation will help persuade sanctuary jurisdictions to simply abide by current federal law and, in doing so, advance public safety.”<sup>114</sup> The chief sponsor of the legislation, Congressman Duncan Hunter of California, believes that “this bill is just the first step in restoring accountability in our immigration system.”<sup>115</sup> These statements make clear that proponents intend to counter sanctuary policies

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111. See Homeland Security Enhancement Act of 2005, S. 1362, 109th Cong. (2005) (proposing additional funding for state and local municipalities engaged in enforcement of federal immigration laws).

112. L.A. OFF. OF CHIEF OF POLICE, SPECIAL ORDER NO. 40 (1979), [http://assets.lapdonline.org/assets/pdf/SO\\_40.pdf](http://assets.lapdonline.org/assets/pdf/SO_40.pdf).

113. 8 U.S.C. § 1373(a) (2012) (emphasis added).

114. 161 CONG. REC. H5440–41 (daily ed. July 23, 2015) (statement of Rep. Goodlatte).

115. 161 CONG. REC. H5441 (daily ed. July 23, 2015) (statement of Rep. Hunter).

in a way that will bind courts into finding such conduct in violation of federal law.

### B. Text

The Act seeks to fill the “don’t ask” loophole by refusing some federal funding if a locality “prohibits State or local law enforcement officials from *gathering* information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>116</sup> By using “gathering” in the text, the plain language compels an interpretation that the bill aims to target policies that prohibit detecting or obtaining information from persons that may be in violation of federal immigration laws. The bill does not require that law enforcement explicitly ask about immigration status, but prevents state and local governments from instituting policies that prevent asking such questions.<sup>117</sup>

Instead of solely instituting a prohibition, the Act also targets two primary sources of funding to incentivize state and local municipalities’ compliance: the State Criminal Alien Assistance Program (“SCAAP”) and grants made available through the Department of Justice, namely the Edward Byrne Memorial Justice Assistance (“JAG”) Program and Community Oriented Policing Services (“COPS”) program.<sup>118</sup> While use and eligibility of these programs vary, they provide state and local governments funding for a range of law enforcement purposes, including immigration enforcement.<sup>119</sup> In order to understand the effect that withholding funding from these programs may have on state and local governments, the programs are explained briefly below.

The Immigration and Nationality Act, and the Violent Crime Control and Law Enforcement Act of 1994 govern SCAAP.<sup>120</sup> The program generally allows state or local subdivisions to receive federal funding for incarceration costs of undocumented criminal immigrants.<sup>121</sup> Minimum eligibility requirements include incarcerating undocumented immigrants with at least one felony or two misdemeanor convictions for violations of state or local law for at least four consecutive days.<sup>122</sup>

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116. H.R. 3009, 114th Cong. § 2 (2015) (emphasis added).

117. 161 CONG. REC. H5442 (daily ed. July 23, 2015) (Sen. Bob Goodlatte gave a statement to “make very clear nothing in this bill requires any officer of the law to ask any question.”).

118. H.R. 3009, 114th Cong. §§ 2-3 (2015). Similarly, S. 2146 proposed limiting grants from SCAAP and COPS, while S. 1640 proposes limiting grants from SCAAP, COPS, and any other grant from the Department of Homeland Security. S. 2146, 114th Cong. § 3 (2015); S. 1640, 114th Cong. § 114(d)(1) (2015).

119. See *infra* pp. 25–27.

120. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (SCAAP) 1 (2015), [https://www.bja.gov/Funding/15SCAAP\\_Guide\\_lines.pdf](https://www.bja.gov/Funding/15SCAAP_Guide_lines.pdf).

121. *Id.*

122. *Id.*

The goal of SCAAP is to help offset the significant jailing costs that immigration enforcement imposes on local governments and increasingly, governments regard SCAAP funding as essential to offset the costs associated with enforcement of federal immigration laws.<sup>123</sup> In 2015, SCAAP funding totaled over \$165 million, with the State of California as the largest recipient, at about \$44 million.<sup>124</sup> Grant amounts are determined by costs incurred by the municipality.<sup>125</sup>

The JAG Program is authorized under the Omnibus Crime Control and Safe Streets Act of 1968,<sup>126</sup> and was created by the Consolidated Appropriations Act of 2005, which merged the Edward Byrne Memorial Grant Program and the Local Law Enforcement Block Grant program.<sup>127</sup> The JAG Program provides states and local governments with funding that must go to one of seven purposes: “law enforcement, prosecution and courts, prevention and education, corrections and community corrections, drug treatment planning, evaluation and technology improvement, and crime victim and witness initiatives.”<sup>128</sup>

Broad purpose categories allow state and local governments to use the funding more flexibly than other federal funding options, if they are eligible. Eligibility is based on a formula that takes into account a jurisdiction’s share of the nation’s violent crime and population.<sup>129</sup> Local allocations are based on a jurisdiction’s proportion of the state’s 3-year violent crime average and if the calculated award is less than \$10,000, the funds are transferred to the state.<sup>130</sup> In 2014, the JAG program dispersed over \$290 million to states, territories, and local governments. The state of California was the largest recipient, at \$32.2 million.<sup>131</sup>

The COPS program was originally authorized under Title I of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>132</sup> However, in 1994, the Violent Crime Control and Law Enforcement Act reauthorized

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123. See Letter from Matthew D. Chase, Exec. Director, Nat’l Ass’n of Ctys., to Barbara Mikulski, Chairwoman, Senate Appropriations Comm. (Nov. 18, 2014), <http://www.naco.org/sites/default/files/SCAAP-fy15.pdf> (representing county interests in maintaining SCAAP funding at no less than \$210 million for FY 2015).

124. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 2015 SCAAP AWARDS (2015), <https://www.bja.gov/funding/FY-2015-SCAAP-Awards.pdf>.

125. BUREAU OF JUSTICE ASSISTANCE, *supra* note 120.

126. 42 U.S.C. § 3751(a) (2012).

127. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-169, § 1111, 119 Stat. 2960, 3094 (2006).

128. ALEXIA D. COOPER & KIMBERLY MARTIN, U.S. DEP’T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2014 1 (2014) <http://www.bjs.gov/content/pub/pdf/jagp14.pdf>.

129. *Id.* at 2.

130. *Id.*

131. *Id.* at 1.

132. 42 U.S.C. § 3796dd (2012).

and amended the program creating the COPS office.<sup>133</sup> The COPS office has developed the program to focus on 5 separate grant award packages: COPS Anti-Methamphetamine Program, COPS Hiring Program (“CHP”), Community Policing Development (“CPD”), Coordinated Tribal Assistance Solicitation, and COPS Anti-Heroin Task Force.<sup>134</sup>

Grantees of the COPS programs such as CPD extend beyond government agencies.<sup>135</sup> Particularly important for state and local municipalities is the CHP program, which awarded over \$113 million to employ law enforcement officers in 2015.<sup>136</sup> Grant applicants with primary law enforcement authority for the population to be served are eligible to apply.<sup>137</sup>

To summarize, the proposed Act specifically targets “don’t ask” policies by withholding funding for a variety of law enforcement measures utilized by state and local municipalities.

### C. Constitutionality

If faced with a constitutional challenge, the Act would likely survive. Courts have consistently held that Congress has the ability to urge a State to adopt a legislative program consistent with federal interests.<sup>138</sup> A challenge of the Act would require an analysis based on Congress’s spending power. An anti-commandeering analysis would not be relevant since the attachment of funds makes compliance with the Act elective, rather than mandatory. Relevant here, Congress may attach conditions on the receipt of federal funds through its spending power, so long as such conditions meet five requirements: (1) a congressional exercise must be in pursuit of the “general welfare”; (2) conditions on state and local governments must be unambiguous; (3) the conditions must be related “to the federal interest in particular national projects or programs”; (4) other constitutional provi-

133. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1003, 108 Stat. 1796, 1808-15 (1994).

134. *Grants & Funding*, U.S. DEP’T OF JUSTICE CMTY. ORIENTED POLICING SERVS., <http://cops.usdoj.gov/Default.asp?Item=46> (last visited Oct. 1, 2016).

135. *See e.g.*, U.S. DEP’T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., 2015 COMMUNITY POLICING DEVELOPMENT AND COLLABORATIVE REFORM FOR TECHNICAL ASSISTANCE (2015), [http://cops.usdoj.gov/pdf/2015AwardDocs/cpd/CPD\\_award\\_list.pdf](http://cops.usdoj.gov/pdf/2015AwardDocs/cpd/CPD_award_list.pdf) (awarding grants to nongovernmental agencies such as the Vera Institute of Justice, University of South Florida of Tampa, and Xero Associates Inc. of Oak Park, among others).

136. U.S. DEP’T OF JUSTICE CMTY. ORIENTED POLICING SERVS., 2015 COPS PROGRAM AWARDS LIST (2015), [http://cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP\\_Award\\_List.pdf](http://cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_Award_List.pdf).

137. *COPS Hiring Program (CHP)*, U.S. DEP’T OF JUSTICE CMTY. ORIENTED POLICING SERVS., <http://cops.usdoj.gov/Default.asp?Item=2367> (last visited Oct. 1, 2016).

138. *See, e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (holding that the Surface Mining Act does not impinge on state sovereignty as it governs the activities of private individuals and businesses and is within Congress’s Commerce power); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding provisions of the Social Security Act designed to induce states to adopt laws for funding and paying unemployment compensation).

sions must not provide “an independent bar to the conditional grant of federal funds”; and (5) the conditions may not coerce local governments into submission.<sup>139</sup>

The Act would sufficiently meet the first requirement that congressional exercise be in pursuit of the general welfare. Given that the Supreme Court has granted a “wide range of discretion . . . to the Congress” in its determination of general welfare, it is reasonable that Congress may find eliminating “don’t ask” policies to be for the betterment of the nation.<sup>140</sup> House Bill 3009 was introduced to influence sanctuary cities into greater coordination with existing federal immigration policy. In House debate, members of Congress repeatedly stated that enforcement of immigration laws could reduce crime and that sanctuary policies were in opposition to federal law.<sup>141</sup>

Given the specificity of the Act, the requirement that the condition on state and local governments be unambiguous is met. The Act explicitly states that a locality cannot prohibit “[s]tate or local law enforcement officials from gathering information regarding the citizenship or immigration status” of an individual.<sup>142</sup> This statement gives direct information on the type of conduct that will result in a loss of federal funding and sufficiently provides state and local governments with information to “exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>143</sup> If they want to be eligible for SCAAP, COPS, or JAG funding, localities cannot institute formal or informal policies that forbid law enforcement from obtaining citizenship or immigration information from individuals.

The prohibition in House Bill 3009 directly relates to the federal interest in enforcement of immigration policies and no other constitutional provisions ban such action. The federal government’s control of immigration policy was affirmatively restated in *Arizona v. United States*.<sup>144</sup> Additionally, since the prohibition is tied to funding, the Tenth Amendment does not prevent such legislation. Anti-commandeering doctrine prevents the federal government from compelling action by a locality in an area designated within the locality’s sovereign power. Here, a local government

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139. *South Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987).

140. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

141. 161 CONG. REC. S5443 (daily ed. July 23, 2015) (“[I]f we had no sanctuary jurisdictions in America, there is a lot greater chance that [Mr. Sanchez’s] deportation would have stuck.”).

142. H.R. 3009, 114th Cong. § 2(7)(B) (2015).

143. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

144. 132 S. Ct. 2492, 2498 (2012) (holding that the federal government “has broad, undoubted power over the subject of immigration and the status of aliens . . . [which] rests, in part, on the National Government’s constitutional power to ‘establish an uniform Rule of Naturalization,’ U.S. Const. Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.”).

may simply be denied the funds and retain “don’t ask” policies. As such, the third and fourth requirements are met.

Having met these requirements, a court would additionally determine whether the Act is coercive of state and local governments. While these funding programs are important to municipalities, they likely do not reach such a level as to be coercive under Supreme Court analysis. In *National Federation of Independent Businesses v. Sebelius*, Justice John Robert’s plurality opinion stated that the withholding of original Medicare funding for lack of compliance amounted to coercion because those funds threatened a loss in excess of 10% of some states’ overall budgets.<sup>145</sup> In *South Dakota v. Dole*, the Court held that withholding 5% of highway funds if states did not increase the legal drinking age was not coercive and upheld the law.<sup>146</sup> Applied here, receipt of the grants varies by jurisdiction and by year, making it difficult to determine the impact on an individual jurisdiction’s budget. For example, the City of Los Angeles has an estimated \$8.6 billion in total expenditures for FY 2015–2016.<sup>147</sup> Police expenditures are budgeted at \$1.4 billion, while total grants budgeted from SCAAP, COPS, and JAG are only about \$7 million.<sup>148</sup> That means the program funding for the City is only 0.5% of the police expenditures and even less of its total expenditures.<sup>149</sup> Note that this is only one jurisdiction and not necessarily indicative of others, but these numbers compel a non-coercive outcome. This is especially true when considering that SCAAP funding goes specifically to the incarceration of undocumented immigrants. Sanctuary cities may utilize SCAAP funding for jailing undocumented criminal immigrants, but this amount is naturally limited as sanctuary provisions limit immigration enforcement.<sup>150</sup>

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145. 132 S. Ct. 2566, 2602–07 (2012).

146. 483 U.S. 203, 211–12 (1987).

147. CITY OF L.A., BUDGET FISCAL YEAR 2015–16, at 42 (2015).

148. *Id.* at 142–46, 389–90. There is no budget line item for SCAAP funding, likely because SCAAP grants are based on actual expenses caused by incarceration of undocumented immigrants. The County of Los Angeles received about \$3 million in SCAAP funding in 2015. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 2015 SCAAP AWARDS (2015), <https://www.bja.gov/funding/FY-2015-SCAAP-Awards.pdf>. To give a conservative estimate, I have attributed the entire \$3 million County SCAAP funding to the City of Los Angeles.

149. There was no indication that the State of California provides additional program funding to the City as an allocation of the portion that it receives, but this is possible. It is additionally worth noting, however, that even if the State of California gave its entire \$32 million in JAG funding from FY 2015, this would only be 2% of the City of Los Angeles’s budgeted police expenditures. See CITY OF L.A., BUDGET FISCAL YEAR 2015–16, at 142–46 (2015); ALEXIA D. COOPER & KIMBERLY MARTIN, U.S. DEP’T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2014, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/jagp14.pdf>.

150. JESSICA M. VAUGHAN & RUSS DOUBLEDAY, CENTER FOR IMMIGRATION STUDIES, SUBSIDIZING SANCTUARIES THE STATE CRIMINAL ALIEN ASSISTANCE PROGRAM 1 (2010), <http://www.cis.org/sites/cis.org/files/articles/2010/subsidizing-sanctuaries.pdf> (discussing the tension between having policies in place designed to impede federal immigration law enforcement yet receiving reimbursements for costs that their own policies may exacerbate).

Given that the federal funding likely forms a low percentage of the overall police budget or general city budget, the fact that SCAAP is only received when enforcing federal immigration policies, and the fact that the other requirements are met, a court will probably find the Act is not coercive and does not reach into matters of state concern.<sup>151</sup>

#### D. *Effect and Continued Viability of Sanctuary Cities*

Aside from constitutionality concerns, the Act is unlikely to have a substantial impact on enforcement policies of sanctuary cities. Procedurally, state and local governments will have to repeal formal and informal “don’t ask” provisions to continue to receive funding. However, they can still maintain “don’t enforce” policies and continue receiving funding. It is significant that the Act does not require direct state or local action, but only limits funding if the jurisdiction prohibits gathering information that is relevant for enforcement. Allowing law enforcement officers to gather information does not require enforcement, which still remains within the discretion of the enforcement officer, subject to formal or informal “don’t enforce” policies of his or her jurisdiction.

The outcome seems similar to the maintenance of sanctuary cities after the 1996 legislative challenges (IIRIRA and INA). This is essentially due to the fact that short of requiring state enforcement, complete coordination with current federal immigration policy will be difficult. Requiring state enforcement, however, will impinge on state police powers, creating an unconstitutional obligation on the part of the states to execute federal laws.<sup>152</sup>

Immigration scholars have focused on this reoccurring debate between federal immigration policy and localities’ enforcement policies, suggesting alternatives that target the disagreement directly. Leading immigration scholar Cristina Rodriguez suggests that “immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.”<sup>153</sup> Such a

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151. In contrast, President-elect Trump’s suggestion for legislation that withholds all federal funding would certainly coerce local governments into submission and would be found unconstitutional. *National Federation of Independent Businesses v. Sebelius* alone informs this outcome because withholding original Medicare funding is subsumed in all federal funding and that alone was found coercive. 132 S. Ct. 2566, 2602-07 (2012).

152. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that an obligation to conduct background checks on handgun purchasers imposed unconstitutional obligation on state officers to execute federal laws); *United States v. Butler*, 297 U.S. 1, 64 (1936) (finding that Congress cannot use power to enforce a regulation of matters of state concern).

153. Rodriguez, *supra* note 42, at 571. Cristina Rodríguez is the Leighton Homer Surbeck Professor of Law at Yale Law School. Her research interests include constitutional law and theory; immigration law and policy; language rights and policy; and citizenship theory. For a more detailed biography, see <https://www.law.yale.edu/cristina-rodriguez>.

proposition would move Congress to restrain from further legislation that would constrain local governments from enacting provisions that seem counter to federal immigration policy. Rodriguez's functionalist suggestion would change the nature of the conversation. Politicians and scholars either in support of or opposition to local enforcement of federal immigration law would take their fight to state and local governments and debate resource allocations, provisions to prevent loss of community trust, and other factors. Since localities specifically face the integration of immigrants, it seems acceptable to allow them to decide an enforcement policy without the constant concern of federal preemption.<sup>154</sup>

Nonetheless, others stand in direct opposition to such proposals and maintain that immigration law should remain in the hands of the federal government.<sup>155</sup> Such opposition relies on a textualist reading of the Constitution that immigration policy remains squarely in the purview of the federal government through its "constitutional power to 'establish a uniform Rule of Naturalization,'<sup>156</sup> and on its inherent power as sovereign to control and conduct relations with foreign nations."<sup>157</sup> Since states are limited to the federal construct of immigration policy, their discretion on enforcement does not yield any productive results.<sup>158</sup>

As President Barack Obama has emphasized, the immigration policy of the nation needs a reassessment,<sup>159</sup> and this applies to the continuing struggle with sanctuary cities. Without a larger policy decision on the purview of local enforcement, the tension will continue, with cities maintaining their inclusionary policies and the federal government in preempting the sanctuary provisions. Using the spending power remains Congress's best weapon, but for now, the federal funding stipulated in House Bill 3009 and other pending legislation will likely not be enough to quell sanctuary jurisdictions from exercising their local discretion regarding immigration enforcement.

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154. See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (arguing that a localist response will help provide a response to a local "crisis" as the limitations of federal immigration policies have been highlighted through the history of immigration debate).

155. See e.g., Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011).

156. U.S. CONST. art. I, § 8, cl. 4

157. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

158. See Cunningham-Parmeter, *supra* note 155.

159. See *Comprehensive Immigration Reform*, BARACKOBAMA.COM, <https://www.barackobama.com/immigration-reform/> (last visited Sept. 23, 2016).