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Federal Anti-Sanctuary Law: A Failed Approach to Immigration and a Poor Substitute for Real Reform

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FEDERAL ANTI-SANCTUARY LAW: A FAILED APPROACH TO IMMIGRATION ENFORCEMENT AND A POOR SUBSTITUTE FOR REAL REFORM

by
*Elizabeth M. McCormick**

In July 2015, Kate Steinle, a 32-year-old San Francisco resident, was shot and killed as she walked with her father along a popular fishing pier. Juan Francisco Lopez-Sanchez, a native of Mexico living unlawfully in the United States, was arrested and later confessed to shooting Ms. Steinle. Lopez-Sanchez had seven prior criminal convictions and had previously been deported from the United States five times. Three months before the shooting, Lopez-Sanchez was released from custody by the San Francisco Sheriff's office despite a request from federal immigration officials that Lopez-Sanchez be detained for transfer to federal custody and, eventually, removal from the United States.

In the aftermath of Steinle's death, a torrent of accusations and blame were leveled at the San Francisco Sheriff's office for failing to comply with the immigration detainer, at the City of San Francisco for establishing itself as a sanctuary city where unauthorized immigrants are alleged to be immune from prosecution of immigration law violations, and at the Obama administration for failing to enforce federal laws designed to shut down sanctuary cities. More specifically, it was argued that two federal "anti-sanctuary" laws passed in 1996 made it illegal for San Francisco to refuse to comply with federal immigration authorities' requests for assistance and that the Obama administration had willfully failed to enforce those laws against hundreds of sanctuary jurisdictions. Had these laws been obeyed and enforced, critics asked, would Kate Steinle be alive today?

This Article offers an answer to this question. It does so by closely examining the history of the 1996 federal anti-sanctuary laws, the ways in which state and federal courts have understood their meaning and purpose, and the evolving role of the statutes in the national

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immigration debate, in particular the struggle to define the proper role for state and local actors in immigration enforcement. The Article closes with a discussion of the anti-sanctuary statutes in the context of Kate Steinle's killing and San Francisco's sanctuary law, concluding that the San Francisco ordinance which mandated Lopez-Sanchez's release from custody did not violate the anti-sanctuary statutes or any other federal law. On the other hand, San Francisco's sanctuary provision also did not prohibit the San Francisco Sheriff from contacting federal immigration officials to advise them that Lopez-Sanchez would be released, something that did not happen and that may very well have saved Kate Steinle's life. Almost two decades of experience with the anti-sanctuary statutes and the recent senseless death of Kate Steinle reveal that an anti-sanctuary approach to immigration enforcement is a failed strategy that diverts resources from enforcement priorities like national security and public safety and diverts attention from seeking real solutions through comprehensive immigration reform.

I.	INTRODUCTION.....	166
II.	THE PATH FROM SANCTUARY TO ANTI-SANCTUARY	173
III.	THE FEDERAL ANTI-SANCTUARY PROVISIONS IN THE BATTLE AGAINST SANCTUARY	181
	A. City of New York v. United States: §§ 1644 and 1373 Sur- vive a Constitutional Challenge.....	182
	B. Defining the Limits of the Anti-Sanctuary Provisions.....	190
	1. Claims for Damages Under §§ 1644 and 1373	190
	2. Claims to Invalidate Sanctuary Policies Pursuant to §§ 1644 and 1373	194
IV.	THE RELATIONSHIPS BETWEEN FEDERAL ANTI-SANCTUARY PROVISIONS AND OTHER FEDERAL PRIVACY LAWS	198
	A. Sections 1644 and 1373 Do Not Repeal Existing Privacy Protec- tions in Federal Law.....	201
	B. FERPA and Disclosure of Educational Records to Immigration Authorities	206
V.	THE FEDERAL ANTI-SANCTUARY PROVISIONS IN THE BATTLE FOR AND AGAINST SUB-FEDERAL IMMIGRATION ENFORCEMENT ...	215
	A. The Path from Anti-Sanctuary to Pro-Enforcement.....	215
	B. United States v. Arizona: The Evolving Meaning of §§ 1644 and 1373.....	222
VI.	CONCLUSION: LESSONS LEARNED FROM AN ANTI-SANCTUARY APPROACH TO IMMIGRATION ENFORCEMENT	229

I. INTRODUCTION

On July 1, 2015, Kate Steinle, a 32-year-old San Francisco resident, was shot and killed as she walked with her father along a popular fishing

pier.¹ Juan Francisco Lopez-Sanchez,² a native of Mexico living unlawfully in the United States on and off since 1991, was arrested and later confessed to shooting Ms. Steinle. Sanchez had a number of prior criminal convictions and had previously been deported from the United States five times. Three months before the shooting, Sanchez was released from custody by the San Francisco Sheriff's office despite a request from federal immigration officials that Sanchez be detained for transfer to federal custody and, eventually, removal from the United States.³ For more than a year, a San Francisco ordinance had been in place which prohibited city officials from keeping an individual in custody based on a civil immigration detainer like the one lodged by the U.S. Immigration and Customs Enforcement (ICE) against Lopez-Sanchez, except where that person had a felony conviction within seven years and a judicial warrant had been issued.⁴ Since no warrant was provided to the Sheriff for Lopez-Sanchez, he was released from custody when his San Francisco criminal case, a 20-year-old drug charge, was dismissed.⁵ In the aftermath of Steinle's death, accusations and blame have been leveled at the San Francisco Sheriff's office for failing to comply with the immigration detainer, at the City of San Francisco for establishing itself as a sanctuary city⁶ where unauthorized immigrants are alleged to be immune from prosecution of immigration law violations, and at the Obama administration for failing to enforce federal laws designed to shut down sanctuary cities.⁷ More specifically, it has been argued that two federal laws passed

¹ Lee Romney, *Family of Woman Allegedly Slain by Deportee Files Claims Against S.F. and U.S.*, L.A. TIMES (Sept. 1, 2015), <http://www.latimes.com/local/lanow/la-me-ln-kate-steinle-claims-20150901-story.html>; Lee Romney et al., *Fatal Shooting of S.F. Woman Reveals Disconnect Between ICE, Local Police; 5-time Deportee Charged*, L.A. TIMES (July 6, 2015), <http://www.latimes.com/local/crime/la-me-sf-shooting-20150707-story.html>.

² Federal authorities gave his real name as Jose Inez Garcia-Zarate. Juan Francisco Lopez-Sanchez is one of several pseudonyms he has used. Romney et al., *supra* note 1.

³ *Id.*

⁴ See S.F., CAL., ADMIN. CODE § 12I (2015). The ordinance was an amendment to the administrative code and was entitled "Due Process Ordinance for All on Civil Immigration Detainers."

⁵ See Romney et al., *supra* note 1.

⁶ See S.F., CAL., ADMIN. CODE § 12H (2015). San Francisco passed the City and County of Refuge ordinance in 1989. The ordinance bars the use of city resources to assist with immigration enforcement or immigration status checks. The ordinance also prohibits local officials from detaining, arresting, or questioning an individual on the basis of immigration status. Finally, the ordinance prohibits gathering or disseminating information about individuals' immigration status, except in the case of individuals charged with or convicted of felonies.

⁷ Scott Eric Kaufman, *Bill O'Reilly: The Murder of Kate Steinle Proves Donald Trump Is*

in 1996 made it illegal for San Francisco to refuse to comply with federal immigration authorities' requests for assistance and that the Obama administration had willfully failed to enforce those laws against hundreds of sanctuary jurisdictions. Had these laws been obeyed and enforced, critics argue, Kate Steinle would be alive today.

It seems beyond dispute that there was a significant failure in the immigration-enforcement system that permitted the release of Francisco Lopez-Sanchez, an unauthorized immigrant who had been deported at least five times, had multiple felony drug convictions, and had served lengthy prison terms for at least two convictions for illegal reentry after removal.⁸ What is much less clear is whether two federal laws in place since 1996, even with 100% compliance and enforcement, would have blocked San Francisco from putting in place its 2013 civil-detainer ordinance or the city's long-standing sanctuary ordinance, or prevented Lopez-Sanchez's release from custody three months before Kate Steinle's fatal shooting. Since Steinle's killing, lawmakers and political commentators have debated whether San Francisco or any other state or municipality can lawfully refuse to cooperate in the enforcement of federal immigration laws.⁹ In particular, they disagree about whether two federal statutes enacted in 1996 require such cooperation in immigration enforcement, or merely encourage it. Although Kate Steinle's death has brought renewed attention to this issue, the question itself is anything but new.

In 1996, Congress passed two laws that prohibit state or local governments from restricting communication with the federal government regarding the immigration status of any individual. Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1644,¹⁰ and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1373,¹¹ were passed within weeks of each other in an attempt to encourage and explicitly authorize state and local law enforcement agencies to communicate

Right About Mexicans, SALON (July 7, 2015), http://www.salon.com/2015/07/07/bill_oreilly_the_murder_of_kate_steinle_proves_donald_trump_is_right_about_mexicans/ (reporting statement of commentator Bill O'Reilly that "the mayor and city supervisors of San Francisco are directly responsible for the murder of Kate Steinle, and the Obama administration is complicit").

⁸ See Romney et al., *supra* note 1.

⁹ See, e.g., *United States Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 9, 62-64 (2015) [hereinafter *Homeland Security Hearing*] (statement of Jeh Johnson, U.S. Sec'y of Homeland Security) (stating that mandating state cooperation might violate the Constitution).

¹⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1644 (2012)).

¹¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 1373(2012)).

with federal immigration authorities regarding the status and presence of unauthorized immigrants in their jurisdictions. In addition to encouraging cooperation with federal immigration enforcement efforts, these provisions were also a response to certain noncooperation or sanctuary policies and practices adopted in the 1980s and early 1990s by some state and local governments and law enforcement agencies who objected to federal immigration policies and priorities and to efforts to involve state and local government actors in immigration policing. Notably, neither of the 1996 federal anti-sanctuary statutes¹² mandates cooperation or sharing of information with federal immigration authorities, but both prohibit any restriction on information sharing between the federal government and state or local government entities or officials. In the almost two decades since they became law, the anti-sanctuary provisions have been at the center of legal challenges brought by local governments preemptively defending local sanctuary provisions and private citizens and organizations challenging local policies and practices alleged to violate these federal laws.

Just days after the laws went into effect in 1996, the City of New York brought an action challenging the constitutionality of the statutes and defending a 1989 executive order that prohibited New York City officials and employees from sharing information with federal immigration authorities.¹³ In response, the United States defended the statutes by arguing that a local policy like New York's, which barred voluntary cooperation with federal immigration authorities was incompatible with effective implementation of federal immigration laws and policy and was therefore

¹² Throughout this Article, I refer to 8 USC §§ 1644 and 1373 as “anti-sanctuary statutes” or “anti-sanctuary provisions” as a shorthand reference only. Similarly, the use of the term “sanctuary” is used here to refer in general to measures adopted by localities that place limits of any kind on the assistance that the localities will provide to federal immigration authorities in the enforcement of federal immigration law. There is no definition of “sanctuary” in federal law and there is a wide and diverse range of activities that might qualify as a “sanctuary” measure under the definition I use here. I acknowledge, as discussed further, that the use of the term sanctuary is itself controversial in that it is often used pejoratively by those who oppose sub-federal efforts by state and municipal governments to limit cooperation or assistance with federal immigration authorities, and some jurisdictions that have been labeled with the term reject it outright. See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 253–54 (2012). See generally Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011) (asserting that the current immigration linguistic metaphors are problematic and suggesting that changes, such as using the word “migration” rather than “immigration,” will help humanize the dialogue surrounding immigration and immigration reform).

¹³ See *City of New York v. United States*, 179 F.3d 29, 31–33 (2d Cir. 1999).

preempted by the federal statutes at issue. The City's challenge failed in federal district court and on appeal.¹⁴ The statutes have also been the basis of unsuccessful challenges to local law enforcement policies that purport to restrict communication by police officers with federal immigration authorities about the immigration status of individuals the officers encounter in the course of their duties.¹⁵ However, since 1996, the United States government has never sought to enforce these laws against a state or local government, or to invalidate a sub-federal sanctuary law or practice based on these provisions.¹⁶

Indeed, rather than being used as a weapon against sub-federal restrictions on cooperation or communications with federal immigration authorities, in recent years the anti-sanctuary provisions have been used instead to both challenge and support state and local efforts to engage in the enforcement of federal immigration laws. On the one hand, proponents of more robust state and local involvement in immigration regulation and enforcement have repeatedly argued that the anti-sanctuary provisions are an expression of Congress's clear intent to maximize cooperation between federal, state, and local law enforcement agencies in enforcing federal immigration laws. To that end, they argue, the involvement of local law enforcement in immigration policing, as well as efforts by state and local lawmakers to regulate in the area of immigration, are desirable and appropriate. On the other hand, proponents of less state and local involvement in immigration enforcement, including the Obama administration, have argued that the anti-sanctuary provisions preempt certain state and local efforts to engage in immigration enforcement by drawing explicit limits on the nature of non-federal engagement in immigration enforcement. For example, in the lawsuit brought by the United States against Arizona challenging the constitutionality of the Arizona Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), the U.S. Department of Justice argued that § 2

¹⁴ See *infra* Part III.A.

¹⁵ See, e.g., *Johnson v. Hurtt*, 893 F. Supp. 2d 817, 840 (S.D. Tex. 2012); *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 722–23 (Ct. App. 2009); see also *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 572 n.7 (Ct. App. 2008) (declining to address whether or not San Francisco's sanctuary policy conflicted with federal law).

¹⁶ See Appellants' Opening Brief at 10–12, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (arguing that despite congressional intent to enforce federal immigration laws, evidenced by the passage of §§ 1373 and 1644, interior enforcement of illegal immigration is lacking due to inability or unwillingness on the part of the federal government); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1384–85 (2006); see also H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.) (“[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and . . . illegal aliens do not have the right to remain in the United States undetected and unapprehended.”).

of S.B. 1070 was preempted by 8 U.S.C. § 1373.¹⁷ Section 2 requires police officers to verify the immigration status of anyone stopped or detained for any reason where the officer has reasonable suspicion to believe the person is unlawfully present in the United States.¹⁸ This mandatory status check, the United States argued, was preempted because it stood as an obstacle to federal–state cooperation envisioned by § 1373 by forcing officers to make status inquiries irrespective of whether such inquiries were in line with the government’s immigration enforcement priorities.¹⁹

This evolution of the use and meaning of the so-called anti-sanctuary provisions reflects a deepening divide within the federal government and between the federal government, the states, and the American public around the issue of unauthorized immigration. Since the anti-sanctuary provisions were enacted in 1996, the perception that federal government efforts to vigorously enforce immigration laws and eliminate unauthorized immigration were being undermined by isolated pockets of state and local “sanctuary” efforts,²⁰ has been replaced by a perception that Congress has repeatedly failed to fix a broken immigration system²¹ and, more recently, that the Obama Administration has failed to enforce existing immigration laws.²² At the same time, though, the efforts of state and

¹⁷ See Brief for the United States at 51–52, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

¹⁸ ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

¹⁹ See Brief for the United States, *supra* note 17, at 46–52.

²⁰ See CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, at 30 (1995) (“[B]y adopting non-cooperation laws, local jurisdictions are making effective governmental response to the problem of criminal aliens substantially more difficult.”). The committee also suggested sanctions against localities with public non-cooperation policies. *Id.* at 32.

²¹ See Editorial, *Now’s Time to Undo ‘96’s Bad Immigration Reform*, ARIZ. REPUBLIC, Oct. 7, 2000, at B7, 2000 WLNR 10425454; Michael Riley, *Failure of ‘86 Immigration Reform Holds Lessons for Bush*, DENVER POST, Nov. 17, 2002, at A27; Press Release, Office of Sen. Mel F. Martinez, Sens. Martinez, Obama Urge Comprehensive, Realistic Immigration Reform (December 15, 2005) (U.S. FED. NEWS).

²² Elizabeth Price Foley, Opinion, *Allowing Some Illegal Immigrants to Stay Abuses Prosecutorial Discretion*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/allowing-some-illegal-immigrants-to-stay-abuses-prosecutorial-discretion>; see also Nigel Duara & Molly Hennessy-Fiske, *Federal Judge Refuses to Lift Injunction on Obama’s Immigration Order*, L.A. TIMES (Apr. 7, 2015), <http://www.latimes.com/nation/la-na-ff-immigration-hanen-20150407-story.html>; Jan C. Ting, Opinion, *Obama’s Own Words Refute His Stand on Immigration Authority*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/obamas-own-words-refute-his-stand-on-immigration-authority>. But see Elise Foley, *Backlash Against Mass Family Immigrant Detention Grows as Senate Democrats Pile On*, HUFFINGTON POST (June 2, 2015), http://www.huffingtonpost.com/2015/06/02/family-immigrant-detention_

local governments to respond to the worsening immigration crisis have evolved and now include measures that seek to reinforce federal immigration enforcement, as well as those designed to protect unauthorized immigrants from immigration enforcement. In some respects, and in surprising ways, §§ 1644 and 1373—the so-called anti-sanctuary provisions—have been instrumental in the evolution of some state and local immigration measures on both sides of the spectrum. This, in turn, has led to even more confusion and frustration about the meaning of these statutes and the meaning of sanctuary itself. This Article examines the evolution of the use and meaning of the anti-sanctuary provisions in the national immigration debate, and in particular in the struggle to define the proper role for sub-federal actors in immigration enforcement.

Part II will explore the legal and political context in which the anti-sanctuary laws were enacted, including an examination of the extent to which sub-federal noncooperation or sanctuary policies were actually in effect and impacting federal enforcement efforts at the time the provisions became law, and also take a closer look at what the language of the statutes says and means. Part III will examine the interpretations of §§ 1644 and 1373 by federal and state courts considering local noncooperation policies and practices in context. This Part will begin with a discussion of the unsuccessful constitutional challenge to the anti-sanctuary provisions brought by the City of New York in its effort to preserve the city's own sanctuary policy, an executive order prohibiting the disclosure of immigration-related information to federal immigration authorities. This Part will then consider the use of the federal anti-sanctuary measures as the basis for a number of legal challenges, also largely unsuccessful, to state and local sanctuary provisions. Part IV will consider the relationship between the federal anti-sanctuary provisions and other federal privacy protections, examining interpretations of the anti-sanctuary statutes by federal agencies and courts charged with determining whether and how privacy protections in other federal laws might be impacted by the anti-sanctuary provisions. Part V will look at the role of the anti-sanctuary provisions in the proliferation of and challenges to sub-federal efforts to enact immigration legislation and enforce federal immigration law, including the legal challenge to Arizona's S.B. 1070. In particular, the discussion will examine the ways in which each party in *United States v. Arizona* relied on §§ 1644 and 1373 as support for its position, and the federal courts' reactions to those arguments.

The Article closes with discussion of the lessons learned two decades after the anti-sanctuary provisions became law, what the statutes mean

n_7495282.html; Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

and what they don't, and how they are situated in the ongoing debate over unauthorized immigration and immigration reform. With these lessons in mind, the Article then turns to a discussion of the anti-sanctuary statutes in the context of Kate Steinle's killing and San Francisco's sanctuary law, ultimately concluding that the anti-sanctuary statutes and the anti-sanctuary approach to immigration enforcement have been largely ineffective, and have diverted resources away from meaningful enforcement and critically needed reforms to the federal immigration system.

II. THE PATH FROM SANCTUARY TO ANTI-SANCTUARY

A great deal of scholarship to date has focused on the propriety of sanctuary or noncooperation measures enacted by state and municipal governments.²³ In particular, this scholarship has considered how and whether non-federal governments and entities may enact—consistent with the U.S. Constitution and federal law—laws, resolutions, and policies which restrict the ability of state and local actors to engage in the enforcement of federal immigration laws or to cooperate with federal government enforcement efforts.²⁴ In doing so, these scholars have examined the history and origins of the sanctuary movement, beginning with a campaign in the 1980s and 1990s to offer protection to refugees from El Salvador and Guatemala whose legitimate claims for asylum in the United States were systematically denied.²⁵ They have also described how this initially church-led campaign evolved into an effort joined by cities and towns across the country who were sympathetic to the cause of Latin American refugees and who wanted to offer support and protection to these communities by declaring themselves sanctuaries or refuges from federal immigration enforcement.²⁶ Finally, they have considered how, in recent history, the sanctuary or “new” sanctuary movement has

²³ See, e.g., Hing, *supra* note 12; Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (1989); Pham, *supra* note 16; Ruti Teitel, *Debating Conviction Against Conviction—Constitutional Considerations on the Sanctuary Movement*, 14 HASTINGS CONST. L.Q. 25 (1986); Rose Cuison Villazor, “Sanctuary Cities” and Local Citizenship, 37 FORDHAM URB. L.J. 573 (2010).

²⁴ See, e.g., Hing, *supra* note 12, at 309–10; Pham, *supra* note 16, at 1382; see also Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1685 (2009).

²⁵ See John Fife, *From the Sanctuary Movement to No More Deaths*, in RELIGIOUS AND ETHICAL PERSPECTIVES ON GLOBAL MIGRATION 257, 257–64 (Elizabeth W. Collier & Charles R. Strain eds., 2014); see also Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 747–48 (1986); Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 139–42 (2008).

²⁶ See Carro, *supra* note 23, at 297; Villazor, *supra* note 25, at 142.

expanded to include cities and municipalities and entities within them, most notably law enforcement agencies that have adopted policies that limit or prohibit involvement in federal immigration enforcement efforts in order to protect public safety and preserve relationships with the immigrant community.²⁷ This Article narrows the focus of the sanctuary scholarship to a consideration of the anti-sanctuary phenomenon that emerged in response to the sanctuary movement and subsequent sanctuary policies. The starting point and recurring reference point for this discussion are the federal anti-sanctuary statutes, 8 U.S.C. §§ 1644 and 1373.

At the time §§ 1644 and 1373 were enacted in 1996, more than two dozen sanctuary measures had been adopted by U.S. cities and states.²⁸ Many of these measures were adopted, at least initially, as expressions of support for the plight of unauthorized immigrants, primarily asylum seekers from Latin America, seeking protection and a right to remain in the United States.²⁹ However, by 1996, many of these state and local sanctuary measures were not put in place out of opposition to federal immigration enforcement practices. Rather, the almost universal public justification for these efforts by states and cities to protect immigration status information from disclosure was promoting the health and safety of the entire community, including unauthorized immigrant residents.³⁰ These measures included resolutions, municipal ordinances, executive orders and proclamations, and, in some cases, state legislative actions.³¹ They included expressions of solidarity with immigrants seeking asylum protection; directives to government employees, including police officers, to refrain from sharing immigration status information or cooperating with federal immigration officials; and laws providing access to state driver's licenses and municipal identification cards to all residents regardless of immigration status.³² Among the jurisdictions with sanctuary policies or

²⁷ See Hing, *supra* note 12, at 254–55; Pham, *supra* note 16, at 1398.

²⁸ See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 51–52 (1994).

²⁹ Carro, *supra* note 23, at 297–98; Hing, *supra* note 12, at 253; Pham, *supra* note 16, at 1382–83; see CHI., ILL., MUN. CODE 2-173-005 (2015); S.F., CAL., ADMIN. CODE § 12H.2 (2015); see also S.J. Res. 19, 59th Leg. (Mont. 2005); N.M. Exec. Order No. 2005-019 (Apr. 7, 2005); OR. REV. STAT. § 181.850(1) (2014). *But see* MO. ANN. STAT. § 67.307.2 (West 2014); OKLA. STAT. ANN. tit. 74, § 20j (West 2015); UTAH CODE ANN. § 76-9-1006 (LexisNexis 2012); Hazleton, Pa., Ordinance 2006-18 (Sept. 2006); Prince William County, Va., Resolution 07–894 (Oct. 16, 2007).

³⁰ Hing, *supra* note 12, at 253; Villazor, *supra* note 23, at 593–94; see also Patrick J. McDonnell, *Law Could Alter Role of Police on Immigration*, L.A. TIMES (Sept. 30, 1996), http://articles.latimes.com/1996-09-30/news/mn-49038_1_illegal-immigrants (“All of these efforts stemmed from a fundamental principle: the need to encourage new arrivals—many lacking papers and hailing from troubled homelands where police were often thieves and torturers—to come forward and report crimes.”).

³¹ Carro, *supra* note 23, at 305–15; Pham, *supra* note 16, at 1388–89.

³² See, e.g., CONN. GEN. STAT. ANN. § 14-36m(b)(1) (West 2014); Newark, N.J.,

laws in place in 1996 were New York City, Chicago, Los Angeles, San Francisco, New York State, and New Mexico.³³ Their resistance to involvement with federal immigration enforcement did not go unnoticed.

In August 1996, President Bill Clinton signed the federal Welfare Reform Act,³⁴ which included numerous provisions limiting access to public benefits for non-citizens. Among the immigration-related provisions was § 434, entitled “Communication Between State and Local Government Agencies and the Immigration and Naturalization Service,” which became part of federal law at 8 U.S.C. § 1644,³⁵ and provides:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.³⁶

The congressional record provides useful insight into the intended scope of the provision and makes clear that Congress’s intent was to encourage, but not require, communication between state and local governments and federal immigration authorities:

The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien or the presence, whereabouts, or activities of illegal aliens. It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS.

The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent

Ordinance 15-0804 (May 20, 2015); N.Y.C., N.Y., ADMIN. CODE § 3-115(c)(2) (2015); S.F., CAL., ADMIN. CODE § 12.H; TAKOMA PARK, MD., MUN. CODE § 9.04.010 (2015).

³³ See N.Y.C., N.Y., ADMIN. CODE § 3-115(c)(2); CHI., ILL., MUNICIPAL CODE 2-173-005; S.F., CAL., ADMIN. CODE § 12.H; N.M. Exec. Order No. 2005-019 (Apr. 7, 2005); L.A. Police Dep’t, Special Order No. 40 (Nov. 27, 1979), http://assets.lapdonline.org/assets/pdf/SO_40.pdf.

³⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Congress had twice previously tried to enact anti-sanctuary measures. See S. 1607, 103d Cong. § 725 (1993); H.R. 5255, 102d Cong. (1992); see also Rudolph W. Giuliani, Address, *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 4 GEO. J. ON FIGHTING POVERTY 165, 168 (1996) (“As I have said, this idea [revoking noncooperation ordinances] has long been debated in Congress and there have been at least two other attempts to revoke [New York City’s Executive Order 124], both of which have been defeated.”).

³⁵ § 434, 110 Stat. at 2275.

³⁶ *Id.*

any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS. The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.³⁷

A similar measure was enacted several weeks later as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This provision, IIRIRA § 642(a), entitled “Communication Between Government Agencies and the Immigration and Naturalization Service,” is codified at 8 U.S.C. § 1373 and provides:

(a) In General

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional Authority of Government Entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to Respond to Inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.³⁸

IIRIRA § 642, while also focusing on intergovernmental communication, included broader language encompassing a greater array of gov-

³⁷ H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.).

³⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 342, 110 Stat. 3009-546, 3009-707.

ernment actors and protected activities, as well as an explicit mandate to federal immigration authorities to respond to inquiries about immigration status from federal, state, and local government agencies. A Senate committee report accompanying the legislation states, in reference to this section, that it:

Prohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.³⁹

The text and commentary to both anti-sanctuary provisions make clear that these provisions were intended to facilitate immigration-related information sharing in support of federal immigration enforcement efforts. In the context of the Welfare Reform Act, § 1644 formed part of a concerted effort to make drastic cuts in federal welfare programs by limiting access by all non-citizens, not just unauthorized immigrants, to federal public benefits.⁴⁰ Indeed, eliminating access to benefit programs by legal permanent residents alone would result in the lion's share of the budget savings wrought by the Welfare Reform Act.⁴¹ Although the Welfare Reform Act most dramatically impacted access to public benefits for green card holders, it also reiterated and formalized the ineligibility of undocumented immigrants for virtually all public-benefit programs in the United States.⁴² In that vein, § 1644 confirmed Congress's intent to

³⁹ S. REP. NO. 104-249, at 19–20 (1996).

⁴⁰ DOLORES ACEVEDO-GARCIA ET AL., U.S. COMM'N ON IMMIGR. REFORM, IMPACT OF FEDERAL WELFARE REFORM ON IMMIGRANTS 1 (July 28, 1997), <https://www.utexas.edu/lbj/uscir/respapers/iot-jul97.pdf> (“Title IV of [the Welfare Reform Act] sets forth new requirements on the states to discontinue benefits and deny eligibility for federal, state and local welfare programs to specific classes of immigrants, including qualified immigrants, non-qualified immigrants, and illegal immigrants.”).

⁴¹ Audrey Singer, *Welfare Reform and Immigrants: A Policy Review*, in IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 21, 25 (Philip Kretsedemas & Ana Aparicio eds., 2004) (“The welfare law was projected to save the federal government \$54.1 billion over six years. The largest savings—\$23.8 billion or 44 percent of the net savings—was to come from slashing benefits to legal permanent residents (green card holders). Legal immigrants, including those who were participating in the programs at the time the law became effective, became ineligible for most federally funded programs.”).

⁴² Excluded from benefits under the Welfare Reform Act are “undocumented immigrants, asylum applicants, immigrants formerly considered ‘permanently

ensure that all non-citizens, but perhaps especially unauthorized immigrants, accessing or thinking about accessing public benefits would be subject to information sharing with and, ultimately, enforcement action by federal immigration authorities.⁴³

But the scope of § 1644 was not limited to the public-benefit arena. Section 1644 banned restrictions on immigration-related information sharing by any state or local government entity, including existing state and local restrictions on information sharing related to law enforcement, education, and public health functions. Of the more than two dozen sanctuary measures then in place, a number of them contained restrictions on sharing immigration-related information with federal immigration authorities that would be prohibited by § 1644.⁴⁴

It is also evident that in enacting § 1644, Congress perceived that certain state and local measures restricting disclosure of immigration-related information had been adopted in order to avoid the loss of funding under existing federal laws that specifically prohibited disclosure of certain categories of protected information, including immigration status information:

The confidentiality provisions of various State statutes may prohibit disclosure of immigration status obtained under them. Some Federal laws, including the Family Education Rights and Protection Act, may deny funds to certain State and local agencies that disclose a protected individual's immigration status. Various localities have enacted laws preventing local officials from disclosing the immigration status of individuals to INS.⁴⁵

The conference report specifically mentions the Family Educational Rights and Privacy Act (FERPA), which restricts and penalizes unauthorized disclosure of educational records.⁴⁶ However, other federal laws already in place in 1996 and still in effect today also prohibit disclosure of certain types of confidential information except in limited circumstances, and impose penalties, including loss of federal funding for unauthorized disclosures. In addition to educational records, federal law restricts or

residing under color of law' . . . as well as those with temporary status such as students and tourists." *Id.* at 23.

⁴³ *See id.* at 26 ("For their part, immigrants had to confront their precarious place in American society. Many immigrants felt vulnerable, including those who had never participated in U.S. welfare programs.").

⁴⁴ *See, e.g.*, L.A. Police Dep't, Special Order No. 40 (Nov. 27, 1979), http://assets.lapdonline.org/assets/pdf/SO_40.pdf; *see also* McDonnell, *supra* note 30 ("The trailblazing LAPD policy, enacted after intense community pressure, generally prevents officers from quizzing anyone about their immigration status, checking with the INS or turning suspects accused of minor violations over to immigration authorities. (The major exception involves those who commit serious crimes.)").

⁴⁵ H.R. REP. NO. 104-725, at 391 (1996) (Conf. Rep.).

⁴⁶ *See infra* Part IV.B.

prohibits disclosure of protected information including health records,⁴⁷ census records,⁴⁸ driver's license records,⁴⁹ and tax records,⁵⁰ all of which might include information relating to immigration status. As discussed in Part IV, *infra*, state and local entities and officials covered by the federal anti-sanctuary statutes would undoubtedly also be subject to these federal privacy protections.

The anti-sanctuary provision in IIRIRA, like its counterpart in the Welfare Reform Act, formed part of a broader legislative effort intended to prevent non-citizens, particularly unauthorized immigrants, from accessing government benefits and services.⁵¹ Beyond that, IIRIRA was designed to crack down on unauthorized immigration through tighter border controls, expansion of detention capacity, streamlined removal procedures, employer sanctions, and penalties for fraud and abuse in asylum and parole procedures.⁵² Faced with increasing levels of unauthorized immigration,⁵³ Congress sought to expand enforcement capacity by encouraging information sharing and other forms of cooperation within the federal government and between the federal government and state and local governments.⁵⁴ While the text of § 1373 clearly expresses Congress's intent to encourage open communication of immigration-related information among all levels and branches of government, the legislative commentary also reveals Congress's frustration with certain "Americans,"

⁴⁷ Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-6 (2012).

⁴⁸ 13 U.S.C. § 9(a) (2012).

⁴⁹ Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2012).

⁵⁰ 26 U.S.C. § 6103 (2012).

⁵¹ See S. REP. NO. 104-249, at 3 (1996) ("The committee bill is needed to address the high current levels of illegal immigration . . . and the substantial burden imposed on the taxpayers of this country as the result of aliens' use of welfare and other government benefits.").

⁵² *Id.* at 2.

⁵³ See *id.* at 3 ("No matter how successful Congress might be in crafting a set of immigration laws that would—in theory—lead to the most long-term benefits to the American people, such benefits will not actually occur if those laws cannot be enforced. Unfortunately, U.S. immigration law is violated on a massive scale.").

⁵⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707; see also § 133, 110 Stat. at 3009-563 (authorizing the Attorney General to enter into written agreements with a state, or any political subdivision of a state, to permit specially trained state officers to arrest and detain aliens); § 623, 110 Stat. at 3009-697 (requiring the Attorney General to release information provided to the INS by an alien in connection with an application for legalization or the special-agricultural-work program in order to assist law enforcement authorities with a criminal investigation or to assist in the identification of a deceased person); § 656, 110 Stat. at 3009-716 to -719 (establishing federal standards for birth certificates and state-issued driver's licenses and grants for states to facilitate the matching of birth and death records).

including members of the federal judiciary, who were perceived as not fully supporting federal efforts to enforce immigration law.⁵⁵ Consequently, IIRIRA's anti-sanctuary provision is more expansive than that in § 1644 of the Welfare Reform Act, applying not just to state and local government entities but to federal entities as well, and protecting communication of immigration-related information among non-federal entities as well as with federal immigration authorities.⁵⁶ Additionally, § 1373 contains a provision which further encourages immigration-related information sharing by requiring federal immigration officials to respond to communications from federal, state, and local government agencies seeking information about or verification of the immigration status of any individual for any purpose authorized by law.⁵⁷

Almost immediately after they were enacted, it was understood that §§ 1644 and 1373 were intended to target so-called sanctuary measures promulgated by states and localities in order to ensure that their undocumented immigrant residents were not deterred from reporting crimes, seeking medical care, or enrolling in public schools out of fear of immigration enforcement.⁵⁸ In New York City, San Francisco, and Los Angeles, where long-standing policies prohibiting disclosure of immigration-related information were in place, there was concern about the impact that the federal anti-sanctuary provisions would have on those communities.⁵⁹ Most understood the anti-sanctuary provisions as invalidating state

⁵⁵ See S. REP. NO. 104-249, at 7 (“At this point, there is a fundamental committee intent that should be clearly expressed—an intent that should be taken into account in the interpretation of every provision of this bill. The committee intends that aliens within the jurisdiction of this country be required to fully obey all State and Federal laws—including the immigration laws. Some Americans appear to be ambivalent about the enforcement of the Immigration and Nationality Act. This includes a number of judges, perhaps reflecting a tension they feel between their duty to apply the law and their inclination to be humane toward those seeking a better life in this country, in accordance with our immigrant heritage. For example, while the U.S. Supreme Court has recognized that the making of immigration policy is reserved to the political branches under our constitutional system and should be largely immune from judicial control, and that relief from deportation may be left to the unfettered discretion of the Attorney General, the Court on other occasions has characterized deportation as a grave penalty and suggested that statutory ambiguities should be resolved in favor of the alien. If the United States is to have an immigration policy that is both fair and effective, the law and the commitment of those with the duty to apply or enforce it must be clear. There should be no confusion about the intent of Congress that U.S. immigration law be fully binding on all persons at or within the borders of this country. This is a nation governed by law, and the law includes the immigration statutes and the regulations promulgated thereunder.” (internal citations omitted)).

⁵⁶ 8 U.S.C. § 1373(b) (2012).

⁵⁷ *Id.* § 1373(c).

⁵⁸ See McDonnell, *supra* note 30.

⁵⁹ *Id.*; see, e.g., Giuliani, *supra* note 34, at 165 (describing § 1644 as an attempt to

and local measures that prohibited public agencies and employees from sharing immigration information.⁶⁰ However, some public officials and news reports initially understood the federal statutes as mandating reporting of immigration information to the federal government.⁶¹ Whatever initial uncertainty or misunderstanding may have existed about the meaning and effect of the federal anti-sanctuary provisions, it does not appear that any state or municipality voluntarily rescinded or revised an existing sanctuary measure upon their enactment. Perhaps because it was unclear how or whether the anti-sanctuary measures would be enforced, most sanctuary jurisdictions seemed to take a “wait and see” approach.⁶² One jurisdiction, New York City, was unwilling to wait and on September 11, 1996, Mayor Rudolph Giuliani announced that the City of New York would challenge the anti-sanctuary provisions in court.⁶³

III. THE FEDERAL ANTI-SANCTUARY PROVISIONS IN THE BATTLE AGAINST SANCTUARY

Following the enactment of the anti-sanctuary provisions, some predicted dire consequences for public safety and health in communities where sanctuary provisions were then in place.⁶⁴ Others applauded the measures and eagerly awaited the opportunity to exercise this apparently

reverse a New York City executive order “in existence since 1988 stating that New York City will create a zone of protection for illegal and undocumented immigrants who are seeking the protection of the police, or seeking medical services because they are sick, or attempting to or actually putting their children in public schools so they can be educated”); *see also* 142 CONG. REC. S10712–13 (daily ed. Sept 17, 1996) (statement of Senator Moynihan) (“[S]ection 434 . . . poses a serious threat to health and safety in New York City and elsewhere.”).

⁶⁰ *See* McDonnell, *supra* note 30 (“The new welfare statute expressly voids federal, state and local laws prohibiting state and local agencies from exchanging information with the INS.”).

⁶¹ *See id.* (quoting Los Angeles Mayor Richard Riordan saying “I have a big problem making schools and local police departments the ones who are responsible for policing illegal immigration.”).

⁶² *See, e.g., id.* (“Until the matter is clarified, LAPD officials have no plans to alter their policy of generally not inquiring about people’s immigration status ‘We do not want to discourage the community from coming forward.’”).

⁶³ David Firestone, *Giuliani to Sue over Provision on Welfare*, N.Y. TIMES, Sept. 12, 1996, at B1.

⁶⁴ David Firestone, *Mayoral Order on Immigrants Is Struck Down*, N.Y. TIMES, July 19, 1997, at 21 (“Last September, in announcing that he would sue the Federal Government over the provision, the Mayor said that ending the executive order would ‘create chaos in New York City.’ Without an iron-clad guarantee that they would not be turned in, illegal immigrants might refuse to send their children to school, report crimes to the police or seek treatment for contagious diseases, he said.”).

unrestricted authority to share information with federal immigration authorities.⁶⁵ Nevertheless, there was a great deal of uncertainty about how the provisions would be enforced,⁶⁶ and some opponents of the anti-sanctuary measures predicted that the federal government would never enforce the laws, that their only purpose was to create fear and apprehension (and ultimately self-deportation) in immigrant communities about increased enforcement at all levels of government.⁶⁷ As it turns out, the federal government never took affirmative steps to enforce the anti-sanctuary provisions or to invalidate a state or local sanctuary law. Even so, §§ 1644 and 1373 have been at the center of numerous legal challenges involving sub-federal sanctuary measures in the almost two decades since they became law.

A. *City of New York v. United States: §§ 1644 and 1373 Survive a Constitutional Challenge*

In August 1989, Edward Koch, then Mayor of New York City, issued Executive Order 124. The order, entitled “City Policy Concerning Aliens,” was subsequently reissued by Mayor David Dinkins and Mayor Giuliani,⁶⁸ and provides:

Section 2. Confidentiality of Information Respecting Aliens.

⁶⁵ McDonnell, *supra* note 30 (quoting California Governor Pete Wilson regarding his plan to immediately implement the mandates of the anti-sanctuary provisions: “We fully intend to use the new authority that has been conferred on the state and local governments to deny services to those who are illegally in the country and report them to the INS, hopefully for return back to their country of origin”); *see also* Michael Grunwald, *Illegal Alien List Dilemma for Reformers; Overhaul Mandates INS Access to Names of Welfare Recipients*, BOS. GLOBE, Dec. 12, 1996, at A1 (quoting Massachusetts Governor William F. Weld’s welfare commissioner regarding new requirements that state and local agencies report immigration-related information about individuals seeking welfare benefits: “I don’t have any problem releasing this information[.] . . . These people are in this country illegally. I don’t see why we shouldn’t let the INS know about that.”).

⁶⁶ *See* McDonnell, *supra* note 30 (“[T]he law contains no mechanisms to enforce the provision, and it remains unclear what kind of enforcement, if any, would emerge.”).

⁶⁷ Giuliani, *supra* note 34, at 169 (“So it seems to us that this provision is another ‘not-real’ attempt to control immigration in a useful way, but creates a sense of fear as well as disincentives because the reality is that all the names, if we are required to turn them in, will just be added to a very big pile. The overwhelming majority of people will face a type of Russian roulette where some will be deported and some will not be deported. So you create this catastrophic setting, but in no way are you affecting the number of people, at least the present population of illegal and undocumented immigrants, that are here.”).

⁶⁸ *See* Hing, *supra* note 12, at 259.

a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) such officer's or employee's agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.⁶⁹

The commentary issued with the order made clear that the City's goal in issuing the order was to encourage all residents, including unauthorized immigrants, to utilize health, police and educational services, as a matter of public welfare.⁷⁰ It also articulated the City's understanding that immigration enforcement was a federal obligation and that the City was not obliged, except in limited circumstances, to provide immigration-related information to federal immigration authorities.⁷¹ In balancing

⁶⁹ N.Y.C., N.Y., Exec. Order No. 124, § 2 (Aug. 7, 1989), http://www.nyc.gov/html/records/pdf/executive_orders/1989EO124.PDF.

⁷⁰ *Id.* at 3 ("Many services provided by New York City, including education and police protection, are available to all City residents regardless of their citizenship or immigration status. However, many aliens who reside in the City fail to make use of such services, largely from fear that any contact with a government agency will bring them to the attention of federal immigration authorities. It is to the disadvantage of all City residents if some who live in the City are uneducated, inadequately protected from crime, or untreated for illness. Regardless of their immigration status, aliens should not be discouraged from utilizing those City services to which they are entitled. On the contrary, the public welfare requires that they be encouraged to do so. Yet many aliens will continue to avoid City agencies as long as they fear that they will be reported to federal immigration authorities.").

⁷¹ *Id.* ("Federal law places full responsibility for immigration control on the

this understanding with the City's interest in protecting public health and safety, the order prohibited disclosure of immigration-related information except (1) where otherwise required by law, (2) where the individual involved consented to the disclosure, or (3) where the individual was suspected of criminal activity.⁷² The order also required that only designated city officials or employees would be authorized to make a decision to report immigration information to federal authorities.⁷³ In this way, the order prevented ad hoc reporting by city employees and allowed designated city officials to decide when and whether to report information on a case-by-case basis. By limiting the discretion of individual employees to share immigration-related information, the order protected unauthorized immigrant residents from the uncertainty and fear of being reported to immigration authorities whenever they came in contact with city employees or accessed a city service.⁷⁴

In early October 1996, as Mayor Giuliani had promised, the City of New York filed a lawsuit bringing a facial challenge to the constitutionality of §§ 1644 and 1373. New York City alleged that the anti-sanctuary provisions violated principles of federalism and the Tenth Amendment⁷⁵ and Guarantee Clause⁷⁶ of the United States Constitution because they "(1) . . . directly prohibit States and localities from engaging in the central sovereign process of passing laws or otherwise determining policy; and (2) they usurp States' and local governments' administration of core functions of government, including the provision of police protection

federal government. With limited exceptions, the City therefore has no legal obligation to report any alien to federal authorities. The executive order, in recognition of this lack of obligation and the importance of providing the services covered herein, requires City agencies to preserve the confidentiality of all information respecting law-abiding aliens to the extent permitted by law.").

⁷² *Id.* § 2(a).

⁷³ *Id.* § 2(b).

⁷⁴ *See* Giuliani, *supra* note 34, at 168 ("The illegal and undocumented parent seeking to put her child in school would not know if a teacher would report her to the INS or not. So [§ 1644] would have precisely the impact the order intended to avoid. It would make illegal and undocumented immigrants wary of contact with the government for basic services they need to protect themselves as well as the rest of the population."); *see also* Firestone, *supra* note 64, at 22 ("[T]he Mayor said the welfare law provision would have the same effect as requiring teachers to report illegal immigrants, because the immigrants, not knowing which of the city's 200,000 employees might decide to report them, would assume that any employee might turn them in.").

⁷⁵ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁷⁶ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

and regulation of their own workforces.”⁷⁷ New York City first argued that the anti-sanctuary provisions violated the Tenth Amendment by forbidding state and local governments from controlling how they use immigration-related information gathered in the course of official business.⁷⁸ While the City did not dispute that the federal government has plenary power to legislate in the area of immigration, it contended that the Tenth Amendment prohibited the federal government from exercising that power in a way that prevented states and local governments from enacting laws and policies that restrict their employees from cooperating with federal immigration.⁷⁹ The City argued that by prohibiting the City from ordering City employees to keep immigration-related information confidential, the anti-sanctuary provisions compelled the City to bear the political responsibility for ad hoc immigration reporting by City officials that is compelled by the federal government.⁸⁰ The City relied on *New York v. United States*⁸¹ and *Printz v. United States*⁸² to argue that the City had the authority to choose to not participate in a federal regulatory program and to prohibit city employees from voluntarily providing information to federal immigration authorities.⁸³ In *New York* and *Printz*, the U.S. Supreme Court held that the federal government could neither compel states to enact legislation to enforce a federal program,⁸⁴ nor coerce states into enforcing a federal law.⁸⁵

⁷⁷ *City of New York v. United States*, 971 F. Supp. 789, 791 (S.D.N.Y. 1997), *aff'd*, 179 F.3d 29 (2d Cir. 1999).

⁷⁸ *Id.* at 794.

⁷⁹ *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999).

⁸⁰ *City of New York*, 971 F. Supp. at 794.

⁸¹ 505 U.S. 144 (1992).

⁸² 521 U.S. 898 (1997).

⁸³ See Appellants' Brief at 41, *City of New York*, 179 F.3d 29 (No. 97-6182) (“When Congress desires to regulate in areas where it has authority under the Constitution, it must do so directly and cannot conscript State and local governments to do its bidding.” (citing *Printz*, 521 U.S. at 935)); see also *id.* at 43 (“While Congress, short of outright coercion, may encourage a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.” (citing *New York*, 505 U.S. at 167–68)).

⁸⁴ *New York*, 505 U.S. at 161 (“As an initial matter, Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981))).

⁸⁵ *Printz*, 521 U.S. at 935 (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

The Second Circuit Court of Appeals disagreed with the City's reliance on *Printz* and *New York*. The court distinguished the 1996 anti-sanctuary provisions from the laws at issue in *Printz* and *New York*, which "conscripted states (or their officers) to enact or administer federal regulatory programs" and reallocated federal enforcement and administrative responsibilities to the states, thus "diminish[ing] the political accountability of both state and federal officers."⁸⁶ With regard to the anti-sanctuary provisions, the Second Circuit found that Congress had not forced state and local governments to enact or administer any federal regulatory program, nor conscripted them into federal government service.⁸⁷ Indeed, the court found that the anti-sanctuary statutes did not directly compel states or localities to do anything, but rather prohibited state and local governments "only from directly restricting the voluntary exchange of immigration information" with federal immigration authorities.⁸⁸ The court found that the Tenth Amendment did not give states or localities "an untrammelled right to forbid all voluntary cooperation with particular federal programs," pointing out that a "system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system."⁸⁹

New York City's second argument was that the anti-sanctuary provisions improperly interfered with the City's control of confidential information gathered in the course of official business and of the actions of its employees in connection with that information. The City argued that the ability to establish policies that assure access to vital services by all residents, including unauthorized immigrants, was central to its police power.⁹⁰ Depriving the City of the ability to guarantee residents that information about immigration status would be kept confidential was, the City argued, an unconstitutional interference with the City's authority to "preserve public order and to protect the health, safety and well-being of its residents."⁹¹ With respect to the City's ability to control employee disclo-

⁸⁶ *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999).

⁸⁷ *Id.* at 35.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Appellants' Brief at 24, *City of New York*, 179 F.3d 29 (No. 97-6182) ("The exercise of police powers to protect the health, safety, good order and general welfare of the people is the chief purpose of local government, and has never been surrendered to the federal government. Police powers are inherent in the States and their political subdivisions, reserved to them by the Constitution, and necessary to their existence as separate and independent governments.").

⁹¹ *Id.* at 37; *see also id.* at 29 ("This executive order was issued to protect the health, safety and well-being of all New York City residents by assuring the confidentiality of law-abiding immigrants, many of whom were not seeking medical attention, reporting crimes, or sending their children to school for fear that any

sure of confidential immigration-related information, the City contended that such information, gathered by City employees as part of their official duties, was the property of the City and that the mayor had the authority to “establish policy prohibiting City employees, who do not have the expertise or authority to determine immigration status, to make ad hoc decisions regarding that status . . . [and to] forbid City employees from using City time and resources to report law-abiding immigrants to INS.”⁹² The nature of state sovereignty depends, the City contended, on the power of local government to set policy and to control internal processes and procedures, including “the ability to control City employees and to assign their duties.”⁹³ Without such authority, the City argued, it would not be possible to maintain the “open and honest communications . . . essential to the preservation of health, prevention of crime and the protection of the public welfare.”⁹⁴ Executive Order 124 was, according to the City, a legitimate exercise of the City’s police powers, and this power was not subordinate to the federal government’s authority over immigration.⁹⁵

The Court of Appeals agreed with the City on two points. First, the court agreed with the City that without an expectation of privacy the City could be hindered in obtaining information necessary to a wide variety of city functions, and that preserving confidentiality could also require restricting the disclosure of such information by City employees.⁹⁶ The court also agreed with the City that §§ 1644 and 1373 did in fact interfere with the City’s control over confidential information and its employees’ use of that information.⁹⁷ However, the court found that the City had

contact with a government agency will bring them to the attention of federal immigration authorities.” (quoting N.Y.C., N.Y., Exec. Order No. 124, at 3 (Aug. 7, 1989), http://www.nyc.gov/html/records/pdf/executive_orders/1989EO124.pdf)).

⁹² *Id.* at 37.

⁹³ *Id.* at 38 (“Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies[.]” (quoting *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996))).

⁹⁴ *Id.* at 37.

⁹⁵ *Id.* at 32 (“The People of the States did not confer authority upon Congress to subordinate their health, safety and well-being to the regulation of immigrants in accordance with congressionally-imposed rules. No matter how powerful the federal interest may be, the Constitution simply does not give Congress the authority to conduct its business in a fashion such as to inflict injury upon the public, or to obstruct the operations of municipal government directed at protecting the public. The power of Congress to regulate immigration was not intended as an authority to control local governments in the exercise of their police powers over local matters, always existing and carefully reserved to them in the Tenth Amendment.”).

⁹⁶ *City of New York v. United States*, 179 F.3d 29, 36 (2d Cir. 1999).

⁹⁷ *Id.*

failed to show that the anti-sanctuary provisions constituted an impermissible intrusion on the City's authority to control the use of confidential information and to determine how such information will be handled by City employees.⁹⁸ In particular, because Executive Order 124 was the only city policy the City claimed was disrupted by §§ 1644 and 1373, and because Executive Order 124 did not prevent voluntary sharing of immigration-related information with anyone other than federal immigration agencies and officers, the court concluded that Executive Order 124 was not integral to the functions of city government.⁹⁹ The court applied a balancing test between the anti-sanctuary statutes' interference with the City's interests and the executive order's interference with federal policy and decided that, in the context of the City's facial challenge, the anti-sanctuary provisions were valid.¹⁰⁰

In *City of New York*, the fate of state and local sanctuary provisions that prohibit voluntary immigration-related information sharing with federal immigration authorities was sealed. Such provisions are preempted by the anti-sanctuary statutes.¹⁰¹ However, the court's opinion in this case left open a number of questions with respect to the interaction of the anti-sanctuary statutes and sub-federal sanctuary provisions. First, the court's opinion in *City of New York* explicitly left open the question of whether the federal anti-sanctuary provisions would survive a challenge in the context of a more generalized city policy protecting confidential information that included but was not limited to immigration information.¹⁰² In the wake of the Second Circuit's decision, the City of New York revoked Executive Order 124, putting in place a new order which incorporated privacy protections for immigration-related information into a more generalized privacy policy that applies to a broader category of information in a variety of contexts.¹⁰³ To emphasize the importance of

⁹⁸ *Id.*

⁹⁹ *Id.* at 36–37.

¹⁰⁰ *Id.* at 37 (“On its face, [the Executive Order] singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world. It imposes a policy of no-voluntary-cooperation that does not protect confidential information generally but does operate to reduce the effectiveness of a federal policy.”).

¹⁰¹ Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 *TULSA J. COMP. & INT’L L.* 209, 214–15 (2008). *But see* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 *U. PA. L. REV.* 103, 178 (2012) (“[F]ederal demands for information should be considered prohibited commandeering. In all important respects, the commandeering of the states’ information-gathering services is indistinguishable from the commandeering of other law enforcement services.”).

¹⁰² *City of New York*, 179 F.3d at 37.

¹⁰³ N.Y.C., N.Y., Exec. Order No. 41, §§ 1–2 (Sept. 17, 2003), <http://www.nyc.gov/html/imm/downloads/pdf/eo-41.pdf> (defining confidential information to include sexual orientation, status as a sexual assault victim, tax record information,

confidentiality to the city's essential functions, the preamble to the new executive order incorporated language tracking almost verbatim the Second Circuit's acknowledgement in *New York v. United States* of the substantial burdens that could be placed on the city by the anti-sanctuary statutes:

Whereas, the obtaining of pertinent information, which is essential to the performance of a wide variety of government functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved, and preserving confidentiality in turn requires that governments regulate the use of such information by their employees¹⁰⁴

The court's decision in *City of New York* also did not address sanctuary provisions that prohibit the gathering, rather than the sharing of confidential immigration-related information. A number of jurisdictions, including New York City in the aftermath of the court's decision here, have put in place "don't ask" provisions, presumably with the purpose of limiting the collection of immigration-related information that would be subject to the voluntary disclosures encouraged by §§ 1644 and 1373.¹⁰⁵ New York City's Executive Order 41, still in effect today, no longer prohibits immigration-related information sharing but instead prohibits city employees, except in limited circumstances, from inquiring about immigration status.¹⁰⁶

Finally, despite New York City's serious concerns that the anti-sanctuary provisions deterred unauthorized immigrant residents from seeking health services or sending children to school, *City of New York v. United States* did not address the question, discussed *infra* Part III, of whether the anti-sanctuary provisions permit voluntary disclosure of immigration-related information that is protected by other federal confidentiality provisions. In other words, even if §§ 1644 and 1373 block state and local governments from prohibiting sharing of immigration-related information with federal immigration authorities, are there other legal prohibitions on information sharing that render such disclosures unlawful?

immigration status, and status as recipient of public assistance; and prohibiting disclosure, with certain exceptions, to anyone, not just to federal immigration authorities as in Executive Order 124).

¹⁰⁴ *Id.* § 1.

¹⁰⁵ *Id.* § 3 (prohibiting inquiries into immigration status except where necessary to determine eligibility for public benefits or as required by law); *id.* § 4(c) (declaring policy of not inquiring regarding the immigration status of crime victims, witnesses, and others assisting an investigation).

¹⁰⁶ *Id.* § 3.

The answers to these questions would come in the years following *City of New York v. United States* in the course of subsequent legal challenges to state and municipal sanctuary provisions.

B. Defining the Limits of the Anti-Sanctuary Provisions

Following the court's decision in *New York v. United States*, it would be several years before any other court considered the meaning and scope of §§ 1644 and 1373 in the context of a sub-federal sanctuary provision or practice. Though there were a number of sanctuary laws and policies already in place in 1996, that number continued to grow in the aftermath of IIRIRA's call for enhanced state and local involvement in immigration enforcement¹⁰⁷ and the release of a controversial Department of Justice opinion declaring that local police had "inherent authority" to enforce federal immigration laws.¹⁰⁸ In response to this increased pressure to engage them in immigration enforcement activities, dozens of cities, states and law enforcement agencies adopted policies making clear that immigration enforcement was not their responsibility.¹⁰⁹ This surge in sanctuary policies led, unsurprisingly, to new legal challenges.

1. Claims for Damages Under §§ 1644 and 1373

Among the first legal challenges involving the federal anti-sanctuary provisions were several seeking damages for injuries to private citizens

¹⁰⁷ In addition to barring states and localities from imposing restrictions on immigration-related information sharing through § 1373, IIRIRA contained a provision establishing a program through which local law enforcement agencies could enter in to agreements with ICE that enabled local officers to be trained to enforce federal immigration law under ICE's supervision. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563 to -564 (codified at 8 U.S.C. § 1357(g) (2012)).

¹⁰⁸ Memorandum from Jay S. Bybee, Assistant Att'y General, to the Att'y General (Apr. 3, 2002), <https://www.aclu.org/sites/default/files/FilesPDFs/ACF27DA.pdf>. Attorney General John Ashcroft relied on this memo to support a request for assistance from state and local police in the enforcement of civil immigration violations. This opinion was a reversal of a long-standing DOJ position that state and local police could not enforce non-criminal provisions of federal immigration law. The change in position caused concern among immigrant advocates and law enforcement agencies who believed that increased involvement in immigration enforcement would have a detrimental impact on public safety by deterring immigrants from cooperating with or seeking assistance from local law enforcement. See *Secret Immigration Enforcement Memo Exposed*, ACLU (Sept. 7, 2005), <https://www.aclu.org/news/secret-immigration-enforcement-memo-exposed>.

¹⁰⁹ See NAT'L IMMIGRATION FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 3 (Aug. 2007), <http://www.immigrationpolicy.org/sites/default/files/docs/EnforcementbyStateandLocalPolice-08-07.pdf>; see also NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES 14-15 (Oct. 2013), <http://www.nilc.org/document.html?id=963>.

claiming that state or local governments had acted in violation of §§ 1644 and 1373. In *Lewis v. City of Kimball*, a federal court in Nebraska considered the petitioner's claim that her termination from her job as a police officer in retaliation for her cooperation with federal immigration officials violated § 1373.¹¹⁰ Plaintiff did not allege that any defendant prohibited or restricted her from maintaining or exchanging relevant information in violation of § 1373. Instead she alleged that the defendants violated § 1373 by terminating her after several local employers complained to city officials about enforcement actions conducted by ICE against their employees in connection with investigations conducted by plaintiff.¹¹¹ That is, the city prohibited her from sharing immigration-related information in the course of her work as a police officer by firing her. The district court dismissed the complaint, agreeing with defendants that, even if plaintiff's allegations were true, § 1373 did not provide her with a remedy: "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."¹¹² The court found that § 1373 did not expressly provide for a private right of action and that a private right of action was not implicit in the statute. The court listed four factors traditionally considered by courts in determining whether a statute implies a private right of action:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?¹¹³

Noting that these four factors were not entitled to equal weight in the calculation, and that the critical determination was whether Congress intended to afford a private right of action,¹¹⁴ the court concluded that, because § 1373 did not expressly provide for a private right of action and the legislative history did not suggest in any way that Congress intended to do so, a private right of action under § 1373 did not exist.¹¹⁵

¹¹⁰ See *Lewis v. City of Kimball*, No. 4:06CV3084, 2006 WL 2375479, at *2 (D. Neb. Aug. 14, 2006).

¹¹¹ *Id.* at *1.

¹¹² *Id.* at *5 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979)).

¹¹³ *Id.* (quoting *Cannon*, 441 U.S. at 688 n.9 (citations omitted)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* ("In other words, even if it is consistent with the underlying purpose of

In *Doe v. New York City*, the plaintiff sought damages in connection with a rape and robbery on property owned and operated by the Metropolitan Transit Authority.¹¹⁶ Among the suspects charged and ultimately convicted of the crime were four unauthorized immigrants. The plaintiff alleged that city officials were aware of homeless squatters, including her attackers, who lived in an encampment near the railroad tracks where the assault took place but had failed to report the presence of unauthorized immigrants to federal immigration officials in violation of § 1373.¹¹⁷ She also alleged that several of her undocumented immigrant attackers had been previously arrested by New York City police but had been released pursuant to the city's sanctuary policy, amended after the Second Circuit's decision in *City of New York v. United States*.¹¹⁸ The court dismissed the complaint, finding that although § 1373 prohibited state and local governments from placing restrictions on reporting immigration-related information to federal immigration authorities, it did not impose an affirmative duty on them to make such reports.¹¹⁹ The court noted that § 1373 did not expressly provide for a private right of action and that a private right of action could be implied "only when the plaintiff is one of the class for whose particular benefit the statute was enacted and a right of action would be clearly in furtherance of the legislative purpose," which the court found was "lacking here."¹²⁰

In *Bologna v. City and County of San Francisco*, family members of three men murdered by an unauthorized immigrant filed a claim seeking damages and alleging that the city's sanctuary policy was the legal cause of the deaths.¹²¹ In particular, the plaintiffs alleged that the suspected murderer was a gang member and a drug trafficker known to and previously arrested by city authorities, but that he had never been reported to or turned

§ 1373 to imply a private remedy in this case, and even if the enforcement of § 1373 is a matter of federal concern, those considerations would not outweigh the fact that there is absolutely no reason to conclude that Congress intended to create a private cause of action for violations of § 1373.").

¹¹⁶ See *Doe v. City of New York*, 860 N.Y.S.2d 841, 842–43 (Sup. Ct. 2008). The Metropolitan Transit Authority is a "public benefit corporation[] and by statute [is] regarded as performing a governmental function in carrying out [its] corporate purpose and exercising the powers granted by statute." *Id.* at 844.

¹¹⁷ *Id.* at 842–43.

¹¹⁸ See Peggy O'Hare, *Accused Killer Helped by HPD's 'Hands-off' Proviso*, HOUS. CHRON. (Mar. 8, 2003), <http://www.chron.com/news/houston-texas/article/Accused-killer-helped-by-HPD-s-hands-off-proviso-2099827.php> (discussing the circumstances giving rise to *Doe*).

¹¹⁹ *Doe*, 860 N.Y.S.2d at 844.

¹²⁰ *Id.* at 844–45 (citing *Sheehy v. Big Flats Cmty. Day, Inc.*, 541 N.E.2d 18, 20 (N.Y. 1989); *CPC Int'l, Inc. v. McKesson Corp.*, 514 N.E.2d 116, 119 (N.Y. 1987); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459, 463 (N.Y. 1983)).

¹²¹ See *Bologna v. City & County of San Francisco*, 121 Cal. Rptr. 3d 406, 409 (Ct. App. 2011).

over to immigration officials because of the sanctuary policy. According to plaintiffs, the sanctuary policy caused the defendants to violate § 1373, and that statutory violation was the basis for a finding of negligence per se against the city.¹²² In dismissing plaintiffs' claim, the court noted that in order to succeed on a claim of negligence per se the plaintiffs must show "that the harm allegedly caused is of the precise nature a statute was designed to prevent."¹²³ The court found that plaintiffs had identified nothing in the legislative history or the text of the statute to suggest that Congress intended § 1373 to protect individuals from violent crime.¹²⁴ As a result, the court concluded plaintiffs' tort claims could not be premised on § 1373.

And in *Johnson v. Hurtt*, Joselyn Johnson, the widow of a slain Houston Police Officer and a Houston police officer herself, brought a claim under 42 U.S.C. § 1983, alleging that the Houston Police Department's sanctuary policies restricted her "right" to communicate with federal immigration officials in violation of §§ 1644 and 1373.¹²⁵ Johnson claimed that the anti-sanctuary statutes "confirm, if not create, a federal right on the part of local government officials such as Sergeant Johnson to share information with federal immigration officials without interference from their employers."¹²⁶ The district court disagreed, pointing out that "§ 1983 only provides redress for a plaintiff who asserts 'a violation of a federal right, not merely a violation of federal law,'" and concluding that neither § 1644 nor § 1373 reflect Congress's clear and unambiguous intent to benefit the plaintiff individually.¹²⁷ First, the court noted that the language of § 1644 speaks expressly about the exchange of information between ICE and state or local government entities, with no mention whatsoever of the application of the statute to individuals. Consequently, the court found that § 1644 did not convey "the sort of 'individual entitlement' that is enforceable under § 1983."¹²⁸ With respect to § 1373, the court also found that Congress did not intend to "address[] any particular individual needs or concerns regarding information sharing," but was instead implementing a "nationwide system of voluntary information

¹²² *Id.* at 411.

¹²³ *Id.* (citing *Hoff v. Vacaville Unified Sch. Dist.*, 968 P.2d 522, 531 (Cal. 1998)).

¹²⁴ *Id.* at 414.

¹²⁵ *Johnson v. Hurtt*, 893 F. Supp. 2d 817, 822–24 (S.D. Tex. 2012). Mrs. Johnson was represented in this case by Judicial Watch, Inc. See Tom Fitton, *Judicial Watch Goes to Court*, JUDICIAL WATCH: WEEKLY UPDATE (Sept. 25, 2009), <http://www.judicialwatch.org/press-room/weekly-updates/39-judicial-watch-goes-court/>.

¹²⁶ Reply Brief of Appellant at 15–16, *Johnson v. City of Houston*, 444 F. App'x 26 (5th Cir. 2011) (No. 10-20743).

¹²⁷ *Johnson*, 893 F. Supp. 2d at 837–38 (quoting *Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001)).

¹²⁸ *Id.* at 838 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)).

sharing” intended to assist federal immigration authorities with the enforcement of immigration laws.¹²⁹ Thus the court dismissed plaintiff’s claims related to the anti-sanctuary statutes, finding that they did not confer any individual rights enforceable under § 1983.¹³⁰

2. *Claims to Invalidate Sanctuary Policies Pursuant to §§ 1644 and 1373*

In addition to claims for damages, there have been various attempts to use the federal anti-sanctuary provisions to invalidate state and local sanctuary policies, claiming that they are in conflict with or preempted by §§ 1644 and 1373. In *Fonseca v. Fong*,¹³¹ a San Francisco resident and taxpayer filed a petition for a writ of mandamus alleging that the San Francisco Police Department (SFPD) was not complying with a state statute, § 11369 of the California Health and Safety Code, which requires local law enforcement agencies to report certain individuals arrested for drug-related crimes and believed to be aliens to federal immigration authorities.¹³² Fonseca alleged that by “disregard[ing]” their obligations under that state law, the SFPD’s policies and practices violated federal law, including § 1373(a) and the Supremacy Clause of the U.S. Constitution.¹³³ Fonseca asserted that the official policy of SFPD for implementing § 11369 impermissibly restricted cooperation with federal immigration authorities in violation of § 1373,¹³⁴ and sought an order mandating compliance with § 11369.

Fonseca was represented in this action by Judicial Watch, Inc., a “conservative, non-partisan educational foundation” that engages in litigation related to immigration and other issues in order to hold federal, state, and local government entities accountable.¹³⁵ Judicial Watch has identified “illegal immigration” as an area of focus for their litigation efforts, and has characterized their involvement in *Fonseca* and other immigration-related litigation as “[o]pposing state and local illegal alien sanctuary policies and extension of government benefits to aliens, and defending states that enforce our laws from attacks by groups who prefer

¹²⁹ *Id.* at 840.

¹³⁰ *Id.*

¹³¹ 84 Cal. Rptr. 3d 567, 570–71 (Ct. App. 2008).

¹³² See CAL. HEALTH & SAFETY CODE § 11369 (West 2015). The statute provides: “Arrest of alien; notice to federal agency[.] When there is reason to believe that any person arrested for a violation of [California controlled-substance law] may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.”

¹³³ *Fonseca*, 84 Cal. Rptr. 3d at 572 & n.7, 575–76.

¹³⁴ *Id.* at 572 n.7 (“As we understand appellant’s position it is that, as a practical matter, SFPD’s official policy purporting to implement Section 11369 . . . actually restricts compliance with [8 U.S.C. § 1373] by SFPD officers.”).

¹³⁵ See *About Judicial Watch*, JUDICIAL WATCH (2015), <http://www.judicialwatch.org/about/>.

lawlessness.”¹³⁶ By mandating compliance with § 11369, Judicial Watch sought, through *Fonseca v. Fong*, to “strike[] at the heart of the sanctuary movement for illegal aliens.”¹³⁷

In response to Fonseca’s petition, the City of San Francisco argued that § 11369, because it “serves no purpose other than promoting and facilitating enforcement of immigration laws,” was an impermissible regulation of immigration preempted by federal law.¹³⁸ Alternatively, the City claimed that they did in fact comply with § 11369 and that San Francisco’s City of Refuge Ordinance¹³⁹ did permit the release of immigration-related information in the circumstances required under § 11369.¹⁴⁰ The state court of appeal, without deciding whether the SFPD violated its obligations under either § 11369 or 8 U.S.C. § 1373 as plaintiffs alleged, concluded only that § 11369 was not preempted by the Constitution or by federal law. The court of appeal rejected the trial court’s finding that § 11369 was an impermissible regulation of immigration preempted per se by the federal government’s exclusive power over immigration.¹⁴¹ Notably for purposes of this discussion, while the court rejected the City’s preemption challenge to § 11369, it did not address the question of

¹³⁶ See *Amicus Briefs and Litigation*, JUDICIAL WATCH (2015), <http://www.judicialwatch.org/amicus-briefs/>. According to Judicial Watch, the challenge in *Fonseca v. Fong* is part of their effort to fight “rampant law-breaking resulting from the willful non-enforcement of laws, whether due to selective enforcement or institutional failure. Open law-breaking harms the public and creates a culture of lawlessness, which leads to increases in criminal conduct.” *Id.*

¹³⁷ See *Fonseca v. Fong* (No. CPF-07-507227)—*San Francisco Sanctuary Policy*, JUDICIAL WATCH (Oct. 31, 2011), <http://www.judicialwatch.org/cases/fonseca-v-fong-no-cpf-07-507227-2/>.

¹³⁸ Memorandum of Points and Authorities in Support of Respondents’ Demurrer to Petition for Writ of Ordinary Mandamus at 11–12, *Fonseca*, 84 Cal. Rptr. 3d 567 (No. A120206). The City relied on the analysis set forth by the Supreme Court in *De Canas v. Bica*, for determining whether a state statute related to immigration is preempted. See *id.* at 7, 11 (citing *De Canas v. Bica*, 424 U.S. 351 (1976)). The *De Canas* test provides: First, is the state statute an impermissible regulation of immigration? Second, was the “clear and manifest purpose of Congress” to effect a “complete ouster of state power” with respect to the subject matter which the statute attempts to regulate? And third, does the state law conflict with or “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?” If a state statute does not survive any of the three tests, it is preempted. See *Fonseca*, 84 Cal. Rptr. 3d. at 575 (quoting *De Canas*, 424 U.S. at 355, 357, 363).

¹³⁹ S.F., CAL., ADMIN. CODE § 12H (2015).

¹⁴⁰ See *Fonseca*, 84 Cal. Rptr. 3d at 572 n.8.

¹⁴¹ *Id.* at 584. Relying on the three-part preemption analysis established in *De Canas v. Bica*, the court explained that “[f]or purposes of assessing whether Section 11369 is per se preempted, the salient factor . . . is that it does not require any state actor to determine who is and who is not present in the United States unlawfully.” *Id.* at 583.

whether the City's sanctuary policy or police department practices pursuant to that policy were invalidated by the federal anti-sanctuary statutes. The *Fonseca* court merely concluded that a state law that requires city officials to report certain non-citizens arrested for drug-related crimes to federal authorities was not preempted by § 1373.¹⁴² Despite the limited scope of the court's holding, the outcome in this case was touted as a victory by Judicial Watch:

As a result of the appellate ruling, San Francisco must now end its sanctuary policy that protects aliens arrested for certain drug offenses from being reported to ICE.

....

... San Francisco and other sanctuary cities are not above the law. This court ruling exposes the lie behind the argument that state and local law enforcement cannot help enforce immigration laws.¹⁴³

Judicial Watch's predictions about the fate of San Francisco's sanctuary policy were overstated, however, and in 2015 the policy challenged in *Fonseca* is still largely in place.¹⁴⁴

In *Sturgeon v. Bratton*,¹⁴⁵ another anti-sanctuary lawsuit initiated by Judicial Watch, Harold Sturgeon, a resident of Los Angeles, brought a challenge in California state court to the validity of Special Order 40 (SO40), a policy of the Los Angeles Police Department (LAPD) which reads:

Enforcement of United States Immigration Laws. Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).¹⁴⁶

SO40 was adopted in 1979 and represented a significant reversal in LAPD practice and policy regarding unauthorized immigrants. Where previously LAPD officers were encouraged and in some cases mandated to obtain and report immigration-related information about individuals suspected of being unauthorized immigrants, SO40 prohibited officers from engaging with members of the community for the sole purpose of uncovering civil immigration violations.¹⁴⁷ As compared to the Executive

¹⁴² *Id.* at 583–84.

¹⁴³ *California Appellate Court Rules Against San Francisco Sanctuary Policy*, JUDICIAL WATCH (Oct. 23, 2008), <http://www.judicialwatch.org/press-room/press-releases/california-appeals-court-rules-against-san-francisco-sanctuary-policy/>.

¹⁴⁴ *See* S.F., CAL., ADMIN. CODE §§ 12H, 12I.

¹⁴⁵ 95 Cal. Rptr. 3d 718 (Ct. App. 2009).

¹⁴⁶ *Id.* at 722, 724–25. SO40 and other Special Orders are directives issued by the Police Chief which amend the LAPD Manual. SO40 is incorporated into the Manual at Volume IV, § 264.50.

¹⁴⁷ RAMPART INDEP. REVIEW PANEL, A REPORT TO THE LOS ANGELES BOARD OF

Order at issue in *New York v. United States*, a “don’t tell” policy that prohibited sharing immigration-related information with federal immigration authorities, SO40 has been characterized as a “don’t ask” policy.¹⁴⁸

Sturgeon sought an injunction against the enforcement of SO40 as an illegal expenditure of taxpayer funds.¹⁴⁹ Sturgeon alleged that SO40 violated the Supremacy Clause of the U.S. Constitution because it was in direct conflict with § 1373. He also argued that, even absent an unconstitutional conflict with § 1373, SO40 was preempted by federal immigration law because it was an improper “regulation of immigration” and stood as an obstacle to Congress’s intentions in enacting § 1373.¹⁵⁰ The court of appeal concluded that Sturgeon had brought a facial challenge to SO40 since he had not offered evidence of any specific applications of SO40 resulting in a violation of § 1373.¹⁵¹ After reviewing the text of SO40 and § 1373, the court found that there was “no total and fatal conflict” between them.¹⁵² Specifically, the court found no conflict because SO40 said nothing about communication with ICE, the only topic addressed by § 1373, and § 1373 said nothing about initiation of police action or arrests for illegal entry, the only topics addressed by SO40.¹⁵³ The court similarly found that SO40 did not stand as an obstacle to Congress’s purposes and objective in enacting § 1373. While leaving open the possibility that SO40 could be interpreted or applied in a way that conflicted with § 1373, the court found that SO40 was not preempted because by its terms it had “no effect on the voluntary flow of immigration information between LAPD officers and ICE.”¹⁵⁴

POLICE COMMISSIONERS CONCERNING SPECIAL ORDER 40, at 1 (Feb. 1, 2001), http://assets.lapdonline.org/assets/pdf/report_rampart_special_order_40.pdf.

¹⁴⁸ Hing, *supra* note 12, at 259–60.

¹⁴⁹ *Sturgeon*, 95 Cal. Rptr. 3d at 722. Harold Sturgeon has been the named plaintiff in at least two other lawsuits brought by Judicial Watch, Inc. *See Sturgeon v. County of Los Angeles*, 119 Cal. Rptr. 3d 332 (Ct. App. 2010); *Sturgeon v. County of Los Angeles*, 84 Cal. Rptr. 3d 242 (Ct. App. 2008).

¹⁵⁰ *Sturgeon*, 95 Cal. Rptr. 3d at 732. Plaintiff also alleged that SO40 was invalid because it violated § 834b of the California Penal Code, a provision that imposes certain requirements on all state law enforcement agencies relating to obtaining and reporting immigration-related information to federal immigration authorities. The court dismissed this claim based on a prior federal court ruling that § 834b was preempted as an impermissible regulation of immigration law. *See id.* at 733–34.

¹⁵¹ *Id.* at 730.

¹⁵² *Id.* at 731–32.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 732–33; *see also Moreno v. Bratton*, No. B214390, 2010 WL 161503, at *2 (Cal. Ct. App. 2010) (rejecting Judicial Watch challenge to LAPD sanctuary policy in the context of compliance with § 11369 of the California Health and Safety Code requiring reporting of persons arrested for certain drug-related crimes to immigration authorities); Steven M. Ellis, *Court Rejects Challenge to LAPD Immigration*

While the controversy over states, cities, and law enforcement agencies adopting policies or practices that limit their involvement with federal immigration enforcement continues to rage almost twenty years after §§ 1644 and 1373 became law, the federal anti-sanctuary provisions have been largely ineffective in putting a stop to sanctuary laws and policies. In addition, the legal challenges to sanctuary laws based on §§ 1644 and 1373 have not resulted in the expansive interpretations of the statutes that the plaintiffs and opponents of sanctuary laws in general were hoping for. Indeed, as discussed above, the litigation has brought clarity on how very limited the application of the statutes is, providing guidance to states and cities as they moved forward with drafting their own sanctuary provisions. As weapons against sub-federal sanctuary measures, §§ 1644 and 1373 have proven much less than lethal.

IV. THE RELATIONSHIPS BETWEEN FEDERAL ANTI-SANCTUARY PROVISIONS AND OTHER FEDERAL PRIVACY LAWS

Much of the debate and virtually all of the litigation surrounding §§ 1644 and 1373 has centered on how these provisions impact the ability of state and local law enforcement agencies and officers to implement practices that protect from disclosure the immigration status of individuals they come in contact with in the course of their professional duties. And there is little doubt that the 1996 laws were passed in substantial part to respond specifically to measures implemented by or directed at local law enforcement agencies that attempted to limit immigration information sharing between state and local police and federal immigration officials. Nevertheless, government agencies and officials outside of law enforcement arguably come in even more frequent contact with unauthorized immigrant residents and have access to personal information about them. In particular, officials and employees of public schools and public health care systems have frequent interactions with and access to personal, identifying information about unauthorized immigrants residing in a community. And like law enforcement agencies, they would fall within the ambit of §§ 1644 and 1373, and so be prohibited from adopting policies or practices that restrict the sharing of immigration-related information with federal immigration authorities. If this is true, a registrar at a local elementary school could not be prohibited from contacting ICE to provide the names and addresses of students and their families that she believed were in the United States in violation of immigration law. Similarly, a records clerk at a public hospital emergency room could call ICE to provide the names and addresses of emergency room patients, who because they spoke Spanish and had no medical insurance, he sus-

Policy, L.A. CMTY POLICING (Jan. 21, 2010), <http://www.lacp.org/2010-Articles-Main/012110-CourtRejectsChallengeToLAPDImmigrationPolicy.htm>.

pected were unauthorized immigrants. The impact of such disclosures would be devastating to the individuals involved and have a chilling effect on the willingness of other unauthorized immigrants to send their children to school or to seek medical treatment. Indeed, in at least one state that passed a state anti-sanctuary bill that mirrored § 1373, there was an immediate drop in attendance in public schools serving the immigrant communities in that state,¹⁵⁵ and a child's death was reported when his parents delayed seeking medical treatment because they feared that hospital officials would report them to ICE.¹⁵⁶ In addition, public health officials have expressed grave concerns that state immigration enforcement initiatives, including anti-sanctuary measures, will impede the management of communicable disease treatment if unauthorized immigrants avoid diagnosis or treatment out of fear of reporting by health care providers to federal immigration officials.¹⁵⁷

Part of the message implicit in §§ 1644 and 1373, as well as in copycat state measures, is that *any public employee* who acquires personal information about an unauthorized immigrant in the course of his or her official duties is free to contact ICE to report a suspected immigration violation and that no government agency or official may do anything to prevent that. The power in that message is real and gives license to those who might want to report and anxiety to those who fear being reported. Nor are concerns about personal information gathered by state agencies

¹⁵⁵ Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. TIMES, Oct. 3, 2011, at A1. Two days after a federal judge upheld Alabama's H.B. 56, nearly 2,000 Hispanic children across the state were absent from school.

¹⁵⁶ Justin Juozapavicius, *Okl. Immigration Law Blamed for Death*, FOX NEWS (Jan. 25, 2008), http://www.foxnews.com/printer_friendly_wires/2008Jan25/0,4675,ImmigrationCrackdownOklahoma,00.html. Edgar Castorena, a two-month-old child, died of a ruptured intestine in Tulsa, Oklahoma, in July 2007. Though he had suffered for more than a week with diarrhea, his parents, both unauthorized immigrants, were afraid to take him to a hospital out of concern that a recently passed state law that permitted and encouraged public employees to share immigration status information with federal immigration officials would lead to their deportation. The Oklahoma law, H.B. 1804, included a provision that prohibited state and local government agencies and officials from restricting government employees from communicating or cooperating with federal immigration authorities.

¹⁵⁷ AM. COLL. OF PHYSICIANS, STATE IMMIGRATION INITIATIVES AFFECTING ACCESS TO HEALTH CARE, https://www.acponline.org/advocacy/state_health_policy/otherissuesofinterest/state_immigration_innitiatives.pdf (“[P]rospective patients may not seek needed medical care for fear of being reported to immigration authorities which could, in turn, endanger the public health.”); see also Sonal S. Munsiff, *Communicable Disease and Immigration Fears*, 9 VIRTUAL MENTOR: AMA J. ETHICS 799, 803 (2007) (“Patients who fear and avoid treatment could infect many more people; it is in all of society's interest to ensure that all patients with TB are fully and confidentially treated.”).

being shared with immigration enforcement officials unfounded. In Salt Lake City, Utah, as lawmakers there began to draft a bill modeled after Arizona's S.B. 1070, a group calling itself Concerned Citizens of the United States released a list entitled "Illegal Immigrants" that included personal information about 1300 people, including names, addresses, dates of birth, and other information.¹⁵⁸ The list was sent to news media and law enforcement agencies accompanied by a letter urging the publication of the list and the immediate deportation of every person on the list.¹⁵⁹ The release of the list caused panic in the immigrant community, especially because the list was not published anywhere so there was anxiety about who was on the list and what action might be taken against them.¹⁶⁰ One representative of a local advocacy organization called it a "witch hunt."¹⁶¹ An investigation discovered that at least two employees from the State Workforce Services office were involved, and the Governor's Office issued a statement acknowledging that the release of this information could be a violation of both state and federal law, including "federal medical privacy laws," and could lead to criminal prosecutions.¹⁶² Among the information collected by the Workforce Services Office is information in connection with applications for food stamps and Medicaid, including due date information about pregnant women seeking prenatal health services.¹⁶³ State officials referred to the employees involved as rogue employees, disgruntled around some issues related to immigration,¹⁶⁴ but this incident exemplifies the unfettered voluntary information-sharing that the federal anti-sanctuary statutes are intended to both encourage and provoke. While in this case both the scope of the information released and the recipients of that information went beyond the disclosures protected under §§ 1644 and 1373, the anti-sanctuary provisions are clearly intended to prevent states and localities from putting up any obstacles to immigration-related information sharing by public employees, even when that information may otherwise be protected by federal law. Notably, although both employees in this case lost their jobs and were eventually convicted of state crimes, neither was charged with a

¹⁵⁸ Kirk Johnson, *'Immigrant' List in Utah Reveals Private Data and Sets Off Fears*, N.Y. TIMES, July 15, 2010, at A1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at A3.

¹⁶¹ David Wright et al., *Leaking of List of Illegal Immigrants in Utah Terrifies Latino Community*, ABC NEWS (July 15, 2010), <http://abcnews.go.com/WN/leaking-list-1300-purported-illegal-immigrants-living-utah/story?id=11166203&singlePage=true>.

¹⁶² Johnson, *supra* note 158, at A3.

¹⁶³ *Id.*

¹⁶⁴ Brock Vergakis, *Utah Illegal Immigrants List Leakers Identified*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2010/07/16/utah-illegal-immigrants-l_n_649625.html.

violation of a federal privacy law.¹⁶⁵ However, assuming the information released was in fact protected by federal medical privacy laws, it is far from clear that §§ 1644 and 1373 would have protected these employees from prosecution under federal law, even for the limited release to federal immigration authorities specifically permitted by these provisions.

Sections 1644 and 1373 both prohibit state or local government restrictions on the communication of immigration status information between federal and state or local entities “[n]otwithstanding any other provision of Federal, State, or local law.”¹⁶⁶ In the context of educational and health records in particular, this calls into question whether and how other federal laws protecting the privacy of these records may operate to prevent disclosures of immigration status information that falls within the scope of protected health and educational records. Is a public official or employee with access to protected health, educational or other records prohibited from disclosing that information to federal immigration authorities? Do the federal anti-sanctuary provisions supersede or repeal conflicting federal laws that would restrict sharing immigration status information with federal immigration authorities?

A. Sections 1644 and 1373 Do Not Repeal Existing Privacy Protections in Federal Law

When the federal anti-sanctuary provisions became law in 1996, there were federal laws in place that prohibited disclosure of information from tax records,¹⁶⁷ educational records,¹⁶⁸ health records,¹⁶⁹ driver’s license records¹⁷⁰ and census records.¹⁷¹ Despite the fact that §§ 1644 and 1373 each contain the prefatory phrase “[n]otwithstanding any other

¹⁶⁵ Nate Carlisle, *Probation for Former Utah Employees Who Made ‘the List,’* SALT LAKE TRIB. (June 7, 2011), <http://www.sltrib.com/sltrib/news/51952737-78/carson-bassett-reed-list.html.csp> (“Carson pleaded guilty to a misdemeanor and was given 12 months of probation and a \$440 fine. Bassett . . . maintained her innocence but acknowledged prosecutors had enough evidence to convict her of two felonies. A judge sentenced Bassett to 36 months of probation and 250 hours of community service.”).

¹⁶⁶ 8 U.S.C. § 1644 (2012); *id.* § 1373.

¹⁶⁷ Tax Reform Act of 1976, Pub. L. No. 94-455, sec. 1202, 90 Stat. 1520, 1667 (codified as amended at 26 U.S.C. § 6103(a)).

¹⁶⁸ Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (codified as amended at 20 U.S.C. § 1232g).

¹⁶⁹ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262, 110 Stat. 1936, 2029 (codified as amended at 42 U.S.C. § 1320d-6).

¹⁷⁰ Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099 (codified as amended at 18 U.S.C. §§ 2721(a)).

¹⁷¹ Act of Aug. 31, 1954, Pub. L. No. 740, 68 Stat. 1012, 1013–14 (codified as amended at 13 U.S.C. § 9(a)).

provisions of Federal, state or local law,” a fair reading of the text and history of the statutes suggests that the anti-sanctuary provisions were not intended to and do not repeal conflicting privacy protections in federal law.

First, the text of the statutes does not suggest that Congress intended to repeal any particular federal privacy protection or federal privacy protections in general. It is beyond doubt that Congress was aware in 1996 that there existed a number of federal laws that placed restrictions on disclosure of certain categories of protected information. Federal protections for taxpayer information and educational records had been in place for decades, and a federal law prohibiting release of driver’s license information had been implemented just two years prior. Indeed, in the same session of Congress in which §§ 1644 and 1373 were enacted, Congress considered and adopted the Health Insurance Portability and Accountability Act (HIPAA), which included prohibitions on disclosure of protected health information.¹⁷² Had Congress wanted to repeal these existing protections, §§ 1644 and 1373 could have been drafted in a manner which would have left no ambiguity about their intent.¹⁷³ “[I]t is ‘[a] long-standing maxim of statutory construction that statutes are enacted in accord with the legislative policy embodied in prior statutes, and therefore statutes dealing with the same subject should be construed together.’”¹⁷⁴ In the absence of a clear expression of an intent to repeal, then, the anti-sanctuary provisions must be read in a way that will allow them to be reconciled with existing privacy protections.¹⁷⁵ To do otherwise is to assume that Congress intended to roll back long-standing privacy protections, a conclusion that seems especially unlikely given the number of existing federal laws likely to be impacted and absent clear language to that effect in the statutes.

¹⁷² HIPAA § 262 was enacted on August 21, 1996, one day before PRWORA.

¹⁷³ See Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information, 23 Op. O.L.C. Supp., at 5 (1999) [hereinafter *IIRIRA Opinion Letter*], <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1999-05-18-census-confidentiality.pdf>.

¹⁷⁴ *Id.* (quoting Memorandum for Glen E. Pommerening, Assistant Att’y Gen. for Admin., from Antonin Scalia, Assistant Att’y Gen., Office of Legal Counsel, *Re: Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice*, at 3 (Apr. 3, 1975)).

¹⁷⁵ *Cf.* Morton v. Mancari, 417 U.S. 535, 551 (1974) (citing United States v. Borden Co., 308 U.S. 188, 198 (1939)) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. ‘When there are two acts upon the same subject, the rule is to give effect to both if possible The intention of the legislature to repeal must be clear and manifest.’”).

In 1999, the Department of Justice Office of Legal Counsel (OLC) was asked to consider the relationship between § 1373 and a federal statute barring disclosure of census-related information.¹⁷⁶ In that opinion, the OLC concluded that § 1373 did not act to repeal the census privacy law. Though the OLC opinion focused specifically on the interaction between § 1373 and the census-privacy protections, the analysis and conclusions apply as well to the interaction of the federal anti-sanctuary statutes and other privacy protections in federal law. The OLC considered first whether the prohibition in § 1373 on federal, state, or local-government entities and officials was meant to include the “United States Congress acting pursuant to its lawmaking authority.”¹⁷⁷ Such an interpretation, the OLC concluded, would “be at odds” with the principle that Congress “may not, by statute, direct the Congress not to enact certain laws in the future.”¹⁷⁸ Since Congress lacks the authority “to command itself by statute not to enact a law in the future,” the OLC concluded that “it would be odd to construe the command contained in § 1373 to have been intended to apply to Congress’s own power to enact prohibitions or restrictions on disclosure.”¹⁷⁹ The only way to avoid that odd outcome would be to interpret § 1373 to apply only retroactively to federal statutes.

The OLC, however, concluded that there was no basis for construing § 1373 to apply both prospectively and retroactively to state and local laws but only retroactively to federal statutes. The interpretive “oddities” could be avoided, according to OLC, if the text of § 1373 was interpreted instead to “apply only to disclosure prohibitions or restrictions other than those imposed by federal statute.”¹⁸⁰ Interpreting § 1373 to invalidate conflicting state and local non-disclosure law is consistent with the requirement that sub-federal governments can only legislate in the immigration area in accord with federal law. Similarly, § 1373 could be “comfortably construed to limit the discretionary authority of federal officers, or employees, or . . . agencies”—but not Congress—to adopt prohibitions on disclosure, since such discretionary authority may generally only be exercised to the extent permitted by statute.¹⁸¹

¹⁷⁶ See *IIRIRA Opinion Letter*, *supra* note 173 (construing 8 U.S.C. § 1373(a) and 13 U.S.C. § 9(a)).

¹⁷⁷ *Id.* at 6.

¹⁷⁸ *Id.* (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)) (“The principle asserted is that one legislature . . . cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.”).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 6–7.

While the OLC acknowledged that the prefatory language “‘notwithstanding any other provisions of Federal, State, or local law’ does reflect a congressional intent to displace inconsistent law,” it concluded that absent any other indication of Congress’s intent to repeal, this language did not “support a broad construction of the substantive provision that would give rise to such inconsistencies.”¹⁸² The fact that a statute provides that it is effective *notwithstanding* any other provision of law “does not evidence an express repeal” of the statute.¹⁸³ This is especially true when the potential repealer does not identify in any way the statute or statutes that might be affected, but instead is a general repealing clause that has the potential to affect a number of inconsistent enactments.¹⁸⁴ Under these circumstances, the OLC suggested that with respect to federal law, the “notwithstanding” phrase of § 1373 can only be reasonably interpreted to mean that federal officials or entities may not “exercise their general administrative discretion in a manner that would prohibit or restrict disclosures” of immigration-related information covered by § 1373.¹⁸⁵ “The phrase should not be understood to refer, therefore, to federal statutes that themselves prohibit or restrict such disclosures.”¹⁸⁶

The OLC also considered the “important governmental interests that first prompted the enactment of a statutory requirement of confidentiality” for census information. Confidentiality encourages the public to cooperate with census officials by “giv[ing] effective assurance to all persons . . . that the identity of the informant and the information furnished would be held in complete confidence.”¹⁸⁷ Together with the fact that the census privacy law had been amended subsequent to the adoption of § 1373 to add two specific exceptions to the confidentiality requirement and had not specifically mentioned the interplay with § 1373,¹⁸⁸ the OLC concluded that “[i]t is unlikely that . . . Congress would have adopted such a significant limitation on the scope of the census confidentiality requirement without either referring to it expressly” in § 1373 or an

¹⁸² *Id.* at 6.

¹⁸³ *Moyle v. Dir., Office of Workers’ Comp. Programs*, 147 F.3d 1116, 1119 n.4 (9th Cir. 1998) (citing *In re The Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991)).

¹⁸⁴ See *Moyle*, 147 F.3d at 1119 n.4 (quoting 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23.08 (5th ed. 1993) (“An express general repealing clause to the effect that all inconsistent enactments are repealed, should legally be a nullity.”)).

¹⁸⁵ *IIRIRA Opinion Letter*, *supra* note 173, at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 10 (quoting Seventeenth Decennial Census, 41 Op. Att’y Gen. 120, 124 (1953)) (citing *Baldrige v. Shapiro*, 455 U.S. 345, 356–62 (1982) (concluding that in enacting the Freedom of Information Act, and in giving courts authority to discover non-privileged information, Congress could not have intended to override the census privacy protections)).

¹⁸⁸ *Id.* at 8.

amendment to the census privacy provision, or “at the least, using more direct language than it has employed here.”¹⁸⁹

Finally, the OLC looked to the legislative history for any indication that Congress intended to repeal federal statutory restrictions on disclosure of confidential information. Here, too, the OLC concluded that the legislative history reveals no such intent, pointing out that the House conference report refers only to the impact of § 1373 on state or local entities¹⁹⁰ and that the Senate report suggests that Congress was primarily concerned with state and local restrictions, not federal statutory restrictions.¹⁹¹ Since the OLC opinion was limited to a discussion of § 1373, it did not consider the reference to FERPA in the House Conference Report to § 1644, but that reference similarly contains no clear expression of a congressional intent to repeal the privacy protections in FERPA or any other federal privacy provisions:

The confidentiality provisions of various State statutes may prohibit disclosure of immigration status obtained under them. Some Federal laws, including the Family Education Rights and Protection Act, may deny funds to certain State and local agencies that disclose a protected individual’s immigration status. Various localities have enacted laws preventing local officials from disclosing the immigration status of individuals to INS.¹⁹²

At most, this language suggests that Congress may have been aware of certain state and local laws prohibiting disclosure of immigration-related information and that some Federal laws, including FERPA, may deny funds to states that make unauthorized disclosures of immigration-related information. Nothing here suggests that Congress intended to supersede the disclosure protections in FERPA. In fact, this language might more appropriately be read as an expression of Congress’s intent to invalidate the state and local measures, but leave intact the privacy

¹⁸⁹ *Id.* at 11.

¹⁹⁰ *See id.* at 11–12 (“[Section 1373] provides that notwithstanding any other provision of Federal, State or local law, no *State or local government entity* shall prohibit or in any way restrict any government entity or official from sending to or receiving from the INS information regarding the immigration status of any individual in the United States.” (emphasis added) (quoting H.R. REP. NO. 104-828, at 249 (1996) (Conf. Rep.))).

¹⁹¹ *See id.* at 11 (“Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.” (quoting S. REP. NO. 104-249, at 19–20 (1996))).

¹⁹² H.R. REP. NO. 104-725, at 391 (1996) (Conf. Rep.).

protections provided under FERPA and the other federal laws referenced.

The OLC's analysis and conclusions with respect to § 1373 and the federal census privacy protections suggest that the federal anti-sanctuary provisions do not and were not intended to repeal any other existing privacy protections in federal law. Neither the text nor the legislative history of §§ 1644 or 1373 reveals an intent by Congress to repeal existing federal privacy laws. Additionally, given the important governmental interest in protecting confidential educational, health, driver's license, and tax information,¹⁹³ and the impact that a repeal of these provisions would have on those interests, it is inconceivable that Congress could have intended such a result. Indeed, as discussed below, the federal government has made it quite clear that FERPA's privacy protections apply with equal force to immigration-related information in education records, and that failing to comply with such protections is both illegal and unconstitutional.

B. FERPA and Disclosure of Educational Records to Immigration Authorities

The Family Educational Rights and Privacy Act of 1974 (FERPA) generally prohibits school officials and employees from disclosing education records without the prior written consent of the parent.¹⁹⁴ FERPA defines education records to include “records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”¹⁹⁵ Certain information is specifically excluded from the definition of educational records, including “records maintained by a law enforcement unit of the educational agency . . . that were created by that law enforcement unit for the purpose of law enforcement.”¹⁹⁶ Additionally, there are exceptions under

¹⁹³ See, e.g., Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Regulations Promulgated Thereunder*, 194 A.L.R. FED. 133, 148–49 (2004) (stating that due to “increased electronic transmission of health information” under HIPAA, Congress “recogniz[ed] the concomitant need to guarantee certain protections to patients’ privacy”); Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 ED. L. REP. 469, 469 (2001) (noting that FERPA was enacted at a time when “[p]rivacy was a growing concern”); Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1070–71 (2003) (citing government studies that linked confidentially to an increase in taxpayer cooperation).

¹⁹⁴ 20 U.S.C. § 1232g (2012); 34 C.F.R. § 99.30(a) (2015). FERPA applies to all schools, public and private, that receive funds under an applicable program of the U.S. Department of Education. *Id.*

¹⁹⁵ 20 U.S.C. § 1232g(a)(4)(A).

¹⁹⁶ *Id.* § 1232g(a)(4)(B)(ii). The definition of law enforcement records limits the

which disclosure of otherwise protected educational records may be made without prior parental consent,¹⁹⁷ but reporting immigration status or any other information to a federal immigration agency or even to local law enforcement is not among the exceptions. Moreover, re-disclosure of information by the individual or agency receiving information from a school under one of these exceptions is also strictly proscribed.¹⁹⁸ Schools may also disclose, without consent, “directory” information including a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.¹⁹⁹ However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them.²⁰⁰ Generally, directory information is information that would not be considered harmful or an invasion of privacy if disclosed.²⁰¹ In the context of immigration enforcement, place of birth could very well be among the “directory” information that an immigrant family would not want disclosed, since a birthplace outside of the United States could raise questions about citizenship or immigration status. However, even the disclosure of such “directory” information requires advance notification to parents and an opportunity to object to release of that information.²⁰²

The collection and dissemination of student personal information and education records has been a source of debate and confusion among educators, parents, and lawmakers since the 1982 Supreme Court ruling

scope of information that falls into this exception: “Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.” 34 C.F.R. § 99.8(c)(2).

¹⁹⁷ See 34 C.F.R. § 99.31; Family Policy Compliance Office, *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (listing exceptions allowing disclosure of records “to the following parties or under the following conditions . . . : School officials with legitimate educational interest; [o]ther schools to which a student is transferring; [s]pecified officials for audit or evaluation purposes; [a]ppropriate parties in connection with financial aid to a student; [o]rganizations conducting certain studies for or on behalf of the school; [a]ccrediting organizations; [t]o comply with a judicial order or lawfully issued subpoena; [a]ppropriate officials in cases of health and safety emergencies; and [s]tate and local authorities, within a juvenile justice system, pursuant to specific State law”).

¹⁹⁸ See 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.

¹⁹⁹ See 20 U.S.C. § 1232g(a)(5)(A).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See 34 C.F.R. § 99.37.

in *Plyler v. Doe*.²⁰³ *Plyler* overturned a 1975 Texas statute that authorized Texas school districts to deny enrollment to unauthorized immigrant children and withheld state funding for their education. In declaring the Texas law unconstitutional, *Plyler* held that unauthorized-immigrant children must have the same access to public primary and secondary education as U.S.-citizen children and cannot be denied access to enrollment based solely on their immigration status.²⁰⁴ Denying unauthorized immigrant children access to public education, the Court held, was a violation of equal protection under the Fourteenth Amendment of the U.S. Constitution.²⁰⁵

In the more than two decades since the *Plyler* decision, numerous attempts have been made to overturn or circumvent *Plyler*.²⁰⁶ Notable for the purposes of this article have been efforts by school districts and some state legislatures to require certain forms of identification or proof of residence for all children enrolling in public school. Typically, the documentation or information required has included documents or information that an unauthorized immigrant child would be unable to provide, including social security numbers, driver's licenses, green cards, or visas.²⁰⁷ Students unable to produce the documents are unable to enroll and others, aware of the documentation requirement are discouraged from attempting to enroll, and both are ultimately denied access to free public education in violation of *Plyler*.²⁰⁸ In response to reports that

²⁰³ See *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁰⁴ *Id.* at 230.

²⁰⁵ *Id.* at 210–213.

²⁰⁶ See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997) (overturning Proposition 187, a referendum that would have banned enrollment in California public schools by unauthorized immigrant children and required authorities to report the children's unauthorized—or apparently unauthorized—parents or guardians). In another unsuccessful attempt to reverse *Plyler*, California representative Elton Gallegly proposed an amendment to an immigration bill that would permit the states to deny unauthorized alien children free K-12 public education, as California had sought to do with Proposition 187, or to charge those students tuition for public school enrollment, as Texas had done before. See H.R. 4134, 104th Cong. (1996); Marc Lacey et al., *Gallegly Brings Proposition 187-Style Tug-of-War to Congress*, L.A. TIMES (Apr. 12, 1996), http://articles.latimes.com/1996-04-12/local/me-57668_1_elton-gallegly. The Gallegly amendment failed.

²⁰⁷ See Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 204–09 (2012).

²⁰⁸ *Id.*; see Julia Preston, *Districts Told Not to Deny Students Over Immigration*, N.Y. TIMES (May 8, 2014), <http://www.nytimes.com/2014/05/09/us/districts-are-warned-not-to-deny-students-over-immigration-status.html>. The Department of Justice entered into formal settlements with two counties in Georgia and Florida, which at the time were engaging in practices that prevented undocumented students from enrolling. See *Agreement Between the United States of America and Henry County School District* (Nov. 9, 2012), <http://www.justice.gov/iso/opa/resources/>

many school districts engaged in practices that discouraged enrollment by unauthorized immigrant children, the U.S. Departments of Justice and Education recently issued an amended guidance detailing the types of documentation that can legally be required for enrollment in public schools.²⁰⁹ That guidance reminded state and local education agencies of their obligation under federal law to provide all children with equal access to primary and secondary education and “encourage[d] states and districts to proactively implement supportive enrollment policies and practices that create a welcoming and inclusive environment for all students.”²¹⁰ Further, it specifically advised that schools may not inquire about a student’s or parent’s citizenship or immigration status as proof of residency; refuse to enroll a student who does not provide a social security number or request a social security number from a parent; or prevent or discourage a child from enrolling because he does not have a birth certificate or has a foreign birth certificate.²¹¹ Significantly, it also noted that FERPA controls the circumstances under which a school district, once it has acquired personal information about a student, may disclose information from that student’s education records without the consent of a parent.²¹² The guidance confirmed that these circumstances are “limited and unlikely to be applicable in the majority of situations school districts confront.”²¹³ There is no mention in the guidance of federal anti-sanctuary provisions providing a mechanism for disclosure of immigration-status information from educational records contrary to FERPA’s protections. Rather, as noted above, the guidance makes clear that school districts are not to concern themselves with the immigration status of

456201211914625474963.pdf. Additionally, following a lawsuit brought by the ACLU, a New Jersey school district stopped a practice that required parents to present state-issued identification cards that undocumented immigrants could not obtain. *Id.* A survey showed that at least 187 New Jersey school districts were illegally requesting Social Security numbers during enrollment. *See 1 in 5 NJ Schools Puts Up Barriers for Immigrant Children*, ACLU N.J. (Sept. 2, 2008), <https://www.aclu-nj.org/news/2008/09/02/1-in-5-nj-schools-puts-up-barriers-for-immigrant-children/>.

²⁰⁹ *See* Preston, *supra* note 208; *see* Letter from Catherine E. Lhamon et al., U.S. Dep’t of Justice & U.S. Dep’t of Educ. (May. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>; Fact Sheet: Information on the Rights of All Children to Enroll in School, U.S. Dep’t. of Justice & U.S. Dep’t of Educ., <http://www.justice.gov/crt/about/edu/documents/plylerfact.pdf>; Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents, U.S. Dep’t. of Justice & U.S. Dep’t of Educ. (May 8, 2014), <http://www.justice.gov/crt/about/edu/documents/plylerqa.pdf> [hereinafter *Questions and Answers*].

²¹⁰ *Questions and Answers*, *supra* note 209, at 1.

²¹¹ *Id.* at 3–5.

²¹² *Id.* at 5.

²¹³ *Id.*

their students and should take steps to ensure that they do not act in a way that would discourage or prevent any child from enrolling in school.

In addition to unlawful documentation requirements, there have also been state measures that require public schools to collect information about the immigration status of students and their parents in a purported attempt to track the number of unauthorized immigrant children enrolled.²¹⁴ These measures not only mandate collection of information about immigration status, they also require the state Department of Education to report to the legislature the costs associated with educating unauthorized immigrant children, presumably with a goal of proving that providing this education substantially impacts the state education budget and, as a result, the quality of education in the state overall. In *Plyler*, the Supreme Court rejected Texas's claim that the cost of educating unauthorized immigrant children detracted from the overall quality of education available to students in the state, finding that "[t]he record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State."²¹⁵ These more recent data-gathering provisions are likely intended by the states to arm themselves with evidence found lacking in *Plyler* and, ultimately, to pave the way for an end to *Plyler*.²¹⁶ But whether or not that happens, these state measures, which require school districts to gather immigration status information from all enrolling students, prompt a more careful look at the interplay between the federal anti-sanctuary statutes and FERPA. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56) provides an opportunity to do just that. H.B. 56 was enacted in June 2011. It is, like Arizona's S.B. 1070, a comprehensive bill with provisions requiring immigration status checks at police stops, criminalizing failure to carry immigration documents, prohibiting employment by unauthorized migrants, and requiring schools to verify the immigration sta-

²¹⁴ See ALA. CODE § 31-13-27 (LexisNexis 2011), *invalidated by* Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236 (11th Cir. 2012); see also Ofer, *supra* note 207, at 218–22.

²¹⁵ *Plyler v. Doe*, 457 U.S. 202, 229 (1982).

²¹⁶ See *id.* ("As the District Court . . . noted, the State failed to offer any 'credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education.' And, after reviewing the State's school financing mechanism, the District Court . . . concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. Of course, even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children." (alteration in original) (citations omitted)).

tus of all students enrolling.²¹⁷ The law was immediately challenged by the U.S. Department of Justice and a coalition of human rights groups.²¹⁸ By August 2012, many of the law's provisions had been blocked by federal courts, including § 28, the provision requiring immigration status checks and information gathering for public-school students.²¹⁹ Section 28 requires public elementary and secondary schools in the state to determine if the child “was born outside the . . . United States” or is the child of an unauthorized immigrant parent.²²⁰ This determination is made by examining the child's birth certificate.²²¹ If the birth certificate reveals “that the student was born outside the . . . United States or is the child of an alien not lawfully present in the United States,” or if no birth certificate is available, then the child's guardian must notify the school of the child's actual citizenship or immigration status within 30 days.²²² The statute specifies that this notification shall be either official documentation of the student's U.S. citizenship or legal immigration status or a sworn declaration of the parent confirming the U.S. citizenship or legal immigration status of the child.²²³ If no such notification is provided the school

²¹⁷ See Beason–Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888 (codified as amended at ALA. CODE § 31-13-1 to -13-35); see also S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

²¹⁸ See *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1240 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d 1269, 1279–80 (11th Cir. 2012).

²¹⁹ See *Hispanic Interest Coal.*, 691 F.3d at 1241.

²²⁰ ALA. CODE § 31-13-27(a)(1) (“Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program.”).

²²¹ *Id.* § 31-13-27(a)(2) (“The public school, when making the determination required by subdivision (1), shall rely upon presentation of the student's original birth certificate, or a certified copy thereof.”).

²²² *Id.* § 31-13-27(a)(3) (“If, upon review of the student's birth certificate, it is determined that the student was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States, or where such certificate is not available for any reason, the parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law.”).

²²³ *Id.* § 31-13-27(a)(4) (“Notification shall consist of both of the following: a. The presentation for inspection to a school official . . . of official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student, or alternatively by submission of a notarized copy of such documentation to such official[; and] b. Attestation by the parent, guardian, or legal custodian, under penalty of perjury, that the document states the true identity of the child. If the student or his or her parent, guardian, or legal representative possesses no such

shall presume and report that the student is not lawfully present in the United States.²²⁴ The statute further states that “[p]ublic disclosure by any person of information obtained pursuant to this section which personally identifies any student shall be unlawful, except for purposes permitted pursuant to 8 [U.S.C. §§] 1644 and 1373.”²²⁵ In other words, no student information gathered as a part of this enrollment process shall be disclosed except for immigration status information, which can be shared with federal immigration enforcement pursuant to federal anti-sanctuary provisions.

In *Hispanic Interest Coalition v. Alabama*, and in *United States v. Alabama*, the companion case filed by the United States against Alabama, the Eleventh Circuit approved an equal protection challenge to § 28.²²⁶ Despite the fact that the provision treats every child enrolling in Alabama schools the same by requiring the presentation of a birth certificate, the court found that the statute had a special impact on unauthorized immigrant children because it required them to disclose their immigration status as a condition of enrollment. Indeed, the court found that even though all students were required to show birth certificates, the purpose of the provision was to “force[] unlawfully present aliens to divulge their unlawful status,” either by “admit[ting their] unlawful status outright or conced[ing] it through silence.”²²⁷ As a result, the court found that the children were exposed to criminal prosecution, deportation, harassment and intimidation.²²⁸ “We are of the mind that an increased likelihood of deportation or harassment upon enrollment in school significantly deters undocumented children from enrolling in and attending school, in contravention of their rights under *Plyler*.”²²⁹

Significantly, the court found that the adverse immigration consequences inflicted on unauthorized-immigrant students by § 28 of H.B. 56 were the direct result of 8 U.S.C. §§ 1644 and 1373. The court dismissed as ineffectual the language in § 28 limiting disclosure of student infor-

documentation but nevertheless maintains that the student is either a United States citizen or an alien lawfully present in the United States, the parent, guardian, or legal representative of the student may sign a declaration so stating, under penalty of perjury.”).

²²⁴ *Id.* § 31-13-27(a)(5) (“If no such documentation or declaration is presented, the school official shall presume for the purposes of reporting under this section that the student is an alien unlawfully present in the United States.”)

²²⁵ *Id.* § 31-13-27(e). The statute does, however, require that anyone intending to disclose this information “shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of this subsection.” *Id.*

²²⁶ *See* *Hispanic Interest Coal. of Ala. v. Alabama*, 691 F.3d 1236, 1249–50 (11th Cir. 2012).

²²⁷ *Id.* at 1246–47.

²²⁸ *Id.* at 1247.

²²⁹ *Id.*

mation to those permitted under §§ 1644 and 1373, and found that the federal anti-sanctuary provisions in fact “require[d] Alabama to provide immigration-related information to the federal government and other states upon request and prohibit[ed] Alabama from restricting this transfer of information.”²³⁰ Concluding that the risks resulting from the mandatory disclosure of immigration status burdened the rights secured by *Plyler*, the court found that § 28 violated the Equal Protection Clause.²³¹ Neither party argued, nor did the court discuss, whether FERPA might protect from disclosure the personal student information gathered by schools pursuant to § 28. If it had, it is worth considering whether that would have altered the court’s assessment of § 28.

First, whether or not the immigration-status information was protected from disclosure by FERPA, § 28 still arguably stands as an obstacle to the free public education guaranteed by *Plyler*. One has to assume that unauthorized immigrant children and their families in Alabama, even if not specifically aware that §§ 1644 and 1373 permitted the sharing of immigration status information between state, local and federal law enforcement agencies, could nonetheless be discouraged from enrolling in public schools if in order to do so they had to reveal their immigration status. This would be especially true given the media coverage of the enactment of H.B. 56²³² and the law’s stated purpose to “discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.”²³³

Alternatively, if the Eleventh Circuit had considered whether the student information gathered pursuant to § 28 was prohibited from disclosure by FERPA, it likely would have found that the information was in fact protected. Information about a student’s place of birth and immigration status gathered in the course of enrollment and maintained by the district would fall under FERPA’s definition of educational records. As such, unless the information fell within one of the narrow exceptions defined in the FERPA statute, Alabama school officials could not disclose it to federal immigration authorities without express parental consent.²³⁴

²³⁰ *Id.* at 1248. (“Any textual prohibition on revealing the immigration status of the children and their families is of little comfort when federal law requires that disclosure upon request.”).

²³¹ *Id.* at 1249–50.

²³² See Richard Fausset, *Alabama Enacts Anti-Illegal Immigration Law Described as Nation’s Strictest*, L.A. TIMES (June 10, 2011), <http://articles.latimes.com/2011/jun/10/nation/la-na-alabama-immigration-20110610>; Julia Preston, *In Alabama, a Harsh Bill for Residents Here Illegally*, N.Y. TIMES (June 3, 2011), <http://www.nytimes.com/2011/06/04/us/04immig.html>.

²³³ ALA. CODE § 31-13-2 (LexisNexis 2011).

²³⁴ See 20 U.S.C. § 1232g(a)(4)(B)(ii) (2012); 34 C.F.R. §§ 99.8, 99.31 (2015).

But even if the court had found that the immigration status information collected by Alabama schools was protected by FERPA, it still seems likely that it would have held that § 28 violated the Equal Protection Clause. The court noted the overall purpose of § 28 is to “target[] the population of undocumented school children in Alabama,” and found that the mandated disclosure of immigration status could lead not only to immigration enforcement and removal proceedings, but also to harassment and intimidation that would deter unauthorized immigrant children from enrolling in and attending school.²³⁵ The requirement to provide immigration-status information, even without the possibility of disclosure to federal immigration authorities, would lead to unacceptable burdens on immigrant children and their families.²³⁶ Thus, even with the protections provided by FERPA, the demand for immigration-status information and documentation would likely still be found to unlawfully burden a child’s rights under *Plyler*.

The importance of acknowledging the privacy protections afforded by FERPA is nonetheless significant since it serves as an important counterweight to the myth surrounding anti-sanctuary provisions that there can be no restrictions on a school district’s ability to share immigration status information with federal immigration authorities. As mentioned above, this is an important message not just for immigrant children and families seeking to enroll in public schools but also for school officials and employees who may misunderstand their obligations under FERPA in light of the anti-sanctuary provisions. The recent federal guidance on this issue²³⁷ is an important first step but greater efforts should be made by school districts to assure their students and their employees that, notwithstanding 8 U.S.C. §§ 1644 and 1373 or state copycat anti-sanctuary provisions, FERPA prohibits the disclosure of immigration-status information except in the narrowest of circumstances. Only then can the promise of *Plyler* be fully achieved.

²³⁵ *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1246–47 (11th Cir. 2012).

²³⁶ *Id.* (citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064–65 (9th Cir. 2004) (prohibiting questions pertaining to immigration status during discovery in order not to “discourage legal and illegal immigrants alike from pursuing their potentially valid legal claims not only in this case, but in future cases as well”) and *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (finding that despite employer’s promises not to disclose immigration status of plaintiffs sought through discovery there would still remain “the danger of intimidation, the danger of destroying the cause of action”)).

²³⁷ *See supra* note 209.

V. THE FEDERAL ANTI-SANCTUARY PROVISIONS IN THE BATTLE FOR AND AGAINST SUB-FEDERAL IMMIGRATION ENFORCEMENT

A. *The Path from Anti-Sanctuary to Pro-Enforcement*

If Congress's repeated failure to achieve fair and workable immigration reform has led certain states and localities to refuse to cooperate in immigration enforcement, frustration with the federal government's enforcement efforts has led others to take matters into their own hands and to seek out ways to maximize their own contribution to these enforcement efforts. States and cities interested in taking on an active role in immigration enforcement have become involved in a number of different ways, including entering into § 287(g) agreements to deputize local officers to assist ICE enforcement²³⁸ and enacting legislation to discourage unauthorized immigrants from coming to or remaining in their jurisdictions.²³⁹ A number of states have also enacted legislation to override and prevent the enactment of sanctuary laws and policies. That is, they adopted measures like §§ 1644 and 1373 that prohibited restrictions on communication of immigration-related information to ICE.²⁴⁰ Some of

²³⁸ Section 287(g) of the Immigration and Nationality Act was adopted as part of IIRIRA in 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563 (codified as amended at 8 U.S.C. § 1357(g)) “[§ 1357(g)] authorizes the Director of ICE to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, provided that the local law enforcement officers receive appropriate training and function under the supervision of ICE officers.” *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/factsheets/287g>. As of October 2012, fifty-seven 287(g) agreements were in place. *See The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement*, AM. IMMIGR. COUNCIL (Nov. 29, 2012), <http://www.immigrationpolicy.org/just-facts/287g-program-flawed-and-obsolete-method-immigration-enforcement>.

²³⁹ This legislation included provisions restricting access to public benefits, driver's licenses, housing, educational programs, and health care, as well as provisions creating state crimes for unlawful presence in the state and for transporting and harboring unauthorized immigrants. *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888; Oklahoma Taxpayer and Citizen Protection Act, 2007 Okla. Sess. Laws 545, 546–552; Hazleton, Pa., Ordinance 2006-18 (Sept. 2006); Farmers Branch, Tex., Ordinance No. 2892 (2006). A number of these state and local laws have been struck down following legal challenges. *See, e.g.*, *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010); Editorial, *Alabama Surrenders*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/opinion/alabama-surrenders.html>.

²⁴⁰ *See, e.g.*, ALA. CODE § 31-13-5 (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 11-1051(F) (2012); GA. CODE ANN. § 36-80-23(b) (2012); IND. CODE ANN. § 5-2-18.2-3 (LexisNexis 2013); MISS. CODE ANN. § 71-11-1 (West 2014); S.C. CODE ANN. § 6-1-170

these state anti-sanctuary provisions closely mirror and even specifically reference §§ 1644 and 1373.²⁴¹ Others provide some sort of penalty or other enforcement mechanism not present in the federal anti-sanctuary statutes.²⁴² And some prohibit restrictions on a broader range of activities than §§ 1644 and 1373, going beyond communicating, sending, receiving and maintaining immigration-related information to prohibit policies that limit *cooperation* with federal immigration officials.²⁴³

State-level anti-sanctuary provisions have been put in place to invalidate existing measures and to ward off the implementation of future sanctuary efforts. In California and Arizona, where there were long-standing sanctuary policies and practices in cities and towns within those states, anti-sanctuary provisions have been introduced as part of broadly sweeping legislation designed to bar unauthorized immigrant access to a variety of services and benefits, including employment, health care, public benefits, and education, and to maximize state involvement in immigration enforcement. In California, Proposition 187 became law at a time when there were sanctuary provisions in place in San Francisco, San Jose, Oakland and Sacramento.²⁴⁴ In Arizona, the anti-sanctuary provisions in S.B. 1070 were adopted after the cities of Tucson and Phoenix had implemented sanctuary policies.²⁴⁵ In this respect, certain anti-sanctuary policies were indicative not only of the states' frustration with federal immigration efforts but also with perceived obstacles to enforcement within their own jurisdictions. As was true following the enactment of §§ 1644 and 1373, communities impacted by these sub-federal anti-sanctuary provisions reacted with concern about the chilling effect that these laws would have on immigrant access to health care, education and other services, as well as the detrimental effect such policies would have on public

(2014); TENN. CODE ANN. § 7-68-103 (2011); UTAH CODE ANN. § 76-9-1006 (LexisNexis 2012).

²⁴¹ See, e.g., ALA. CODE § 31-13-5 (LexisNexis 2011) (specifically referencing §§ 1344 and 1373); see also MO. ANN. STAT. § 650.475(1), (3) (West 2014); OKLA. STAT. ANN. tit. 74, § 20j(D)–(E) (West 2015); UTAH CODE ANN. § 76-9-1006 (LexisNexis 2012).

²⁴² See, e.g., GA. CODE ANN. § 36-80-23(c)–(d) (2012); MO. ANN. STAT. § 67.307(2) (West 2014); OKLA. STAT. ANN. tit. 74, § 20j(F) (West 2015); IND. CODE ANN. §§ 5-2-18.2-5 to -6; S.C. CODE ANN. § 6-1-170(E)(3) (LexisNexis 2013).

²⁴³ See, e.g., IND. CODE ANN. § 5-2-18.2-7 (LexisNexis 2013); MISS. CODE ANN. § 71-11-1; OHIO REV. CODE ANN. § 9.63(B) (West Supp. 2014); S.C. CODE ANN. § 17-13-170(C) (LexisNexis 2013).

²⁴⁴ See Carro, *supra* note 23, at 297 & n.2.

²⁴⁵ See Christian Palmer, *Local Control at Issue in Battle over Enforcement of Immigration Laws in Phoenix*, ARIZ. CAPITOL TIMES (Apr. 24, 2009), <http://azcapitoltimes.com/news/2009/04/24/local-control-at-issue-in-battle-over-enforcement-of-immigration-laws/>, 2009 WLNR 29878738 (quoting Arizona Senator Russell Pearce, who stated that “Phoenix, Mesa, Chandler and Tucson, to name a few, all adequately represent the ‘complete sanctuary city.’”).

safety and health in general.²⁴⁶ These concerns led to legal challenges where, once again, §§ 1644 and 1373 took center stage.

In 1994, two years before the federal anti-sanctuary provisions became law, California voters approved Proposition 187, a ballot initiative that not only denied unauthorized immigrants access to public services but also required public employees, including school teachers, health care workers, and police officers to verify and report the immigration status of anyone with which they came into contact.²⁴⁷ Notably for this discussion, Proposition 187 also contained an anti-sanctuary provision, which specifically prohibited any local government or law enforcement agency from limiting or restricting the ability of its officials to cooperate with federal authorities on immigration.²⁴⁸ With its combination of provisions mandating cooperation and immigration-status reporting by public employees and banning any restriction on such cooperation, Proposition 187 sent the clear message that unauthorized immigrants were unwelcome in the state and that, essentially, they had no place to hide from immigration enforcement.²⁴⁹

The day after the law went into effect, a number of legal challenges were filed in state and federal court.²⁵⁰ Ultimately, the majority of the challenged provisions of Proposition 187, including the anti-sanctuary

²⁴⁶ See Emily Bazar, *Immigrant Activism Taking a Bold Turn*, USA TODAY (Sept. 13, 2007), http://www.usatoday.com/news/nation/2007-09-12-immigrants_N.htm; Darryl Fears, *Illegal Immigrants Targeted by States*, WASH. POST (June 25, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401662.html>.

²⁴⁷ See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 555–56, 563 (1996).

²⁴⁸ In a section entitled “Law Enforcement Cooperation with INS,” Proposition 187 provided: “Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.” CAL. PENAL CODE § 834b(c) (West 2008) (repealed 2014).

²⁴⁹ Proponents of Proposition 187, also known as the Save Our State Initiative (SOS), apparently envisioned that it would enable and encourage California residents to participate in “rounding up” unauthorized immigrants in the state. See Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. TIMES, Aug. 10, 1994, at A1 (quoting Proposition 187 initiative co-founder saying to a crowd of supporters, “you are the posse . . . SOS is the rope”); see also Prop. 187 § 1 (Cal. 1994) (“[T]he People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.”).

²⁵⁰ Five actions filed in federal court were consolidated in *League of United Latin Am. Citizens v. Wilson (LULAC I)*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

provision, were found preempted by federal immigration law.²⁵¹ With respect to § 4, which included the provisions mandating immigration inquiries and reporting, as well as the anti-sanctuary provision, the federal district court, relying on *De Canas v. Bica*, found that these provisions constituted an impermissible regulation of immigration and were preempted.²⁵² Distinguishing the Proposition 187 provisions from those at issue in *De Canas*, the court found that they had much more than a “purely speculative and indirect impact on immigration” and directly regulated immigration by “creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens.”²⁵³ Additionally, the court found that, unlike the statute upheld in *De Canas* which adopted federal standards to determine a person’s immigration status, Proposition 187 created an entirely independent set of criteria of immigration classifications and required state agents to make “independent determinations of who is subject to the initiative’s benefits denial, notification and cooperation/reporting provisions and who may lawfully remain in the United States.”²⁵⁴ As a result, these provisions were an unconstitutional regulation of immigration and were preempted under *De Canas*’s first test.²⁵⁵

At the time of the district court’s ruling in *League of United Latin American Citizens v. Wilson*, §§ 1644 and 1373 had not yet been enacted. However, following the enactment of the anti-sanctuary provisions, the State of California filed a motion for reconsideration and ultimately an appeal to the Ninth Circuit, challenging the district court’s preemption finding with respect to Proposition 187’s cooperation and reporting requirements, including the anti-sanctuary provision, and arguing that the federal anti-sanctuary provisions “confirm that state and local government cooperation with the INS is not preempted as a regulation of immigration.”²⁵⁶ The district court denied the motion for reconsideration²⁵⁷

²⁵¹ *Id.* at 786–87.

²⁵² *Id.* at 771 (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

²⁵³ *Id.* at 769.

²⁵⁴ *Id.* at 769–70.

²⁵⁵ *Id.* at 771 (“[A] state may not require its agents to (i) make independent determinations of who is and who is not in this country ‘in violation of immigration laws;’ (ii) report such determinations to state and federal authorities; or (iii) ‘cooperate’ with the INS, solely for the purpose of ensuring that such persons leave the country. The sole stated purpose and the sole effect of section 4 is to impermissibly regulate immigration. Accordingly, section 4 is entirely preempted by federal law under the first *De Canas* test.” (citing *De Canas*, 424 U.S. at 354–56)).

²⁵⁶ Opening Brief of Appellants at 44, *League of United Latin Am. Citizens v. Wilson*, No. 98-55671 (9th Cir. Oct. 30, 1998) [hereinafter Brief of Appellants], 1998 WL 34178728.

²⁵⁷ See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1252 & n.9 (C.D. Cal. 1997) (“Defendants argued that the [Welfare Reform Act] permits

and the appeal in the Ninth Circuit was ultimately withdrawn when the parties reached a settlement that nullified the majority of Proposition 187, including the mandatory reporting and cooperation provisions and the anti-sanctuary provision.²⁵⁸ Nevertheless, the reliance by both parties on the federal anti-sanctuary provisions in the appeal reflect the increasingly divergent understanding of §§ 1644 and 1373 as, on one side, a broad invitation for state and local involvement in immigration enforcement, and on the other, a limited authorization for immigration-related information sharing.

On appeal to the Ninth Circuit, California contended that Congress's unequivocal support for state and local cooperation in immigration enforcement, and its determination that such cooperation did not constitute an "unwanted interference" with federal regulation of immigration, was reflected not only in §§ 1644 and 1373, but also in a separate provision of the Welfare Reform Act that specifically required state agencies administering certain federal assistance programs to provide immigration-related information quarterly to federal immigration authorities:²⁵⁹

It is difficult to conceive of a plainer statement of congressional policy and intent that state and local government entities be permitted to cooperate with the INS. [The Welfare Reform Act] and [IIRIRA] thus reflect a congressional determination that state cooperation with the INS is a permissible, indeed desirable, supplement to federal policy.²⁶⁰

The state further argued that, even though the federal anti-sanctuary statutes permitted but did not require cooperation and reporting to the

cooperation between state and local government entities and the INS. The Court agrees that some cooperation is permitted and even required by the [Act]. However, the cooperation and reporting detailed in . . . Proposition 187 are part of a regulatory scheme preempted by federal law, as explained in [*LULAC I*]. These sections of Proposition 187 require state officials, teachers, health care providers and other unknown individuals to report to the [INS] information about alien status that such individuals are not permitted to determine. Nothing in [*LULAC I*] should be interpreted to prohibit cooperation between state officials and the [INS] pursuant to the [Welfare Reform Act]." (citations omitted).

²⁵⁸ See Margaret Talev, *Reaction Subdued on Prop. 187*, L.A. TIMES (July 30, 1999), <http://articles.latimes.com/print/1999/jul/30/local/me-60918>.

²⁵⁹ See Brief of Appellants, *supra* note 256, at 45–47 (citing 42 U.S.C. § 611a (2012)). Section 611a mandates that agencies that administer Supplemental Security Income (SSI), housing-assistance programs, and Temporary Assistance for Needy Families "furnish information about aliens they know to be unlawfully in the United States to the Immigration and Naturalization Service (INS) at least four times annually and upon INS request." H.R. REP. NO. 104-725, at 382 (1996) (Conf. Rep.).

²⁶⁰ Brief of Appellants, *supra* note 256, at 47.

extent that the state law did, there was no conflict since “compliance with both state and federal law [was] possible” and the state laws were not an obstacle to the accomplishment of the federal laws.²⁶¹ Essentially here, the state argued that because the state law provisions mirrored those in the federal law, and even in some ways were more comprehensive than federal law, they survived conflict preemption.²⁶²

The plaintiffs rejected the assertion that §§ 1644 and 1373 impacted the court’s preemption analysis, arguing instead that they confirmed the federal government’s determination to occupy the area of immigration regulation.²⁶³ Had Congress intended to open up the area of immigration law-making to states, they argued that Congress could have expressly done so, and pointed to a provision of the Welfare Reform Act where Congress had permitted states to enact such legislation in limited circumstances.²⁶⁴ Instead, plaintiffs argued that the immigration-related provisions of the Welfare Act and IIRIRA mandated immigration-status reporting in certain limited circumstances and “otherwise expressly permit[ed] and explicitly protect[ed] the continued ability of local entities to choose whether or not to report or cooperate.”²⁶⁵ Presaging arguments that would be made by the United States more than a decade later in *United States v. Arizona*, the plaintiffs also argued that the mandatory cooperation and reporting provisions of Proposition 187 were in conflict with the voluntary reporting provided for in §§ 1644 and 1373:

There is, of course an important distinction—and conflict—between a mandate and an authority or permission. Moreover, the distinction would create havoc with the federal scheme and objectives [Proposition 187] would undermine enforcement of federal immigration laws by interposing a separate state program that overwhelms the efforts of the federal agency.²⁶⁶

²⁶¹ *Id.* at 53.

²⁶² The argument that state immigration laws that “mirror” federal law are not preempted has been widely used by proponents of state involvement in immigration enforcement. For a comprehensive critique of the mirror-image theory, particularly in the context of state criminal immigration law-making, see Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 278–79 (2011).

²⁶³ Opening Brief of Gregorio T. Plaintiffs–Appellees/Cross-Appellants at 67–68, *League of United Latin Am. Citizens v. Wilson*, No. 98-55671 (9th Cir. Feb. 3, 1999) [hereinafter Brief of Appellee], 1999 WL 33729894.

²⁶⁴ *Id.* at 67 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411(d), 110 Stat. 2105, 2269 (requiring states that intend to reject the federal restriction on access by unauthorized immigrants to state-funded public benefits to pass legislation specifically permitting such benefits)).

²⁶⁵ *Id.* at 67.

²⁶⁶ *Id.* at 84.

While the anti-sanctuary provision in Proposition 187 did not survive, it did not die in vain. In fact, it might properly be considered the mother of all anti-sanctuary provisions. Indeed, it is likely that political pressure brought to bear by the proponents of Proposition 187 ultimately led to the passage of §§ 1644 and 1373.²⁶⁷ However, the apparent ineffectiveness of §§ 1644 and 1373 at eliminating sanctuary laws and practices in the years following their enactment led not only to efforts by Congress to “put some teeth” in the federal anti-sanctuary statutes,²⁶⁸ but also to the steady proliferation of state anti-sanctuary provisions, many of which, like the proposals in Congress, included penalties for non-compliance.²⁶⁹ Among the states that had enacted anti-sanctuary provisions by 2010 when Arizona’s S.B. 1070 became law were Colorado,²⁷⁰ Georgia,²⁷¹ Mis-

²⁶⁷ Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1371 (2013) (“It is easy to think of Proposition 187 as a quirk of California politics. Yet this overlooks the extent to which Proposition 187 was entangled with the national political conversation and national political actors. The chief architects and financial supporters of Proposition 187 were the Federation for American Immigration Reform (FAIR) and the Pioneer Fund—both major political organizations interested foremost in national policy reform rather than immigration policies tailored to specific states. The authors of Proposition 187 were prominent figures in federal politics: Alan Nelson, who served as the Commissioner of the Immigration and Naturalization Service (INS) under President Reagan; and Harold Ezell, who was the western regional commissioner for INS at the same time. It was also clear that the authors of Proposition 187 were primarily interested in federal policies. Ezell argued that ‘[t]here’s no need for another Proposition 187 in any other state if Congress does its job.’” (footnotes omitted)); see also Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L. L. 121, 125–26 (1994).

²⁶⁸ Tom Tancredo, Editorial, *Should Congress Cut Money to States and Cities that Use Tax Dollars to Aid Illegal Immigrants?*, DULUTH NEWS-TRIB. (May 6, 2006), 2006 WLNR 7763717 (discussing repeated efforts by the author, Colorado Representative Tom Tancredo, to cut off all federal funding to localities with sanctuary laws in order to “put some teeth into our anti-sanctuary laws”).

²⁶⁹ Of course, the subsequent proliferation of state anti-sanctuary and other pro-enforcement measures is indicative of the failure of the federal anti-sanctuary provisions and IIRIRA in general as effective responses to unauthorized immigration. Rather than driving the unauthorized immigrant population out of the United States, IIRIRA provisions that made it more difficult for immigrants to move back and forth between jobs in the United States and family south of the border had the opposite effect. “Enhanced border controls and harsh penalties for unlawful entry to or presence in the United States created a disincentive for unauthorized immigrants to return home either because they wanted to avoid the perils and expense of another unauthorized entry or because leaving could mean a lengthy separation from [U.S. citizen] or permanent resident family members in the United States.” Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 319 (2009) (footnote omitted).

²⁷⁰ COLO. REV. STAT. § 29-29-103 (2012) (repealed 2013). Colorado’s law, enacted while sanctuary provisions were in place in Denver, Boulder, and Durango, required

souri,²⁷² Oklahoma,²⁷³ Tennessee,²⁷⁴ and Utah.²⁷⁵ In Oklahoma, the anti-sanctuary provision prohibited any restrictions on cooperation as well as communication with federal immigration authorities, and provided for a right of action by any state resident to force compliance with the statute.²⁷⁶ In Missouri and Ohio, non-compliant government entities would be denied state funding.²⁷⁷ A number of other states tried unsuccessfully to pass anti-sanctuary laws in the years leading up to Arizona's adoption of S.B.1070.²⁷⁸ The outcome of *United States v. Arizona*²⁷⁹ would clarify the limits of state and local authority to cooperate and assist with federal immigration law enforcement.

B. *United States v. Arizona: The Evolving Meaning of §§ 1644 and 1373*

The competing characterizations of §§ 1644 and 1373—on the one hand, as expressions of Congress's clear intent to maximize cooperation between federal, state, and local law enforcement agencies in enforcing federal immigration laws and, on the other hand, as explicit limits on the nature of non-federal engagement in immigration enforcement—came head to head in *United States v. Arizona*.²⁸⁰ In this challenge to the Arizona Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), the United States sought to enjoin a number of provisions of a now-infamous state law that was widely regarded as a model for states seeking to maximize their engagement in immigration enforcement.²⁸¹ Two of the challenged provisions, §§ 3 and 5(c), created new state crimes and

police to contact ICE whenever a person suspected of being an unauthorized immigrant was arrested on a misdemeanor or felony charge. *See Anti-Sanctuary Law Sets Off Consular Tiff*, WASH. TIMES (May 7, 2006), <http://www.washingtontimes.com/news/2006/may/7/20060507-121634-7756r/print/>.

²⁷¹ GA. CODE ANN. § 36-80-23 (2012).

²⁷² MO. ANN. STAT. § 650.475 (West 2014).

²⁷³ OKLA. STAT. ANN. tit. 74, § 20j (West 2015).

²⁷⁴ TENN. CODE ANN. § 7-68-103 (2011).

²⁷⁵ UTAH CODE ANN. § 76-9-1006 (LexisNexis 2012) (declared preempted in part by Utah Coal. of La Raza v. Herbert, 26 F. Supp. 3d 1125, 1143 (D. Utah 2014)).

²⁷⁶ OKLA. STAT. ANN. tit. 74, § 20j(F) (West 2015).

²⁷⁷ *See* MO. ANN. STAT. § 650.475(5) (West 2014); OHIO REV. CODE ANN. § 9.63(C) (West Supp. 2014).

²⁷⁸ *See* Anna Gorman, *Arizona's Immigration Law Isn't the Only One*, L.A. TIMES (July 16, 2010), <http://articles.latimes.com/2010/jul/16/nation/la-na-immigration-states-20100717>.

²⁷⁹ *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012).

²⁸⁰ *See id.* at 350–51.

²⁸¹ *See id.* at 343–44; Seth Freed Wessler, *Bills Modeled After Arizona's SB 1070 Spread Through States*, RACE FORWARD: COLORLINES, (Mar. 2, 2011), <http://www.colorlines.com/content/bills-modeled-after-arizonas-sb-1070-spread-through-states> (listing 16 states considering bills modeled after S.B. 1070).

criminal penalties for failing to comply with federal alien-registration requirements and working without authorization.²⁸² Section 2(E) authorized warrantless arrests by Arizona officers when there is probable cause to believe that a person has committed a “public offense that makes the person removable from the United States.”²⁸³ Section 2(B), the so-called “show me your papers” provision, required police officers to verify the immigration status of anyone stopped or detained for any reason where the officer has reasonable suspicion to believe the person is unlawfully present in the United States.²⁸⁴ The Supreme Court found that three out of four provisions challenged by the United States and previously enjoined by the Ninth Circuit Court of Appeals, were preempted by federal law.²⁸⁵ Section 2(B) survived a facial challenge.²⁸⁶ The federal anti-sanctuary provisions played a significant role in the arguments on both sides of the case, and in particular with respect to the challenge to § 2(B).

As a starting point, it is worth noting that, in addition to § 2(B)’s mandatory immigration status checks, § 2 of S.B. 1070 also contained its own anti-sanctuary provisions, that read, in part:

A. No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

....

F. Except as provided in federal law, officials or agencies of this state and counties, cities, towns and other political subdivisions of this state may not be prohibited or in any way be restricted from sending, receiving or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state or local governmental entity for the following official purposes:

1. Determining eligibility for any public benefit, service or license provided by any federal, state, local or other political subdivision of this state.
2. Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding in this state.

²⁸² S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 3, 5(c) (Ariz. 2010).

²⁸³ *Id.* § 2(E).

²⁸⁴ *Id.* § 2(B).

²⁸⁵ *Arizona v. United States*, 132 S. Ct. 2492, 2501–07 (2012).

²⁸⁶ *Id.* at 2510.

3. If the person is an alien, determining whether the person is in compliance with the federal registration laws prescribed by title II, chapter 7 of the federal immigration and nationality act.

4. Pursuant to 8 United States Code § 1373 and 8 United States Code § 1644.

....

H. A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Code §§ 1373 and 1644, to less than the full extent permitted by federal law. If there is a judicial finding that an entity has violated this section, the court shall order that the entity pay a civil penalty of not less than five hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection.

....

K. Except in relation to matters in which the officer is adjudged to have acted in bad faith, a law enforcement officer is indemnified by the law enforcement officer's agency against reasonable costs and expenses, including attorney fees, incurred by the officer in connection with any action, suit or proceeding brought pursuant to this section in which the officer may be a defendant by reason of the officer being or having been a member of the law enforcement agency.²⁸⁷

Like many other jurisdictions, Arizona had adopted its anti-sanctuary provision as part of a more comprehensive effort to engage state agencies and officers in immigration enforcement at a time of growing frustration with federal immigration-enforcement efforts, including frustration with the administration's failure to stop the proliferation of sanctuary cities in violation of §§ 1644 and 1373.²⁸⁸ Arizona's anti-sanctuary provision went further than §§ 1644 and 1373 by providing an enforcement mechanism that allowed residents of the state to bring a civil action against any non-

²⁸⁷ ARIZ. REV. STAT. ANN. § 11-1051 (2012)

²⁸⁸ See Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioners at 18, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182) (“[The United States’s] decision to prevent Arizona from protecting its citizens is even more galling in light of its willful failure to stop more egregious actions by state and local governments around the country that are in violation of and contrary to federal law. Certain states and local governments have decided to flout federal law and declare themselves ‘sanctuary cities’ where immigration status is concealed from federal authorities. Many have also decided to provide in-state tuition benefits to illegal aliens, in direct contravention of federal law.”).

complying jurisdiction. It also provided that government entities found to have enacted or implemented a policy or practice restricting the enforcement of federal immigration laws, including §§ 1644 and 1377, are subject to hefty financial penalties.²⁸⁹ Additionally, the anti-sanctuary provision leaves open the possibility that individual police officers could be made to bear the costs of a legal challenge if they are found to have acted in bad faith, arguably incentivizing officers to over-comply with the mandated immigration cooperation and reporting in order to avoid being found in violation.²⁹⁰ Arizona's anti-sanctuary provision was not among the four challenged provisions of S.B. 1070 considered by the Supreme Court.²⁹¹ However, like the federal anti-sanctuary statutes, they were integral to the arguments in *United States v. Arizona* for and against S.B. 1070.

The United States argued that § 2(B) of S.B. 1070 was preempted by 8 U.S.C. § 1373.²⁹² Section 2(B)'s mandatory status-check, according to the United States, was preempted because it stood as an obstacle to the federal-state cooperation § 1373 envisioned by forcing officers to make status inquiries irrespective of whether such inquiries were in line with the government's immigration-enforcement priorities.²⁹³ The United States contended that § 2(B)'s mandatory status checks, together with the civil penalties imposed in § 2(H) for failing to comply with this mandate, stood in conflict with federal law and threatened to divert federal resources from the federal government's immigration enforcement priorities.²⁹⁴ Rather than facilitating cooperation and information sharing, as § 1373 envisioned, S.B. 1070 "harnesses the federal apparatus in pursuit

²⁸⁹ See ARIZ. REV. STAT. ANN. § 11-1051(H).

²⁹⁰ See Rick Su, *Police Discretion and Local Immigration Policy Making*, 79 UMKC L. REV. 901, 914 (2011).

²⁹¹ Potential challenges to subsections 2(A), (C)–(G), and (I)–(L) were dismissed by the district court. See Order at 12–13, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (D. Ariz. Dec. 10, 2010).

²⁹² See *Arizona v. United States*, 132 S. Ct. at 2508; Brief for the United States, *supra* note 17, at 50–52.

²⁹³ Brief for the United States, *supra* note 17, at 48 ("DHS's highest enforcement priorities are aliens who threaten public safety or national security and members of criminal gangs that smuggle aliens and contraband. DHS also gives priority to removing repeat border crossers, recent entrants, aliens who have previously been removed, and aliens who have disregarded a final order of removal."); see also Complaint at 17, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-NVW) ("The mandatory nature of Section 2, in tandem with S.B. 1070's new or amended state immigration crimes, directs officers to seek maximum scrutiny of a person's immigration status, and mandates the imposition of state criminal penalties for what is effectively unlawful presence, even in circumstances where the federal government has decided not to impose such penalties because of federal enforcement priorities or humanitarian, foreign policy, or other federal interests.").

²⁹⁴ Complaint, *supra* note 293, at 16–18.

of a scheme over which the federal government would have no control, and would proceed without regard to federal practice and policy and the essential nature of the cooperative relationship.”²⁹⁵ According to the United States, §§ 1644 and 1373 were intended to facilitate mutual information sharing, including by preempting state and local sanctuary measures, such as the one at issue in *City of New York v. United States*,²⁹⁶ which restricted immigration-related information sharing.²⁹⁷ The federal anti-sanctuary provisions did this by ensuring that there would be no restrictions on information sharing by state and local governments and, in § 1373(c), mandating that ICE reply to those requests for information. But, the United States argued that § 1373 “does not sanction efforts to use DHS resources to enforce the federal immigration laws without regard to federal priorities and discretion.”²⁹⁸ The conflict between § 2(B) and the federal anti-sanctuary statutes, the United States argued, stemmed essentially from the mandatory nature of the reporting required by § 2(B), a mandate not present in §§ 1373 and 1644, which require nothing on the part of state and local governments but merely ensure that they not be restricted in their ability to communicate with federal immigration authorities.²⁹⁹ That mandate in § 2(B) eliminates the discretion necessary for state and local actors to cooperate with and otherwise act in conformity with federal immigration priorities.

Arizona’s arguments in support of S.B. 1070, and § 2(B) in particular, centered largely on an assertion that Congress had enacted numerous laws and policies, including §§ 1644 and 1373, that reflected a broad intent to encourage state and local cooperation in immigration enforcement, and that S.B. 1070 was completely consistent with those policies.³⁰⁰ Arizona identified sanctuary laws and policies enacted by state and local governments as one of two primary sets of obstacles to the enforcement of federal immigration laws, to which the Federal Government had responded in 1996 by “establish[ing] a federal policy of encouraging cooperation among federal, state, and local authorities in enforcing the federal immigration laws,” and implementing that policy through §§ 1644 and 1373.³⁰¹ Thus, according to Arizona, §§ 1644 and 1373 were more than anti-sanctuary provisions. They were pro-enforcement provisions.³⁰²

²⁹⁵ Brief for Appellee at 50, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162512.

²⁹⁶ *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999).

²⁹⁷ Brief for the United States, *supra* note 17, at 51–52.

²⁹⁸ *Id.* at 52.

²⁹⁹ See Transcript of Oral Argument at 37, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182); see also *supra* note 83 and accompanying text.

³⁰⁰ Appellants’ Opening Brief, *supra* note 16, at 12–13.

³⁰¹ *Id.* at 7–9.

³⁰² *Id.* at 27 (“Congress has expressed a clear intent to encourage the assistance from state and local law enforcement officers in the enforcement of federal

Pointing to §§ 1644 and 1373, Arizona asserted that “Congress expressly contemplated that state and local law enforcement officers and agencies would inquire into the immigration status of lawfully-present aliens, and Congress determined—mandated—that ICE respond because Congress concluded that this sharing of information was of critical importance in the enforcement of federal immigration laws.”³⁰³ Indeed, according to Arizona, §§ 1644 and 1373 not only mandate that ICE respond to inquiries from state and local law enforcement, they also mandate that state and local officers make such inquiries.³⁰⁴ In this respect, Arizona contended that § 2(B) of S.B. 1070, by mandating immigration-status inquiries, simply mirrored the federal anti-sanctuary provisions, and so questioned the viability of the United States’s conflict preemption argument.³⁰⁵ And in response to the Ninth Circuit’s more limited characterization of §§ 1373 and 1644 as “anti-sanctuary provisions” that prohibit states from impeding immigration enforcement but are not an “invitation” to states to enact immigration legislation,³⁰⁶ Arizona argued instead that “these provisions expressly confirm that nothing in *federal law* stands in the way of state statutes such as § 2(B).”³⁰⁷

Ultimately, the Supreme Court reversed the Ninth Circuit’s finding that § 2(B) was preempted.³⁰⁸ The Court found that the mandatory nature of § 2(B)’s immigration status checks did not interfere or conflict with federal law, even if those status checks took place under circumstances that would fall outside the federal government’s immigration enforcement priorities.³⁰⁹ While the Court expressed support for the federal government’s discretionary authority in implementing federal immigra-

immigration laws that section 2(B) would provide.”).

³⁰³ *Id.*

³⁰⁴ See Brief for Petitioners at 24–25, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 416748, at *8 (“The federal immigration laws not only decline to preempt state law enforcement efforts, they affirmatively require federal cooperation.”).

³⁰⁵ Transcript of Oral Argument, *supra* note 299, at 21–22 (“It does do one thing that’s very important, though, which it does have the effect of overriding local policies that actually forbid some officers from making those communications . . . because that’s one of the primary effects of 2(B). It just shows how difficult the government’s preemption argument is here because those kind of local policies are expressly forbidden by Federal statute. [Sections 1373(a) and 1644] basically say that localities can’t have those kind of sanctuary laws. And so one effect that 2(B) has is, on a state level, it basically says, look, you can’t have local officers telling you not to make those inquiries. You must have those inquiries.”).

³⁰⁶ See *United States v. Arizona*, 641 F.3d 339, 351 n.11 (9th Cir. 2011), *rev’d in part*, 132 S. Ct. 2492 (2012).

³⁰⁷ See Brief for Petitioners, *supra* note 304, at 37.

³⁰⁸ *Arizona v. United States*, 132 S. Ct. at 2510.

³⁰⁹ *Id.* at 2508.

tion law,³¹⁰ the Court found nothing in federal law which required state or local law enforcement officers to consider federal enforcement priorities in deciding whether to contact ICE to obtain status information about a person who has been lawfully detained.³¹¹ Additionally, the Court seemed unpersuaded that § 2(B) would inevitably lead to a conflict with federal enforcement priorities since, even if Arizona law enforcement contacted ICE about a detained person, ICE ultimately retained the authority to decide how and whether to enforce federal immigration laws in each case.³¹² Concluding that the federal statutory scheme, including §§ 1644 and 1373, encouraged the sharing of information about possible immigration violations, the Court determined that it “leaves room for a policy requiring state officials to contact ICE as a routine matter.”³¹³ Notably, the Court interpreted § 2(B) to permit status inquiries and information sharing with ICE only in the context of an otherwise constitutional stop or arrest. While acknowledging that § 2(B) might be applied in a way that would raise constitutional concerns, the Court concluded that § 2(B) survived a facial challenge absent “some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.”³¹⁴

In the end, neither side succeeded in getting the Court to adopt its interpretation of the federal anti-sanctuary statutes. The Court rejected the United States’s narrow interpretation of permissible state–federal immigration cooperation and its argument that “by refusing to respect Congress’s designation of the Executive Branch to take the lead in the

³¹⁰ See *id.* at 2499 (“A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal.” (citation omitted)).

³¹¹ *Id.* at 2508.

³¹² During oral argument, several Justices questioned the Solicitor General about the actual impact of calls to ICE in circumstances where the detained individual might not be an enforcement priority, and suggested that ICE still maintained authority over the ultimate decision regarding enforcement. See Transcript of Oral Argument, *supra* note 299, at 71 (“All it does is lets you know . . . that an illegal alien has been arrested, and you can decide, we are not going to initiate removal proceedings against that individual. It doesn’t require you to remove one more person than you would like to remove under your priorities.”); *id.* at 56 (“[I]t’s not that it’s forcing you to change your enforcement priorities. You don’t have to take the person into custody.”).

³¹³ *Arizona v. United States*, 132 S. Ct. at 2508 (citing *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985–86 (2011) (finding no preemption of Arizona law requiring that employers verify the immigration status of employees using a federal system that had been promoted by the United States)).

³¹⁴ *Id.* at 2510.

enforcement of the federal immigration laws, and by requiring all Arizona officers to adhere instead to the State's own policy of 'attrition through enforcement,' Arizona exceeded the permissible bounds of cooperation" between states and the federal government provided for in federal immigration law.³¹⁵

On the other hand, the Court also rejected the expanded interpretation of permissible state-federal cooperation proffered by Arizona in its defense of S.B. 1070 § 6, which authorized warrantless arrests for immigration violations: "There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."³¹⁶

VI. CONCLUSION: LESSONS LEARNED FROM AN ANTI-SANCTUARY APPROACH TO IMMIGRATION ENFORCEMENT

In the almost 20 years since the adoption of the federal anti-sanctuary provisions, some clarity about the meaning and the purpose of the statutes has emerged. First, despite all arguments to the contrary, the federal anti-sanctuary statutes do not mandate that states and localities do anything.³¹⁷ The argument that the statutes mandate state action, whether that is in the form of information sharing, information gathering, or general cooperation around immigration enforcement, has been repeatedly rejected, whether argued by those wanting to invalidate anti-sanctuary laws³¹⁸ or by those seeking to invalidate sanctuary provisions.³¹⁹ Indeed, Congress expressed its intent not to mandate but simply to authorize communication with federal immigration authorities from the very beginning.³²⁰

A second point of clarity, related to the first, is that the anti-sanctuary statutes prohibit restrictions on communication; they do not prohibit restrictions on other activities by state and local agencies and officers.³²¹ Therefore, a state or municipal government can prohibit its employees or officers from inquiring about immigration status where it is not otherwise required by law or from initiating contact with individuals for the pur-

³¹⁵ Brief for the United States, *supra* note 17, at 43.

³¹⁶ *Arizona v. United States*, 132 S. Ct. at 2507.

³¹⁷ *See, e.g., City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

³¹⁸ *See id.*

³¹⁹ *See Doe v. City of New York*, 860 N.Y.S.2d 841, 844 (Sup. Ct. 2008).

³²⁰ *See H.R. REP. NO. 104-725*, at 383 (1996) (Conf. Rep.).

³²¹ *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731 (Ct. App. 2009).

pose of discovering their immigration statuses.³²² On the other hand, states and municipalities may not, consistent with §§ 1644 and 1373, place restrictions on immigration-related information sharing with the federal immigration authorities, unless that restriction is part of a broader policy to protect confidential information from disclosure.³²³

Third, the anti-sanctuary statutes do not provide for a private right of action for individuals claiming harm in connection with them, whether that claim is for damages or to compel compliance with the statutes.³²⁴ Indeed, allegations that the anti-sanctuary statutes have been both unenforceable and unenforced have led members of Congress to attempt to amend the statutes numerous times in recent years to include enforcement provisions and penalties.³²⁵ These efforts have so far all failed but have included proposals to deny funding to jurisdictions that fail to comply with §§ 1373 and 1644, and creating civil or criminal liability for failures to comply.³²⁶

Fourth, the federal anti-sanctuary measures do not repeal or otherwise override the privacy protections in other federal statutes, including FERPA and HIPAA. Most importantly, they do not provide a blank check for the voluntary sharing of information that is otherwise protected from disclosure under federal law. Moreover, the unauthorized release of otherwise protected records to federal immigration officers pursuant to the permission granted under §§ 1644 and 1373 may be punishable with civil and criminal penalties.³²⁷

Finally, states and municipalities may mandate certain types of cooperation with federal immigration enforcement without conflict with the anti-sanctuary statutes.³²⁸ In particular, state statutes that mandate immigration status checks and reporting are not preempted per se by the federal anti-sanctuary statutes or the federal government's exclusive power over immigration.³²⁹ However, mandatory status checks, reporting or oth-

³²² *Id.*

³²³ *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

³²⁴ *See Lewis v. City of Kimball*, No. 4:06CV3084, 2006 WL 2375479, at *6 (D. Neb. Aug. 14, 2006); *Bologna v. City and County of San Francisco*, 121 Cal. Rptr. 3d 406, 414–15 (Ct. App. 2011); *Doe*, 860 N.Y.S.2d at 844–45.

³²⁵ *See, e.g.*, Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015); SUBCOMM. ON INVESTIG. OF THE COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, 30 (1995).

³²⁶ *Id.* n.75.

³²⁷ *See, e.g.*, 42 U.S.C. § 1320d-5 (2012) (HIPAA penalties); 18 U.S.C. §§ 2723–2724 (2012) (Driver's Privacy Protection Act of 1994 penalties).

³²⁸ *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 581–82 (Ct. App. 2008).

³²⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2508–10 (2012); *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731–33 (Ct. App. 2009).

er cooperation that in practice conflicts or interferes with the federal government's immigration enforcement authority are preempted.³³⁰

In the wake of the tragic killing of Kate Steinle, with overwhelming attention and criticism focused on San Francisco's sanctuary law, the lessons learned about the anti-sanctuary provisions over two decades may help guide the conversation going forward. A torrent of blame for Kate Steinle's death has been unleashed against various city officials and agencies for implementing San Francisco's sanctuary ordinances, allegedly in violation of the federal anti-sanctuary statutes, and against the Obama administration for a failure to enforce the anti-sanctuary provisions against San Francisco and against sanctuary cities in general.³³¹ The familiar complaint of supporters of tougher immigration enforcement—that if the laws on the books were just enforced, the problem of unauthorized immigration would be solved—runs through these arguments.³³² In other words, if the federal anti-sanctuary provisions had been enforced, Lopez-Sanchez would not have been released and Kate Steinle would not be dead. Unfortunately, these criticisms fail to acknowledge at least two critical points. First, by all accounts, the decision to release Lopez-Sanchez was not premised on San Francisco's City of Refuge ordinance, but instead was based on the 2013 city ordinance prescribing the circumstances in which a federal immigration detainer could be honored.³³³ While there is disagreement about whether the sheriff's office misinterpreted the de-

³³⁰ United States v. Arizona, 641 F.3d 339, 351–52 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012).

³³¹ Valerie Richardson, *Kathryn Steinle Killing Fuels Outrage over Democrats' Deportation Opposition*, WASH. TIMES (July 6, 2015) <http://www.washingtontimes.com/news/2015/jul/6/kathryn-steinle-killing-fuels-outrage-over-democra/?page=all> (reporting statement of Rep. Bob Goodlatte that the administration was “releasing criminals back onto the streets” and was “not enforcing our immigration laws . . . [a]nd, quite frankly, I don't think they care”).

³³² See, e.g., Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CTR. FOR IMMIGR. STUD.: BACKGROUNDER (Apr. 2006), <http://www.cis.org/sites/cis.org/files/articles/2006/back406.pdf>; *Attrition Through Enforcement Is the True Middle-Ground Solution*, NUMBERSUSA (Feb. 17, 2015), <https://www.numbersusa.com/content/learn/issues/american-workers/attrition-through-enforcement-true-middl.html> (“[L]iving illegally in the United States will become more difficult and less satisfying over time when the government—at ALL LEVELS—enforces all of the laws already on the books.”). *But see The Fallacy of “Enforcement First,”* AM. IMMIGR. COUNCIL (May 9, 2013), <http://www.immigrationpolicy.org/just-facts/fallacy-enforcement-first> (describing the futility of enforcing unworkable laws that themselves promote unauthorized immigration).

³³³ See Press Release, Office of the Sheriff, City & Cty. of S.F., Sheriff Ross Mirkarimi Sets the Record Straight on the April 2015 Release of Juan Francisco Lopez-Sanchez and Offers Recommendations for the Future (July 10, 2015), http://www.sfsheriff.com/files/SFSD_PR_RM_07_10_15.pdf.

tainer ordinance in deciding to release Lopez-Sanchez,³³⁴ the detainer ordinance itself does not conflict with federal law. The 1996 anti-sanctuary statutes do not mandate in any way that any jurisdiction honor a detainer request from ICE, such as the one provided to San Francisco before the release of Francisco Lopez-Sanchez. Indeed, not only is compliance with such requests not mandated by the federal anti-sanctuary provisions, it is also not mandated by the federal regulations authorizing ICE to issue detainees.³³⁵ Secondly, San Francisco's City of Refuge Ordinance would not have prohibited the Sheriff from contacting ICE about Lopez-Sanchez, because it permits cooperation and communication with ICE in cases involving individuals with prior felony convictions.³³⁶ Even without holding Lopez-Sanchez on the ICE detainer, the Sheriff would have been free to notify ICE that his San Francisco criminal matter was dismissed and that he would soon be released so that ICE could make arrangements to take him into custody.³³⁷ Thus, even had the Obama administration enforced the anti-sanctuary provisions against San Francisco, it is far from clear that this would have prevented the release of Lopez-Sanchez or the killing of Kate Steinle.

Nevertheless, the political reaction to the killing has been swift. Within weeks of Steinle's death, several proposals were introduced in Congress that would prohibit federal funding to states and cities that have sanctuary policies in place.³³⁸ There were also proposals to mandate

³³⁴ See Vivian Ho, *S.F. Deputies Union Ties Pier Killing to Sheriff's Order*, S.F. CHRON. (July 17, 2015), <http://www.sfchronicle.com/crime/article/SF-deputies-union-ties-pier-killing-to-6389935.php> (discussing complaint against sheriff by deputy-sheriffs' union alleging that a memo issued by the Sheriff in connection with the detainer ordinance improperly prohibited staff from giving information about detainees to immigration agents).

³³⁵ See *Morales v. Chadbourne*, 793 F.3d 208, 211 (1st Cir. 2015) (requiring probable cause for an ICE agent to issue an immigration detainer); *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014) (holding that immigration detainees under 8 C.F.R. § 287.7 are voluntary requests to state and local law enforcement to detain a person for no more than an additional 48 hours). The Third Circuit cited various local laws limiting cooperation on immigration detainees, including in Santa Clara County, California, New York City, Chicago, and San Francisco, as evidence that immigration detainees cannot be mandatory. *Id.* at 645 & n.10.

³³⁶ See S.F., CAL., ADMIN. CODE § 12H.2-1 (2015); Ho, *supra* note 334 (reporting statement of Mayor Ed Lee that "nothing in this sanctuary-city law prohibits the officials of the city and county of San Francisco to communicate, to engage in discussion").

³³⁷ ICE officials contend that they could have easily made arrangements to take Lopez-Sanchez into custody immediately upon his arrest if they had notified, though ICE's reliability in that regard is disputed. See Eric Kurhi & Matthew Artz, *As S.F. Shooting Suspect Apologizes, Factions Square Off over Noncompliance Policy*, SAN JOSE MERCURY NEWS (July 7, 2015), http://www.mercurynews.com/crime-courts/ci_28442952/s-f-shooting-suspect-apologizes-actions-square-off.

³³⁸ S. 1640, 114th Cong. § 114 (2015); H.R. 1148, 114th Cong. § 114 (2015); *see*

reporting of immigration-status related information every time anyone suspected of being an unauthorized immigrant is taken into custody.³³⁹ Another bill, Kate's Law, championed by Fox News commentator Bill O'Reilly, imposes a mandatory five-year prison term following a conviction for illegal reentry after a deportation.³⁴⁰ Similar measures have been introduced before and failed,³⁴¹ and though there is momentum to take action in response to Kate Steinle's death, there are reasons to proceed with caution. First, an unfunded mandate to states and cities to report information about suspected unauthorized immigrants to ICE, as at least one of the current proposals includes, would not survive a Tenth Amendment challenge.³⁴² Alternatively, cutting off federal funding to states and cities that are resistant to engaging in immigration enforcement, while it may survive a constitutional challenge, is likely to test already strained relationships between ICE and state and local governments and law enforcement agencies.³⁴³ Forcing states and cities to engage under threat of critical funding loss may result in more participation by states and cities but it ignores their legitimate concerns about the detrimental impact on community policing and public health and safety. Similarly, imposing mandatory sentences for unlawful reentry seems also to miss the mark since this would likely divert already scarce resources to the prosecution and incarceration of individuals, most of whom are not likely to be serious criminals or otherwise pose a danger to the communi-

also San Francisco Shooting Prompts Debate Over 'Sanctuary Cities,' CQ NEWS (July 13, 2015), 2015 WLNR 21363609 (discussing introduction of several bills targeting sanctuary cities).

³³⁹ S. 1640 § 111(2); H.R. 1148 § 111(2).

³⁴⁰ See Erik Wemple, *Fox News's Bill O'Reilly Embraces Activism with 'Kate's Law,'* WASH. POST (July 14, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/14/c/>.

³⁴¹ S. 169, 112th Cong. (2011) (restricting funding to sanctuary cities); *see also* H.R. 2217, 113th Cong. § 577 (as reported by S. Comm. on Appropriations, July 18, 2013) (removing a provision that would have denied funds for use in contravention of §§ 1644 and 1373); Andrew Adams, *Congressman Wants to Penalize Salt Lake City over Immigration Enforcement,* DESERET NEWS (May 11, 2011), <http://www.deseretnews.com/article/705372473/Congressman-wants-to-penalize-Salt-Lake-City-over-immigration-enforcement.html> (discussing bill introduced by representative Lou Barletta to withhold federal funding to sanctuary cities).

³⁴² See *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.")

³⁴³ See *Homeland Security Hearing*, *supra* note 9, at 9 (statement of Jeh Johnson, U.S. Sec'y of Homeland Security) (stating that one challenge to immigration enforcement is "fixing our relationship with State and local law enforcement").

ty.³⁴⁴ Federal law already provides for criminal fines and imprisonment up to 20 years for unlawful reentry after removal.³⁴⁵ Given the fact that Lopez-Sanchez had been prosecuted and imprisoned three times for unlawful reentry after a removal, in one case serving more than four years in prison, he was apparently not deterred from returning to the United States by the threat of incarceration.³⁴⁶

Perhaps the biggest lesson learned 20 years after the passage of §§ 1644 and 1373 is that an anti-sanctuary approach to unauthorized immigration does not lead to real solutions. The anti-sanctuary statutes, if they have been effective at all, have been effective as weapons of political rhetoric, designed to send a message that unauthorized immigrants have no place to hide and to, as much as constitutionally permissible, enlist states and municipalities in joining in delivering that message. Sanctuary, like amnesty, has become a term so wrought with controversy and derision, that public officials, lawmakers, and especially political candidates, deny any association with it. This is no wonder since, in the context of the national debate on immigration, sanctuary has become synonymous with “pro illegal immigration.” Jurisdictions that have adopted laws or policies that restrict involvement in immigration enforcement or otherwise allow law-abiding unauthorized immigrants to live in a community without fear are accused of protecting lawbreakers and even being lawbreakers themselves. From the perspective of critics of sanctuary policies, anything short of full enforcement of the immigration laws is properly labeled as sanctuary, including most recently the Obama administration’s efforts to prioritize enforcement resources through the exercise of prosecutorial discretion.³⁴⁷

The federal anti-sanctuary laws, by encouraging state and local governments to assist with immigration enforcement by enlisting personnel from local law enforcement, schools, hospitals, and other public agencies, have become an integral piece of immigration restrictionists’ attrition-through-enforcement strategy.³⁴⁸ This is a strategy designed to drive

³⁴⁴ See Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

³⁴⁵ See 8 U.S.C. § 1326 (2012).

³⁴⁶ See Romney et al., *supra* note 1.

³⁴⁷ See *Homeland Security Hearing*, *supra* note 9, at 2–3 (statement of Bob Goodlatte, Chairman of the House Committee on the Judiciary); Foley, *supra* note 22.

³⁴⁸ A key component of this strategy is enlisting cooperation and assistance from states and localities in immigration enforcement in order to “discourage the settlement of illegal aliens and to make it more difficult for illegal aliens to conceal their status.” See MICHELE WASLIN, IMMIGRATION POLICY CTR., DISCREDITING “SELF DEPORTATION” AS IMMIGRATION POLICY 4 (Feb. 2012), http://www.immigrationpolicy.org/sites/default/files/docs/Waslin_-_Attrition_Through_Enforcement_020612.pdf (quoting Vaughan, *supra* note 332, at 3).

unauthorized immigrants out of the United States through a combination of increased local enforcement efforts and laws that make it difficult to find work or a place to live or to access public services. But as states and cities have grown more concerned about the loss of trust between law enforcement agencies and immigrant residents and the harm to public health and safety, they have also become more resistant to efforts to engage them in increasingly more aggressive federal enforcement programs.³⁴⁹ Recently, federal immigration authorities have begun to respond to this resistance, recognizing that a stronger and stronger push for state and local cooperation with federal immigration enforcement efforts, without regard for the legitimate concerns of states and cities to protect public health and safety and promote the general welfare of their communities, has been a failure as an enforcement strategy.³⁵⁰

The rush to take action following the death of Kate Steinle is understandable, but targeting sanctuary laws and policies will not solve the problem of unauthorized immigration any more than it would have prevented the release of Lopez-Sanchez. That problem will not be solved without thoughtful, meaningful reforms that focus limited enforcement resources on serious threats to public safety and national security, while providing some solution for the millions of unauthorized immigrants living in our communities who pose no threat. Anti-sanctuary policies alone were not the answer in 1996 and they are not the answer now.

³⁴⁹ See LYNN TRAMONTE, IMMIGRATION POLICY CTR., DEBUNKING THE MYTH OF “SANCTUARY CITIES” 8 (April 2011), http://www.immigrationpolicy.org/sites/default/files/docs/Community_Policing_Policies_Protect_American_042611_update.pdf (“287(g) and Secure Communities are two federal programs that involve state and local police in the deportation of immigrants. Although described as targeting foreign-born criminals, these programs—as well as the erroneous belief that state and local police have the ‘inherent authority’ to enforce civil immigration laws—are also sweeping up immigrants who have not committed crimes, and harming the relationship between police and the immigrant community.” (footnotes omitted)).

³⁵⁰ See *Statement from U.S. Immigration and Customs Enforcement’s (ICE) Director Sarah R. Saldana*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Mar. 20, 2015), <https://www.ice.gov/news/releases/statement-us-immigration-and-customs-enforcement-ice-director-saldana> (“The reality is that Secure Communities had become legally and politically controversial, and led to the enactment by numerous jurisdictions of laws, ordinances, directives and policies that limit their cooperation with ICE in our efforts to promote public safety. . . . The overriding objective is public safety, while implementing this new approach in a way that upholds the trusted relationships local law enforcement need to build with and among their communities, and we believe these officials will recognize and concur with our goals. Any effort at federal legislation now to mandate state and local law enforcement’s compliance with ICE detainers will, in our view, be a highly counterproductive step and lead to more resistance and less cooperation in our overall efforts to promote public safety.”).