

## CONSTITUTIONAL RIGHTS OF DENVER AS A SANCTUARY CITY

On February 15, 2018, the president of Denver’s police union spoke before Congress regarding the city’s recent immigration ordinance.<sup>1</sup> Testifying in front of the House Border and Immigration Subcommittee, Nick Rodgers told lawmakers he thought the city’s ordinance was unsafe and made it difficult to arrest immigrant drug dealers.<sup>2</sup> These comments came in response to a recent Denver city ordinance that banned police and city officials from asking about or sharing anyone’s immigration status.<sup>3</sup> In fact, the same day Denver passed its immigration ordinance, it joined thirty-five other cities and counties across the country in filing a legal brief to support Chicago’s lawsuit challenging new federal grant restrictions on “sanctuary cities.”<sup>4</sup>

The term *sanctuary city* has frequented the news since President Donald J. Trump was a presidential candidate.<sup>5</sup> In an August 2016 speech, presidential candidate Trump’s fourth item on his immigration agenda was to end sanctuary cities by cutting off their federal funding.<sup>6</sup> Threats by the Trump Administration to withhold federal funding from sanctuary cities became a reality when President Trump issued an executive order on January 25, 2017.<sup>7</sup> The executive order, titled “Enhancing Public Safety in the Interior of the United States,”<sup>8</sup> declares that sanctuary jurisdictions “across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States.”<sup>9</sup> The order adds that “[t]hese jurisdictions have caused immeasurable harm to

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1. Jim Hooley, *President of Denver Police Union Tells Congress City’s Immigration Ordinance is Unsafe*, FOX 31 DENV. (Feb. 15, 2018, 7:12 AM), <http://kdvr.com/2018/02/15/president-of-denver-police-union-to-testify-in-front-of-congress-on-citys-immigration-ordinance/>.

2. *Id.*

3. Jon Murray, “*We Do Not Do the Work of ICE*,” *Denver Police Chief Says as Immigration Ordinance is Signed into Law*, DENV. POST (Aug. 31, 2017, 6:35 PM), <https://www.denverpost.com/2017/08/31/immigration-ordinance-denver-police-ice-robert-white/>.

4. *Id.*

5. *Transcript: Donald Trump’s Full Immigration Speech, annotated*, L.A. TIMES (Aug. 31, 2016, 9:35 PM), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htlmlstory.html>.

6. Ahmad Al-Dajani, *Current Developments in the Executive Branch: Sanctuary Cities Under the Trump Administration, The Frontlines of the Battle for Immigration*, 31 GEO. IMMIGR. L.J. 665, 665 (2017).

7. Exec. Order No. 13768, 82 Fed. Reg. 8779 (Jan. 25, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

8. *Id.*

9. *Id.*

the American people and to the very fabric of our Republic.”<sup>10</sup> Another key provision states:

In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with the law, shall ensure that jurisdictions that willfully refuse to comply with Section 1373 of Title 8 of the U.S. Code are not eligible to receive federal grants, except as deemed necessary for law enforcement by the Attorney General and the Secretary.<sup>11</sup>

Section 1373 states that no law can prevent 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.”<sup>12</sup>

Sanctuary cities across the country responded by challenging the order with litigation.<sup>13</sup> Nearly 300 jurisdictions, including the states of Colorado, California, and Connecticut, have adopted some form of sanctuary policy.<sup>14</sup> In light of Trump Administration and Justice Department policy choices, Denver has emerged as a city opposed to serving as an arm of federal immigration authority.<sup>15</sup> Traditionally, this type of coercion of local governments has been struck down by federalist principles supported by the Supreme Court,<sup>16</sup> leaving Denver and other sanctuary cities with legal arguments to challenge the executive order and similar administration policies.

Among several cities in the United States that have countered federal immigration crackdowns with local ordinances, Denver has taken a similar stance. Denver Police Chief Robert White summarized this position prior to Denver’s immigration ordinance passing into law stating, “We do not do the work of ICE” (referring to the U.S. Immigration and Customs Enforcement).<sup>17</sup> But Denver’s stance has not risen to the level of Chicago, San Francisco, and New York which have cut off *all* communication with ICE agents.<sup>18</sup> Denver has taken a more moderate track by continuing to give ICE agents notice before releasing inmates wanted on a detainer.<sup>19</sup> While Mayor Hancock’s administration has argued in

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10. *Id.*

11. *Id.*

12. 8 U.S.C. § 1373 (2012).

13. Erwin Chemerinsky, *The Constitutionality of Withholding Federal Funds From Sanctuary Cities*, 40 APR. L.A. LAW. 60, 60 (2017); Mitch Smith, *Sessions Scolds Chicago for Suing Over ‘Sanctuary Cities’ Threat*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/us/chicago-sues-justice-department-over-sanctuary-crackdown.html>.

14. Al-Dajani, *supra* note 6, at 665.

15. Murray, *supra* note 3.

16. Chemerinsky, *supra* note 13, at 60. *See also* Nat. Fed. Indep. Bus. v. Sebellius, 567 U.S. 519 (2012); United States v. Printz, 521 U.S. 898 (1997).

17. Murray, *supra* note 3.

18. *Id.*

19. *Id.*

favor of keeping release notifications to limit the ire of federal authorities, Denver still falls short of federal wishes by allowing jail access to agents only if they have a judicial warrant and providing much shorter notice than requested by Attorney General Jeff Sessions.<sup>20</sup>

To be clear, sanctuary cities do not conceal or shelter undocumented immigrants from authorities.<sup>21</sup> Instead, sanctuary cities refuse to be considered a part of federal immigration authority in investigating, arresting, or detaining individuals based on their immigration status.<sup>22</sup> Sanctuary cities will continue to provide services to all and generally not turn over individuals to federal immigration officers.<sup>23</sup> As a city with a large immigrant populous, there are many reasons to take the sanctuary stance. A policy of non-inquiry with regard to immigration status encourages victims and witnesses of crimes to come forward without fear of deportation.<sup>24</sup> Additionally, immigrants will be discouraged from seeking medical treatment and sending their children to school with deportation looming over their heads.<sup>25</sup> Conversely, President Trump's campaign made immigration a focal point, leading to his executive order days into his administration assuming office.<sup>26</sup> Despite the President's swift action, many constitutional scholars argue the executive order is unconstitutional, giving sanctuary cities plenty of reasons to continue their non-inquiry-based policies.

Professor Erwin Chemerinsky<sup>27</sup> argues this order violates the Tenth Amendment.<sup>28</sup> The Tenth Amendment reads, "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."<sup>29</sup> The Supreme Court has held it is unconstitutional for Congress to "commandeer" state and local governments by forcing them to adopt federal mandates.<sup>30</sup> Specifically, *United States v. Printz*<sup>31</sup> declared a provision of the Brady

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20. *Id.*

21. Chemerinsky, *supra* note 13, at 60.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Trump Administration Makes Significant Down Payment on Immigration Campaign Promises But Has Yet to Achieve Most Substantive Changes*, MIGRATION POL. INST. (Dec. 20, 2017), <https://www.migrationpolicy.org/news/trump-administration-makes-significant-down-payment-immigration-campaign-promises-has-yet>.

27. Erwin Chemerinsky is the Dean at the University of California-Berkeley School of Law. His scholarship includes constitutional law, first amendment law, federal courts, and appellate litigation. In January 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. See *Faculty Profiles, Erwin Chemerinsky*, BERKELEY L., <https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/>.

28. Chemerinsky, *supra* note 13, at 60.

29. U.S. CONST. amend. X. (emphasis added).

30. Chemerinsky, *supra* note 13, at 60. See also *Nat. Fed. Indep. Bus. v. Sebellius*, 567 U.S. 519 (2012); *United States v. Printz*, 521 U.S. 898 (1997).

31. 521 U.S. 898 (1997).

Handgun Control Act unconstitutional.<sup>32</sup> The Act required state and local governments to perform background checks before issuing firearm permits.<sup>33</sup> Justice Scalia held that such compulsion violated principles of federalism and the Tenth Amendment.<sup>34</sup>

More recently in *National Federation of Independent Businesses v. Sebelius*,<sup>35</sup> the Supreme Court unknowingly provided a roadmap for sanctuary cities to find President Trump's executive order unduly coercive in violation of the Tenth Amendment. In *Sebelius*, the Supreme Court examined the Medicaid provisions of the Affordable Care Act (ACA) that required states to provide coverage for certain impoverished individuals if they accepted federal Medicaid funds.<sup>36</sup> In declaring the Medicaid provisions of the ACA unconstitutional, Chief Justice Roberts held that the Act impermissibly coerced state government in violation of the Tenth Amendment.<sup>37</sup> The Court went as far to say that the Act served as a "gun to the head" of states.<sup>38</sup> Furthermore, Chief Justice Roberts, writing alone, argued states need to have a genuine choice to participate in the program, and *fair notice* of the possibility of losing all funding for non-compliance.<sup>39</sup> If states had proper notice of this tying notice condition when considering the funding program in the first place, the condition would not be coercive under Roberts's reading.<sup>40</sup> The legitimacy of Congress's exercise of spending power then depends on "whether the State voluntary and knowingly accepts the terms of the contract."<sup>41</sup> Since states had no prior notice that all of their federal Medicaid funding could be revoked for not complying with the ACA, Chief Justice Roberts saw this as impermissible coercion or "economic dragooning."<sup>42</sup>

Applying these cases to the circumstances Denver currently faces, the analysis looks familiar. *Printz* holds that forcing state and local government officials to act according to Federal mandates violates the Tenth Amendment.<sup>43</sup> While the federal government can use its agencies as it sees fit to enforce federal immigration law, it cannot force local governments to act as an arm of federal immigration enforcement.<sup>44</sup> President Trump's executive order does just that. By threatening to withhold im-

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32. Chemerinsky, *supra* note 13, at 60.

33. *Id.*

34. *Printz*, 521 U.S. at 935.

35. 567 U.S. 519 (2012).

36. *Sebelius*, 567 U.S. at 542.

37. *Id.* at 589.

38. *Id.* at 581; Chemerinsky, *supra* note 13, at 60.

39. *Sebelius*, 567 U.S. at 587; Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 593 (2013).

40. Pasachoff, *supra* note 38, at 601.

41. *Sebelius*, 567 U.S. at 577 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal quotations omitted)).

42. *Sebelius*, 567 U.S. at 582. *See also* Chemerinsky, *supra* note 13, at 60; Pasachoff, *supra* note 38, at 601.

43. *United States v. Printz*, 521 U.S. 898, 935 (1997).

44. Chereminsky, *supra* note 13, at 60.

migration funding from states that refuse to comply with the executive order and 8 U.S.C. § 1373, the Trump Administration is forcing local government and their administrations to enforce federal immigration law.

Further, thanks to Chief Justice Roberts's opinion in *Sebelius*, arguing that lack of proper notice to states results in impermissible economic dragooning in violation of the Tenth Amendment, sanctuary cities like Denver can also argue they were not given any notice that they could lose federal immigration grants by refusing to comply with this new order. While Denver may not be as large of a sanctuary target to the Trump Administration as cities like Chicago, New York, and San Francisco, it has taken considerable steps to indicate it will not operate as an arm of federal immigration enforcement.<sup>45</sup> Cases like *Printz* and *Sebelius* give Denver and other sanctuary cities a constitutional argument to continue on with local ordinances and policies promoting non-inquiry with regard to immigration status in the face of President Trump's executive order.

Recently, however, some states have responded by banning the practice of sanctuary cities.<sup>46</sup> In May 2017, the Texas legislature passed Senate Bill 4, requiring local police chiefs and sheriffs to cooperate with federal immigration officials.<sup>47</sup> The legislation also allows police to question the immigration status of anyone they arrest.<sup>48</sup> A federal judge in San Antonio temporarily blocked Texas officials from enforcing the ban in August 2017.<sup>49</sup> On March 13, 2018, a three-judge panel on the Fifth Circuit Court of Appeals reversed the temporary order from the District Court.<sup>50</sup> The Fifth Circuit's opinion did not completely rule on the merits of the case; rather it held that the ban could take affect while legal challenges were taking place.<sup>51</sup> The panel did not have confidence in the legal merits of the challenge to the ban, stating that "[t]he plaintiffs have not made a showing they are likely to succeed on the merits of their constitutional claims."<sup>52</sup>

In Colorado, there is no indication the state legislature will be enacting a ban on sanctuary cities anytime soon. However, multiple measures have been brought to a vote in the Colorado legislature over the past two years that would open up sanctuary city officials to punishment and require local officials to comply with federal immigration officers.<sup>53</sup> Colo-

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45. Murray, *supra* note 3.

46. Maggie Astor, *Texas' Ban on Sanctuary Cities' Begin, Appeals Court Rules*, N.Y. TIMES, (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/texas-immigration-law-sb4.html>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Jesse Paul, *Colorado's 'Sanctuary City' Officials Would Face Lawsuits, Felony Charge in Return of GOP Lawmaker's Longshot Measure*, DENV. POST (Mar. 13, 2018, 2:09 PM), <https://www.denverpost.com/2018/03/13/dave-williams-colorado-sanctuary-city->

rado Springs-based state Representative Dave Williams, an immigration ally of President Trump, brought a similar bill to vote last year that died in the Democratic-controlled house.<sup>54</sup> Williams introduced a mirror image of last year's bill on March 13 of this year, and it is expected to suffer the same fate as last year's bill.<sup>55</sup> House Bill 1178 would have allowed victims of crimes by individuals in the United States illegally to sue sanctuary cities and their policy makers, and make creation of sanctuary policies a class 4 felony.<sup>56</sup> The bill would also require local law enforcement officers to notify federal immigration authorities if they *suspect* a person under arrest is living in the United States illegally.<sup>57</sup> Like in 2017, House Bill 1178 failed to get the votes it needed in the house.<sup>58</sup> Challenges to Denver's immigration policies are likely to persist during the Trump Administration, but the Democratic-leaning house is likely to continue to support Denver's effort to maintain sanctuary city policies.

The Trump Administration has not shown any signs of backing away from its immigration hard line, but as long as state legislatures are backing the policy decisions of sanctuary city officials, it is unlikely sanctuary cities will be forced to change course because of funding threats. Moreover, the Supreme Court has distinctly held that actions such as President Trump's executive order violate the Tenth Amendment by forcing state and local officials to serve as an arm of federal enforcement.

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bill/?returnUrl=https://www.denverpost.com/2018/03/13/dave-williams-colorado-sanctuary-city-bill/?clearUserState=true.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (emphasis added).

58. *Colorado House Bill 1178*, LEGISCAN, <https://legiscan.com/CO/bill/HB1178/2018> (last visited Apr. 13, 2018).

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