

August 2011

# Hidden Beneath the Waves of Immigration Debate: San Francisco's Sanctuary Ordinance

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## Recommended Citation

Gregorin, Jennifer L. (2011) "Hidden Beneath the Waves of Immigration Debate: San Francisco's Sanctuary Ordinance," *Liberty University Law Review*: Vol. 6: Iss. 1, Article 7.

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## COMMENT

### HIDDEN BENEATH THE WAVES OF IMMIGRATION DEBATE: SAN FRANCISCO'S SANCTUARY ORDINANCE

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#### I. INTRODUCTION

The summer of 2010 represented a tumultuous time of debate and uncertainty in America's immigration law as the Nation's attention was captivated by the fate of Arizona's controversial immigration law.<sup>1</sup> On July 28, 2010, after filing suit against the State of Arizona because the State's immigration law was allegedly unconstitutional and preempted by federal law, the United States Department of Justice ("Justice Department") secured an injunction to prevent enforcement of certain sections of the Arizona law.<sup>2</sup> Not long after the injunction, the United States Department of State ("State Department") sent a human rights report to the United Nations.<sup>3</sup>

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1. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Senate Bill 1070 is also known as the "Support Our Law Enforcement and Safe Neighborhoods Act." *Id.* § 13. The legislature stated its intent for the bill in Section 1:

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

*Id.* § 1.

2. See *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010) (granting in part and denying in part the Justice Department's preliminary injunction).

3. *State Department Stands By Decision to Include Arizona in U.N. Human Rights Report*, FOXNEWS.COM (Aug. 30, 2010), <http://www.foxnews.com/politics/2010/08/30/state-department-stands-decision-include-arizona-human-rights-report> (providing reactions from Arizona officials to the State Department including a report on the Arizona immigration controversy in a report to the United Nations and relating how the State Department supported its report); see also *UN at a Glance*, UNITED NATIONS,

The report included an example of America's process for resolving a social issue under the rule of law.<sup>4</sup> The State Department proffered to the United Nations the Justice Department's lawsuit against the State of Arizona in response to Arizona's immigration law.<sup>5</sup> Through the report, the State Department wanted America to be an example for the rest of the world.<sup>6</sup>

The federal government disapproves of Arizona's immigration law because the law is allegedly preempted by federal law,<sup>7</sup> but the federal government allows cities to pass laws and adopt policies that expressly discourage or prevent local law enforcement officers and government employees from *complying* with federal immigration laws.<sup>8</sup> Cities that prohibit local law enforcement or other employees from enforcing immigration laws to the fullest extent allowed by the federal government are commonly referred to as sanctuary cities.<sup>9</sup> The discrepancy between the Justice Department's condemning Arizona's immigration law and concomitantly condoning sanctuary city policies creates a legal conundrum.

Many cities in the United States represent express or implied sanctuary cities, and San Francisco represents one city that has expressly declared itself a sanctuary city.<sup>10</sup> This Comment examines the history of American sanctuary cities and focuses specifically on the unconstitutionality of San Francisco's sanctuary city policy. Section II discusses the background of American sanctuary cities, addresses the semantics of the term, and follows

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<http://www.un.org/en/aboutun/index> (last visited Oct. 20, 2011). In 1945, after World War II, the United Nations was founded as an international organization with the goal of promoting international peace and security. *Id.* Through its organizations and programs, it works in various areas such as refugee protection, disaster relief, counter terrorism, and human rights. *Id.* Currently, the United Nations has 193 member states. *Id.*

4. *State Department Stands by Decision*, *supra* note 3.

5. *Id.* (noting Arizona officials' outrage at the American government's submitting Arizona's "duly enacted laws" to the United Nations for review).

6. *Id.*

7. *Arizona*, 703 F. Supp. 2d at 986.

8. See Debra J. Saunders, *Free pass for sanctuary cities?*, SFGATE.COM (July 27, 2010), <http://articles.sfgate.com/2010-07-27/opinion/21999142> (noting the irony of a lawsuit against Arizona's enforcement of immigration law while sanctuary cities like San Francisco decline to enforce it).

9. YULE KIM & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 22773, "SANCTUARY CITIES": LEGAL ISSUES 1 (2008), available at <http://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf> (presenting a report on sanctuary cities for congressional members and committees).

10. SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.1 (2010), available at <http://sfgsa.org/index.aspx?page=1069> (stating "[i]t is hereby affirmed that the City and County of San Francisco is a City and County of Refuge").

the progression of the American sanctuary city movement since its inception. Section II also identifies numerous American sanctuary cities and presents current federal statutes addressing sanctuary city policies. Cities that advertise and promote a secure environment for *all* immigrants will undoubtedly attract illegal immigrants. The legal and ethical problems of protecting illegal immigrants should concern the American citizens who live in sanctuary cities as well as the citizens who may soon find their city becoming a sanctuary city. Section III focuses on San Francisco's Sanctuary Ordinance and includes views from both sides of the sanctuary city argument. It also addresses the unconstitutionality of San Francisco's Sanctuary Ordinance in light of the Second Circuit's holding in *City of New York v. United States*<sup>11</sup> and the California Court of Appeals's decision in *Bologna v. City and County of San Francisco*.<sup>12</sup> Section IV proposes that a plaintiff with standing should bring suit against San Francisco's Sanctuary Ordinance, an ordinance unconstitutional in light of preempting federal immigration statutes.

## II. BACKGROUND

Examining the current controversy over American sanctuary cities necessitates an awareness of the history and progression of the American sanctuary city movement. Before actual cities of sanctuary existed in America, it was churches and individuals who offered sanctuary to refugees and illegal immigrants.

### A. *The History of American Sanctuary Cities*

#### 1. A Matter of Semantics

In a shifting society, words do not always carry the meaning their speakers or hearers attribute to them. Because denotations and connotations change over time, the term "sanctuary cities" could present a problem for Americans who are not familiar with its current definition. Some Americans even furrow their brows in confusion because they have

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11. *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (holding that the challenged congressional statutes survived the plaintiff's facial challenge), *cert. denied*, 528 U.S. 1115 (2000).

12. *Bologna v. City of San Francisco*, 192 Cal. App. 4th 429, 440 (Cal. Ct. App. 2011) (entering judgment for the City and County of San Francisco because the plaintiff could not premise her claims on 8 U.S.C. § 1373(a) or the California Health and Safety Code section 11369).

never heard the term. However, entering the search term “sanctuary cities” into an Internet search engine produces over two million results.

At first glance, sanctuary cities might sound like a positive concept. For biblical scholars, the term inspires Old Testament passages about cities of refuge available to a person who had accidentally killed someone.<sup>13</sup> In the twentieth century, the term referenced the Jews who were concealed and protected during the Holocaust or the draft dodgers who were hidden during the Vietnam War.<sup>14</sup> For people living along America’s southern border during the early 1980s, the term referred to the protection afforded refugees fleeing across the border from persecution in El Salvador and Guatemala.<sup>15</sup> Today, however, the term “sanctuary cities” connotes a different definition.

The term “sanctuary cities” has evolved from the sanctuary movement that began in the early 1980s,<sup>16</sup> but perhaps some people have carried the connotation through the movement while missing the shifting denotation. In a 2008 Congressional Research Service (“CRS”) report, the CRS explained that “the term ‘sanctuary city’ is not defined by federal law, but it is often used to refer to those localities which, as a result of a state or local act, ordinance, policy, or fiscal constraints, limit their assistance to federal immigration authorities seeking to apprehend and remove unauthorized aliens.”<sup>17</sup> Regardless of their historical definition, sanctuary cities have evolved into controversial localities, generating constitutional questions and courtroom litigation.

## 2. The Progression of the Sanctuary City Movement

The history of American sanctuary cities spans the years primarily since the 1980s when Americans near the United States’s southern border began

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13. See *Deuteronomy* 4:41(King James) (describing how Moses set aside three cities that would be for anyone to find safety if he had unintentionally killed someone without evil intent). All Scripture quotations herein are from the King James Version, unless otherwise noted. See also *Joshua* 20:2 (relating how God directed Joshua to tell the Israelites to set aside cities of refuge for people to flee to if they had unintentionally killed someone).

14. Rose Cuison Villazor, *What is a “Sanctuary”?*, 61 SMU L. REV. 133, 139 (2008) (discussing the historical background of sanctuary cities).

15. *Id.*

16. Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 901 n.7 (describing the sanctuary movement as the movement of Central American immigrants to places of safety during the Reagan and Bush administrations).

17. KIM & GARCIA, *supra* note 9, at 1.

aiding and harboring Central American refugees, regardless of the refugees' legal statuses with the U.S. government. This stirring of sanctuary efforts stemmed from church congregations and individuals; filled with religious and moral convictions, they were intent to care for refugees despite opposition or disapproval.

a. The American Sanctuary Movement Begins

In 1980, Congress enacted the Refugee Act.<sup>18</sup> Under the Refugee Act, immigrants entered the United States to escape persecution in Central America.<sup>19</sup> However, the Refugee Act did not include “military operations, civil strife, or natural disasters” in its definition of conditions from which a refugee could be fleeing.<sup>20</sup> If the United States rejected an immigrant’s application for asylum, then the immigrant would be subject to deportation if he remained in the United States.<sup>21</sup> Dissatisfied with the United States’s denial of asylum to certain refugees, churches and individuals took the initiative to help the refugees.<sup>22</sup> They provided shelter, clothing, food, transportation, and legal representation during deportation hearings.<sup>23</sup>

In 1981 in Tucson, Arizona, a group formed a coalition of more than sixty local churches—the Tucson Ecumenical Council—and organized themselves into the Task Force on Central America.<sup>24</sup> Jim Corbett, a key figure in the Tucson sanctuary movement, helped Central American

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18. Refugee Act of 1980, 8 U.S.C. § 1101 (2006); *see also* *The Refugee Act*, ADMINISTRATION FOR CHILDREN & FAMILIES 1, <http://www.acf.hhs.gov/programs/orr/policy/refact1.htm> (describing that the Refugee Act of 1980 was to provide “for the effective resettlement of refugees and to assist them to achieve economic self-sufficiency as quickly as possible after arrival in the United States”).

19. *See* 8 U.S.C. § 1101(a)(42) (2006). Congress considers a refugee to be any person who is outside any country of such person’s nationality . . . and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

*Id.*

20. ANN CRITTENDEN, SANCTUARY 22 (1988) (presenting the story of the sanctuary movement in the United States and focusing on its beginnings with the Central American refugee movement).

21. Villazor, *supra* note 14, at 139-40.

22. *Id.* at 140.

23. *Id.* at 141.

24. CRITTENDEN, *supra* note 20, at 28. This author typifies the sanctuary issue as one that divides Americans into two camps depending on how they view America’s “place in the world.” *Id.* at xviii.

refugees across the desert and onto his ranch where he and his wife cared for them.<sup>25</sup> After visiting Corbett's ranch, John Fife, a local pastor at Southside Presbyterian Church, brought Corbett's situation before a session with the church elders; the elders agreed to use the church to aid the sanctuary movement.<sup>26</sup> Shortly after that decision, the church announced to its congregation that it would be a "sanctuary center" for refugees.<sup>27</sup>

When the Immigration and Naturalization Service ("INS") received rumors of the Tucson sanctuary movement, it warned the individuals to stop their sanctuary endeavors.<sup>28</sup> The group considered halting its program, but that was not a viable option since the individuals felt they could not in good conscience stop helping the refugees.<sup>29</sup> However, if they continued their work, the government could prosecute them and obtain the names of the immigrants they were assisting.<sup>30</sup> Hoping to educate the public about their efforts before the possibility of prosecution, Corbett and Fife issued a public declaration asserting a moral and religious obligation to care for the refugees.<sup>31</sup> In addition to the public declaration, John Fife sent a letter to the U.S. Attorney General, the Arizona U.S. Attorney, the Immigration Service in Tucson, and the Tucson Border Patrol.<sup>32</sup> This letter announced Southside United Presbyterian Church's refusal to follow Section 274(A) of the Immigration and Nationality Act, and the letter stated in part:

We take this action because we believe the current policy and practice of the United States Government with regard to Central American refugees is illegal and immoral. We believe our government is in violation of the 1980 Refugee Act and international law by continuing to arrest, detain, and forcibly

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25. *Id.* at 55-56.

26. *Id.* at 56-57 (noting that Fife claimed, "We do not check green cards at the door; we meet people's needs," and the session members agreed that their assistance should be given "as quietly and as unobtrusively as possible").

27. *Id.* at 57.

28. *Id.* at 61 (describing how the sanctuary workers learned of the INS threat when an INS attorney pulled aside a political organizer sympathetic to the sanctuary cause and told her that the INS was not sure what "Fife and Corbett are up to . . . but tell them to stop or we'll indict them").

29. *Id.*; see also Bezdek, *supra* note 16, at 941-42 n.155 (describing how some people justified their actions because they claimed they were doing what the government was failing to do—uphold the Refugee Act of 1980).

30. Bezdek, *supra* note 16, at 936.

31. *Id.* at 937; see also CRITTENDEN, *supra* note 20, at 61-62, 72-73.

32. CRITTENDEN, *supra* note 20, at 73-74.

return refugees to the terror, persecution, and murder in El Salvador and Guatemala.<sup>33</sup>

This letter indicates the sanctuary workers knew they were violating federal law, but they considered that law subordinate to their moral obligations to the refugees. The INS hesitated to initiate action against the church and its members because it did not want to be regarded as the villain by arresting church members for their benevolent acts.<sup>34</sup> Simultaneously, the INS faced pressure for allowing the church to defy the government's refugee policy; meanwhile, the media started to portray the sanctuary workers as heroes.<sup>35</sup>

Over the next two years, the INS conducted covert investigations in an attempt to convict Corbett and Fife.<sup>36</sup> In January of 1985, almost three years into the sanctuary movement that Corbett and Fife began, the INS had sufficient evidence for a grand jury to indict Corbett, Fife, and thirteen other people involved in the movement.<sup>37</sup> Still, some federal officials were unsure about prosecuting the members of the movement criminally because, other than alien smuggling, nothing indicated the members were guilty of criminal activity.<sup>38</sup> Don Reno, Special Assistant U.S. Attorney, wondered also about the negative repercussions of failing to prosecute the illegal activity.<sup>39</sup> Almost a year and a half after the indictments, the jury delivered its verdicts.<sup>40</sup> The jury acquitted Jim Corbett of all charges but convicted John Fife "of the conspiracy charge, of another felony for bringing an alien illegally into the United States, and of a misdemeanor for

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33. *Id.* at 74 (declaring also that they felt a God-given right, in the name of justice and mercy, to aid those who were fleeing persecution).

34. *Id.* at 78 (noting the danger in arresting "church people" and possibly making martyrs out of them).

35. *Id.* at 77. In August, 1982, *People* magazine published an article on Jim Corbett and his immigrant smuggling efforts. *Id.* at 102. The article presented Corbett in such a way as to engender sympathy for his deeds. *Id.* In December, Corbett related the story of his sanctuary efforts when he appeared as a guest on CBS's *60 Minutes*. *Id.*

36. *Id.* at 169, 190.

37. *Id.* at 192.

38. *Id.* at 191.

39. *Id.* (expressing concern about the impression it would create if the Justice Department had gone so far and suddenly ceased the prosecution).

40. *Id.* at 322-23.



aiding and abetting the presence of an illegal alien.”<sup>41</sup> When the judge pronounced the sentences for the convicted defendants, he did not give prison terms to any of the sanctuary workers; he gave everyone suspended sentences or probation.<sup>42</sup>

#### b. City Governments Adopt Sanctuary Policies

While the Tucson sanctuary movement was facing discovery from the INS, more churches were developing interest in the sanctuary movement.<sup>43</sup> Congregations in other cities, such as San Francisco, were establishing their own sanctuary services for refugees.<sup>44</sup> A Lutheran church in Berkeley, California; a Unitarian Universalist church in Los Angeles, California; a Community Bible church in Lawrence, New York; and a Lutheran church in Washington, D.C. all served as places of sanctuary.<sup>45</sup>

The church sanctuary movement eventually led to local governments establishing sanctuary policies.<sup>46</sup> For example, New York City and Seattle developed sanctuary policies that prohibited local government agencies from inquiring into or reporting immigration statuses to the federal government.<sup>47</sup> These policies helped assure immigrants that they need not fear deportation if they approached the police to report a crime.<sup>48</sup> These sanctuary practices began as protection for Central American refugees escaping persecution in their native countries, but they diffused to include all immigrants in the pool of protection.<sup>49</sup> The federal government offered little resistance to local sanctuary city policies, and the policies continued.<sup>50</sup>

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41. *Id.* at 323-24. After his acquittal, Corbett stated, “We will continue to provide sanctuary services openly and go to trial as often as is necessary to establish . . . that the protection of human rights is never illegal.” *Id.*

42. *Id.* at 335. After delivering the sentences, the judge encouraged the sanctuary workers that although a trial was a means of getting their cause into the public eye, they should pursue their objectives through proper channels. *See id.* at 338-39.

43. *Id.* at 63-64 (citing a Lutheran church that suggested it was time for churches to be involved with the sanctuary movement as a way to enforce justice).

44. Bezdek, *supra* note 16, at 937 n.140. Some related the plight of the Central American refugees to that of European refugees during World War II. *Id.* at 924.

45. CRITTENDEN, *supra* note 20, at 69.

46. Villazor, *supra* note 14, at 142.

47. *Id.*

48. *Id.* at 142-43 n.62.

49. *Id.* at 143 n.63.

50. *Id.* at 143.

The sanctuary movement of the 1980s, led significantly by Jim Corbett and John Fife, helped establish the modern sanctuary city movement that goes beyond church members trying to help refugees escape persecution in their native countries. Modern sanctuary cities are no longer characterized by conscience-burdened church people covertly hiding refugees from war-torn countries. Instead, entire cities publicly declare themselves as safe harbors for immigrants, “regardless of their immigration status.”<sup>51</sup>

### B. *Modern-Day Sanctuary Cities*

Again, basic Internet searches illustrate the public nature of modern sanctuary cities. Easily accessible lists of sanctuary cities attest to the willingness of cities to promote themselves as places of refuge and point to the ease with which illegal immigrants can identify the cities that allow them to live in the United States without the likelihood of discovery and deportation.

#### 1. Examples of Modern-Day Sanctuary Cities

Sanctuary cities employ express or implied sanctuary policies depending on the wording of a city’s policy. According to the National Immigration Law Center, more than a dozen states have cities employing sanctuary policies.<sup>52</sup> California alone has over a dozen sanctuary cities.<sup>53</sup> The website for the City and County of San Francisco lists several sanctuary cities in the United States, including Los Angeles, California; Denver, Colorado; Miami, Florida; Chicago, Illinois; Baltimore, Maryland; Detroit, Michigan; New York, New York; and Durham, North Carolina.<sup>54</sup> Some cities incorporate a

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51. *Frequently Asked Questions*, CITY AND COUNTY OF SAN FRANCISCO, no. 3, <http://www.sfgsa.org/index.aspx?page=1072> (last visited October 20, 2011) (noting that San Francisco wants all immigrants to feel safe from fear of possible investigation when they seek to obtain certain public benefits).

52. *See Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, NATIONAL IMMIGRATION LAW CENTER (Dec. 2008), <http://www.nilc.org/immlawpolicy/locallaw/locallaw-limiting-tbl-2008-12-03.pdf> (listing state-by-state the laws and policies that states have instituted to limit enforcement of immigration laws).

53. *Id.* at 2-5.

54. *Frequently Asked Questions*, *supra* note 51, at no. 2. San Francisco’s city and county website lists the following as “just a few” of the sanctuary cities in America:

Anchorage, AK	Fort Collins, CO	New York, NY
Chandler, AZ	DeLeon Springs, FL	Farmingville, NY
Davis, CA	Miami, FL	Durham, NC

“don’t ask, don’t tell” approach into their sanctuary policies,<sup>55</sup> and in certain situations, officials may not inquire into a person’s immigration status in certain situations.<sup>56</sup> One goal of sanctuary cities is to limit “the role of local law enforcement agencies and officers in the enforcement of immigration laws.”<sup>57</sup> Since the federal government is responsible for enforcing immigration, local governments do not want their employees and officers interfering with the federal government’s enforcement of immigration laws.<sup>58</sup>

New York City represents an implied sanctuary city because it employs sanctuary policies without expressly declaring itself a sanctuary city. In 1989, the Mayor of New York City issued Executive Order 124, prohibiting city officers or employees from disclosing information about immigrants (aliens) to the federal immigration authorities unless (1) the officers or employees were required by law to disclose the information; (2) the alien authorized, in writing, the officer or employee to transmit the information; or (3) the alien was suspected of criminal activity.<sup>59</sup> The Order also created in-between parties to evaluate any information about the alien that was sent to the federal immigration authorities; the in-between party would determine if the information should be sent to the federal authorities, and the officials and employees in the field were not permitted to send any information on their own.<sup>60</sup> New York City law enforcement officers were still required to cooperate with federal authorities if officers suspected aliens of criminal activity, but law enforcement officers could not disclose

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Downey, CA	Chicago, IL	Portland, OR
Los Angeles, CA	Evanston, IL	Brownsville, TX
Oakland, CA	Cambridge, MA	Houston, TX
San Bernardino, CA	Baltimore, MD	Salt Lake City, UT
San Jose, CA	Detroit, MI	Fairfax County, VA
Watsonville, CA	St. Paul, MN	Seattle, WA
New Haven, CN	Newark, NJ	Madison, WI
Denver, CO	Albuquerque, NM	Jackson Hole, WY.

*Id.*

55. KIM & GARCIA, *supra* note 9.

56. *Id.* (noting that though a “don’t ask, don’t tell” approach does not directly violate federal laws that require unhindered communication from local authorities to federal authorities, this approach keeps local authorities from discovering valuable information in the first place).

57. *Id.* at 2.

58. *Id.*

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

60. *Id.*

information regarding alien victims of crimes.<sup>61</sup> Despite these policies, Mayor Rudolph Giuliani declared in 2007 that New York City was *not* a sanctuary city.<sup>62</sup> He did, however, advocate the importance of providing a safe environment for illegal immigrants to feel secure enough to report crimes.<sup>63</sup> Mayor Giuliani argued that a number of criminals would go free if illegal immigrants feared police retaliation after reporting crimes.<sup>64</sup>

Another implied sanctuary city is Hartford, Connecticut, whose municipal code includes “Article XXI. – City Services Relating to Immigration Status.”<sup>65</sup> This code pertaining to police matters mandates that

- (a) Hartford police officers shall not inquire about a person’s immigration status unless such an inquiry is necessary to an investigation involving criminal activity as defined in section 2-926 above.
- (b) Hartford police shall not inquire about the immigration status of crime victims, witnesses, or others who call, approach or are interviewed [sic] the Hartford Police Department.
- (c) The Hartford Police will not arrest or detain a person based solely on their immigration status unless there is a criminal warrant.
- (d) Hartford police officers shall not make arrests or detain individuals based on administrative warrants for removal entered by ICE into the National Crime Information Center database.
- (e) The Hartford Police Department shall conduct necessary training and education to ensure that its officers are knowledgeable about provisions set forth in this article.
- (f) Nothing in this section shall be construed to prohibit any Hartford police officer from cooperating with federal immigration authorities as required by law.<sup>66</sup>

Hartford may not declare itself to be a sanctuary city, but like New York City, it places strict prohibitions on its law enforcement officers’ voluntary dissemination of immigration information to federal authorities.

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61. *Id.* at 31-32.

62. Michael Luo, *A Closer Look at the ‘Sanctuary City’ Argument*, N.Y. TIMES, (Nov. 29, 2007), <http://www.nytimes.com/2007/11/29/us/politics/29truth.html>.

63. *Id.*

64. *Id.*

65. HARTFORD, CONN., MUN. CODE ch. 2, art. XXI (2008), *available at* <http://library.municode.com/index.aspx?clientID=10895&stateID=7&statername=Connecticut>.

66. *Id.* § 2-928.

In contrast to New York City and Hartford, San Francisco represents an express sanctuary city.<sup>67</sup> The San Francisco Administrative Code (“the Code”), Section 12H.1 states, “It is hereby affirmed that the City and County of San Francisco is a City and County of Refuge.”<sup>68</sup> The Code mandates in Section 12H.2 that city funds shall not be used to gather or distribute immigration status information of anyone in San Francisco unless required by law.<sup>69</sup> The Code does permit law enforcement officers to report anyone who is processed for a felony or is suspected of violating “civil provisions of the immigration laws.”<sup>70</sup> However, there is a danger that criminal illegal immigrants will fall through the cracks or be ignored purposely by the local authorities because the Code prohibits law enforcement from voluntarily providing immigration information to federal authorities.

Ignoring a criminal illegal immigrant purportedly led to the death of a San Francisco father and his two sons. In 2009, the plaintiff lost on her federal claims in the Northern District of California.<sup>71</sup> The plaintiff’s husband and two sons had been shot and killed while stopped in traffic in San Francisco.<sup>72</sup> The alleged killer was an illegal immigrant and member of a known gang,<sup>73</sup> and San Francisco police had previously arrested him on

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67. SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.1 (2010), *available at* <http://sfgsa.org/index.aspx?page=1069>. Cambridge, Massachusetts, represents another expressed sanctuary city. In a City Council meeting on June 17, 2002, the Council reaffirmed Cambridge’s 1985 resolution declaring Cambridge to be

“A Sanctuary City” in which city departments and employees are committed to protect refugees from: requests for information about, or conditioning receipt of city services on, citizenship status; “Investigations or arrest procedures, public or clandestine, relating to alleged violations of immigration law . . .”; and Deportation and dangerous returns to their homelands . . . .

City of Cambridge, Mass., Amended Order (June 17, 2002), *available at* [http://www.cambridgema.gov/ccouncil/citymanagersagenda/~/\\_media/Files/citycouncil/Agendas/2002/020617.ashx](http://www.cambridgema.gov/ccouncil/citymanagersagenda/~/_media/Files/citycouncil/Agendas/2002/020617.ashx) (cached copy that is opened as a PDF).

68. SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.1 (2010), *available at* <http://sfgsa.org/index.aspx?page=1069>.

69. *Id.* § 12H.2.

70. *Id.* § 12H.2-1.

71. *Bologna v. City of San Francisco*, 2009 U.S. Dist. LEXIS 69985, at \*23 (N.D. Cal. Aug. 11, 2009), *remanded at* 2009 U.S. Dist. LEXIS 89289, at \*3 (N.D. Cal. Sept. 11, 2009) (noting that though the plaintiff’s federal claims had been dismissed, her remaining claims should be remanded to San Francisco Superior Court).

72. *Id.* at \*2.

73. *Id.*

multiple occasions.<sup>74</sup> The plaintiff contended that the officers failed to report the illegal immigrant to Federal Immigration and Customs Enforcement (“ICE”) because San Francisco’s sanctuary policy prevented them from reporting.<sup>75</sup> The district court dismissed the plaintiff’s federal claims for lack of standing.<sup>76</sup> Nonetheless, while the plaintiff’s federal claims were not valid in this case, not reporting criminal illegal immigrants to ICE officials still presents the danger that criminal illegal immigrants living in the United States threaten Americans’ safety. In this case, if local law enforcement had relayed the information about the criminal illegal alien to ICE, ICE likely would have deported him and avoided this tragedy.

## 2. The Congressional Response to Sanctuary Cities

Several years after the mayor of New York City signed Executive Order 124, Congress passed the Personal Responsibility and Work Opportunity Act of 1996 (“Welfare Reform Act”).<sup>77</sup> Section 434 (“8 U.S.C. § 1644”) of the Welfare Reform Act mandates that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”<sup>78</sup> The Conference Report to the bill explains that

[t]he 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

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74. *Id.* at \*3.

75. *Id.* at \*3-4.

76. *Id.* at \*12-13. The plaintiff presented an equal protection challenge, claiming that San Francisco’s sanctuary policy treated United States citizens and illegal immigrants differently by reporting the citizens who aided illegal immigrants and ignoring the illegal immigrants. *Id.* at \*10-11. The district court held that the plaintiff did not have standing to bring the claim on behalf of other United States citizens, and the plaintiff’s claim was not traceable to this alleged differential treatment. *Id.* at \*12-13. The plaintiff’s claim also failed on an alleged equal protection violation when the district court determined that the plaintiff failed to show more than a “disparate impact” because of San Francisco authorities not reporting the illegal alien to ICE. *Id.* at \*14. The plaintiff also waged a due process claim based on San Francisco’s putting the plaintiff and her family in danger by instructing police officers not to report the illegal alien to ICE. *Id.* at \*16. The court held that due process did not impose on San Francisco a duty to the entire population of San Francisco. *Id.*

77. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C.).

78. 8 U.S.C. § 1644 (2006).

designed to prevent 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.<sup>79</sup>

The Welfare Reform Act did not mandate that local authorities *had* to communicate, but local authorities could not be denied the option to communicate.

Additionally, Congress signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“Immigration Reform Act”).<sup>80</sup> Section 642 (“8 U.S.C. § 1373”) of the Immigration Reform Act determined that 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.”<sup>81</sup> These federal statutes do not require local authorities to regulate immigration, but they ensure local authorities cannot prevent local agencies or employees from voluntarily reporting immigration information. The statutes present a problem for cities like San Francisco that seek to prevent local law enforcement from disseminating immigration status information to federal authorities. The federal government is concerned with Arizona’s strict immigration policy, but it should be equally concerned with cities that follow implied or express sanctuary policies that are in direct violation of federal statutes.

The American sanctuary city movement has evolved since the Tucson church group in the 1980s. It transitioned from Fife and Corbett’s morally-driven view of refugee protection to New York City’s refusing to enforce anything more than what federal law expressly requires. Next, Congress mandated that local governments not prevent employees from communicating with federal immigration authorities regarding the

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79. H.R. REP. NO. 104-725, at 313 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771, 1996 WL 443732 (emphasis added).

80. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 42 U.S.C.)

81. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 642, 8 U.S.C. § 1373(a) (2010).

immigration status of individuals within the country. The current concern is whether cities should continue to hide behind the federal government's complacency with their policies that prohibit local law enforcement and other employees from voluntarily giving immigration information to federal immigration authorities unless required by law.

### III. PROBLEM

In response to Arizona's immigration law,<sup>82</sup> President Obama declared that "a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with the federal immigration laws."<sup>83</sup> Ironically, while Arizona attempts to strictly *enforce* immigration laws, cities like San Francisco attempt to establish their own immigration policies by *prohibiting* law enforcement officers or other officials from voluntarily assisting with immigration enforcement.<sup>84</sup> Supporters of sanctuary cities stand behind the Tenth Amendment and state sovereignty<sup>85</sup> while opponents of sanctuary cities rely on the Supremacy Clause<sup>86</sup> and federal preemption.

#### A. *Opposing Views of Sanctuary Cities*

Supporters of sanctuary cities allege that sanctuary policies are more effective than strict immigration policies at promoting strong and safe communities.<sup>87</sup> They believe sanctuary cities do not contravene the United States Constitution because states are merely exercising their rights under the Tenth Amendment. Nevertheless, opponents of sanctuary policies claim

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82. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

83. Saunders, *supra* note 8.

84. *Id.*

85. 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.").

86. U.S. CONST. art. VI, cl. 2 (stating that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

87. KIM & GARCIA, *supra* note 9, at 2-3 (stating that supporters argue immigration enforcement is a federal responsibility and that "local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local enforcement, or violate humanitarian principles").



such policies violate federal law because the federal government retains control over immigration.<sup>88</sup>

### 1. Support for Sanctuary Cities

The paramount concern for supporters of sanctuary cities is the belief that sanctuary cities foster a cooperative spirit that leads to safety in the community. They contend that illegal immigrants will not approach police to report crimes if they fear investigation and deportation.<sup>89</sup> They also argue that an absence of sanctuary-like policies will strip justice away from crime victims because “they have a justifiable fear that their lack of immigration status will trump the criminal justice protections afforded crime victims under the law.”<sup>90</sup> Proponents also purport that sanctuary policies prevent racial profiling and keep local authorities from deciding constitutional questions of authority or dealing with the financial restraints of enforcing immigration law.<sup>91</sup>

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88. The biblical mandate for civil government represents another issue opponents can raise. As Creator of the world, God is the ultimate law-giver. See *Genesis* 1:1. Just as a sculptor has authority over his creation, God, as Creator and Sustainer of man, holds the authority to establish the laws that govern man, His creation; these laws, viewed through the lens of Scripture and applied to human and societal conditions, are collectively referred to as natural law. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*26 (stating that the “will of his Maker is called the law of nature”). Man’s laws should never run contrary to natural law because to contravene the laws of nature would be to contravene God’s laws. These laws are given through the Bible and the principles it sets forth. Romans directs that everyone should be subject to their governing authorities because God put those authorities in place. *Romans* 13:1. The government’s priority is to punish evil and promote good. *Romans* 13:3-4. Governments enact laws to preserve an ordered system and protect the public; under this ordered system, criminals are punished for breaking these laws. The government has enacted laws to control immigration, and immigrants who choose not to abide by those laws risk the consequences. Sanctuary cities protect immigrants from the consequences of immigration laws. Criminal illegal immigrants choose to break the law, and sanctuary cities protect such criminals by providing a safe harbor from federal immigration authorities who will investigate and possibly deport the criminals.

89. Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 579 (2009).

90. Lynn Tramonte, *Debunking the Myth of “Sanctuary Cities,”* IMMIGRATION POLICY CTR. (Apr. 26, 2006), <http://www.immigrationpolicy.org/special-reports/debunking-myth-sanctuary-cities> (advocating for sanctuary policies and quoting Leslye Orloff, Director of the Immigrant Women Program of Legal Momentum and Co-Founder of the National Network of End Violence Against Women in her testimony before Congress).

91. Sullivan, *supra* note 89, at 578-79 (proffering a list of social and philosophical reasons for allowing sanctuary cities, but focusing on the aspect of community cooperation).

Supporters of sanctuary cities claim the Tenth Amendment prevents the federal government from commandeering local governments to assist with federal responsibilities such as immigration enforcement.<sup>92</sup> In 1992, the U.S. Supreme Court determined that the federal government could offer incentives for states to comply with federal programs, but the federal government could not compel states to enact or administer federal programs.<sup>93</sup> Since the Tenth Amendment gives to the states powers not reserved for the federal government, the argument is that immigration belongs to the federal government and states should not be required to assist with immigration enforcement.<sup>94</sup>

## 2. Opposition to Sanctuary Cities

Opponents of sanctuary cities argue that sanctuary city policies violate federal law by prohibiting local officials and law enforcement agencies from reporting illegal immigrants to federal immigration authorities.<sup>95</sup> When Congress passed the Welfare Reform Act,<sup>96</sup> it determined through 8 U.S.C. § 1644 that

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in

92. KIM & GARCIA, *supra* note 9, at 4.

93. *New York v. United States*, 505 U.S. 144, 167-68 (1992) (determining that Congress may use monetary incentives to encourage states to support federal programs). The Supreme Court also recognized that “[s]tate governments are neither regional offices nor administrative agencies of the Federal Government.” *Id.* at 188.

94. Sanctuary Cities also oppose the controversial Secure Communities Program launched by Immigration and Customs Enforcement in 2009. *See Secure Communities*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (providing information regarding the Secure Communities Program such as its mission and background and links to resources and contact information). Under the Secure Communities Program, fingerprints of anyone arrested and processed into local custody will be checked against FBI criminal records databases and Department of Homeland Security (“DHS”) immigration records. *Id.* (explaining that while local law enforcement fingerprint records are traditionally checked against the Department of Justice’s records, the Secure Communities Program will additionally check fingerprints against DHS immigration records). If fingerprints match DHS records, ICE can evaluate and prioritize a criminal alien’s status to more efficiently effectuate identification and removal. *Id.* (noting that “ICE prioritizes the removal of criminal aliens, those who pose a threat to public safety, and repeat immigrant violators”).

95. Saunders, *supra* note 8.

96. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C.).

any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.<sup>97</sup>

8 U.S.C. § 1644 makes it unlawful for cities to prohibit law enforcement officers or officials from reporting illegal immigrants to federal authorities. 8 U.S.C. § 1644 does not dictate that local governments *must* share immigration status information; instead, the statute mandates that local governments cannot *prohibit* officers from sharing information. In the face of federal statutes mandating to the contrary, the City and County of San Francisco maintains a sanctuary policy contravening federal law.<sup>98</sup>

#### B. San Francisco's Sanctuary City Ordinance

The City and County of San Francisco's ("San Francisco") website publicly declares San Francisco to be a sanctuary city,<sup>99</sup> and San Francisco's former mayor, Gavin Newsom, issued an executive order in 2007 that called for protocol and training in the sanctuary ordinance.<sup>100</sup> San Francisco's sanctuary city policies are in place to assure "immigrants" they will not be reported to federal authorities if they seek health services, report crimes, or enroll their children in schools.<sup>101</sup> San Francisco asserts that law enforcement officials do not usually share information with federal immigration authorities, but they will share information when arresting someone for a felony offense, or someone with a prior felony offense, if they become aware that someone they have arrested is an undocumented immigrant.<sup>102</sup>

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97. Personal Responsibility and Work Opportunity Act of 1996 § 434, 8 U.S.C. § 1644 (2006).

98. Saunders, *supra* note 8. The United States Supreme Court has held that Congress has authority "to regulate matters directly and to pre-empt contrary state regulation." *New York*, 505 U.S. at 178.

99. *Frequently Asked Questions*, *supra* note 51, at no. 1 (declaring that San Francisco passed a "City and County of Refuge" Ordinance in 1989, which "prohibits City employees from helping Immigration and Customs Enforcement (ICE) with immigration investigations or arrests unless such help is required by federal or state law or a warrant").

100. *Id.* (noting that this exemplified San Francisco's commitment to immigrant communities).

101. *Id.* at no. 3.

102. *Id.* at no. 5. This section, *Frequently Asked Questions*, of San Francisco's website does not use the term "illegal" immigrant and refers only once to "undocumented"

While San Francisco declares itself a city and county of refuge and defends its Sanctuary Ordinance and the philosophy behind the Ordinance,<sup>103</sup> San Francisco's Ordinance fails under the Second Circuit Court of Appeals's analysis in a case involving a substantially similar sanctuary policy in New York City.

1. The Second Circuit's Analysis in *City of New York v. United States*

In 1997, the City of New York ("the City") brought an action against the United States, claiming that Section 434 and Section 642 ("8 U.S.C. § 1644" and "8 U.S.C. § 1373") were unconstitutional because they violated the Tenth Amendment and the Guarantee Clause of Article IV.<sup>104</sup> The United States District Court for the Southern District of New York held that 8 U.S.C. § 1644 and 8 U.S.C. § 1373 did not violate either the Tenth Amendment or the Guarantee Clause.<sup>105</sup> The City appealed, and the Second Circuit Court of Appeals considered the City's Tenth Amendment and Guarantee Clause claims.<sup>106</sup>

The City did not dispute Congress's authority to "legislate on the subject of aliens."<sup>107</sup> Rather, the City disputed Congress's authority to "regulate aliens in a way that forbids states and localities from enacting laws that essentially restrict state and local officials from cooperating in the federal regulation of aliens, even on a voluntary basis."<sup>108</sup> The City claimed the Tenth Amendment's grant of state sovereignty gave the City authority to decline to participate in federal programs and the authority to prohibit "agencies, officials, and employees" from assisting with federal programs

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immigrants when referring to the possibility of officers reporting undocumented immigrants for felony offenses if their undocumented status becomes known to the officers.

103. *Id.* at no. 6. San Francisco's website includes the frequently asked question of "How does the Sanctuary Ordinance benefit San Francisco?" *Id.* The answer purported on the website is that "[t]he Sanctuary Ordinance helps to maintain the stability of our communities. It keeps our communities safe by making sure all residents feel comfortable calling the Police and Fire Departments during emergencies. It keeps our families and workforce healthy by providing safe access to schools, clinics and other City services." *Id.*

104. *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999). The City of New York maintained that the federal government's control over immigration did not extend to controlling the City's power over its employees. *Id.* The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]" U.S. CONST. art. IV, § 4.

105. *City of New York*, 179 F.3d at 33.

106. *Id.*

107. *Id.* at 34.

108. *Id.*

(even voluntarily).<sup>109</sup> The City also claimed that the federal government could not legislate in such a way as to interrupt local government operations.<sup>110</sup> The City relied on *New York v. United States*<sup>111</sup> and *Printz v. United States*<sup>112</sup> to argue that states retain the right to choose whether to involve themselves with federal programs and whether to allow employees to participate voluntarily in such programs.<sup>113</sup>

The Second Circuit declined to read *New York v. United States* and *Printz* as broadly as the City suggested; instead, the Second Circuit read these cases to distinguish between *conscripting* state employees to participate in executing federal programs and simply *prohibiting* states from restricting their employees from voluntarily providing information.<sup>114</sup> The Second Circuit determined that 8 U.S.C. § 1644 and 8 U.S.C. § 1373 do not *conscript* states or state employees to “enact or administer any federal regulatory program.”<sup>115</sup> Instead, the statutes mandate that states cannot prevent employees from voluntarily providing immigration information to the Immigration and Naturalization Service (“INS”).<sup>116</sup> The Second Circuit explained, “The City’s sovereignty argument asks us to turn the Tenth Amendment’s shield against the federal government’s using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates

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109. *Id.*

110. *Id.* The Second Circuit briefly considered the City’s Guarantee Clause claim and determined that 8 U.S.C. §§ 1644 and 1373 did not impermissibly interfere with the City’s Executive Order and did not violate the City’s republican form of government because they “in no way” altered the City’s government. *Id.* at 37.

111. *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests.”).

112. *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that “[t]he 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”).

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

114. *Id.* (emphasis added) (noting that “while Congress may condition federal funding on state compliance with a federal regulatory scheme or preempt state powers in particular areas . . . it may not directly force states to assume enforcement or administrative responsibilities constitutionally vested in the federal government”).

115. *Id.*

116. *Id.*

federal programs.”<sup>117</sup> The court went on to iterate how the dual sovereignties of state and federal governments cannot coexist if they hold each other in a deadlock by refusing to cooperate with each other.<sup>118</sup> The Supremacy Clause restricts states from thwarting federal regulatory programs and puts an end to any potential deadlock.<sup>119</sup> The Second Circuit held that the Tenth Amendment did not give New York City the right to prevent its employees from voluntarily offering immigration information to the INS.<sup>120</sup>

## 2. The Parallel Between San Francisco’s Ordinance and New York City’s Ordinance

In light of the Second Circuit’s holding in *City of New York*, that Sections 434 and 642 are constitutional and preempt states’ attempts at contrary legislation, San Francisco’s Sanctuary Ordinance is unconstitutional because it prohibits what Congress determined states may not prohibit. San Francisco’s City and County of Refuge Ordinance provides in part that

[n]o department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision. The prohibition set forth in this Chapter shall include, but shall not be limited to:

(a) Assisting or cooperating, in one’s official capacity, with any Immigration and Naturalization Service (INS) investigation, detention, or arrest procedures, public or clandestine, relating to alleged violations of the civil provisions of the federal immigration law . . . .

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* New York City also argued that 8 U.S.C. §§ 1644 and 1373 interfere with local government by regulating the City’s control over information it obtains and by interfering with the City’s control of its workforce. *Id.* at 36. The court recognized the validity of the City’s desire to protect its confidential information and to retain control of its workforce, but it found that the City failed to make a case under its Executive Order. *Id.* at 36. The Executive Order precluded employees from giving information only to the INS, so the confidentiality of its information was not protected from any other dissemination. *Id.* at 36-37.

(c) Requesting information about, or disseminating information regarding, the immigration status of any individual, or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by federal or State statute or regulation, City and County public assistance criteria, or court decision.<sup>121</sup>

San Francisco's sanctuary ordinance is analogous to New York City's Executive Order 124 that states

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.

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.<sup>122</sup>

In *City of New York*, the Second Circuit held that "states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs."<sup>123</sup> The Second Circuit described New York City's Executive Order 124 as a "mandatory non-cooperation directive relating solely to a particular federal program,"<sup>124</sup> which is the precise manner of directive San Francisco employs in its Sanctuary Ordinance. The Second Circuit described Sections 434 and 642 as "valid federal measures that prohibit states from compelling

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121. SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.2 (2010), available at <http://sfgsa.org/index.aspx?page=1069>.

122. *City of New York*, 179 F.3d at 31 n.1.

123. *Id.* at 35.

124. *Id.*

passive resistance to federal programs.”<sup>125</sup> San Francisco’s sanctuary ordinance reads much the same as New York City’s Order, and they both prohibit city employees from voluntarily disseminating immigration status information.<sup>126</sup> While the City of New York pursued a facial challenge against Sections 434 and 642 as violating the Tenth Amendment, the Second Circuit held Sections 434 and 642 constitutional.<sup>127</sup> Just as New York City’s sanctuary city policy contravened federal statutes, San Francisco’s Sanctuary City Ordinance contravenes the same federal law and is unconstitutional.<sup>128</sup>

#### IV. SOLUTION

In light of the Second Circuit’s holding in *City of New York v. United States*, San Francisco cannot continue to violate 8 U.S.C. § 1644 and 8 U.S.C. § 1373 by prohibiting its law enforcement officers and other officials from voluntarily reporting immigration information to federal immigration authorities. Because it is unlikely that San Francisco would repeal its ordinance, a plaintiff with standing needs to secure an injunction against San Francisco’s Sanctuary Ordinance and obtain a holding that the Sanctuary Ordinance is unconstitutional in light of Congressional Sections 434 and 642.<sup>129</sup>

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125. *Id.*

126. See SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.2 (2010), available at <http://sfgsa.org/index.aspx?page=1069>; see also *City of New York*, 179 F.3d at 31 n.1.

127. *City of New York*, 179 F.3d at 37; see also *id.* at 32 (noting that the Conference Report accompanying the bill manifested an intention to give State and local officials the authority to communicate with the INS regarding illegal aliens).

128. See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government can “pre-empt state regulation [that is] contrary to federal interests”).

129. See Sullivan, *supra* note 88. The author suggests that sanctuary city policies remain popular in spite of 8 U.S.C. §§ 1644 and 1373 because no one has filed lawsuits challenging the policies. *Id.* at 576-76. Nevertheless, she recognizes the limited capacity of local law enforcement to enforce sanctuary policies in light of preempting federal statutes. *Id.*



A. *San Francisco's Sanctuary City Ordinance Is Unconstitutional In Light of the Second Circuit's Holding in City of New York v. United States.*

1. The Second Circuit's Holding in *City of New York v. United States*

In 1999, the Second Circuit Court of Appeals determined that 8 U.S.C. § 1644 and 8 U.S.C. § 1373 were constitutional.<sup>130</sup> The court held that Congress was not compelling state and local governments to “enact or administer any federal regulatory program.”<sup>131</sup> Instead, Congress was prohibiting “state and local government entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.”<sup>132</sup> The federal government cannot force states to help with federal immigration programs, but states cannot prohibit their employees from voluntarily doing so. Contravening federal legislation, San Francisco's Sanctuary Ordinance prohibits employees from voluntarily assisting with federal immigration programs.<sup>133</sup> Section 12H.2 of San Francisco's Administrative Code mandates that

No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision.<sup>134</sup>

While Sections 434 and 642 do not require states to gather and disseminate immigration information, the statutes determine that states cannot prevent their employees from voluntarily doing so. San Francisco violates federal law by mandating that no employee shall use City funds or resources to assist in federal immigration enforcement. City funds and resources could include a City-issued cell phone, a City computer, or even on-the-clock hours during which a City employee notifies ICE of an illegal immigrant's status.

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

131. *Id.* at 35.

132. *Id.*

133. SAN FRANCISCO ADMIN. CODE ch. 12H § 12H.2(a), (c) (2010), available at <http://sfgsa.org/index.aspx?page=1069>.

134. *Id.* § 12H.2.

2. Comparing San Francisco's Sanctuary Ordinance to the Second Circuit's Holding in *City of New York v. United States*

Though the federal government cannot conscript state and local governments to enact or administer federal immigration programs, state and local employees should be free to assist the INS without fear of retribution from local or state authorities.

Under the holding in *City of New York v. United States*, New York City's Executive Order 124 did not prevail over Sections 434 and 642 because these statutes are valid exercises of constitutional authority. The court determined that the Supremacy Clause prevents "states from taking actions that frustrate federal laws and regulatory schemes."<sup>135</sup> 8 U.S.C. § 1644 and 8 U.S.C. § 1373, which preempted New York City's Executive Order, preempt San Francisco's Sanctuary Ordinance because San Francisco's Ordinance "frustrate[s] federal laws and regulatory schemes."<sup>136</sup> The federal statutes give local law enforcement the option to voluntarily report immigration information. San Francisco's preventing that voluntary transfer of information frustrates Congress's purposes in these federal statutes.

3. Comparing San Francisco's Sanctuary Ordinance to the Holding in *Bologna v. City & County of San Francisco*

Though San Francisco's Sanctuary Ordinance has been in effect since 1989, a plaintiff with standing to bring a claim could challenge the validity of the Ordinance in federal court.<sup>137</sup> In 2009, the plaintiff in *Bologna v. City & County of San Francisco*<sup>138</sup> included San Francisco's Ordinance in her claim, but she did so on equal protection and due process grounds.<sup>139</sup> The plaintiff claimed that San Francisco violated the Equal Protection Clause by treating illegal immigrants differently from U.S. citizens and by failing to notify federal immigration authorities of the arrest of the criminal illegal

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

136. *Id.*

137. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have constitutional standing, a plaintiff must have suffered an injury in fact that is (1) concrete and particularized and (2) actual or imminent. *Id.* at 560-61. There must also be a causal connection between an injury that is fairly traceable to the action in question. *Id.* Finally, there must be a likelihood of the court's decision redressing the harm. *Id.*

138. *Bologna v. City of San Francisco*, 2009 U.S. Dist. LEXIS 69985 (N.D. Cal. Aug. 11, 2009).

139. *Id.* at \*10-15.

immigrant who allegedly murdered the plaintiff's family.<sup>140</sup> Because the plaintiff could not demonstrate that San Francisco had infringed on her equal protection and due process rights, the court found that she lacked standing to bring a claim.<sup>141</sup>

When the case was remanded to state court, the California Court of Appeals considered the plaintiff's tort claims against the city of San Francisco.<sup>142</sup> The plaintiff alleged violations of the California Health and Safety Code and 8 U.S.C. § 1373.<sup>143</sup> Section 11369 of the Health and Safety Code mandates that upon reason to believe a person arrested for certain drug offenses might not be a United States citizen, the arresting agency shall notify the United States agency having authority over deportation.<sup>144</sup> The plaintiff contended that San Francisco's sanctuary city policy prevented

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140. *Id.* at \*11. The court noted that the illegal alien had been arrested several times for violent crimes and drug offenses, was identified as a suspect in a murder, and was a known member of the MS-13 gang. *Id.* at \*3. The plaintiff contended that the INS would have deported the illegal alien if local law enforcement had reported him to ICE. *Id.* at \*3-4.

141. *Id.* at \*11. The plaintiff could not demonstrate that San Francisco had treated similarly situated individuals differently. *Id.* at \*13. She could also not demonstrate a violation of due process because her claim that San Francisco created a danger by releasing the criminal illegal alien was not particularized; instead, her claim included the entire population of San Francisco in the area of risk. *Id.* at \*16. The court acknowledged the general rule that "the Due Process Clause does not impose an affirmative duty upon the state to protect its citizens against the acts of private third parties." *Id.* at \*16. The District Court for the Northern District of California dismissed the plaintiff's federal claims with prejudice and ordered the parties to show why the case should not be remanded to state court. *Id.* at \*13.

142. *Bologna v. City of San Francisco*, 192 Cal. App. 4th 429, 440 (Cal. Ct. App. 2011). The plaintiff asserted San Francisco was liable under negligence theories under Evidence Code § 669 and Government Code § 815.6. *Id.* at 434. These sections present the elements to support a negligence cause of action. *Id.* Under Evidence Code § 669, failure to exercise due care is presumed if there has been a violation of a "statute, ordinance, or regulation of a public entity," if the violation was the proximate cause of the harm, if the harm resulted from an occurrence of the nature which the statute was designed to prevent, and if the person suffering the harm was of the class of persons the statute was designed to protect. *Id.* Government Code § 815.6 applies to entities rather than individuals and provides that

[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

*Id.*

143. *Id.* at 435-38.

144. *Id.* at 435.

officers from reporting the criminal illegal alien to ICE, and the alien consequently was free to continue to commit crimes.<sup>145</sup>

The California Court of Appeals considered principles of statutory construction to determine if the harm that occurred was the type Section 11369 was designed to prevent and if the person suffering the harm was a member of the class of persons the section was designed to protect.<sup>146</sup> The court looked to a decision by the California Court of Appeals in 2008 in *Fonseca v. Fong*.<sup>147</sup> In *Fonseca*, the court looked at the legislative history of Section 11369 and concluded that the section “was enacted for the purpose of combating the sale and use of illicit narcotics.”<sup>148</sup> The court concluded that although enforcing narcotics law could have an incidentally positive impact on reducing drug-related crime, the incidental benefits to the general public were not sufficient to consider that Section 11369’s purpose was to protect the general public from crime.<sup>149</sup>

Considering the plaintiff’s claim that Section 642 also provides a basis for a tort action against the City, the court found that the Section was not designed to prevent the kind of harm the plaintiff alleged.<sup>150</sup> The plaintiff’s failed claims in *Bologna* illustrate the difficulty of challenging San Francisco’s Sanctuary Ordinance. Yet under *City of New York*, a facial challenge from a plaintiff with standing could result in an injunction against the Ordinance and a holding that the Ordinance is unconstitutional.<sup>151</sup>

145. *Id.*

146. *Id.* at 436.

147. *Id.* (citing *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567 (Cal. Ct. App. 2008)).

148. *Id.* (noting also that a letter from the author of the bill to the Governor described the section as a narcotics bill rather than an immigration bill and the representatives who assisted in drafting the bill were all involved with enforcing narcotics law rather than immigration law).

149. *Id.* at 437 (noting that the plaintiff argued the legislative history did include a reference to language suggesting a goal of preventing violent crime; however, the court found this argument would not lead to a fair reading of the legislative history and further noted that more than narcotics violations would have been included in the section had the legislature’s goal been to prevent violent crime).

150. *Id.* at 439 (finding that Congress’s purpose was to eliminate “restrictions on the voluntary flow of immigration information between state and local entities and federal immigration officials” rather than to protect the general public against violent crime by illegal immigrants).

151. San Francisco cannot claim sovereign immunity from suit by the federal government, as it is commonly understood that the Eleventh Amendment does not protect cities from suit by the federal government. As stated in the Eleventh Amendment, “The judicial power of the United States shall not be construed to extend to any suit in law or

*B. A Plaintiff With Standing Should Bring a Facial Challenge Against San Francisco's Sanctuary Ordinance.*

Just as the City of New York sued the United States to obtain a holding that Congress's statutes were unconstitutional, a plaintiff with standing could bring suit against the City and County of San Francisco.<sup>152</sup> The plaintiff could present a facial challenge<sup>153</sup> and seek a judgment that San Francisco's Sanctuary Ordinance is unconstitutional because it violates two congressional statutes that have been declared constitutional.<sup>154</sup> As the Supreme Court determined in *Lujan v. Defenders of Wildlife*,<sup>155</sup> standing consists of (1) a concrete and particularized injury; (2) a causal connection that is fairly traceable between the injury and the defendant's action; and (3) a likelihood of the plaintiff's injury being redressed by a favorable decision from the court.<sup>156</sup>

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equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI. The United States has brought suit against the City of San Francisco in the past. See *United States v. City of San Francisco*, 310 U.S. 16, 16-18 (1940) (claiming San Francisco violated the Raker Act of December 19, 1913). San Francisco also cannot claim sovereign immunity from suits by individuals. See *Bologna*, 192 Cal. App. 4th 429; see also *Larson v. City of San Francisco*, 192 Cal. App. 4th 1263 (Cal. Ct. App. 2011) (challenging a voter-approved amendment to San Francisco's rent ordinance).

152. A mandamus action represents another option available to a plaintiff. For the court to issue a writ of mandamus, a plaintiff must have a clear and undisputed legal right to performance of the duty he seeks to enforce. 17 AM. JUR. PL. & PR. FORMS MANDAMUS § 1. A writ of mandamus commands performance of a public official and will issue when there is a default of duty. *Id.* A plaintiff would likely seek a mandamus action against the mayor of the City and County of San Francisco to force him to perform his duty to comply with 8 U.S.C. §§ 1644 and 1373. The plaintiff must also be devoid of an adequate alternative method of relief. *Id.* A plaintiff could alternatively bring an injunction against the ordinance because an injunction addresses a "threatened or contemplated omission to act." *Id.* San Francisco's Sanctuary Ordinance represents a threatened omission to act in accordance with federal law.

153. See *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (noting that a plaintiff presenting a facial challenge to a legislative act must prove that the act would be unconstitutional under any circumstances).

154. *Id.* at 31 (holding that 8 U.S.C. §§ 1644 and 1373 survive New York City's facial challenge).

155. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

156. *Lujan*, 504 U.S. at 560-61. The Supreme Court decided that the plaintiffs lacked standing because their claimed injury could be not be supported by anything more than speculation, and it was merely conjectural as to whether the action they sought would actually affect their injury. The plaintiffs sought an injunction requiring the restoration of a previous interpretation of a statute protecting certain endangered species. *Id.* at 558. The

A San Francisco citizen would face a difficult task showing standing because the citizen would, as the plaintiff in *Bologna*, potentially be claiming a general harm to all citizens of San Francisco. This is the kind of general harm the Supreme Court has determined does not rise to the level of an Article III case or controversy.<sup>157</sup> However, as ICE represents the investigative arm of the Department of Homeland Security and is tasked with immigration enforcement,<sup>158</sup> ICE is an object of the action.<sup>159</sup> A citizen plaintiff would rely on the interaction between San Francisco and criminal illegal aliens, but ICE would rely on its position in Congress's statutes and San Francisco's Sanctuary Ordinance. Both 8 U.S.C. § 1644 and 8 U.S.C. § 1373 mandate that local governments cannot prevent the voluntary dissemination of immigration information to the INS.<sup>160</sup> The statutes give local law enforcement agencies authority to communicate with federal immigration authorities.<sup>161</sup> San Francisco's Sanctuary Ordinance contravenes Congress's purposes by preventing any voluntary communication of immigration information from local law enforcement to

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reading the plaintiffs favored applied to endangered species in foreign countries. *Id.* at 558-59. The Supreme Court determined that the plaintiffs would need to prove not only that the species were being jeopardized but also that the plaintiffs' interests were injured. *Id.* at 563. Plaintiffs could not prove, however, that they even had concrete plans of visiting the foreign countries where they claimed they would be deprived of their opportunity to observe the endangered species, and the Supreme Court determined their injury was not actual or imminent. *Id.* at 564. Additionally, the plaintiffs could not show a likelihood of redressability because the only relief the district court could accord could not be sure to lead to the result the plaintiffs sought. *Id.* at 569.

157. *Id.* at 573-74 (noting that claiming a harm because of an "interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large" does not rise to the level of an Article III case or controversy).

158. *ICE Overview*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview>.

159. *See Lujan*, 504 U.S. at 561-62 (explaining that a plaintiff who is himself an object of the action will have a simpler task of establishing standing than a plaintiff whose injury arises from the government's regulating [or failure to regulate] a third party).

160. In 2003, the INS was abolished, and the U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection (agencies under the Department of Homeland Security) filled the void. *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow "About Us" hyperlink; then follow "Our History" hyperlink).

161. H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771 (emphasis added).

federal immigration authorities.<sup>162</sup> Because Congress enacted Sections 434 and 642 to allow communication between local and federal agencies, ICE suffers a concrete and imminent injury because San Francisco's Sanctuary Ordinance directly contravenes Congressional legislation.

ICE meets the second element of standing as its harm is directly attributable to San Francisco's Ordinance. The Ordinance prohibits local law enforcement from engaging in the very act that Congress mandated local law enforcement should be allowed to engage in: voluntarily contacting the INS, or in this case, ICE. While the California Court of Appeals found that 8 U.S.C. § 1373 was not designed to prevent the harm the plaintiff in *Bologna* alleged, the statute was designed to prevent the very harm ICE would allege: San Francisco's preventing local law enforcement from voluntarily sharing information with ICE. Finally, ICE meets the third element of standing because its injury would be readily redressed by a favorable judicial decision declaring the Ordinance invalid. Without San Francisco preventing local law enforcement from voluntarily sharing immigration information with ICE, officials would be free to voluntarily share such information if they so chose.

#### V. CONCLUSION

America's debate over immigration will continue to engender controversy. Some people will approve of Arizona's immigration law while others will think Arizona has overstepped its bounds. Unlike Arizona's law, San Francisco's Sanctuary Ordinance is not in the national spotlight; nonetheless, San Francisco cannot enforce an ordinance that violates federal law. San Francisco law enforcement agencies need the freedom to protect citizens by having the option to provide immigration information to federal immigration authorities. Federal statutes afford this freedom, but San Francisco's Ordinance takes it away. San Francisco is free to work for a change in federal immigration law; but in the meantime, the City and County of San Francisco cannot enact its own ordinances that violate federal law. The legal system and San Francisco's citizens deserve the justice that would be served if San Francisco's Sanctuary Ordinance were invalidated.

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162. SAN FRANCISCO ADMIN. CODE ch. 12H, § 12H.2 (2010), available at <http://sfgsa.org/index.aspx?page=1069> (prohibiting sharing of immigration statuses unless required by federal or State statute or by regulation or court decision).