

**IMMIGRATION TO BLUE CITIES IN RED STATES: THE  
BATTLEGROUND BETWEEN SANCTUARY AND EXCLUSION**

*Karla Mari McKanders\**

ABSTRACT

*An ongoing intrastate immigration regulation battle between cities, municipalities, and states with the Trump Administration intervening with litigation and executive orders has dominated the immigration federalism landscape. Some states, cities, and localities have passed sanctuary laws and policies seeking to protect immigrant communities by not inquiring into an individual's immigration status, while other states have begun to pass exclusionary anti-sanctuary laws, sanctioning non-compliance with federal immigration laws.*

*The Trump Administration's policies, along with the resulting litigation, place immigration federalism in an unprecedented context. This Symposium Article interrogates the concept of immigration federalism examining the political and ideological contours of state and local exclusionary and sanctuary laws highlighting new issues that have surfaced under the Trump Administration's policies. This Article utilizes the red state and blue city intrastate federalism conflicts within the State of Tennessee to highlight the political dynamics that govern the passing of state and local exclusionary and sanctuary laws. The new landscape of exclusionary and sanctuary laws has increasingly emphasized a red state and blue city political divide. In this context, this Article argues that recent immigration federalism standoffs center around political divisions which fail to engage in principled evaluations of which level of government—federal, state, or local—should be the locus of immigration regulation.*

TABLE OF CONTENTS

INTRODUCTION .....	1052
I. IMMIGRATION FEDERALISM AND THE TRUMP ADMINISTRATION..	1054
II. BLUE CITY RESISTANCE TO THE ADMINISTRATION AND RED STATE POLICIES .....	1056
A. <i>Sanctuary as a Form of Resistance</i> .....	1056
B. <i>State and Local Intrastate Immigration Federalism Battles</i> .....	1057
III. COURT BATTLES AND IMPLICATIONS OF CONTINUED SUB-FEDERAL REGULATION.....	1063
CONCLUSION .....	1069

---

\* Clinical Professor of Law at Vanderbilt University Law School. Special thanks to my research assistants Rachel M. Stuckey, Sadie Shourd, and Joshua D. Minchin.

## INTRODUCTION

The January 2018 Symposium topic is particularly relevant: *Executive Power: Immigration Reform in the New Administration* focusing on *Sanctuary Cities: State and Federal Standoffs*. Since 2006, there has been an ongoing battle between cities, municipalities, states, and the federal government over immigration regulation. In this setting, states and cities have passed *both* sanctuary and exclusionary immigration laws. The push for state and local immigration laws began with conservative legislative groups like the American Legislative Exchange Council drafting and promoting subfederal legislatures to enact exclusionary anti-immigrant laws,<sup>1</sup> whereas Sanctuary laws and policies seek to protect immigrant communities by not inquiring into an individual's immigration status when providing state or local services including law enforcement. The intent is to create a safe space for immigrants. The concept of sanctuary has evolved in the United States to signify a moral and ethical obligation to protect migrants from unjust removal from the United States.<sup>2</sup>

This commentary interrogates the concept of immigration federalism, examining the political and ideological contours of state and local sanctuary laws in the context of both state and the Trump Administration's exclusionary policies. I utilize the intrastate federalism conflicts within the State of Tennessee to highlight the political dynamics that govern the passing of state and local sanctuary laws analyzing new issues that have surfaced under the Trump Administration. In this context, the commentary argues that recent immigration federalism standoffs center around political divisions which fail to engage in principled evaluations of which level of government—federal, state, or local—should be the locus of immigration regulation.

---

1 See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* xix (2017) (“‘What we’ve witness,’ he [William Cronon] said, is part of a ‘well-planned and well-coordinated national campaign.’ (italics added). Presciently, he suggested that others look into the funding and activities of a then little-known organization that referred to itself as the American Legislative Exchange Council (ALEC) and kept its elected members to a secret from outsiders. It was producing hundreds of ‘model laws’ each year for Republican legislators to bring home to enact in their states—and nearly 30 percent were going through. Alongside laws to devastate labor unions were others that would rewrite tax codes, undo environmental protections, privatize many public resources, and require police to take action against undocumented immigrants?”); see also Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 *LOY. U. CHI. L.J.* 1, 48–49 (2007) (citing California legislature promoting the passing of Save Our State anti-immigrant laws across the country).

2 See Rose Cuison Villazor, *What Is a “Sanctuary,”* 61 *S.M.U. L. REV.* 133, 135 (2008) (stating that “the use of the word sanctuary conveyed a sense of moral and ethical obligation that churches and, to some extent, the local governments aimed to evoke”).

Immigration scholarship has extensively examined the federalism implications of past and recent state and local laws.<sup>3</sup> Recent immigration federalism scholarship has analyzed how Congress's devolution of immigration power to states has provided space for progressive state legislatures to substantially affect immigration law;<sup>4</sup> as well as state and local push back against the Trump Administration's immigration policies.<sup>5</sup>

My previous scholarship addressing immigration federalism was framed based upon immigration being under the exclusive authority of the federal government.<sup>6</sup> My previous articles posited that “[f]ederalism principles may be employed to simplify the system and safeguard immigrants’ rights.”<sup>7</sup>

The Trump Administration's policies, along with the resulting litigation, place immigration federalism in an unprecedented context. This commentary examines this new context. Part I examines the contours the Trump Administration's unprecedented immigration policies, executive actions, and the resulting impact on immigration federalism. Part II

---

<sup>3</sup> See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008) (discussing the blurring line between national and state governments with respect to immigration laws); Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333, 334 (2013) (examining the relationship between federal and local laws through the lens of Arizona's Senate Bill 1070); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 334, 345–52 (2011) (arguing the Immigration and Nationality Act precludes states from enacting immigration laws under the federal preemption doctrine); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 169–70 (2010) (theorizing that state and local anti-immigrant laws led to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship status); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 590–91, 599–600 (2009) (discussing preemption of state and local immigration laws under Supreme Court precedent); McKanders, *supra* note 1, at 48–49 (arguing that Congress must begin to explicitly preempt state immigration laws); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1376–77 (2006) (discussing whether the federal government may require state governments to cooperate in enforcement of immigration laws under the federal preemption doctrine); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 620–26 (2008) (discussing federal preemption and state immigration regulation); L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 491–97 (2008) (explaining that the power to regulate immigration has historically and constitutionally been entrusted to the federal government).

<sup>4</sup> See Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 476 (2018) (focusing on how states have achieved integrationist, pre-immigration aims rather than restricting immigration in light of emerging immigration federalism).

<sup>5</sup> See Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1708 (2018) (detailing the efforts of local politicians to enact “sanctuary” policies and denounce the Trump Administration's deportation efforts).

<sup>6</sup> McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, *supra* note 3, at 590–91; McKanders, *supra* note 1, at 48–49; see also Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 169–70 (2010) (summarizing previous articles, which analyzed immigration as a federally preempted area of law).

<sup>7</sup> McKanders, *supra* note 1, at 40.

examines state and local resistance to the Trump Administration's policies specifically examining recent sanctuary and anti-sanctuary state and local immigration laws. This Part utilizes the example of the intrastate conflicts in Tennessee to understand the contours of intrastate immigration and the Trump Administration's federalism battle. Part III examines the resulting litigation between the Trump Administration and sub-federal governments. The commentary concludes with an analysis of what the future holds for immigration federalism.

## I. IMMIGRATION FEDERALISM AND THE TRUMP ADMINISTRATION

The Trump Administration has taken unprecedented unilateral executive actions to regulate immigration. The Administration's unilateral actions have bypassed Congress; reinterpreted longstanding provisions of the Immigration and Nationality Act; and attempted to overturn longstanding Board of Immigration Appeals and federal court precedent. To justify the changes, the Administration has employed the doctrines of sovereignty and national security, which underlie the executive branch's authority over immigration.

The federal government's authority over immigration is derived from multiple places. While there is no specific provision in the Constitution that gives the federal government exclusive jurisdiction over immigration, Article I, Section 8, Clause 4 of the Constitution provides that Congress shall create a uniform rule of naturalization.<sup>8</sup> Pursuant to this clause, Congress enacted the Immigration and Nationality Act of 1965 (the "INA").<sup>9</sup>

The Trump Administration has relied on the plenary powers doctrine to support its broad non-legislative changes to immigration law. The plenary powers doctrine was first articulated in the 1889 Supreme Court case, *Chae Chan Ping v. United States*, which challenged the Chinese Exclusion Act.<sup>10</sup> In *Chae Chan Ping*, the Supreme Court upheld the Exclusion Act, even though it contained a discriminatory animus in deference to the federal government's sweeping powers over immigration.<sup>11</sup>

---

<sup>8</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>9</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101, 1151–1157, 1181–1182, 1201, 1254–1255, 1259, 1322, 1351 (2012)).

<sup>10</sup> *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

<sup>11</sup> *Id.* at 603–04 (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than over the admission of aliens.” (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); Chris Nwachukwu Okeke & James A.R. Nafzinger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 544 (2006) (stating that “[a] cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630 (1997) (“[T]he federal government has enjoyed a virtual carte blanche on immigration matters.”).

The plenary powers doctrine is derived from a sovereign's inherent authority to regulate migration and exclude migrants from its borders.<sup>12</sup> The Supreme Court has held that the federal government's power to control immigration is inherent in the nation's sovereignty.<sup>13</sup>

As a corollary to sovereignty, the Trump Administration has also invoked national security as a grounds for its broad authority to regulate immigration.<sup>14</sup> In the recent Supreme Court case, *Trump v. Hawaii*, the Court refused to examine the President's discriminatory animus as a motivation for the travel ban where he invoked national security as a grounds for instituting a ban on the immigration of individuals from Muslim majority countries.<sup>15</sup>

The invocation of sovereignty and national security has permitted the Administration to institute sweeping reforms, including the 2017 travel ban,<sup>16</sup> the attempt to change the procedures for applying for asylum,<sup>17</sup> and, most relevant to this Article, the attempt to curtail the ways in which states and localities regulate immigrants within their jurisdiction.

In response to the Trump Administration's immigration policies, several states and localities have passed sanctuary laws, resolutions, and policies.<sup>18</sup> In passing sanctuary laws, states have relied upon their Tenth Amendment police powers to exercise control over the health, safety, and welfare of individuals including immigrants within their jurisdiction.<sup>19</sup>

---

<sup>12</sup> See BAS SCHOTEL, ON THE RIGHT OF EXCLUSION: LAW, ETHICS, AND IMMIGRATION POLICY 14 (2012) (defining exclusion in the migratory context through the lens of exclusion of goods).

<sup>13</sup> See *Fiallo*, 430 U.S. at 792 ("Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments . . . ." (internal quotation marks omitted)); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)) (recognizing the inherent power of a sovereign nation to control its borders); see also *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("Drawing upon [its Article I, Section 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders."). See generally *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (pointing out that the Constitution vests the national government with absolute control over international relations); *Chae Chan Ping*, 130 U.S. at 581 (stating that the government's power to exclude aliens from the United States is not open to controversy).

<sup>14</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2405 (2018).

<sup>15</sup> *Id.* at 2421.

<sup>16</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

<sup>17</sup> *Aliens Subject to Bar on Entry Under Certain Presidential Proclamations, Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (codified at 8 C.F.R. § 208.13(c)(3)).

<sup>18</sup> Tim Henderson, *Cities, States Resist—and Assist—Immigration Crackdown in New Ways*, PEW CHARITABLE TR.: STATELINE (Aug. 3, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/03/cities-states-resist-and-assist-immigration-crackdown-in-new-ways>.

<sup>19</sup> See Laurel R. Boatright, Note, "Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1666 (2006) (stating that even though the federal government possesses the clearest authority to enforce immigration laws, states bear most of the costs of failed immigration policy).

## II. BLUE CITY RESISTANCE TO THE ADMINISTRATION AND RED STATE POLICIES

### A. Sanctuary as a Form of Resistance

In response to the Trump Administration's immigration policies, at the sub-federal level, states and localities have developed ways to protect immigrant communities. Some jurisdictions have actively sought to resist the Trump Administration's policies by utilizing traditional sanctuary policies while also developing policies to broadly address the impact of over policing on both immigrant and black and brown communities.<sup>20</sup>

Sanctuary policies have deep historical roots in protecting individuals from the state. The term sanctuary has become deeply contested and has no commonly accepted meaning.<sup>21</sup> The sanctuary, however, is rooted in the Judeo-Christian heritage.<sup>22</sup> In the Old Testament of the Bible, sanctuary was offered as a form of protection to individuals seeking protection.<sup>23</sup> Between 1982 and 1992, American churches popularized the tradition of sanctuary as a religious and political movement where approximately 500 congregations in the United States sheltered Central American refugees, fleeing political violence from Immigration and Naturalization Service authorities.<sup>24</sup> Churches were providing assistance to asylum applicants from Central America.<sup>25</sup>

In 2006, another sanctuary movement emerged in response to mass deportations and an anti-undocumented immigrant sentiment across the United States.<sup>26</sup> Sanctuary today still signifies a wide range of policies by federal, state, local governmental and non-governmental organizations to create a safe space or place for immigrant communities.<sup>27</sup> "Local police departments, for example, have adopted 'non-cooperation' or 'don't ask,

---

<sup>20</sup> See, e.g., Henderson, *supra* note 18 (explaining the ways localities have directed officers to arrest few individuals).

<sup>21</sup> See Lasch, *supra* note 5, at 1709 (2018) (noting that "[t]here is no definition of 'sanctuary' in federal law and there is a wide and diverse range of activities that might qualify as a 'sanctuary'" (quoting Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 169 n.12 (2016))). See generally Virgil Wiebe, *Immigration Federalism in Minnesota: What Does Sanctuary Mean in Practice?*, 13 U. ST. THOMAS L.J. 581 (2017) (discussing varying meanings of sanctuary as applied to the home, church, schools, cities, and states on the federal level).

<sup>22</sup> See KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 8 (4th ed. 2011).

<sup>23</sup> See Villazor, *supra* note 2, at 138–42.

<sup>24</sup> Karla McKanders, *The Subnational Response: Local Intervention in Immigration Policy and Enforcement*, in *COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS* 33–52 (Steven W. Bender & William F. Arrocha eds., 2017).

<sup>25</sup> Villazor, *supra* note 2, at 135.

<sup>26</sup> *Id.* at 144–47.

<sup>27</sup> *Id.* at 145.

don't tell' policies to further public safety concerns."<sup>28</sup> The goal is for the policies to facilitate immigrant communities' cooperation in reporting crimes without fear of deportation or being reported to Immigration and Customs Enforcement ("ICE").

The religious origins of sanctuary imply a certain level of ethics and compassion towards individuals who are displaced from their home countries. Contemporary uses of the word sanctuary cities and states have increasingly developed negative meanings.<sup>29</sup> Immigration scholar Rose Villazor, states: "[the] politically motivated disapproving use of the word sanctuary has unfairly conflated legitimate state and local policies that serve local interests or policies that comply with the Constitution or federal laws with legislation that is intended to supersede immigration law."<sup>30</sup>

The term sanctuary has also been used to denote states and localities that limit cooperation with the enforcement of federal immigration policies—specifically the detention of immigrants for federal immigration authorities.<sup>31</sup> The most recent data from the National Conference of State Legislatures provides that in 2017, at least twenty-five states considered sixty-six bills, down from one-hundred last year.<sup>32</sup> In 2018, three states—California, Iowa, and Tennessee—enacted laws related to sanctuary policies.<sup>33</sup>

### B. State and Local Intrastate Immigration Federalism Battles

Tennessee provides a case study to analyze sanctuary laws and policies in the context of intrastate city and state legislature conflicts in response to the Trump Administration's policies. From 2000–2017, Tennessee experienced a 118.7% increase in its foreign-born population.<sup>34</sup> This demographic change, coupled with the push by organizations like the American Legislative Exchange Council's agenda to pass immigration laws, has given rise to wide

<sup>28</sup> *Id.* at 148.

<sup>29</sup> See generally McKanders, *supra* note 24 (discussing the proliferation of state and local immigration laws and the challenges they face).

<sup>30</sup> Villazor, *supra* note 2, at 136.

<sup>31</sup> *What's a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx>.

<sup>32</sup> *Id.*

<sup>33</sup> *Report on State Immigration Laws | 2018*, NAT'L CONF. ST. LEGISLATURES, (Jan. 11, 2019), <http://www.ncsl.org/research/immigration/report-on-state-immigration-laws.aspx>.

<sup>34</sup> *Tennessee*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/state-profiles/state-demographics/TN> (last visited Mar. 1, 2019); see also *South Dakota Has the Fastest-Growing State Latino Population Since 2000*, PEW RES. CTR. (Sept. 6, 2016), [https://www.pewhispanic.org/2016/09/08/latino-population-growth-and-dispersion-has-slowed-since-the-onset-of-the-great-recession/ph\\_2016-09-08\\_geography-24/](https://www.pewhispanic.org/2016/09/08/latino-population-growth-and-dispersion-has-slowed-since-the-onset-of-the-great-recession/ph_2016-09-08_geography-24/) (finding that from 2000–2014, Tennessee experienced a 176% change in its Latino population); Renee Stepler & Mark Hugo Lopez, *Ranking the Latino Population in the States*, PEW RES. CTR. (Sept. 8, 2016), <https://www.pewhispanic.org/2016/09/08/4-ranking-the-latino-population-in-the-states/> (finding that 43% of the Latino population in Tennessee are foreign born).

variation amongst and within cities and counties in an attempt to pass sanctuary and exclusionary policies. The variation, in some instances, has been divided along a Republican state-Democratic city line.

Further, immigrant populations are moving to both the larger cities in Tennessee and also the more rural areas where there are factories, tourism (Smoky Mountains), and also farming industries.<sup>35</sup> Like other states, Tennessee resembles the rest of the country politically, where Republicans control rural and suburban areas and Democrats control urban areas.<sup>36</sup> The larger cities, Memphis and Nashville, have attempted to pass sanctuary immigration policies, to which the Republican majority Tennessee legislature has expressed opposition. Tennessee mirrors multiple states in the South where there is a battle between largely Republican state legislatures and Democratic cities over sanctuary policies.

Nashville is a demographically diverse city.<sup>37</sup> In 2017, Nashville's City Council considered adopting a sanctuary city ordinance. The proposed ordinance prohibited the county sheriff from responding to inquiries from federal immigration agencies on immigrants in the county's custody unless a warrant was issued.<sup>38</sup> Further, it only mandated cooperation when legally

---

<sup>35</sup> See *Tennessee*, NEW AM. ECON., <https://www.newamericaneconomy.org/locations/tennessee/> (last visited Mar. 1, 2019) (noting the occupations of immigrants in Tennessee ranged from agricultural workers (in rural areas) painters, construction, maids, packers, maintenance workers); see also Lizzy Alf, *Study: Immigrants Vital to Tennessee Economy*, TENNESSEAN (Feb. 21, 2017, 2:50 PM), <https://www.tennessean.com/story/money/2017/02/21/study-immigrants-vital-tennessee-economy/98200076/> (“The occupations with the largest share of foreign-born workers in Tennessee include painters; hand packers and packagers; agricultural workers; construction laborers; software developers; packaging and filling machine operators and tenders; food service managers; maids and housekeepers; physicians and surgeons; and carpenters.”).

<sup>36</sup> See Sam Stockard, *Democratic Mayors Strike Delicate Balance*, TENN. LEDGER, July 30, 2016, at 2, 6; Tennessee Star Staff, *Vanderbilt Poll: Nashville a Blue City in a Red State; Majority of City's Residents Disapprove of President Trump*, TENN. STAR (Apr. 1, 2017), <http://tennesseestar.com/2017/04/01/vanderbilt-poll-nashville-a-blue-city-in-a-red-state-majority-of-citys-residents-disapprove-of-president-trump/>.

<sup>37</sup> See *QuickFacts: Nashville-Davidson (Balance), Tennessee; Davidson County, Tennessee*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/nashvilledavidsonbalancetennessee,davidsoncountytennessee/PST045218> (last visited Mar. 1, 2019) (stating demographic makeup of the City of Nashville is White alone 63.1%; Black or African American alone 27.8%; American Indian and Alaska Native alone 0.3%; Asian alone 3.6%; Hispanic or Latino 10.4%; and White alone, not Hispanic or Latino 55.6%); see also Mary Hance, *11 Things You Should Know About Nashville's Diversity: Nashville Is More Culturally Rich Than You Might Think*, TENNESSEAN (Sept. 30, 2017, 10:00 AM) <https://www.tennessean.com/story/life/shopping/ms-cheap/2017/09/30/11-things-you-should-know-nashvilles-diversity/699228001/> (last updated Oct. 2, 2017, 4:19 PM) (citing Mayor Megan Barry's office and Nashville Culture Festival officials).

<sup>38</sup> Nashville, Tenn., Ordinance No. BL2017-739, § 11.34.020 (introduced June 6, 2017 and withdrawn July 6, 2017), [https://www.nashville.gov/mc/ordinances/term\\_2015\\_2019/bl2017\\_739.htm](https://www.nashville.gov/mc/ordinances/term_2015_2019/bl2017_739.htm); see also Cari Wade Gervin, *Legislators Vow Battle over Metro Ordinance*, NASHVILLE POST (June 22, 2017), <https://www.nashvillepost.com/politics/metro-government/article/20865568/legislators-vow-battle-over-metro-ordinance>.



required<sup>39</sup> and prohibited law enforcement from inquiring into an individual's immigration status.<sup>40</sup>

Like most sanctuary policies, the underlying premise of the ordinance was to encourage “cooperation of immigrant residents, and trust between communities and public agencies, [which] is critical to fulfilling the mission and duties of the city; and trust between the immigrant community and local law enforcement [which] is critical to promoting public safety for our entire city.”<sup>41</sup>

The Nashville city ordinance did not pass.<sup>42</sup> Former Tennessee Republican Congresswoman Diane Black critiqued the ordinance stating that “[i]t’s time for [Nashville] Mayor Barry to stop borrowing liberal policies from California and New York and start putting the safety and security of Tennessee families first.”<sup>43</sup>

Diane Black’s response highlights the politically polarized manner in which sanctuary policies are evaluated and considered. There is no inquiry into whether states and localities are properly exercising their Tenth Amendment police powers or whether states and localities are usurping federal authority in regulating immigrants within its borders.

Another city in Tennessee, Knoxville, has a county and a city government.<sup>44</sup> The city and county governments are diametrically opposed in relation to sub-federal immigration regulation. In 2017, approximately

---

<sup>39</sup> Nashville, Tenn., Ordinance No. BL2017-739, § 11.34.020 (introduced June 6, 2017 and withdrawn July 6, 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Jonquil Rose Newland, *Sanctuary City-Like Ordinance Advanced by Metro Council*, NEWS CHANNEL 5 NASHVILLE (June 20, 2017, 10:36 PM), <https://www.newschannel5.com/news/sanctuary-city-like-ordinance-passed-by-metro-council> (last updated June 21, 2017, 5:45 AM).

<sup>44</sup> See Joey Garrison, *Mayors Remain Source of Strength for Tennessee Democrats*, TENNESSEAN (July 22, 2016, 11:59 AM), <https://www.tennessean.com/story/news/politics/2016/07/22/mayors-remain-source-strength-tennessee-democrats/87135326/> (last updated July 24, 2016, 7:25 AM) (“As the state has reddened politically, mayors of Nashville, Memphis, Chattanooga and Knoxville—all Democrats—have become the strength of the party and a bench as its looks for viable candidates for governor and U.S. Senate. In recent years, party leaders have routinely pointed to the crop of mayors as the centerpiece of a strategy for Democrats to make a comeback.”); see also Michael Collins, *Tennessee Politics: State Increasingly Split Along Urban-Rural Lines*, TENNESSEAN (Nov. 4, 2016, 6:02 AM), <https://www.tennessean.com/story/news/politics/2016/11/04/tennessee-politics-state-increasingly-split-along-urban-rural-lines/93232774/> (last updated Nov. 4, 2016, 11:06 AM); Tyler Whetstone, *Five Things Learned from Knox County Election*, KNOX NEWS (Nov. 7, 2018, 5:00 AM), <https://www.knoxnews.com/story/news/politics/elections/2018/11/07/five-things-learned-knox-county-election/1910687002/> (last updated Nov. 7, 2018, 11:59 AM) (confirming that the Republican party in 2018 still maintains control over Knox County and stating that “[i]n this year’s election, as in other recent electoral contests, the political views of Tennesseans are shaped not just by party and ideology but also by geography”); Zachsearcy, *A Heat Map of Knox County’s 2016 Election Results by Precinct*, REDDIT KNOXVILLE (Nov. 11, 2016, 9:55 PM), [https://www.reddit.com/r/Knoxville/comments/5ciilw/a\\_heat\\_map\\_of\\_knox\\_countys\\_2016\\_election\\_results/](https://www.reddit.com/r/Knoxville/comments/5ciilw/a_heat_map_of_knox_countys_2016_election_results/) (confirming Republican county and Democrat city).

187,347 people resided in the City of Knoxville and 461,860 in the surrounding Knox County.<sup>45</sup> In 2013, the Knox County Sheriff vowed he “will continue to enforce these federal immigration violations with or without the help of U.S. Immigration and Customs Enforcement (ICE). If need be, I will stack these violators like cordwood in the Knox County Jail until the appropriate federal agency responds.”<sup>46</sup>

The Knox County Sheriff’s rhetoric mirrors polarizing statements across the country. The rhetoric is often based in fear. Americans are told that immigrants are taking their jobs, using up tax money, raising crime rates, and are an affront to cultural norms.<sup>47</sup> The Knox County Sheriff’s comments exemplify a common phenomenon when it comes to the debate on immigration reform: the objectification of immigrants. The Knox County Sheriff’s comments led to the 2017 implementation of Knox County and federal government cooperation in the apprehension and detention of immigrants—called 287(g) programs.<sup>48</sup> Knox County is the only local government in the State of Tennessee with this type of enforcement agreement.

Knox County’s policies conflict with the Mayor of the City of Knoxville who declared: “While we are not a sanctuary city we are and will remain a welcoming city—welcoming city to people of all races, ages, genders, ethnicities, nationalities and religions.”<sup>49</sup>

---

<sup>45</sup> *QuickFacts: Knoxville City, Tennessee*, U.S. CENSUS BUREAU (July 1, 2017), <https://www.census.gov/quickfacts/knoxvillecitytennessee>; *QuickFacts: Knox County, Tennessee*, U.S. CENSUS BUREAU (July 1, 2017), <https://www.census.gov/quickfacts/knoxcountytennessee>.

<sup>46</sup> Hedy Weinberg, *ACLU Warns Knox County Sheriff Acting upon His Statements Would Violate Law*, ACLU TENN. (Aug. 28, 2013), <http://www.aclu-tn.org/aclu-warns-knox-county-sheriff-acting-upon-statements-violate-law/>.

<sup>47</sup> Ted Brader, Nicholas A. Valentino, & Elizabeth Suhay, *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959, 959 (2008).

<sup>48</sup> See Michael Crowe, *Knox Co. Sheriff Approved for ICE Partnership; Only Agency in TN*, WBIR.COM (June 29, 2017, 8:46 PM), <https://www.wbir.com/article/news/local/knox-co-sheriff-approved-for-ice-partnership-only-agency-in-tn/51-453026435> (confirming Knox County Sheriff entering into 287(g) agreement program with federal government in 2017 and stating that “Jones [Knox County Sheriff] drew criticism in 2013, after the first application was denied, for saying he would ‘stack these violators like cordwood in the Knox County Jail until the appropriate federal agency respond’”); Tyler Whetstone, *Immigrant Rights Group to Deliver Hundreds of Letters Against ICE Partnership*, KNOX NEWS (Apr. 4, 2019, 9:37 PM), <https://www.knoxnews.com/story/news/politics/2019/04/04/immigrant-rights-group-deliver-hundreds-letters-opposing-287-g-ice-knox-county-sheriff/3345402002/> (last updated Apr. 5, 2019, 3:03 PM) (stating “Former Knox County Sheriff Jimmy ‘J.J.’ Jones signed the two-year 287(g) agreement in June 2017”).

<sup>49</sup> Tyler Whetstone, *Knoxville Mayor: Keep Hearts Open to Immigrants*, KNOX NEWS (Jan. 31, 2017, 8:47 PM), <https://www.knoxnews.com/story/news/local/2017/01/31/knoxville-mayor-keep-hearts-open-immigrants/97290414/> (last updated Jan. 31, 2017, 9:47 PM).

Knoxville's mayor reiterated the police department's longstanding policy to not inquire into a person's immigration status.<sup>50</sup> Like many police departments across the country, not inquiring into a person's immigration status promotes people "feel[ing] comfortable calling the police department if they need help."<sup>51</sup>

In the other large metropolitan area in Tennessee, Memphis, the mayor made an informal declaration that the City would be welcoming to immigrants.<sup>52</sup> In support of this declaration, the spokesperson for the Memphis Police stated that the police would have little interaction with ICE agents.<sup>53</sup> Memphis ultimately did not pass a sanctuary ordinance.<sup>54</sup>

Even though no sanctuary laws were passed in cities and municipalities throughout the State of Tennessee, in 2017 the majority Republican state legislature proposed and enacted an anti-sanctuary jurisdiction law.<sup>55</sup> The law was in response to the proposed Nashville city ordinance. The legislature believed that Nashville's proposed ordinance exposed how a local government could circumvent Tennessee's 2009 anti-sanctuary law.<sup>56</sup> "Proponents of the measure, including state Sen. Mark Green—the bill's sponsor—and [former] U.S. Rep. Diane Black, who is seeking the GOP nomination for governor, also tried to pressure the governor. They argued the legislation is necessary in order to ensure there are no sanctuary cities in Tennessee."<sup>57</sup>

In May 2018, Tennessee Governor Bill Haslam allowed the anti-sanctuary law bill to become law without his signature.<sup>58</sup> The law went into effect on January 1, 2019.<sup>59</sup> The main provision of the law prohibits state and local governmental entities and officials from adopting sanctuary policies. If a city or local government adopts a sanctuary policy, the local entity is ineligible for state funding until the policy is repealed.<sup>60</sup> The law

---

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Ryan Poe, *What Tennessee's New Sanctuary Cities Ban Means to Shelby County*, COM. APPEAL (May 21, 2018, 11:14 AM), <https://www.commercialappeal.com/story/news/government/county/2018/05/21/what-tennessees-new-sanctuary-cities-ban-means-shelby-county/628741002/> (last updated May 21, 2018, 5:57 PM).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (enacted).

<sup>56</sup> Joel Elbert, *Gov. Bill Haslam to Allow Measure Banning Sanctuary Cities, Ordering ICE Compliance to Become Law Without Signature*, TENNESSEAN (May 21, 2018, 10:23 AM), <https://www.tennessean.com/story/news/politics/2018/05/21/gov-bill-haslam-allow-measure-banning-sanctuary-cities-ordering-ice-compliance-become-law-without-si/565769002/> (last updated May 21, 2018, 2:37 PM).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Daniel Connolly, *A Tennessee Immigration Law Goes into Effect Jan. 1 and Could Change Shelby County Policy*, COMMERCIAL APPEAL (Dec. 27, 2018, 6:00 AM), <https://www.commercialappeal.com/story/news/2018/12/27/tennesse-sanctuary-city-bill-shelby-county/2342891002/>.

<sup>60</sup> TENN. CODE ANN. §§ 4-42-101–104 (2019).

also requires all law enforcement officers to inquire into a person's immigration status and punishes local governments if their law enforcement agencies adopt, formally or informally, policies or practices that limit entanglement with federal immigration enforcement.<sup>61</sup> It permits law enforcement agencies to enter into 287(g) memorandums of agreement with federal officials concerning enforcement of federal immigration laws.<sup>62</sup>

Tennessee's anti-sanctuary law requires the state courts to evaluate violations of the law, which may require state courts to engage in an analysis of immigration law.<sup>63</sup> The law requires courts to assess and interpret provisions of the Immigration and Nationality Act.<sup>64</sup> Specifically, when courts assess violations of the law, the courts run the risk of beginning to interpret whether an individual is lawfully present in the United States. An individual's immigration status is a complex area of immigration law for which Congress created a comprehensive administrative immigration system.<sup>65</sup>

The pattern in Tennessee follows a similar trend across the United States. The trend has been for urban cities or Democrat dominated legislatures to pass sanctuary laws while rural areas and Republican dominated legislatures are passing exclusionary immigration laws.<sup>66</sup> Certainly, the intrastate dynamics between the sanctuary friendly cities and the immigrant adverse state legislature in Tennessee demonstrate this exact phenomenon.

---

61 § 4-42-102.

62 § 7-68-105.

63 § 4-42-104.

64 *Id.*

65 "The Immigration and Nationality Act of 1952 . . . rivals the tax code in the level of detail, confusion, and absurd consequences produced by years of layering on provisions without systematically reviewing their results." AM. IMMIGRATION COUNCIL, COMPREHENSIVE IMMIGRATION REFORM: A PRIMER 1 (2009), <https://www.americanimmigrationcouncil.org/research/comprehensive-immigration-reform-primer>; see also *U.S. Immigration Law: The Big Picture*, NOLO, <http://www.nolo.com/legal-encyclopedia/us-immigration-law-the-big-picture> (last visited Mar. 1, 2019) (attesting that immigration law is "[w]idely considered more complex than the tax code").

66 See Tim Henderson, *Cities, States Resist—and Assist—Immigration Crackdown in New Ways*, PEW (Aug. 3, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/03/cities-states-resist-and-assist-immigration-crackdown-in-new-ways>.

### III. COURT BATTLES AND IMPLICATIONS OF CONTINUED SUB-FEDERAL REGULATION

The sub-federal battle has generated federal litigation across the country.<sup>67</sup> The litigation has been between states and localities—highlighting the red state and blue city divide.<sup>68</sup> This divide has increased with the Trump Administration’s immigration policies and the January 25, 2017 Executive Order attempting to defund sanctuary states and cities.<sup>69</sup>

On January 25, 2017, President Donald Trump issued an Executive Order addressing immigration enforcement issues, including the use of state and local law enforcement.<sup>70</sup> The Executive Order acknowledged the need to “cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.”<sup>71</sup>

In addition, on May 22, 2017, the Attorney General issued a memo stating that sanctuary jurisdictions who willfully refuse to comply with Section 1373 of the INA are not eligible to receive federal grants administered by the Department of Justice or the Department of Homeland Security.<sup>72</sup> Section 1373 requires cooperation between the Department of Homeland Security and state and local entities. It specifically provides that federal, state, or local governments cannot restrict access to an individual’s immigration status.<sup>73</sup>

---

67 See, e.g., *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018) (seeking an injunction to prevent the application of certain of California’s sanctuary city policies as preempted by federal immigration law); *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. 2018) (denying motion for preliminary injunction); *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018) (challenging the Trump Administration’s anti-sanctuary city policies and alleging that the Administration is exercising unconstitutionally excessive power over immigration policy).

68 Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

69 See cases cited *infra* note 74.

70 See, e.g., *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); *Texas v. Travis Cty.*, 910 F.3d 809 (5th Cir. 2018).

71 Exec. Order No. 13,767, 82 Fed. Reg. 8793, at § (e) (Jan. 25, 2017).

72 Memorandum from Jefferson Sessions, Att’y Gen., U.S. Dep’t of Justice, on Implementation of Executive Order 13768 (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download>.

73 8 U.S.C. § 1373(a) (2012) (“Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”). Section 1373 has subsequently been held to be unconstitutional by *New York v. Department of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018) and *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018).

In response to the Trump Administration, in January 2019, at least 120 communities enacted sanctuary policies which limit assistance in the enforcement of federal immigration law and twenty-eight states have at least one jurisdiction that enacted a sanctuary policy in the last two years.<sup>74</sup> The Trump Administration has not been successful in state and local litigation challenging the Administration's memo attempting to defund sanctuary states, cities, and localities.<sup>75</sup> The United States District Courts in California, Chicago, and Philadelphia have ruled against the Administration's Executive Order.<sup>76</sup>

---

<sup>74</sup> *The Success of Sanctuary Under Trump*, IMMIGRANT LEGAL RESOURCE CTR. (Jan. 21, 2019), <https://www.ilrc.org/success-sanctuary-under-trump>.

<sup>75</sup> *Id.* On March 29, 2017, the City of Seattle commenced a lawsuit challenging President Trump's Executive Order 13768. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017). The Executive Order denies federal funding to cities found to be in violation of 8 U.S.C. § 1373. A city found to be in violation is labeled a "sanctuary city." The City requested that the court designate Seattle as in compliance with Section 1373 and further sought a declaration from the court that the law was in violation of the Tenth Amendment and the Spending Clause. In April, a nationwide preliminary injunction was instituted against the Executive Order. On October 30, the parties filed a joint motion to stay proceedings until the resolution of *County of Santa Clara v. Trump* in the Ninth Circuit, and this motion was granted on October 31, 2017.

In *City of West Palm Beach v. Sessions*, No. 9:18-CV-80131-DMM (S.D. Fla. Feb. 6, 2018), the Department of Justice threatened to withhold federal Byrne JAG funding from the City of West Palm Beach (similar to the City of Philadelphia case) for ostensibly failing to comply with 8 U.S.C. § 1373. The federal government claimed that West Palm may be out of compliance and requested additional documentation; however, the City countered that they were in compliance with the original requirements and the additional DOJ-imposed requirements violated the Spending Clause. Further, the City argued that it was in compliance with federal law and was not a sanctuary city. The parties entered into mediation and it was decided that the city was in compliance with federal law. City officials were encouraged in a memo to share any and all requested information, including citizenship and immigration status, with federal authorities and the city will retain its Byrne JAG federal funding. The case was closed on March 29, 2018. The settlement agreement, unfortunately, is not publicly available.

<sup>76</sup> In *City of Richmond v. Trump*, No. 17-CV-01535-WHO, 2017 WL 3605216, (N.D. Cal. Aug. 21, 2017), the City of Richmond in California brought suit against the federal government challenging President Trump's Executive Order 13768 regarding immigration funding and the threat to withhold it from "sanctuary jurisdictions." The City argued that the order was unconstitutional because it violated the Separation of Powers and Spending Clauses and also violated the Tenth Amendment by forcing cities to choose between losing federal funding and upholding their own laws. The defendants replied that the plaintiffs have not demonstrated any concrete harm because no action had been initiated against the City of Richmond. Judge Orrick, who is currently handing a number of related cases, invited Richmond to file an amicus brief in the Santa Clara/San Francisco litigation. The city chose to do so and this case was dismissed on August 21, 2017. If the city is targeted in the future, it could bring a case at that time.

In *City & County of San Francisco v. Trump*, No. 4:17-CV-00485-DMR, 2017 WL 412999 (N.D. Cal. Jan. 31, 2017) and *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017), the district court held that President Trump's executive order was unconstitutional and on April 25, 2018, issued a nationwide injunction enjoining defendants from enforcing section 9(a) of the executive order. The case is ongoing. In a 2-1 decision, the Court of Appeals held that the District Court properly granted summary judgment to the counties because the Executive Order violated Separation of Powers. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018). However, the court held that the nationwide injunction was overly broad and limited it to California. *Id.* The court remanded to the district court. *Id.*

In *City of Philadelphia v. Trump*, Philadelphia challenged the Attorney General's memo. The City of Philadelphia received Byrne Justice Assistance Grants ("JAG") Program funding which would be defunded under the Attorney General's memo.<sup>77</sup> Even though the city of Philadelphia is not officially a sanctuary jurisdiction, the City developed policies to establish trust with immigrant communities to encourage the reporting of crimes.<sup>78</sup> In 2017, the Department of Justice added additional criteria for receipt of Byrne funding in an attempt to defund sanctuary jurisdictions. Specifically, the Department of Justice provided that in order to receive Byrne funding a city had to: (1) allow federal immigration agents to access the city's detention facilities; (2) provide the Department of Homeland Security at least forty-eight hours advance notice of when an immigrant would be released from the city's custody; and (3) certify that the city is in compliance with 8 U.S.C. § 1373.<sup>79</sup>

The City of Philadelphia argued that the new conditions placed on the Byrne funding "commandeer[ed] City officials into the enforcement of federal immigration law in violation of the Tenth Amendment."<sup>80</sup> The City sought, and the district court granted, declaratory and injunctive relief.<sup>81</sup>

Significantly, the District Court found that Philadelphia's policies were adopted in good faith to protect individual civil rights.<sup>82</sup> The Third Circuit stated: "[t]he City assumes great risk if it violates individuals' civil rights, which would, inter alia, subject the City to endless litigation and very expensive damage claims for violating civil rights of prisoners."<sup>83</sup> Thus, the court also held that even if the funding conditions were valid, Philadelphia was in compliance or substantial compliance with the conditions.<sup>84</sup>

In addition to the Administration's attempt to defund states and localities, the intrastate battles have also spurred a barrage of lawsuits. Tennessee enacted its law after a federal district court in *City of El Cenizo v. Texas* upheld Texas's 2017 anti-sanctuary law.<sup>85</sup> Texas's anti-sanctuary law similarly permitted local law enforcement officers to question the immigration status of people they detain or arrest.<sup>86</sup> Texas, like Tennessee, is another red state,

---

<sup>77</sup> *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018).

<sup>78</sup> *Id.* at 297.

<sup>79</sup> *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 595 (E.D. Pa. 2017).

<sup>80</sup> *Id.* at 591.

<sup>81</sup> 309 F. Supp. 3d at 344–45.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 316.

<sup>84</sup> *Id.*

<sup>85</sup> 890 F.3d 164, 173 (5th Cir. 2018).

<sup>86</sup> Henderson, *supra* note 18.

blue city jurisdiction where multiple cities—Houston,<sup>87</sup> Austin,<sup>88</sup> and Dallas<sup>89</sup>—proposed and enforced sanctuary laws, resolutions, and policies.

In *City of El Cenizo v. Texas*, cities and localities filed a lawsuit challenging the State’s law.<sup>90</sup> The Texas law prohibited local authorities from limiting their cooperation with federal immigration enforcement, and required local officers to comply with ICE detainer requests for immigrants in custody.<sup>91</sup> The complaint alleged multiple constitutional violations including that the Texas law was preempted by federal immigration law.<sup>92</sup>

The Texas law also banned state and local entities from prohibiting or preventing local entities from inquiring into the immigration status of lawfully detained individuals.<sup>93</sup> The law, like the Tennessee law, established a system whereby the Texas Attorney General enforces the law through the creation of a complaint structure whereby private citizens could file complaints alleging violations of the law.<sup>94</sup> Upon determining that such a complaint is valid, the Attorney General may file suit in state court to enforce

<sup>87</sup> Harris County in which Houston is located the Harris County Sheriff’s Office confirms it does not require its employees to ask the residency of anyone detained or arrested. See Julián Aguilar, *Travis County Sheriff Announces New “Sanctuary” Policy*, TEX. TRIB. (Jan. 20, 2017, 5:00 PM), <https://www.texastribune.org/2017/01/20/travis-county-sheriff-announces-new-sanctuary-poli/> (“A Friday announcement by newly-elected Travis County Sheriff Sally Hernandez that her office would reduce cooperation with federal immigration authorities . . .”); Melissa Correa, *Sanctuary Sites: Can You Find Them in Texas?*, KHOU 11 (Apr. 15, 2019), <https://www.khou.com/article/news/sanctuary-cities-can-you-find-them-in-texas/285-ca1811f2-a32e-40cf-a15b-2dbb9670a25f> (“The Houston Police Department confirms it’s complying with SB-4, giving officers discretion to ask a person’s legal status. The Harris County Sheriff’s Office confirms it does not require its employees to ask the residency of anyone detained or arrested.”); Edwin Rios, *The First Big Fight Over Sanctuary Cities Pits a Latina Sheriff Against Texas’ Governor*, MOTHERJONES (Jan. 27, 2017), <https://www.motherjones.com/politics/2017/01/texas-greg-abbott-austin-sanctuary-city-immigration/>.

<sup>88</sup> Austin, Tex., Resolution 20180614-073 (June 14, 2018); John Barned-Smith & Lomi Kriel, *Sanctuary Cities Bill Ire of Local Law Enforcement*, *Civil Rights Advocates*, CHRON (May 5, 2017, 11:59 AM), <https://www.chron.com/news/houston-texas/houston/article/Sanctuary-cities-bill-draws-ire-of-local-law-11122854.php> (“Travis County Sheriff Sally Hernandez, who announced that she would stop cooperating with most U.S. Immigration and Customs Enforcement requests to hold immigrants while federal authorities investigate their status.”).

<sup>89</sup> Memorandum from City Manager T.C. Broadnax to Mayor and Members of Dallas City Council (Sept. 21, 2018), [https://dallascityhall.com/government/citymanager/Documents/FY17-18%20Memos/Welcoming-Plan-Recommendations-and-Resolution\\_Memo\\_092118.pdf](https://dallascityhall.com/government/citymanager/Documents/FY17-18%20Memos/Welcoming-Plan-Recommendations-and-Resolution_Memo_092118.pdf); Stephen Young, *Dallas County Passes Resolution Supporting Undocumented Residents*, DALL. OBSERVER (Feb. 8, 2017, 7:25 AM), <https://www.dallasobserver.com/news/dallas-county-passes-resolution-supporting-undocumented-residents-9164779>; Brandi Grissom & Dianne Solís, *Abbott Targets Sanctuary Cities, Dallas Sheriff’s New Policy*, DALL. NEWS (Oct. 26, 2015), <https://www.dallasnews.com/news/local-politics/2015/10/26/abbott-targets-sanctuary-cities-dallas-sheriffs-new-policy>.

<sup>90</sup> 890 F.3d at 173.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 174.

<sup>94</sup> *Id.* at 175 (citing TEX. GOV’T CODE § 752.055(a) (2017)).



the law.<sup>95</sup> State and local officials' violations of the law would result in their removal from office.<sup>96</sup>

The Texas law was the subject of an appeal to the Fifth Circuit. In the case, the Circuit Court examined whether the INA preempted Texas anti-sanctuary law. The Fifth Circuit's preemption analysis evaluated both field and conflict preemption doctrines and relied upon the Supreme Court's federal preemption cases *Arizona v. United States*<sup>97</sup> and *De Canas v. Bica*.<sup>98</sup> The court held that Congress had not manifested a clear and manifest purpose to oust state power to regulate immigration.<sup>99</sup> Accordingly, there was no field preemption.<sup>100</sup> The court found that while the INA regulates *how* local entities cooperate in immigration enforcement, the Texas law only specified *whether* state and local governments can cooperate. The court also held that there was no conflict between the INA and the Texas law.<sup>101</sup>

In addition, the court found that no conflict preemption existed between the Texas law and immigration laws.<sup>102</sup> The court relied upon principles articulated in *Arizona v. United States*<sup>103</sup> and *Chamber of Commerce of United States v. Whiting*,<sup>104</sup> where the Supreme Court articulated that it is not the courts' job to engage in a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law."<sup>105</sup>

This case demonstrates an overall trend of federal courts construing state regulation of immigration broadly. The broad construction permits states to cooperate with the federal government in the enforcement of immigration laws. *City of El Cenizo* also demonstrates that when a state legislates cooperation there is little room for local governments, cities, and counties to carve out their own sanctuary policies.

---

<sup>95</sup> *Id.* (citing TEX. GOV'T CODE § 752.0565(b) (2017)).

<sup>96</sup> *Id.* (citing TEX. GOV'T CODE § 752.0565(c)).

<sup>97</sup> *Id.* at 176 (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

<sup>98</sup> *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 357 (1976)).

<sup>99</sup> *Id.* (citing *De Canas*, 424 U.S. at 357).

<sup>100</sup> *Id.* at 177–78 (first citing *Arizona*, 567 U.S. at 400–02 (defining the relevant field as "alien registration"); and then citing *De Canas*, 424 U.S. at 360 n.8 ("Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.")).

<sup>101</sup> *City of El Cenizo*, 890 F.3d at 178.

<sup>102</sup> *Id.* at 178 ("Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility. . . or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal citations and quotation marks omitted)).

<sup>103</sup> *Id.* at 179–80 (citing *Arizona*, 567 U.S. at 399, 411–15).

<sup>104</sup> *City of El Cenizo*, 890 F.3d at 179–80 (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011)).

<sup>105</sup> *Id.* at 180 (quoting *Whiting*, 563 U.S. at 607).

Even after the Texas ruling, in June 2018, the City of Austin passed a Freedom City initiative—intended to be different from sanctuary policies but addressing similar issues.<sup>106</sup> The three components of the policy are: “(1) To direct the Austin Police Department in ending ‘unnecessary arrests;’” “(2) To make sure the immigrant community members are aware of all their rights;” and “(3) To mend the trust/relationships between community members and law enforcement.”<sup>107</sup>

Resolution 73 charges the City of Austin to reduce racial disparities in arrests and eliminate the low-level arrests that the Austin Police Department doesn’t have to make in the first place. Arrests for low-level charges contribute to racial disparities in the Travis County Jail. Under SB 4, they are also a ticket to detention and deportation.

Resolution 74 directs the City of Austin to create policies that create protections for immigrant community members and their constitutional rights under SB 4, including requiring that police officers who ask about immigration status also inform people of their right to not answer. It also requires officers to complete a report explaining the encounter and the circumstances leading them to ask for immigration status.<sup>108</sup>

The resolution is crafted very broadly. It also addressed overall policing misconduct that operates at the intersection of race, class, and immigration status.

On February 27, 2019, the Albuquerque Bernalillo County Commission passed a non-discrimination resolution, similar to the city of Austin’s policy.<sup>109</sup> The Albuquerque resolution not only limits the information that can be shared with the Department of Homeland Security, it also broadly protects the following:

[S]ocial security number or individual tax identification number or lack of such numbers, an inmate’s custody release date, a person’s place and date of birth, a person’s status as a recipient of public assistance or as a crime victim, a person’s home or work address, a person’s employment information, a

<sup>106</sup> See Adam Edelman, *The Crackdown on Sanctuary Cities Gives Birth to ‘Freedom Cities,’* NBS NEWS (Sept. 15, 2018, 8:08 AM), <https://www.nbcnews.com/politics/immigration/crackdown-sanctuary-cities-gives-birth-freedom-cities-n909606> (stating new “freedom cities” include Madison, Wisconsin; Portland, Oregon; Ann Arbor, Michigan; Albany, California; Silver City, New Mexico, among others).

<sup>107</sup> Leslie Adami, *Councilman Casar Introduces Freedom City Policy Ahead of Thursday’s Meeting*, ABC: KVUE (June 12, 2018, 5:55 PM), <https://www.kvue.com/article/news/local/councilman-casar-introduces-freedom-city-policy-ahead-of-thursdays-meeting/269-563852479> (last updated June 12, 2018, 6:23 PM).

<sup>108</sup> Press Release, Grassroots Leadership, *As Austin’s Freedom City Policy Goes into Effect Today, Organizers Explain Why It Matters* (Nov. 1, 2018), <https://grassrootsleadership.org/releases/2018/11/austin-s-freedom-city-policy-goes-effect-today-organizers-explain-why-it-matters>.

<sup>109</sup> *BernCo Commission Approves Resolution to Strengthen Non-Discrimination Policies*, BERNALILLO (Feb. 27, 2019), <https://www.bernco.gov/District-2/> (follow “What’s Happening in District 2” hyperlink, then follow “District 2 News” hyperlink, then click the title of the article).

person's sexual orientation, gender identity, physical or mental disability, religion, or national origin.<sup>110</sup>

The goal of the policy is to “create new ways for city officials to comply legally with federal rules and state laws, while still protecting undocumented immigrants.”<sup>111</sup> So far there are no legal challenges to the Austin Freedom City Resolution. Other cities—Madison, Wisconsin; Portland, Oregon; Ann Arbor, Michigan; Albany, California; and Silver City, New Mexico—have passed similar resolutions and ordinances.<sup>112</sup> The issue will be whether the broad exercise of localities' powers to regulate individuals within their jurisdictions will prevent challenges to the immigration parts of the Austin Freedom City-like resolutions.

### CONCLUSION

The intrastate battles demonstrate how diverse political geographies create varied immigration policies within one state. More specifically the political battle lines have often been drawn between Republican states and Democrat cities within those states. Within this battle, Republican states are promoting the Trump Administration's restrictive immigration policies while cities attempt to protect immigrants within their communities.<sup>113</sup> Early immigration federalism scholarship focused on the contours of whether state or local action was preempted and which body (local, state, or federal) was the appropriate entity to regulate immigration. The legal landscape has changed to a politically charged one in which the influence of interest groups promoting ideological stances cannot be discounted. With this change, scholars must pay attention to how the red state and blue city political landscape influences the contour of immigration federalism.

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Edelman, *supra* note 106.

<sup>113</sup> Deborah M. Weissman et al., *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 119 (2018) (stating “[t]he diverse political geography of the United States, including divergent regional traditions, distinct cultures, and different histories, consigns immigrant rights to the realm of multiple interpretations, often undermining the opportunity for immigrants to claim rights”).

