

State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement

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Summary

While the power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government, the impact of alien migration—whether lawful or unlawful—is arguably felt most directly in the communities where aliens settle. State and local responses to unlawfully present aliens within their jurisdictions have varied considerably, particularly as to the role that state and local police should play in enforcing federal immigration law. Some states, cities, and other municipalities have sought to play an active role in immigration enforcement efforts. However, others have been unwilling to assist the federal government in enforcing measures that distinguish between residents with legal immigration status and those who lack authorization under federal law to be present in the United States. In some circumstances, these jurisdictions have actively opposed federal immigration authorities' efforts to identify and remove certain unlawfully present aliens within their jurisdictions.

Although state and local restrictions on cooperation with federal immigration enforcement efforts have existed for decades, there has reportedly been an upswing in the adoption of these measures in recent years. Moreover, the nature of these restrictions has evolved over time, particularly in response to recent federal immigration enforcement initiatives like Secure Communities (subsequently replaced by the Priority Enforcement Program), which enable federal authorities to more easily identify removable aliens in state or local custody. Entities that have adopted such policies are sometimes referred to as "sanctuary" jurisdictions, though there is not necessarily a consensus as to the meaning of this term or its application to a particular state or locality. Recent reports that an alien who shot and killed a woman, after being released by San Francisco authorities who had declined to honor an immigration detainer issued by federal authorities, have brought increased attention to state and local practices of declining to honor such detainers, as well as "sanctuary" policies more generally.

This report discusses legal issues related to state and local measures that limit law enforcement cooperation with federal immigration authorities. The report begins by providing a brief overview of the constitutional principles informing the relationship between federal immigration authorities and state and local jurisdictions, including the federal government's power to preempt state and local activities under the Supremacy Clause, and the Tenth Amendment's proscription against Congress directly "commandeering" the states to administer a federally enacted regulatory scheme.

The report then discusses various types of measures adopted or considered by states and localities to limit their participation in federal immigration enforcement efforts, including (1) limiting police investigations into the immigration status of persons with whom they come in contact; (2) declining to honor federal immigration authorities' requests that certain aliens be held until those authorities may assume custody; (3) shielding certain unlawfully present aliens from detection by federal immigration authorities; and (4) amending or applying state criminal laws so as to reduce or eliminate the immigration consequences that might result from an alien's criminal conviction. For discussion of legal issues raised by states and localities seeking to play an active role in enforcing federal immigration law, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by (name redacted) and (name redacted).

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Introduction

While the power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government,¹ the impact of alien migration—whether lawful or unlawful—is arguably felt most directly in the communities where aliens settle. State and local responses to unlawfully present aliens within their jurisdictions have varied considerably, particularly as to the role that state and local police should play in enforcing federal immigration law.

At one end of the spectrum, some states and localities have actively sought to deter unlawfully present aliens from settling within their jurisdictions, including by assisting federal immigration authorities in identifying and apprehending such aliens for purposes of removal. In some cases, this has involved state and local participation in federally coordinated immigration enforcement programs.² In recent years, some states and localities have attempted to play an even greater role in the area of immigration enforcement, in many cases due to perceptions that federal efforts have been inadequate. Some have adopted measures that criminally sanction conduct believed to facilitate the presence of unlawfully present aliens, and have also instructed police to actively work to detect such aliens as part of their regular duties. The adoption of such measures has waned considerably, however, in the aftermath of the 2012 Supreme Court ruling in *Arizona v. United States*, where the Court held that many of the provisions of one such enactment, Arizona's S.B. 1070, were facially preempted by federal immigration law.³

At the other end of the spectrum, some states and localities have been unwilling to assist the federal government's enforcement of measures that distinguish between those residents with legal immigration status and those who lack authorization under federal law to be present in the United States. In some instances, these jurisdictions have adopted measures that seek to thwart federal efforts to identify and apprehend unlawfully present aliens within the state or locality's jurisdiction.

¹ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972) (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (internal citations omitted); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens into the United States).

² Perhaps most notably, under §287(g) of the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) is authorized to enter written agreements with state and local jurisdictions that enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision. 8 U.S.C. §1357(g). For further discussion of state and local participation in the federal government's immigration enforcement efforts, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by (name redacted) and (name redacted), and CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

³ *Arizona v. United States*, 132 S.Ct. 2492 (2012). See also CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted), and CRS Legal Sidebar WSLG96, *Arizona v. United States: Some Immediate Takeaways*, by (name redacted).

While state and local restrictions on cooperation in federal immigration enforcement efforts have existed for decades, there has been an upswing in the adoption of these measures in recent years.⁴ Moreover, the nature of these restrictions has evolved over time, particularly in response to recent federal immigration enforcement initiatives like Secure Communities (subsequently replaced by the Priority Enforcement Program (PEP), as discussed below), which enable federal authorities to more easily identify potentially removable aliens in state or local custody.

This report discusses legal issues related to state and local measures limiting law enforcement cooperation with federal immigration authorities. It begins by providing a brief overview of constitutional principles informing the relationship between federal immigration authorities and state and local jurisdictions. The report then discusses various types of measures adopted or considered by states and localities to limit their participation with federal immigration enforcement efforts, including (1) limiting police investigations into the immigration status of persons with whom they come in contact; (2) declining to honor federal immigration authorities' requests that certain aliens be held until those authorities may assume custody; (3) shielding certain unlawfully present aliens from detection by federal immigration authorities; and (4) amending or applying state criminal laws so as to reduce or eliminate the immigration consequences that might result from an alien's criminal conviction.

Legal Background

Pursuant to its "broad, undoubted power over the subject of immigration and the status of aliens,"⁵ the federal government has established an "extensive and complex" set of rules governing the admission and removal of aliens, along with conditions for aliens' continued presence within the United States.⁶ These rules are primarily contained in the Immigration and Nationality Act of 1952, as amended (INA).⁷ The INA supplements these rules through an enforcement regime that contains criminal and civil provisions, which sometimes sanction similar

⁴ See National Council of State Legislatures, *2014 Immigration Report* (Jan. 2015), available at <http://www.ncsl.org/research/immigration/2014-immigration-report.aspx> (hereinafter "NCSL Immigration Report"); National Immigration Law Center, *Inclusive Policies Advance Dramatically in the States* (Oct. 2013), available at <http://www.nilc.org/document.html?id=963>; Federation for American Immigration Reform, *Sanctuary Policies Across the U.S.* (Oct. 2013) (identifying and providing links to various state and local enactments and policies restricting involvement in immigration enforcement activity), available at http://www.fairus.org/DocServer/amnesty_2013_debate/Sanctuary_Policies_Across_the_US_110513.pdf (hereinafter "FAIR Compilation of State and Local Restrictions"). See also Center for Immigration Studies, *Map: Sanctuary Cities, Counties and State* (July 2015) (interactive map identifying states, counties, and municipalities that limit the honoring of immigration detainee requests) (hereinafter "CIS Map of Jurisdictions which Restrict the Honoring of Immigration Detainees").

⁵ *Arizona*, 132 S. Ct. at 2497. See also *supra* footnote 1 (citing several Supreme Court cases recognizing exclusive federal power over immigration). Federal authority over immigration derives from multiple sources. The Constitution provides Congress with the authority "[t]o regulate Commerce with foreign Nations," and "[t]o establish a uniform Rule of Naturalization." U.S. CONST., Art. I, §8, cl. 3-4. Federal authority to regulate the admission and presence of aliens also derives from its authority over foreign affairs. See *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (discussing various constitutional provisions, as well as authority over foreign affairs, which may serve as a source for immigration regulation by the federal government); *Arizona*, 132 S. Ct. at 2498 (2012) (similar, and also stating that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws"); *Kleindienst*, 408 U.S. at 767 (discussing Congress's plenary authority to make rules for admission of aliens).

⁶ *Arizona*, 132 S.Ct. at 2497.

⁷ 8 U.S.C. §§1101, *et seq.*

conduct.⁸ The courts have consistently recognized that the removal of aliens from the United States for violating the terms of their admission or continued presence in the country is a civil action, rather than a criminal sanction, because the main purpose is not to punish wrongdoing but to end a continuing violation of the nation's immigration laws.⁹

While the federal government's authority over immigration is well established, the Supreme Court has recognized that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted" by the federal government's exclusive power over immigration.¹⁰ The Tenth Amendment provides that 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."¹¹ Among the powers reserved to the states are traditional "police powers" concerning the promotion and regulation of safety, health, welfare, and economic activity within the state's jurisdiction.¹² Pursuant to the exercise of these powers, states and municipalities have frequently enacted measures which, directly or indirectly, address aliens residing in their communities.¹³

The exercise of state police powers may be circumscribed by lawful assertions of federal authority. The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land."¹⁴ Accordingly, states and localities may be precluded from taking actions that are "preempted" by federal law, even if such actions are otherwise valid exercises of their police powers.¹⁵ An act of Congress may preempt state or local

⁸ For a brief discussion of immigration-related crimes, see CRS Legal Sidebar WSLG563, *An Overview of Immigration-Related Crimes*, by (name redacted).

⁹ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction.") (internal quotations and citations omitted); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.").

¹⁰ *De Canas v. Bica*, 424 U.S. at 355 (1976) (holding that state law regulating employment of unauthorized aliens was not preempted by federal law, in a case decided prior to the INA being amended to comprehensively regulate alien employment and expressly preempting most state sanctions upon unauthorized alien employment). *See also, e.g., Arizona*, 132 S. Ct. at 2507-2511 (while finding many provisions of state immigration enforcement law were preempted, rejecting facial preemption challenge to provision requiring police to verify immigration status of lawfully stopped persons who were suspected of unlawful status); *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (holding that federal law did not preempt a state measure that authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hire unauthorized aliens); *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054 (9th Cir. 2013) (upholding state law barring state courts from setting bail for unlawfully present aliens charged with certain felony offenses).

¹¹ U.S. CONST., amend. X.

¹² *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907) ("Decisions of this court ... recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people."); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true."). *See also Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power....").

¹³ *See supra* footnote 10 (citing illustrative cases where state or local measures addressing unlawfully present aliens were upheld against preemption challenges); NCSL Immigration Report, *supra* footnote 4 (discussing legislation enacted by states in 2013 concerning non-U.S. citizens).

¹⁴ U.S. CONST., art. VI, cl. 2.

¹⁵ Conversely, the federal government's exertion of its constitutional authority over a matter is permissible even if it (continued...)

action in one of three ways: (1) the statute expressly indicates its preemptive intent (express preemption); (2) Congress intended to wholly occupy the regulatory field, thereby implicitly precluding supplemental action by a state or local government in that area (field preemption); or (3) state or local action conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).¹⁶ Congressional intent is paramount in the analysis as to whether federal law preempts state or local activity. However, courts' preemption analysis generally begins with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹⁷

Acting pursuant to its authority over immigration, the federal government has expressly or impliedly preempted a range of state and local activities that potentially undermine or conflict with federal immigration enforcement policies. Of particular relevance to this report, pursuant to §434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193) and §642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208, Div. C), Congress has preempted state or municipal measures that bar the exchange of information relating to persons' immigration status with federal, state, or local authorities.

While the federal government's power to preempt activity in the area of immigration is extensive, there are constitutional limits to its power to influence state and local activity. Notably, it may not directly "commandeer" state or local governments into the service of federal immigration authorities.¹⁸ The anti-commandeering doctrine was most prominently defined by the Supreme

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targets activities that might also be regulated by a state under its traditional police powers. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. at 156 ("[W]hen the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."); *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.").

¹⁶ *Arizona*, 132 S. Ct. at 2500-01 (citing, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

¹⁷ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). See also *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (similar). However, in some recent cases, the Court did not deem a presumption against preemption to be applicable in the matter before it. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (holding that the presumption against preemption does not apply in Election Clause cases); *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) ("There is, however, one interpretive tool that is inapplicable [with respect to interstate compacts]: the presumption against pre-emption."); *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009) ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."). But see *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (applying the presumption with respect to the preemption of state laws governing domestic relations).

¹⁸ Judicial analysis of federal directives to the states has primarily centered on the permissibility of these requirements under the Tenth Amendment. However, such activities might arguably implicate other constitutional provisions, including the Guarantee Clause, which obligates the United States to "guarantee to every State in this Union a Republican Form of Government..." U.S. CONST., art. IV, §4. Traditionally, courts have viewed claims presented under the Guarantee Clause as raising non-justiciable political questions, but in *New York v. United States*, the Supreme Court expressly left open the possibility that "not all claims under the Guarantee Clause present non-justiciable political questions." 505 U.S. 144, 183-185 (1992) (also citing cases where the Court had rejected Guarantee Clause claims on non-justiciability grounds). Nonetheless, subsequent legal challenges to federal action that have been premised on the Guarantee Clause have proven unsuccessful. See, e.g., *Padavan v. United States*, 82 F.3d 23 (2nd Cir. 1996) (challenge by state officials to adequacy of federal immigration enforcement policies, which was premised on violation of the Guarantee Clause, deemed non-justiciable); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995) (same); *City of New* (continued...)

Court in the cases of *New York v. United States*¹⁹ and *Printz v. United States*.²⁰ The decisions were premised on the view that under the federalist system, the states are understood to be sovereign entities distinct from the federal government,²¹ and Congress cannot muddy this distinction by commandeering the state political branches to perform functions on the federal government's behalf.²² In *New York*, the Supreme Court ruled that the Tenth Amendment barred the federal government from directly compelling state legislatures to "enact and enforce a federal regulatory program" related to the disposal of low-level radioactive waste.²³ In *Printz*, the Court considered a Tenth Amendment challenge to an interim requirement under federal law that directed state and local police to conduct background checks on prospective handgun purchases. The Court ruled that the constitutional prohibition on the federal government commandeering states to administer a federal regulatory program was "categorical" in nature and, in addition to barring the commandeering of a state's legislature, also prevented Congress from "conscripting the State's officers directly."²⁴

However, not every requirement imposed by the federal government upon sub-federal government entities and officials necessarily violates the anti-commandeering principles identified in *Printz* and *New York*. A number of federal statutes provide that certain information collected by state entities must be reported to federal agencies.²⁵ The Court in *Printz* expressly declined to consider whether these requirements were constitutionally impermissible. Moreover, the Court distinguished reporting requirements from the case before it, which involved "the forced participation of the States ... in the actual administration of a federal program."²⁶

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York v. United States, 971 F. Supp. 789 (S.D.N.Y., 1997) (claim that federal law barring state and local restrictions on information-sharing with federal immigration authorities violated the Guarantee Clause claim was non-justiciable).

¹⁹ *New York v. United States*, 505 U.S. 144 (1992).

²⁰ *Printz v. United States*, 521 U.S. 898 (1997).

²¹ See *New York*, 505 at 155-160 (discussing division of sovereignty in the federalist system, and stating that although "[t]he actual scope of the Federal Government's authority with respect to the States has changed over the years ... the constitutional structure underlying and limiting that authority has not"); *Printz*, 521 U.S. at 518 ("It is incontestable that the Constitution established a system of 'dual sovereignty.'"). The Court identified this distinction as advancing multiple goals, including better ensuring political accountability by the federal and state governments and reducing the risk of tyranny that might result in the concentration of power with one sovereign. *New York*, 505 at 181-183; *Printz*, 521 at 920-921.

²² The Court has repeatedly recognized that the Supremacy Clause contemplates the enforceability of federal law in state court, and that the judicial power afforded under Article III of the Constitution permits federal courts, in appropriate circumstances, to order state officials to comply with federal laws. See, e.g., *New York*, 505 at 178-179 (discussing these cases and deeming them inapposite to the issue of whether Congress may command states to perform federal regulatory functions, as the "Constitution contains no analogous grant of authority to Congress" as is granted to the courts under Article III and the Supremacy Clause).

²³ 505 U.S. at 161.

²⁴ *Printz*, 521 U.S. at 933-934.

²⁵ See, e.g., 42 U.S.C. §5779 (providing that, when a missing child report is submitted to state or local law enforcement, the agency shall report the case to the National Crime Information Center of the Department of Justice). For discussion of various federal reporting requirements applicable to states, see Robert A. Mikos, *Can States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

²⁶ *Printz*, 521 U.S. at 918. See also *id.* at 936 (O'Connor, J., concurring) (describing the Court as having refrained "from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid"). For criticism of the distinction made by the *Printz* Court between reporting requirements and situations where the federal government directly compels states to administer federal regulatory programs, see generally Mikos, *supra* footnote 25.

Federal measures that impose direct requirements on state or municipal authorities appear most likely to withstand an anti-commandeering challenge if they (1) are not directed at a state's regulation of the activities of private parties;²⁷ and (2) apply to the activities of private parties as well as government actors. In *Reno v. Condon*, the Supreme Court unanimously rejected a Tenth Amendment challenge to the Driver's Privacy Protection Act (DPPA), which restricted states from disclosing or sharing a driver's personal information without the driver's consent, and also required the disclosure of some collected information.²⁸ The Court distinguished the DPPA from the federal enactments struck down in *New York* and *Printz*, because the DPPA sought to regulate states "as owners of databases" and did not "require the States in their sovereign capacity to regulate their own citizens ... [or] enact any laws or regulations ... [or] require state officials to assist in the enforcement of federal statutes regulating private individuals."²⁹ The Court also viewed it as significant that the DPPA's requirements relating to information-sharing covered private entities as well as state governments, though it declined to definitively rule upon whether or not the federal government may directly regulate state conduct only through laws of general applicability.³⁰

While the federal government may be constitutionally barred from conscripting state authorities into assisting in the administration of a federal program, other means may be available to influence states to adopt favored policies. For example, when Congress acts in an area in which it may preempt state activity in its entirety, it might impose "preconditions to continued state regulation" in the otherwise preempted field.³¹ Congress may also permissibly condition the receipt of federal funds on state compliance with federal policy preferences. Conditioning the receipt of federal funding is generally permissible so long as the conditions "bear some relationship to the purpose of the federal spending,"³² and the conditioned funds are not so

²⁷ The degree to which the federal law intrudes into a state's sovereignty might also be a factor. *See supra* footnote 26 (citing Court's distinction between federal laws that impose reporting requirements upon states and those that directly compel states to administer federal programs); *City of New York*, 179 F.3d 29 (2nd Cir. 1999) (in case decided after *Printz* and *New York*, dismissing Tenth Amendment challenge to federal law proscribing state or local restrictions on sharing immigration status information with the federal immigration authorities, and suggesting analysis might be different if affected state restriction covered confidential information generally, rather than the sharing of a particular type of information with a particular federal entity).

²⁸ *Reno v. Condon*, 528 U.S. 141 (2000).

²⁹ *Id.* at 151. The *Condon* Court also stated that while state compliance with the DPPA would require "time and effort" by state officials, this did not lead to the measure being incompatible with anti-commandeering principles. *Id.* at 150. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace [situation] that presents no constitutional defect." *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-515 (1988) (upholding federal prohibition upon states' issuance of unregistered bonds in the face of a Tenth Amendment challenge)). *See also* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (extension of overtime and minimum wage requirements of the Fair Labor Standards Act to public transit company authority did not violate Tenth Amendment).

³⁰ *Condon*, 528 U.S. at 151. For further discussion of the evolution of Supreme Court jurisprudence in this area since the 1970s, see CONGRESSIONAL RESEARCH SERVICE, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION (CONSTITUTION ANNOTATED), *Federal Regulations Affecting State Activities and Instrumentalities*, available at <http://www.crs.gov/conan/default.aspx?mode=topic&doc=Amendment10.xml&t=1|2|3>.

³¹ *Printz*, 521 U.S. at 926; *New York*, 505 U.S. at 173-174 ("Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). *See also* *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981) (finding permissible a federal statute that preempted state regulation of surface mining except when it comported with federal standards); *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982) (upholding conditional preemption of state regulation of electricity and gas utilities).

³² *New York*, 505 U.S. at 167. *See also* *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (discussing constitutional limitations upon the degree to which Congress might conditionally grant federal funds, and upholding the conditioning (continued...))

substantial that the inducement to comply with federal preferences is "so coercive as to pass the point at which 'pressure turns into compulsion.'"³³

Select State and Local Limitations on Immigration Enforcement Activity

Several states and municipalities have considered or adopted measures intended to limit their participation in federal immigration enforcement efforts. These limitations take several forms.³⁴ Some states and localities have sought to restrict police cooperation with federal immigration authorities' efforts to apprehend removable aliens. Other measures have gone further, and attempted to shield certain aliens from detection by federal authorities. Still other measures have sought to ensure that state convictions for certain criminal offenses do not carry immigration consequences for a convicted alien. The following sections discuss some of the notable state and local restrictions upon law enforcement activity in the field of immigration enforcement, including the relationship between these restrictions and current federal law.

Traditional "Sanctuary" Policies

A number of states and municipalities have adopted formal or informal policies which prohibit or substantially restrict police cooperation with federal immigration enforcement efforts. Entities that have adopted such policies are sometimes referred to as "sanctuary" jurisdictions, though there is not necessarily a consensus as to the meaning of this term.³⁵ In some instances, jurisdictions have self-identified as "sanctuary" sites.³⁶ In other cases, there might be disagreement regarding the accuracy of such a designation, particularly if state or local law enforcement cooperates with federal immigration authorities in some areas but not others.³⁷ Any

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of state receipt of a portion of federal highway funds upon the adoption of minimum drinking age of 21).

³³ National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (quoting *Dole*, 483 U.S. at 411, and holding that provision in Affordable Care Act, which permitted withholding of future Medicaid payments to any state that failed to comply with conditions attached to offers for expanded federal Medicaid funding, was impermissibly coercive).

³⁴ See *supra* footnote 4 (citing sources identifying various state and local restrictions on immigration enforcement activity).

³⁵ The term "sanctuary" jurisdiction is not defined by federal statute or regulation, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference "jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws." U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States*, January 2007 (redacted public version), at vii, n. 44 (defining "sanctuary" policies for purposes of study).

³⁶ See, e.g., San Francisco, CA, Admin. Code, Chapter 12H: Immigration Status (San Francisco ordinance restricting cooperation with federal immigration enforcement efforts and referring to San Francisco as a "City of Refuge") (hereinafter "San Francisco Ordinance"), available at <http://sfgsa.org/index.aspx?page=1067>; Oakland, CA., Res. 81310 (2008) (reaffirming Oakland's status as a "City of Refuge" for unlawfully present aliens and expressing opposition to federal immigration raids at some city locations).

³⁷ See Op-Ed, "Sanctuary City? Not L.A.," L.A. TIMES, Aug. 26, 2011 (disputing characterization of Los Angeles as a "sanctuary" jurisdiction, and citing matters where local police cooperate with federal immigration authorities). See generally Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (discussing differing meanings given to the term "sanctuary" when describing policies towards unlawfully present aliens).

reference by this report to a policy of a particular jurisdiction is intended only to provide an illustrative example of the type of measure occasionally referenced in discussions of "sanctuary" policies.³⁸ These references should not be taken to indicate CRS is of the view that a particular jurisdiction is a "sanctuary" for unlawfully present aliens.

While state or local measures limiting police participation in immigration enforcement existed beforehand,³⁹ many of the recent "sanctuary"-type initiatives trace their lineage back to actions by U.S. churches that provided refuge to unauthorized Central American aliens fleeing civil unrest in the 1980s. A number of states and municipalities issued declarations in support of these churches' actions.⁴⁰ Others went further and enacted more substantive measures intended to limit police involvement in federal immigration enforcement activities. These have included, among other things, restricting state and local police from arresting persons for immigration violations; limiting the sharing of immigration-related information with federal authorities, and barring police from questioning a person about his or her immigration status.⁴¹

Limiting Arrests for Federal Immigration Violations

As previously noted, violations of federal immigration law may be criminal or civil in nature, with alien removal understood to be a civil proceeding.⁴² Some immigration-related conduct potentially constitutes a removable offense and may also be subject to criminal sanction. For example, an alien who knowingly enters the United States without authorization is not only potentially subject to removal,⁴³ but could also be charged with a criminal offense relating to unlawful entry.⁴⁴ On the other hand, some violations of the INA are exclusively criminal or civil in nature. Most notably, an alien's unauthorized immigration status makes him or her removable, but absent additional factors (e.g., having reentered the United States after being formally removed),⁴⁵ unlawful presence does not constitute a criminal offense.

³⁸ See, e.g., FAIR Compilation of State and Local Restrictions, *supra* footnote 4 (labeling measures of various jurisdictions as "sanctuary policies"); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006) (discussing and describing various state and local law enforcement "sanctuary" policies).

³⁹ For example, in 1979, the Los Angeles Police Department issued Special Order 40, which barred police officers from arresting persons for suspected violations of the federal statute criminalizing illegal entry (reversing a policy contained in a previous police order); prohibited the initiation of police action "with the objective of discovering the alien status of a person"; and established a process and criteria for notifying federal immigration officials when an unlawfully present alien was arrested on criminal charges. Los Angeles, CA Police Dept., Special Order 40: Undocumented Aliens, Nov. 29, 1979, available at http://www.lapdonline.org/assets/pdf/SO_40.pdf (hereinafter "LAPD Order").

⁴⁰ See generally Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (1989) (identifying and distinguishing various state and local responses in support of church actions).

⁴¹ See Kittrie, *supra* footnote 38, at 1455 (surveying local "sanctuary" policies and describing them as doing "one or more of the following: (1) limit[ing] inquiries about a person's immigration status unless investigating illegal activity other than mere status as an unauthorized alien ('don't ask'); (2) limit[ing] arrests or detentions for violation of immigration laws ('don't enforce'); and (3) limit[ing] provision to federal authorities of immigration status information ('don't tell')").

⁴² See *Padilla*, 559 U.S. at 365; *Lopez-Mendoza*, 468 U.S. at 1038-39.

⁴³ INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i) (providing that an alien is inadmissible and subject to removal if he or she is present in the United States without have been admitted or paroled, or arrives in the United States at any time or place other than as designated by the Attorney General (now the Secretary of Homeland Security)).

⁴⁴ INA §275, 8 U.S.C. §1325.

⁴⁵ INA §276, 8 U.S.C. §1326. For discussion of other criminal statutes potentially applicable to unlawfully present (continued...)

Some jurisdictions have adopted formal or informal measures that restrict or bar police officers from making arrests for violations of federal immigration law. In some cases, these restrictions prohibit police from making arrests for "civil" violations of federal immigration law, such as unlawful presence.⁴⁶ In other instances, these restrictions are crafted more broadly and may also restrict arrests for some criminal violations of federal immigration law.⁴⁷

State or local restrictions on police authority to arrest persons for federal immigration law violations do not appear to raise significant legal issues. While the INA expressly allows state and local law enforcement to directly engage in specified immigration enforcement activities within the parameters established by the applicable INA provision,⁴⁸ nothing in the INA directly compels such participation (and indeed, any requirement would raise significant anti-commandeering issues under the Tenth Amendment).⁴⁹ Moreover, following the Supreme Court's decision in *Arizona v. United States*, it appears that states and localities are generally preempted from making arrests for civil violations of the INA in the absence of either specific federal statutory authorization or the "request, approval, or instruction from the Federal Government."⁵⁰

Limiting Information-Sharing with Federal Immigration Authorities

Over the years, some states and localities restricted government agencies or employees from sharing information with federal immigration authorities, primarily to prevent federal authorities from using such information to identify and apprehend unlawfully present aliens for removal. Some of these restrictions have existed for decades, while others are of more recent vintage.⁵¹

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aliens, see CRS Legal Sidebar WSLG563, *An Overview of Immigration-Related Crimes*, by (name redacted).

⁴⁶ See, e.g., San Jose, CA, Police Department Duty Manual (redacted public version) (2015), at 501 ("Officers will not detain or arrest any person not suspected of a State felony or State or local misdemeanor or infraction violation solely on the basis of the person's citizenship or status under civil immigration laws."), available at <http://www.sjpd.org/Records/DutyManual>; Washington, DC, Mayor's Order 2011-174 (Oct. 19, 2011), at 2 ("No person shall be detained solely on the belief that he or she is not present legally in the United States or that he or she has committed a civil immigration violation."), available at <http://dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=1784041> (hereinafter "DC Order"); OR. REV. STAT. §181.850 (barring use of Oregon state funds or resources to arrest persons for presence in violation of federal immigration laws). See generally FAIR Compilation of State and Local Restrictions, *supra* footnote 4 (identifying similar restrictions in other jurisdictions).

⁴⁷ See, e.g., LAPD Order, *supra* footnote 39 (barring arrests for federal crime of unlawful entry); Phoenix, AZ, Police Department Operations Order Manual, at 1.4 (rev. 2011) ("The investigation and enforcement of federal laws relating to illegal entry and residence in the United States is specifically assigned to [Immigration and Customs Enforcement within DHS]."), available at <https://www.phoenix.gov/policesite/Documents/089035.pdf>.

<https://www.phoenix.gov/policesite/Documents/089035.pdf>.

⁴⁸ For discussion of various INA provisions that authorize immigration enforcement activity by states and localities (oftentimes under the direction of federal authorities), see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by (name redacted) and (name redacted).

⁴⁹ See *supra* discussion at "Legal Background."

⁵⁰ *Arizona*, 132 S.Ct. at 2507. The *Arizona* Court's discussion of states' authority to enforce federal immigration law was in reference to arrests for non-criminal immigration status violations. The Court did not opine as to whether state law enforcement agencies are also precluded from making arrests for criminal violations of federal immigration law. However, lower courts have generally recognized that state and local police are not preempted from making such arrests. See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

⁵¹ See, e.g., San Francisco Ordinance, *supra* footnote 36 (enacted in 1989, and subsequently amended to permit communication with federal immigration authorities regarding aliens who have committed felonies); New York City, (continued...)

In 1996, Congress sought to end these restrictions on information-sharing through provisions contained in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)⁵² and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁵³ Neither PRWORA nor IIRIRA *require* state or local government entities to share immigration-related information with federal authorities.⁵⁴ Instead, these provisions bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration authorities regarding a person's immigration status.⁵⁵

PRWORA §434 bars state and local governments from imposing any prohibition or restriction on a state or local government entity that prevents it from sending or receiving information, to or from federal immigration authorities, regarding the "immigration status" of an individual. IIRIRA §642 is broader and more detailed in scope. It bars any restriction on a federal, state, or local governmental entity or official's ability to send or receive information regarding "immigration or citizenship status" to or from federal immigration authorities.⁵⁶ It further provides that no person or agency may prohibit a federal, state, or local government entity from (1) sending information regarding immigration status to, or requesting information from, federal immigration authorities; (2) maintaining information regarding immigration status; or (3) exchanging such information with any other federal, state, or local government entity.⁵⁷

Shortly after these measures were enacted, the City of New York, which had in effect a policy that limited the sharing of information with federal immigration authorities,⁵⁸ brought suit challenging the constitutionality of PRWORA §434 and IIRIRA §642. Among other things,⁵⁹ the city alleged

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NY, Exec. Order 124, City Policy Concerning Aliens (1989) (limiting transmission of information about an alien to federal immigration authorities except in certain circumstances, including when the alien was suspected of criminal activity) (hereinafter "1989 New York City Ordinance"), *available at* http://www.nycourts.gov/library/queens/PDF_files/Orders/ord124.pdf (revoked and replaced in 2003 by New York City Exec. Order 34, as amended by Exec. Order 41, to permit information-sharing in a broader range of circumstances, but not on the basis of alien's unlawful immigration status; copies of these orders can be accessed at <http://www.nyc.gov/html/imm/html/eoll/eoll.shtml>); Governor of Maine, Exec. Order 13 FY 04/05, Concerning Access to State Services By All Entitled Maine Residents (Apr. 9, 2004) (limiting the sharing of information about aliens with federal immigration authorities, except when an alien is involved in illegal activity other than unlawful status; rescinded by Exec. Order 08 FY 11/12 (Jan. 6, 2011)).

⁵² P.L. 104-193, §434 (1996); 8 U.S.C. §1644.

⁵³ P.L. 104-208, Div. C, §642 (1996); 8 U.S.C. §1373.

⁵⁴ Whether Congress could permissibly *require* states and localities to submit collected information to federal immigration authorities has not been definitively resolved. As previously noted, the Supreme Court in *Printz* distinguished federal laws requiring states to report certain information to federal agencies from instances where it compelled state authorities to administer a federal regulatory program as to private parties, and chose not to opine upon whether reporting requirements violated anti-commandeering principles. *Printz*, 521 U.S. at 918. *See also supra* discussion at "Legal Background."

⁵⁵ The provisions expressly apply to restrictions on immigration-related communication between federal, state, and local government entities and employees. In 2005, a federal district court ruled that neither PRWORA §434 nor IIRIRA §642 prevented it from issuing a protective order in a case that barred plaintiffs, who were private citizens, from disclosing the immigration status of an intervening party in the litigation. *Day v. Sebelius*, 227 F.R.D. 668 (D. Kan. 2005).

⁵⁶ 8 U.S.C. §1373(a).

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

⁵⁸ 1989 New York City Ordinance, *supra* footnote 51.

⁵⁹ The city also argued that the information-sharing provisions in PRWORA and IIRIRA violated the Guarantee Clause (continued...)

that the provisions facially violate the Tenth Amendment, because they bar states and localities from controlling the degree to which their officials may cooperate with federal immigration authorities. A federal district court dismissed this claim in *City of New York v. United States*, and a three-judge panel of the U.S. Court of Appeals for the Second Circuit affirmed this ruling in a 1999 decision.

The circuit court observed that unlike the statutes struck down in *New York* and *Printz*, the information-sharing provisions in PRWORA and IIRIRA did not directly compel state authorities to administer and enforce a federal regulatory program.⁶⁰ Instead, these provisions protected "the voluntary exchange" of immigration information between federal and state authorities.⁶¹ According to the circuit court, "informed, extensive, and cooperative interaction of a voluntary nature" between states and the federal authorities is an integral feature of the American system of dual sovereignty, and the information-sharing provisions of PRWORA and IIRIRA were consistent with these principles.⁶²

The Second Circuit raised the possibility that the federal government might, in some circumstances, impermissibly intrude upon state and local entities' authority to control information in their possession.⁶³ However, the court found that the City of New York had not provided evidence that this was such an instance, as the affected city policy only limited the sharing of a particular type of information (i.e., a person's immigration status) with a particular federal agency (i.e., the agency responsible for enforcing federal immigration law).⁶⁴ According to the circuit court, the Tenth Amendment does not provide states and local entities with the "untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs."⁶⁵ The court therefore rejected the city's constitutional challenge to the information-sharing provisions of PRWORA and IIRIRA, finding that they did not facially violate the Tenth Amendment.

The City of New York sought to appeal the decision to the Supreme Court, but its petition for certiorari was denied.⁶⁶ A few months later, however, the Court issued its decision in *Reno v.*

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of the Constitution, U.S. CONST. art. IV, §4, by interfering with the city's oversight of its employees. This claim was rejected by the reviewing courts. *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997) (ruling that claim was non-justiciable); 179 F.3d 29 (2nd Cir. 1999) (even assuming justiciability of a Guarantee Clause claim, PRWORA and IIRIRA information-sharing provisions were permissible). *See also supra* footnote 18 (discussing judicial treatment of Guarantee Clause claims).

⁶⁰ *See City of New York*, 179 F.3d at 35.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 37 ("The effect of [PRWORA §434 and IIRIRA §642]...is to nullify an Order that singles out and forbids voluntary cooperation with federal immigration officials. Whether these Sections would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question.").

⁶⁴ At the time *City of New York* was decided, the federal agency primarily responsible for immigration enforcement (and specifically referenced by PRWORA §434 and IIRIRA §642) was the Immigration and Naturalization Service (INS). Following the establishment of the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its enforcement functions were transferred to DHS. *See* 6 U.S.C. §251.

⁶⁵ *City of New York*, 179 F.3d at 35.

⁶⁶ 528 U.S. 1115 (2000).

Condon, discussed in more detail earlier in this report,⁶⁷ where it found that another federal statute that regulated the dissemination of information collected by state authorities did not violate the Tenth Amendment. While it might be argued that the *Condon* decision provides support for the constitutional validity of PRWORA §434 and IIRIRA §642,⁶⁸ no court appears to have assessed the implications of the *Condon* decision upon these measures. Since the Second Circuit's ruling, it appears that there have been no judicial rulings that have questioned the validity of the information-sharing provisions in PRWORA and IIRIRA. Although some state and local measures that purport to limit officials from sharing immigration-related information with federal immigration authorities remain in effect,⁶⁹ any attempt by the state or locality to enforce these restrictions on information-sharing could be challenged on preemption grounds.

Limiting Police Inquiries into Persons' Immigration Status

Most traditional "sanctuary" policies place restrictions upon police inquiries or investigations into a person's immigration status. Some policies provide, for example, that police should not question a person about his or her immigration status except as part of a criminal investigation.⁷⁰ Other policies might provide more specific restrictions that focus upon law enforcement's questioning of crime victims and witnesses.⁷¹ Still other policies more broadly limit state or local officials from gathering information about persons' immigration status.⁷²

⁶⁷ See *supra* discussion at "Legal Background."

⁶⁸ Although the federal statute upheld in the *Condon* case is in some ways similar to the information-sharing provisions in IIRIRA and PRWORA, the statutes are not wholly analogous. While each statute regulates information collected by states, the statute upheld in *Condon* was characterized by the Court as one of general applicability, regulating both states, as suppliers of motor vehicle information, and private parties that resold the information in interstate commerce. *Condon*, 528 U.S. at 151. The information-sharing provisions in IIRIRA and PRWORA, however, only address information collected and shared between government entities. *But see* Dep't of Justice, Brief on Opposition of Petition to Grant Cert., *City of New York v. United States*, 528 U.S. 115 (No. 99-328), at 12 (characterizing the information-sharing provisions of IIRIRA and PRWORA as components of larger regulation schemes that also addressed private activity). While there is judicial support for the constitutionality of federal regulation of state conduct through laws of general applicability, the *Condon* court expressly declined to "decide whether general applicability is a constitutional requirement for federal regulation of the States...." *Condon*, 528 U.S. at 151.

⁶⁹ See, e.g., New York City, NY, Exec. Order 41, City-Wide Privacy Policy (2003) (restricting disclosure of immigration-related information); San Francisco Ordinance, *supra* footnote 36 (barring the request or dissemination of immigration status information). A common feature of many state or local information-sharing restrictions is language permitting communication when it is required by law. Arguably, such language could be interpreted to allow compliance with the information-sharing provisions of IIRIRA and PRWORA, as these measures "require" voluntary communication to be permitted.

⁷⁰ See, e.g., LAPD Order, *supra* footnote 39 ("Officers shall not initiate police action with the objective of discovering the alien status of a person."); DC Order, *supra* footnote 46 (public safety employees "shall not inquire about a person's immigration status ... for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation."); San Francisco Ordinance, *supra* footnote 36 (barring law enforcement from stopping or questioning persons solely on the basis of immigration status).

⁷¹ See DC Order, *supra* footnote 46 ("It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance."); New Haven, CN, Mayor's Office, Press Release, New Haven Police Issue Executive Order – No Resident Should Be Afraid of Reporting Crime (Dec. 14, 2006) (discussing General Order 06-2, which, among other things, establishes policy of New Haven Police Department not to inquire into the immigration status of crime victims and witnesses), *available at* <http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID={874974A9-AC89-465B-A649-57D122E9FAF9}>.

⁷² See, e.g., San Francisco Ordinance, *supra* footnote 36 (general prohibition on gathering information about immigration status subject to exceptions, including for aliens who have committed felonies); Chicago, IL, Chicago Municipal Code Chapter 2-173, Welcoming City Ordinance (subject to specific exceptions, including as required by law, "[n]o agent or agency shall request information about or otherwise investigate ... the citizenship or immigration (continued...)").

Although PRWORA §434 and IIRIRA §642 prevent state or local restrictions on sharing information about a person's immigration status with federal immigration authorities, these provisions do not require state or local police to actually collect such information.⁷³ Restricting the authority of police to question a person about his or her immigration status helps ensure that law enforcement lacks any information that could be shared with federal immigration authorities.

It could be argued that, even though state or local restrictions on police questioning of persons regarding their immigration status is not expressly preempted by federal statute, these measures are nonetheless impliedly preempted by the information-sharing provisions of IIRIRA and PRWORA. However, this argument was rejected by a California state appellate court in the context of a legal challenge to the Los Angeles Police Department's restrictions on investigations into persons' immigration status.⁷⁴ The federal courts have not directly considered this issue. In *Arizona v. United States*, the Supreme Court found that a provision of an Arizona statute, which required police to contact federal authorities to verify the immigration status of certain stopped individuals, was not facially preempted.⁷⁵ In reaching this conclusion, the Court did not suggest that federal law might preempt states or localities from restricting the circumstances in which police might question individuals about their immigration status.⁷⁶ Indeed, given that the *Arizona* Court held that state and local police were largely preempted from making arrests for immigration status violations, it seems unlikely that a federal court would find that state or local measures that limited police questioning of persons about their immigration status would be viewed as preempted by the INA.

Declining to Honor Immigration Detainers

An *immigration detainer* is a document by which U.S. Immigration and Customs Enforcement (ICE) advises other law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations.⁷⁷ ICE and its predecessor, the Immigration and Naturalization Service (INS), have used detainers as one means of obtaining

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status of any person....").

⁷³ See 8 U.S.C. §1373(b) (barring state or local restrictions on sending, maintaining, or exchanging immigration status information with federal immigration authorities).

⁷⁴ *Sturgeon v. Bratton*, 95 Cal. Rptr.3d 718 (Cal. Dist. Ct. App. 2009). See also LAPD Order, *supra* footnote 39 (barring initiation of police action for sole purpose of determining person's immigration status).

⁷⁵ *Arizona*, 132 S. Ct. at 2508-2509. The Supreme Court's analysis turned primarily on the issue of whether Arizona's requirement that police communicate with federal immigration authorities was preempted by federal law, rather than the issue of when it might be appropriate to question stopped individuals about their immigration status. Indeed, the Court suggested that immigration status investigations by Arizona police could be subject to as-applied challenges. *Id.* at 2509.

⁷⁶ To the contrary, the *Arizona* Court construed federal immigration law as generally permitting state and local police to play a limited role in immigration enforcement. *Id.* at 2506 (state police were generally preempted from arresting aliens for suspected immigration violations in the absence of an authorizing federal statute).

⁷⁷ The standard detainer form (Form I-247) allows ICE to indicate that it has taken certain actions that could lead to the alien's removal (e.g., initiating removal proceedings or an investigation into the alien's removability). The form also allows ICE to request that the other agency take certain actions that could facilitate removal (e.g., holding the alien temporarily, notifying ICE prior to releasing the alien). See, e.g., U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/12), available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. ICE also obtains custody of aliens for removal purposes through means other than detainers. See CRS Report R42690, *Immigration Detainers: Legal Issues*, by (name redacted), at p. 1 n.3.

custody of aliens for purposes of removal proceedings since at least 1950.⁷⁸ However, ICE's implementation of the Secure Communities program in the period between 2008 and 2014 raised numerous questions about detainers.⁷⁹ This program relied upon information sharing between various levels and agencies of government to identify potentially removable aliens.⁸⁰ Detainers were then issued for some of these aliens. DHS emphasized that it prioritized "criminal aliens," those who posed a threat to public safety, and repeat immigration violators for removal through Secure Communities,⁸¹ and the former Director of ICE further instructed that, among "criminal aliens," the focus was to be upon those convicted of "aggravated felonies," as defined in the INA; those convicted of other felonies; and those convicted of three or more misdemeanors.⁸² However, there were reports of detainers issued for persons who were not convicted of any offense, or whose sole offense was a misdemeanor.⁸³

As a result of these and related reports, several jurisdictions adopted policies of declining immigration detainer requests for at least some aliens. In many cases, these jurisdictions will honor immigration detainers for aliens who are being held for felony crimes or who are otherwise believed to pose a threat to the community, but will decline to honor immigration detainers issued for other aliens (e.g., those who have committed non-violent misdemeanor offenses).⁸⁴ In other

⁷⁸ See, e.g., *Slavik v. Miller*, 89 F. Supp. 575, 576 (W.D. Pa. 1950) (stating, of an alien whom immigration officials sought for purposes of removal, that "a detainer has been lodged for the body of the petitioner at the time that the fulfillment of the sentence has expired").

⁷⁹ In particular, Secure Communities was seen to result in the issuance of more detainers for aliens at earlier stages in criminal proceedings than was the practice previously. See, e.g., *Brizuela v. Feliciano*, No. 3:12CV226, Memorandum of Law in Support of Motion for Order to Show Cause and Leave to Propound Precertification Discovery Requests, at 7 (filed D. Conn., Feb. 22, 2012) ("Immigration detainers are an integral part of the Secure Communities program; indeed, the program depends on immigration detainers to work."); *Nat'l Day Laborer Organizing Network v. U.S. ICE*, No. 1:10-cv-3488, Declaration of Ann Benson in Support of Plaintiffs' Opposition to Defendants' Motion for Stay (filed S.D.N.Y., Nov. 18, 2011) ("The belief among the advocacy community is that if a local jurisdiction refuses to honor detainer requests, then the consequences of Secure Communities can be averted.").

⁸⁰ See, e.g., U.S. ICE, *Secure Communities: The Basics*, available at http://www.ice.gov/secure_communities (last accessed: April 29, 2015).

⁸¹ *Id.*

⁸² John Morton, Director, U.S. ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, Mar. 2, 2011, available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>. The priorities that Mr. Morton articulated appear to have remained in effect until November 20, 2014, when they (along with the Secure Communities program) were replaced. See U.S. Dep't of Homeland Security, Secretary Jeh Charles Johnson, *Secure Communities*, Nov. 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (discontinuation of the Secure Communities program); U.S. Dep't of Homeland Security, Secretary Jeh Charles Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Nov. 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (superseding the March 2, 2011, memorandum on civil immigration enforcement priorities).

⁸³ See, e.g., *Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy*, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf>. These comments were made in response to changes in ICE's detainer policy proposed in 2010. Critics of Secure Communities also alleged that state and local officials held aliens longer than the 48 hours (excluding weekends and federal holidays) purportedly authorized by the detainer form and regulations, and that the program resulted in racial profiling and negatively affected community policing strategies. See, e.g., *id.*; William Fisher, *U.S. Sheriff Abused Immigration "Detainer," Lawsuit Charges*, *Inter Press Service*, Apr. 23, 2010, available at <http://www.ipsnews.net/2010/04/us-sheriff-abused-immigration-detainer-lawsuit-charges/>.

⁸⁴ See, e.g., Patricia Mazzei, *Miami-Dade Plans to Stop Paying for Federal Immigration Detentions*, *Miami Herald*, Dec. 18, 2013, available at <http://www.miamiherald.com/2013/12/18/3826317/miami-dade-plans-to-stop-paying.html> (reporting Miami-Dade county's adoption of a policy of honoring detainers only for "dangerous criminals and repeat immigration-law breakers"); California Assembly Bill No. 4, enacted Oct. 5, 2013, available at (continued...)

cases, however, the measure appears to sweep more broadly, for example, barring officials from honoring immigration detainers absent a "written agreement with the federal government by which all costs incurred by [the jurisdiction] in complying with the ICE detainer shall be reimbursed."⁸⁵ The detainer policy may also restrict other aspects of the jurisdiction's response to federal efforts to identify and/or obtain custody of aliens for purposes of removal.⁸⁶

Although criticized by some for impeding federal immigration enforcement efforts,⁸⁷ state or local policies of declining to honor at least some immigration detainers would appear to be permissible under federal law. Nothing in the INA purports to require that states and localities honor immigration detainers.⁸⁸ The detainer regulations do use language that some have opined means that holds pursuant to detainers, at least, are required,⁸⁹ stating that "[u]pon a determination by [ICE] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall* maintain custody of the alien for a period [generally] not to exceed 48

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http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20131005_chaptered.pdf (permitting law enforcement officers to honor immigration detainers only in certain circumstances (e.g., the individual has been convicted of a "serious or violent felony"); *Connecticut Adopts Law to Limit Immigration Detainers*, NEW HAVEN REGISTER NEWS, June 6, 2013, available at <http://www.nhregister.com/general-news/20130626/connecticut-adopts-law-to-limit-immigrant-detainers-2> (honoring detainers only for "immigrants who have felony convictions, belong to gangs, show up on terrorist watch lists, are subject to deportation orders or meet other safety risks").

⁸⁵ Policy for Responding to ICE Detainers, Sept. 7, 2011, available at http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?Window/Args=1501 (amending §46-37 of the Cook County, Illinois, Code).

⁸⁶ Cook County, Illinois, for example, includes in its detainer policy a prohibition upon county personnel "expend[ing] their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release date while on duty." *Id.* This prohibition appears intended to avoid situations wherein immigration officials learn of an alien's upcoming release and are present outside the county facility to take him or her into custody. The prohibition seems to have been drafted as it was—i.e., restricting the sharing of information about "incarceration status or release date while on duty"—in order to avoid conflicts with §434 of PRWORA and §642 of IIRIRA, both of which expressly prohibit states and localities from enacting measures that would limit the ability of state and local governments or officials to share information regarding "immigration or citizenship status" with federal officials. Insofar as Cook County's detainer policy restricts only the sharing of information about aliens' incarceration status or release date while officers are on duty, an argument could be made that it does not run afoul of PRWORA and IIRIRA because it does not absolutely bar sharing of information about immigration or citizenship status. However, in 2012 the Director of ICE claimed that the Cook County restriction and related measures could be impermissible because they prohibit local officials from responding to ICE inquiries. See Letter from U.S. ICE Director John Morton to Cook County President Toni Preckwinkle, Jan. 4, 2012, available at <http://legacy.cookcountygov.com/secretary/committees/LegislationIntergov/FY2012/reports/legis02-09-12%20%28incl.%20attachments%29.pdf#page=39>.

⁸⁷ See, e.g., Judicial Watch (JW), Press Release, JW Files Lawsuit Against Cook County, Ill. Sheriff for Refusal to Honor ICE Immigration Detainers, Apr. 22, 2013, available at <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-files-lawsuit-against-cook-county-ill-sheriff-for-refusal-to-honor-ice-immigration-detainers/>.

⁸⁸ The only express mention of detainers in the INA is in §287(d)(1)-(3), 8 U.S.C. §1357(d)(1)-(3), which discusses the issuance of detainers for aliens arrested for offenses relating to controlled substances. For further discussion of this provision and, particularly, whether it restricts ICE's authority to issue detainers for other offenses, see generally CRS Report R42690, *Immigration Detainers: Legal Issues*, by (name redacted), at pp. 9-11.

⁸⁹ See, e.g., *Rios-Quiroz v. Williamson County*, 2012 U.S. Dist. LEXIS 128237, at *11 (M.D. Tenn., September 10, 2012) (expressly rejecting the view that the word "shall" in the detainer regulation, discussed below, prescribes the maximum period of any detention, instead of requiring the alien be detained); *Moreno v. Napolitano*, 2012 U.S. Dist. LEXIS 170751, at *14 (N.D. Ill., Nov. 30, 2012) (describing the language in DHS regulations stating that state and local law officers "shall maintain" custody of an alien at IC's request as "mandatory language"). Note, however, that the language in *Moreno* arguably reflects the procedural posture of the case, which required that "all reasonable inferences [be] drawn in favor of the plaintiff," and the plaintiffs subsequently conceded that detainers are not mandatory. See 2012 U.S. Dist. LEXIS 170751, at *14-*15; No. 11 C 5452, 2014 U.S. Dist. LEXIS 138576, at *13-*14 (N.D. Ill., Sept. 30, 2014).

hours.”⁹⁰ However, the caption of the section containing this language refers to “temporary detention at [ICE] request,”⁹¹ and the Executive has taken the position that the regulation requires that any period of time that a state or locality holds an alien pursuant to a detainer generally be limited to 48 hours, and not as requiring states or localities to hold aliens pursuant to detainers.⁹² Several federal courts have similarly characterized detainers as requests or otherwise agreed with the Executive’s interpretation here,⁹³ in part, because any purported requirement that states or localities hold aliens for ICE could be seen to run afoul of the anti-commandeering principles of the Tenth Amendment. For example, in its 2014 decision in *Galarza v. Szalczyk*, a majority of a three-judge panel of the U.S. Court of Appeals for the Third Circuit noted if states and localities were required to detain aliens for ICE, they would have to “expend funds and resources to effectuate a federal regulatory scheme,” something found to be impermissible in prior Supreme Court decisions regarding commandeering.⁹⁴ The *Galarza* majority also found that such a requirement would be “exactly the type of command that has historically disrupted our system of federalism” by obscuring which level of government is accountable for particular policies.⁹⁵

Note, however, that DHS’s recent discontinuation of the Secure Communities program and its establishment of a new Priority Enforcement Program (PEP) could allay certain of the concerns that prompted some jurisdictions to adopt policies of declining immigration detainers. PEP is like Secure Communities in that it “will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks.”⁹⁶ However, with PEP, detainers are to be issued only for aliens who have been *convicted of* (rather than just *arrested for*) certain offenses that are among ICE’s priorities for civil immigration enforcement.⁹⁷ Further, with PEP, detainers are

⁹⁰ 8 C.F.R. §287.7(d) (emphasis added).

⁹¹ *Id.*

⁹² See, e.g., *Jimenez Moreno v. Napolitano*, No. 11-CV-05452, Defendants’ Answer, at ¶ 24 (filed N.D. Ill., Dec. 27, 2012) (federal government specifically denying the allegation that federal regulations “impose[] a requirement upon [a state or local law enforcement agency] to detain [aliens] on [its] behalf” in its answer to a complaint filed in federal district court in Illinois challenge federal detainer practices); Dep’t of Homeland Security, ICE Detainers: Frequently Asked Questions, available at <http://www.ice.gov/news/library/factsheets/detainer-faqs.htm> (last accessed: July 9, 2015) (characterizing detainers as requests). Note also that the standard detainer form currently states that detainers are “requests.” See U.S. Dep’t of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/12), available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

⁹³ See, e.g., *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013) (federal immigration officials issuing detainers to local law enforcement “asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released”); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012) (“ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE’s custody”); *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009) (detainers as “request[s] that another law enforcement agency temporarily detain an alien”); *United States v. Female Juvenile*, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) (“detainer . . . serves as a request that another law enforcement agency notify the INS before releasing an alien from detention”).

⁹⁴ 745 F.3d 634, 644 (3d Cir. 2014).

⁹⁵ *Id.*

⁹⁶ *Secure Communities*, *supra* footnote 82, at 2. Specifically, the fingerprints of persons arrested by state and local officers are sent to the FBI’s Integrated Automatic Fingerprint Identification System (IAFIS), which then sends them to ICE’s Automated Biometric Identification System (IDENT). This system automatically notifies ICE personnel whenever the fingerprints of persons arrested by state and local officers match those of a person previously encountered and fingerprinted by immigration officials. ICE personnel then review other databases to determine whether the person is in the United States illegally or otherwise removable, and may issue detainers for aliens who appear to be removable.

⁹⁷ *Id.* Specifically, aliens must have been convicted of an offense listed in the priority 1(a), (c), (d), or (e), or priority 2(a) or (b), categories as given in the November 20, 2014, memorandum on Policies for the Apprehension, Detention (continued...)

generally to be used only to request that state and local law enforcement officials *notify* ICE prior to the alien's release or transfer to another institution, not to request that state and local officials *detain* aliens beyond the point when they otherwise would be released for the state or local offense so that ICE may assume custody.⁹⁸ Any detainers issued to request detention (as opposed to notification) would generally have to specify that (1) the alien is subject to a final order of removal, or (2) "there is other sufficient probable cause to find that the person is a removable alien."⁹⁹

Shielding Unlawfully Present Juveniles from Federal Detection

One way in which the INA regulates immigration is by establishing the conditions under which aliens may enter and remain in the United States. Along with these conditions, it imposes sanctions to deter unlawful entry or presence in the United States. In particular, INA §274 imposes criminal penalties upon those who would transport unlawfully present aliens to or within the United States, or shield such aliens from detection by federal immigration authorities.¹⁰⁰ Some activities by state or local governments or private parties have the potential to run afoul of these "anti-transportation" and "anti-harboring" provisions because the traditional conception of sanctuary entails providing material assistance—most notably, a place of refuge—to those in need.¹⁰¹ Indeed, several individual participants in the sanctuary movement in the 1980s were

(...continued)

and Removal of Undocumented Immigrants. See Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, *supra* footnote 82. These "priority" categories include: (1) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; (2) aliens convicted of offenses of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. §521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang; (3) aliens convicted of offenses classified as a felony in the convicting jurisdiction (other than a state or local offense for which an essential element was the alien's immigration status); (4) aliens convicted of an "aggravated felony," as that term was defined in INA §101(a)(43) at the time of the conviction; (5) aliens convicted of three or more misdemeanor offenses (other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status), provided that the offenses arise out of three separate incidents; and (6) aliens convicted of "significant misdemeanors," such as offenses of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; driving under the influence; or offenses for which the individual was sentenced to time in custody of 90 days or more.

⁹⁸ Secure Communities, footnote 82, at 2.

⁹⁹ *Id.* These limitations on the use of detainers to request that states and localities hold aliens after they would otherwise be released for any state or local offense also serve to address recent concerns about whether such holds are permissible under the Fourth Amendment. See *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or., Apr. 11, 2014) (finding a violation of the Fourth Amendment where a county denied an alien release on bail for which she otherwise qualified, and held her an additional day after her release from state charges, because she was the subject of an immigration detainer requesting that she be held so that ICE could investigate her removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I. 2014) (finding that the Fourth Amendment claim of a naturalized U.S. citizen who was held pursuant to a detainer so that ICE could investigate her removability had been sufficiently pled to withstand a motion to dismiss).

¹⁰⁰ INA §274(a)(1)(A)(ii)-(iii); 8 U.S.C. §1324(a)(1)(A)(ii)-(iii) (imposing a fine and/or term of imprisonment upon any person who "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, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; [or] 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").

¹⁰¹ See Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 113, 115 (2012); Cuison Villazon, *supra* footnote 37 at 139, 144.

convicted of violating §274 because of their efforts to move unlawfully present aliens within the United States and ensure they were not detected by federal immigration officials.¹⁰²

At least as a general rule, state or local measures that restrict involvement with federal immigration enforcement efforts typically would not appear to implicate the anti-harboring provisions of federal immigration law. However, a state or local policy under which government officials affirmatively took steps to prevent the federal government from removing a particular alien might raise more serious concerns, particularly if the officials within the jurisdiction know (or have reason to know) that specific individuals are unlawfully present¹⁰³ and play a "key role" in furthering the aliens' unlawful presence (in the case of transportation),¹⁰⁴ or "substantially facilitate" their continued presence in the United States (in the case of harboring).¹⁰⁵

Such policies or practices would appear to be most likely to develop vis-à-vis specific segments of the unlawfully present alien population which are seen as particularly vulnerable to mistreatment, such as juveniles. For example, beginning in 2008, San Francisco's practice of flying unlawfully present aliens in the juvenile justice system who do not have a parent or guardian in the United States back to their home countries, or placing them in group homes in southern California, was subject to a federal grand jury investigation of potential violations of §274.¹⁰⁶ Whether such policies did indeed run afoul of the anti-harboring provisions in the INA was not definitively determined, as San Francisco reportedly abandoned its policy and federal criminal charges were not pursued.

¹⁰² See, e.g., *United States v. Gonzalez-Torres*, 273 F.3d 1181 (9th Cir. 2001); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985).

¹⁰³ Compare *United States v. Powell*, 498 F.3d 890 (9th Cir. 1974) (defendant need not know the names of individual aliens to know that they are unlawfully present), *cert. denied*, 419 U.S. 866 (1974) with *United States v. Camacho-Davalos*, 468 F.2d 1382 (9th Cir. 1972) (defendant cannot be said to know that individuals are unlawfully present aliens based on the facts that they are "Mexican appearing," speak Spanish, and could not produce immigration documents upon request).

¹⁰⁴ See, e.g., *United States v. Velasquez-Cruz*, 929 F.2d 520 (8th Cir. 1991) (defendant's actions must be more than incidental to the alien's unlawful presence, they must have played a key role); *United States v. Barajas-Chavez*, 134 F.3d 1444 (10th Cir. 1998) (transportation in furtherance of an alien's unlawful presence refers to the defendant's purpose in providing transportation, not the logical result or effect of providing transportation); *United States v. Salinas-Calderon*, 585 F. Supp. 599 (D. Kan. 1984) (requiring a direct and substantial relationship between providing transportation and the furtherance of an alien's unlawful presence).

¹⁰⁵ See, e.g., *United States v. Vargas-Cordon*, 733 F.3d 366 (2nd Cir. 2013); *United States v. Lopez*, 521 F.3d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). It should also be noted that harboring need not involve clandestine sheltering, or concealment of unlawfully present aliens from the general public. See, e.g., *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir. 1976) (harboring involves shelter from detection, not necessarily clandestine sheltering), *cert. denied*, 429 U.S. 836 (1976); *United States v. Smith*, 112 F.2d 83 (2^d Cir. 1940) (concealment need only be from immigration officials, not from the general public).

¹⁰⁶ See City and County of San Francisco, Legal Issues in Connection with Proposed Amendment to Sanctuary City Ordinance, Aug. 18, 2009 (copy on file with the authors) (noting that the investigation was still ongoing at the time this memorandum was written).

Modifying Criminal Sentences to Avoid Immigration Consequences

An alien's conviction for a crime under state law may also carry consequences for the alien under federal immigration law.¹⁰⁷ A criminal conviction may, depending on the circumstances, subject the alien to removal under the INA, disqualify the alien from obtaining relief from removal (e.g., asylum) or an immigration benefit, and potentially result in the alien being barred from re-entering the United States once removed.¹⁰⁸ Because states are responsible for the vast majority of criminal prosecutions in the United States,¹⁰⁹ they have a substantial influence on the size and make-up of the alien population who are removable on criminal grounds.

Some state authorities have sought to reduce or eliminate the immigration consequences of certain criminal convictions. In many instances, whether an alien's criminal activity makes him removable under the INA depends both upon the nature of the criminal offense for which the alien was convicted and the sentence that was imposed.¹¹⁰ A few states have lowered the maximum available sentence for certain offenses to 364 days' imprisonment,¹¹¹ so that aliens will not be subject to removal under those grounds of the INA requiring the alien to have been sentenced to at least a year's imprisonment.¹¹²

State courts may consider the immigration consequences of a criminal conviction or sentence during the course of criminal proceedings against a foreign national.¹¹³ In some situations, state

¹⁰⁷ See generally CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by (name redacted).

¹⁰⁸ *Id.* The most significant immigration consequences attach to any crime designated as an "aggravated felony" under the INA. INA §101(a)(43); 8 U.S.C. §1101(a)(43). The list of criminal offenses identified as aggravated felonies includes both general categories of crimes (e.g., theft, crimes of violence) and many specific criminal offenses (e.g., specific federal tax offenses). The definition also includes some misdemeanor offenses (i.e., offenses punishable by a maximum sentence of imprisonment for less than a year and a day), as well as traditional felonies (i.e., offenses punishable by more than a year imprisonment).

¹⁰⁹ See U.S. Dep't of Justice, *Felony Sentences in State Courts, 2004*, BUREAU OF JUSTICE STATISTICS BULLETIN (Jul. 2007) (estimating that 1,079,000 adults were convicted of a felony by a state court in 2004, compared to 66,518 persons in federal court that same year).

¹¹⁰ In some instances, however, a conviction for a specified offense constitutes a ground for removal regardless of the sentence imposed. See, e.g., INA §237(a)(2)(A)(v), (a)(2)(B) (providing that aliens convicted of most controlled substance offenses, or for failing to register as a sex, offender are removable), 8 U.S.C. §1227(a)(2)(A)(v), (a)(2)(B).

¹¹¹ See WASH. REV. CODE §9A.20.021 notes (2011) (explaining intent behind reduction of the maximum sentence for gross misdemeanor offenses to 364 days was to ensure that a single conviction for such an offense could not make an alien removable under INA provisions making a listed offense a ground for removal when the alien is sentenced to at least a year's imprisonment); NEV. REV. STAT. §193.140 (2013).

¹¹² For example, a crime of violence or theft constitutes an "aggravated felony" making a convicted alien removable if he was sentenced to at least a year's imprisonment. INA §101(a)(43)(F)-(G), 8 U.S.C. §1101(a)(43)(F)-(G); INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii). See also INA §237(a)(2)(A)(i) (providing that a conviction for a crime of moral turpitude within five years of admission is a removable offense if the alien had been sentenced to imprisonment for one year or more). As noted previously, some criminal convictions constitute grounds for removal regardless of the sentence imposed. See *supra* footnote 110. Moreover, two or more convictions of crimes of moral turpitude, not arising out of the same scheme of conduct, make an alien removable. INA §237(a)(2)(A)(ii), 8 U.S.C. §1227(a)(2)(A)(ii).

¹¹³ See generally Washington State Supreme Court, Gender and Justice Commission and Minority and Justice Commission, *Immigration Resource Guide for Judges* (Jul. 2013) (providing guidance to state judges regarding the immigration consequences of criminal sentences and convictions under Washington state law), available at <http://www.courts.wa.gov/content/manuals/Immigration/ImmigrationResourceGuide.pdf> (hereinafter "Washington Immigration Guide for Judges").

courts (possibly with the recommendation of the state prosecutor) might resolve a criminal case in a manner that avoids triggering immigration consequences for the criminal defendant. For example, the court might authorize the parties to enter an agreement that resolves the case in a manner that does not constitute a "conviction" for INA purposes.¹¹⁴ If an alien is convicted of a crime that constitutes a removable offense under the INA only when the alien is sentenced to a specified length of imprisonment, the court might opt to sentence the alien to a lesser term that does not result in removability. A court might also choose to modify an already-imposed sentence so that it no longer has immigration consequences.¹¹⁵ Federal legislative proposals have occasionally been considered that would negate the effects of some of these actions by state courts,¹¹⁶ but none of these bills have been enacted.

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¹¹⁴ For INA purposes, a "conviction" refers to:

a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

INA §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A). "[T]he question of what constitutes a 'conviction' [under the INA]... is a question of federal, not state, law." *Griffiths v. I.N.S.*, 243 F.3d 45, 49 (1st Cir. 2001). Accordingly, whether or not the disposition of a criminal case constitutes a "conviction" under state law has no bearing on whether the disposition constitutes a "conviction" for federal immigration purposes. Some state courts or bar associations have issued instruction manuals that provide guidance as to when state courts' dispositions of criminal cases might constitute "convictions" for purposes of the INA. *See* Washington Immigration Guide for Judges, *supra* footnote 113, at chapter 7 (discussing deferred adjudications and other alternative forms of case resolution available under state law, and when these resolutions might constitute "convictions" for INA purposes).

¹¹⁵ When assessing whether a criminal sentence gives rise to removability, immigration authorities will give full faith and credit to a court reduction to an alien's criminal sentence *nunc pro tunc*, even if the reduction was made solely to prevent the criminal sentence from having immigration consequences. *See In re Cota-Vargas*, 23 I. & N. Dec. 849 (2005). On the other hand, a conviction that is vacated solely to avoid immigration consequences, rather than because of a procedural or substantive defect in the criminal proceedings that had resulted in the conviction, is treated as still being effective for removal purposes. *See In re Pickering*, 23 I. & N. Dec. 621 (BIA 2003); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005) (citing agreement with Board of Immigration Appeals construction of the INA's definition of "conviction" by several federal circuits). *But see Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007) (conviction deemed in effect for immigration purposes even if a direct appeal is pending).

¹¹⁶ *See, e.g.*, H.R. 4437, §613, 1st Sess., 109th Cong. (2005) (House-passed bill modifying INA's definition of "conviction"); H.R. 2278, §301, 1st Sess., 113th Cong. (2013) (similar).

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