

# **JOINT STATEMENT**

## **SUBMITTED TO THE U.S. HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY**

### **HEARING ENTITLED "NEW ORLEANS: HOW THE CRESCENT CITY BECAME A SANCTUARY CITY"**

**September 27, 2016**

We, the undersigned civil rights, immigrant rights, victims' services, and human rights organizations write to express our strong opposition to any arguments suggesting that so-called state and local "sanctuary" policies violate 8 U.S.C. § 1373 or that any such violation would render a state or locality ineligible to receive federal funding through the Edward Byrne Memorial Justice Assistance Grant (JAG) or State Criminal Alien Assistance Program (SCAAP). In particular, given the focus of the House Judiciary Subcommittee on Immigration and Border Security's hearing on September 27<sup>th</sup>, "New Orleans: How the Crescent City Became a Sanctuary City," we wish to underscore our unequivocal view that the New Orleans Police Department (NOPD) in no way violates 8 U.S.C. § 1373 and that this hearing is nothing more than yet another cynical attempt to demonize immigrant communities.

On July 28, 2016, the Department of Justice's (DOJ) Office of the Inspector General (OIG) issued a memo analyzing whether certain jurisdictions' policies to limit entanglement between state and local police and federal immigration authorities were in violation of 8 U.S.C. § 1373, a federal statute that prohibits state and local governments from enacting laws or policies that restrict communication with DHS about "information regarding the citizenship or immigration status" of any individual. The statute does not place affirmative obligations on any government agency to collect or share information about immigration status or citizenship. Nor does it obligate government agencies to share other types of information, such as that relating to an individual's criminal court case, custody status or release date. It is solely focused on policies that prohibit limitations on sharing immigration-status information.

The memo was issued in response to certain Members of Congress who have repeatedly sought to pass coercive legislation that would financially punish states and localities that have limited entanglement with federal immigration authorities in order to promote public safety and community policing. Despite the fact that the DOJ OIG memo is not legally binding and does not make any conclusions about any jurisdictions violating 8 U.S.C. § 1373, it named ten jurisdictions' policies and insinuated, without making any actual findings, that there may be a connection between these jurisdictions' so-called "sanctuary" policies and violations of 8 U.S.C. § 1373.<sup>1</sup>

The NOPD policy was adopted as part of a DOJ consent decree through a court-approved process. The policy reflects thoughtful multi-stakeholder community consensus on how to overcome a pattern and practice of unconstitutional police behavior investigated by DOJ. DOJ's findings included "reports of specific incidents in which immigrant workers called to request police assistance after being victimized by crime, but instead of

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<sup>1</sup> The DOJ OIG Report recommended that grant applicants be required to provide certification specifying compliance with 8 U.S.C. § 1373 along with documentation sufficient to support the certification.

providing assistance, NOPD officers questioned them about their immigration status. Consequently, we found a strong belief among some segments of the Latino community that reporting crime to NOPD may subject the reporter to unwanted attention or harassment.”<sup>2</sup> Specifically, under the current consent decree NOPD Operations Manual Chapter 41.6.1, Immigration Status, *requires* NOPD to construe its policy in accordance with 8 U.S.C. § 1373(a). By definition, therefore, nothing about the NOPD policy violates the narrow prohibition of 8 U.S.C. § 1373 on limiting the sharing of citizenship or immigration status.

Variations of so-called sanctuary policies have been adopted by more than 340 jurisdictions across the country, and with good reason. When state/local law enforcement is entangled in doing the work of federal immigration authorities, it deepens fear and mistrust for crime survivors and witnesses who might otherwise come forward. Policies like that of the NOPD and hundreds of other jurisdictions aim to promote public safety by making sure crime survivors and witnesses are welcomed by the system rather than frightened away. This is particularly important at a time when relationships between law enforcement and communities are strained by years of policing practices that have created fear and distrust of police.

Overwhelmingly, law enforcement officials have spoken up in favor of so-called sanctuary policies, because they agree such policies foster communication from crime victims and witnesses, thereby creating a safer environment for everyone. For example, the Major Cities Chiefs Police Association has said that state and local police involvement in enforcing immigration law undermines immigrant community trust and cooperation with police and significantly diverts resources from the core law-enforcement mission to create safe communities.<sup>3</sup> Similarly, the Police Executive Research Forum has documented concerns of law enforcement officials across the country who believe that mandating or incentivizing state/local immigration enforcement takes away their discretion to set priorities and threatens police-community relationships.<sup>4</sup>

State and local governments have incurred millions of dollars in legal defense costs over the last several years from responding to claims that immigration enforcement policies and practices led to unconstitutional rights abuses, racial profiling, and unjustified detentions.<sup>5</sup> Local governments found to have violated individual rights through immigration enforcement activities have paid damages ranging from \$8,000 to \$200,000.<sup>6</sup>

Rather than subject the NOPD to politically-motivated and unwarranted scrutiny, we should be holding it up as a model. More broadly, these policies also reflect a failure by Congress to take any serious steps towards crafting a broad and humane overhaul to our dysfunctional immigration system. We urge you to focus on enacting policies that encourage and allow immigrants to contribute even more to their families, communities, and our country rather than isolating and criminalizing them.

Sincerely,

American Civil Liberties Union

Asian Americans Advancing Justice - AAJC

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<sup>2</sup> [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf)

<sup>3</sup> [Chief Thomas Manger](#), Major Cities Chiefs Association, to Hon. Bob Goodlatte and Hon. Trey Gowdy, March 13, 2015.

<sup>4</sup> Police Executive Research Forum, [Local Police Perspectives on State Immigration Policies](#), July 2014.

<sup>5</sup> See, e.g., ACLU, “ICE Detainers and the Fourth Amendment: What do Recent Federal Court Decisions Mean?” (Nov. 13, 2014), [https://www.aclu.org/sites/default/files/assets/2014\\_11\\_13\\_-\\_ice\\_detainers\\_4th\\_am\\_limits.pdf](https://www.aclu.org/sites/default/files/assets/2014_11_13_-_ice_detainers_4th_am_limits.pdf)

<sup>6</sup> National Immigration Forum Staff, [“Community and Courtroom Responses to Immigration Detainers,”](#) October 20, 2014; Tim Henderson, [“More Jurisdictions Defying Feds on Deporting Immigrants,”](#) *Pew Stateline*, October 31, 2014.

Asian Americans Advancing Justice - Asian Law Caucus

Asian Americans Advancing Justice - Atlanta

Asian Americans Advancing Justice - Chicago

Asian Americans Advancing Justice - Los Angeles

National Day Laborer Organizing Network

National Immigrant Justice Center

National Immigration Law Center

National Immigration Project of the National Lawyers Guild

New Orleans Worker's Center for Racial Justice

**Statement of the National Immigration Project of the National Lawyers Guild**

House Judiciary Subcommittee

Hearing on the New Orleans Police Department Bias Free Policy

September 26, 2016

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-partisan and non-profit organization that provides legal assistance and technical support to immigrant communities, legal practitioners, and advocates working to advance the rights of noncitizens.

NIPNLG provides this statement to the U.S. House Committee on the Judiciary for the September 27, 2016 hearing entitled, “New Orleans: How the Crescent City Became a Sanctuary City.” NIPNLG is deeply troubled by the tone of this hearing and concerned that the hearing will undermine critical efforts by the City of New Orleans, as well as other cities, to engage in police accountability and reform, racial reconciliation, and the welcoming of immigrants and diversity into its community.

From Ferguson, Missouri to Baltimore, Maryland, the United States is engaged in national criminal justice reform efforts around mass incarceration, bias policing, and police transparency and accountability. In particular, the patterns and practices of police departments have been a necessary focus point of investigation and opportunity for concrete solutions to our criminal justice system challenges. Perhaps nowhere was police abuse and the necessity of reform so laid bare than in New Orleans Police Department (NOPD) after Hurricane Katrina.<sup>1</sup> The trauma and pain caused previously by the New Orleans Police Department was real and devastating.<sup>2</sup> Before the nation knew the names of Mike Brown of Ferguson or Eric Garner of New York City, the deaths of James Brissette and Ronald Madison at Danziger Bridge and Henry Glover, residents of New Orleans, captured national headlines.<sup>3</sup> Moreover, this police harassment and misconduct applied not only to Black residents but also to Latino and immigrant communities, many of whom came to New Orleans after Hurricane Katrina to help rebuild the city.<sup>4</sup>

In light of the “systemic failure” of its police department, the City of New Orleans made the right decision to bring police accountability and reform, turning to the U.S. Department of Justice to

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<sup>1</sup> See “Law and Disorder: After Katrina, New Orleans Police Shot Frequently and Asked Few Questions,” PROPUBLICA and FRONTLINE, August 2010, available at: <https://www.propublica.org/nola>.

<sup>2</sup> See e.g. Melissa Harris-Perry, “From New Orleans to Ferguson: A Decade of Asserting Black Lives Matter,” THE NATION, August 13, 2015, available at: <https://www.thenation.com/article/from-new-orleans-to-ferguson-a-decade-of-asserting-black-lives-matter/>.

<sup>3</sup> See *supra* fn. 1.

<sup>4</sup> Alexa Campbell, “Blacks and Latinos in New Orleans Have Police Harassment in Common,” NATIONAL JOURNAL, October 23, 2014, available at: <http://www.theatlantic.com/politics/archive/2014/10/blacks-and-latinos-in-new-orleans-have-police-harassment-in-common/431400/>; Elizabeth Fussell and Lucas Diaz, Report: New Orleans Index at Ten: Latinos in Metro New Orleans: Progress, Problems, and Potential, The Data Center, August 2015.

investigate the NOPD for unconstitutional policing. This Department of Justice investigation resulted in the Consent Decree.<sup>5</sup> Under this decree, the NOPD is presently engaged in making significant reforms to its police department, and now serves as an example for police reform.<sup>6</sup>

It is deeply troubling that the Subcommittee has targeted the city's bias free immigration policy, a policy that is part of these efforts to build transparency and accountability with the residents of New Orleans. Far from being "reckless," such policies and reform efforts are the result of careful deliberation involving countless community hearings and hundreds of thousands of New Orleans residents who have experienced decades of racial bias, pain, and trauma at the hands of police. Policies like the NOPD's bias free immigration policy are critical to police reform and reconciliation with community. In this way, the New Orleans Police Department Consent Decree and related policy represent hope on how community and police can productively move forward together after public outcry over police shootings and abuse of civilians.

Furthermore, we cannot ignore the possibility that the Committee will use this hearing to undermine other policies that seek to remedy misguided efforts by state and local police to actively engage in immigration enforcement and bias policing. Attempts to coerce cities to expend their own limited resources on acting like federal immigration agents are counter-productive and regressive. They further exacerbate police-community tensions, undermine crime-fighting, and undo years of police reform and community trust-building.

Rather than punishing cities for their efforts to eliminate racial bias from policing and welcome diversity, the Subcommittee should be questioning whether the Department of Justice is doing its upmost to combat unconstitutional policing against immigrants and communities of color by local law enforcement actors, such as Arizona's Sheriff Joe Arpaio, who have been found by federal courts to willfully engage in racial profiling.

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<sup>5</sup> John Schwartz, "New Orleans Police, Mired in Scandal, Accept Plan for Overhaul," New York Times, July 24, 2012 available at: <http://www.nytimes.com/2012/07/25/us/plan-to-reform-new-orleans-police-department.html>

<sup>6</sup> "How Katrina Sparked Reform in a Troubled Police Department," THE ATLANTIC, August 2015, available at: <http://www.theatlantic.com/politics/archive/2015/08/katrina-blew-the-lid-off-the-nopd/402814>.



## **Statement for the Record**

### **U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Border Security**

#### **“New Orleans: How the Crescent City Became a Sanctuary City”**

**September 27, 2016**

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, labor, law enforcement, veterans and business constituencies in communities across the country. Coming together under the Forum’s leadership, these alliances develop and execute legislative and administrative policy positions and advocacy strategies. Leveraging our policy, advocacy and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

#### **Introduction**

The Forum appreciates the opportunity to provide its views on immigration enforcement, the prioritization of criminal aliens, and the need for community policing. Having had the opportunity to work with leading law enforcement voices from the Law Enforcement Immigration Task Force (LEITF), the Forum appreciates the challenges state and local law enforcement agencies face in earning the trust of immigrant communities and balancing competing priorities to ensure community safety. We fully support enforcement approaches that promote safe communities and respect for the rule of law.

#### **Immigration enforcement is a federal responsibility**

Federal leadership in immigration enforcement is paramount, consistent with long-standing doctrine that immigration enforcement is primarily a federal responsibility. As the U.S. Supreme Court recently reaffirmed in *Arizona v. U.S.*, 567 U.S. \_\_\_\_ (2012), the federal government possesses “broad, undoubted power over the subject of immigration.” At the same time, federalism principles under the U.S. Constitution limit what Congress can do to mandate that state and local law enforcement carry out federal immigration priorities and programs.<sup>1</sup>

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<sup>1</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

The U.S. Department of Homeland Security (DHS) has prioritized criminals for deportation, as set forth in DHS Secretary Jeh Johnson's November 2014 policy memorandum.<sup>2</sup> The Forum supports targeting those individuals who pose a danger to our communities for deportation, rather than otherwise law-abiding members of the community. Undocumented criminals convicted of serious crimes should be deported.

Prioritization reflects the reality that federal immigration agencies, including Immigration and Customs Enforcement (ICE), do not have the capacity or resources to remove all undocumented immigrants. By deprioritizing those who pose no threat, federal immigration agencies can allow law enforcement to focus limited resources on serious threats. Under this approach, federal immigration agencies can further intelligence-driven and risk-based policing.

Similarly, the Forum supports the goals of the Priority Enforcement Program (PEP), which it views as a good-faith effort to engage state and local law enforcement on helping DHS meet its prioritization. Given the federal government's limited ability to compel state and local participation in federal immigration enforcement initiatives and priorities, PEP can be a useful program aimed at achieving useful partnerships with state and local law enforcement.

The Forum is opposed to initiatives that would roll-back DHS's enforcement guidelines while moving additional immigration enforcement responsibilities to state and local law enforcement. We believe that this approach – shifting an inherently federal responsibility to states and localities – would divert limited resources from public safety and undermine community trust.

### **State and local law enforcement should focus on community policing strategies to build trust with immigrant communities**

The Forum supports well-established community policing strategies, which numerous state and local law enforcement agencies have implemented in recent decades. Such policies recognize that state and local law enforcement need the trust of their communities, including immigrant communities, because that trust allows law enforcement to better understand and protect the communities they police. Successful community policing strategies are tailored to ensure that immigrant victims and witnesses of crimes cooperate with police and that community members share information about criminal or suspicious conduct. Community policing strategies are well-established and effective at fostering trust.

As with federal authorities, state and local law enforcement should spend their limited time and resources focusing on pursuing truly dangerous criminals, not otherwise law-abiding members of the community. By limiting focus to those who pose a danger to public safety and engaging in trust-building efforts with immigrant communities, state and local law enforcement can earn support and confidence from immigrant communities, making everyone safer.

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<sup>2</sup> Secretary Jeh Charles Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," Department of Homeland Security Memorandum, November 20, 2014.  
[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

LEITF co-chair Tom Manger, Chief of Police in Montgomery County, Maryland, testified before the Senate Judiciary Committee on the importance of creating such trust, “To do our job we must have the trust and respect of the communities we serve. We fail if the public fears their police and will not come forward when we need them. . . . Cooperation is not forthcoming from persons who see their police as immigration agents. When immigrants come to view their local police and sheriffs with distrust because they fear deportation, it creates conditions that encourage criminals to prey upon victims and witnesses alike.”<sup>3</sup>

This sentiment has been echoed by other leading law enforcement voices. LEITF member Richard Biehl, Chief of Police in Dayton, Ohio, stated in July 2015 testimony before this Subcommittee, “For law enforcement agencies to be effective in their public safety mission they need community support. This support is based upon trust – trust that is earned when public and law enforcement officials act fairly and treat people with dignity.”<sup>4</sup> Chief Biehl went on to explain, “Our cities are safer when there is a sense of trust with our communities, including our immigrant communities. If families view law enforcement as a threat . . . no one benefits. Fearful communities are not cooperative communities.”<sup>5</sup>

In a 2015 op-ed, Dallas County Sheriff Lupe Valdez, another member of LEITF, explained the need for community policing, “I don’t want the community’s first interaction with our officers to be a time of fear. . . . A lot of undocumented individuals came from areas where they can’t trust the police. . . . Good law enforcement cannot be carried out this way. Everyone should know that they can report a crime, provide intel on crimes, be a witness, and most of all, not be in fear of the police if they are a victim of a crime.”<sup>6</sup>

The Forum supports these well-established community policing principles, allowing state and local law enforcement to establish trust with immigrant communities and improve public safety for everybody.

### **State and local law enforcement cooperate with federal immigration officials**

The term “sanctuary jurisdiction” is often overused, applied to many cities and localities for which the term is inapt.<sup>7</sup> Most localities, including many jurisdictions referred to as “sanctuary jurisdictions,” cooperate extensively with federal immigration officials, including honoring criminal detainees accompanied by a warrant or court order, participating in federal task forces

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<sup>3</sup> Testimony of Tom Manger, Chief of Police, Montgomery County (MD) Police Department, Hearing on “Oversight of the Administration’s Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims,” Before the Senate Judiciary Committee, July 21, 2015, at p. 2.

<https://www.judiciary.senate.gov/imo/media/doc/07-21-15%20Manger%20Testimony.pdf>

<sup>4</sup> Testimony of Richard Biehl, Chief of Police, Dayton (OH) Police Department, Hearing on “Sanctuary Cities: a Threat to Public Safety,” Before the House Committee on the Judiciary, Subcommittee on Immigration and Border Security, July 23, 2015, at p. 2. <https://judiciary.house.gov/wp-content/uploads/2016/02/Biehl-Testimony.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> Sheriff Lupe Valdez, “Broken immigration system needs repair,” *The Hill*, April 3, 2015.

<http://thehill.com/blogs/congress-blog/civil-rights/237801-broken-immigration-system-needs-repair>

<sup>7</sup> Laurence Benenson, “‘Sanctuary City’ Is Being Used As a Catch-All. It Shouldn’t,” *National Immigration Forum*, July 17, 2015, <https://immigrationforum.org/blog/sanctuary-city-is-being-used-as-a-catch-all-it-shouldnt/>.



and initiatives and providing notification of impending releases of convicted criminals who are undocumented. There are no “law-free zones” for immigration, even in such so-called sanctuary jurisdictions. Federal immigration laws are valid throughout the United States, including in “sanctuary” jurisdictions. However, given recent court decisions that have found immigration detainers to be legally dubious, a growing number of jurisdictions decline to honor detainers unless they are accompanied by a court order or a finding of probable cause.<sup>8</sup> That said, even where a particular city or law enforcement agency declines to honor an U.S. Immigration and Customs Enforcement (ICE) immigration detainer or limits involvement with federal immigration authorities, officers and agents from Customs and Border Protection and ICE can and do enforce federal immigration laws.

However, law enforcement needs are specific to each community, and local control has been a beneficial approach for law enforcement for decades. The thousands of state and local law enforcement agencies across the United States each have different priorities, challenges and concerns. A rural county sheriff’s department’s needs will differ from a big city police department’s. A state police agency’s priorities will differ from a university police department’s. Different communities may face different public safety concerns. Decisions are best left to the individual state and local law enforcement agencies, which are best positioned to gauge what they need in order to build community trust and foster cooperation between law enforcement and the community.

The Forum has expressed concerns about proposals to cut important law enforcement grants or otherwise reduce funding for law enforcement agencies in connection with efforts to address so-called sanctuary cities. Such an approach is counterproductive and does nothing to advance a constructive debate over immigration reform or foster effective cooperation between federal, state and local law enforcement. We are opposed to federal efforts to establish a one-size-fits-all immigration enforcement model that would shift significant immigration enforcement responsibilities to state and local law enforcement agencies.

On the contrary, to the extent that state and local law enforcement play a role in immigration enforcement, the federal government must provide adequate funding in line with these responsibilities. In a time of limited resources and tight budgets, state and local law enforcement cannot afford to carry out unfunded and underfunded federal mandates. If the federal government is looking to partner with state and local law enforcement on immigration initiatives, it has a responsibility to work cooperatively with state and local law enforcement agencies and adequately fund such initiatives.

## Conclusion

The Forum continues to support a model of immigration enforcement led by the federal government. It believes that DHS’s efforts to prioritize enforcement against undocumented

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<sup>8</sup> Laurence Benenson, “The Trouble with Immigration Detainers,” National Immigration Forum, May 24, 2016, <https://immigrationforum.org/blog/the-trouble-with-immigration-detainers/>.

criminals over otherwise law-abiding undocumented immigrants is a common-sense step to make communities safer.

Through working with a broad cross-section of police chiefs and sheriffs in LEITF, the Forum has an appreciation of the need for state and local law enforcement to promote public trust in immigrant communities, and is opposed to efforts to shift additional immigration enforcement responsibilities to state and local law enforcement. Rather, the federal government, along with states and localities, should seek to continue working cooperatively on enforcement matters. The Forum believes that PEP, is a significant effort to promote such cooperation, allowing states and localities to continue successful community policing practices that make their communities safer.

While federal, state, and local law enforcement can takes steps in these areas to promote public safety, the Forum believes that broad immigration reform is absolutely essential to safe communities. By assuaging the climate of fear that exists in many immigrant communities, immigration reform will build bridges between immigrant communities and law enforcement, supporting public safety.



**CWS Statement to the House Judiciary Committee,  
pertaining to its hearing on Tuesday, September 27, 2016**

As a 70-year old humanitarian organization representing 37 Protestant, Anglican, and Orthodox communions and 33 refugee resettlement offices across the country, Church World Service (CWS) urges all Members of Congress to support long-standing efforts of law enforcement officials to foster trusting relationships with the communities they protect and serve. Communities are safer when they pursue policies that strengthen trust and cooperation between local law enforcement, community leadership and institutions, and immigrant residents. The federal government should not hurt intentional, community-based policing efforts that are vital in communities across the country.

When local police collaborate with ICE, more crimes go unreported<sup>1</sup> because victims and witnesses are afraid of being deported if they contact the police. Many local law enforcement agencies and community leaders have spoken out about the harm that this collaboration inflicts on their communities. Local police departments that opt out of enforcing ICE detainer requests – especially when they are made without probable cause or a signed warrant from a judge – see an increase in public safety due to improved trust in its police force. It is precisely this trust that enables community members to report dangerous situations without the fear of being deported and separated from their families. Many cities also recognize how requests by Immigration and Customs Enforcement (ICE) to hold individuals beyond their court-appointed sentences violate due process and have been found unconstitutional by Federal Courts.<sup>2</sup> CWS supports the 320+ jurisdictions across the United States that limit collaboration with ICE, and we strongly oppose legislation that would punish or attempt to stop states, cities, localities and police departments from regulating how they interact with ICE. When all individuals can report dangerous situations without the fear of being deported and separated from their families, safety is increased for all community members.

CWS opposes proposals that would infringe on the rights of states, cities and local police departments from regulating how they interact with ICE. H.R.3009, The Enforce the Law for Sanctuary Cities Act; H.R.3002, The Mobilizing Against Sanctuary Cities Act; H.R.2964, The Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act; H.Amdt 352 attached to H.R. 2578, The FY16 Commerce, Justice, Science Appropriations Act; and similar proposals would do more harm than good. The United States has robust border security measures in place to protect national security interests and uphold the integrity of our boundaries, spending more than \$18 billion on immigration enforcement, more than all other federal law enforcement agencies combined.<sup>3</sup> This includes drones, mobile surveillance systems, video surveillance towers, 11,000 underground sensors, 700 miles of fencing, Blackhawk helicopters, and 18,127 border patrol agents at the southern border alone.

CWS is also opposed to mandatory minimum sentences for individuals who re-enter the United States. Such proposals would punish millions of individuals, including parents, grandparents, and young children who are unjustly deported from the United States and then make the journey again to be reunited with their families and communities. It is not in the best interest of these individuals or our communities to further criminalize illegal re-entry. Due to the brokenness of the U.S. immigration system and the Obama Administration's deportation of a record-breaking two million individuals, many of our long-standing community members have been deported. For them, and especially for individuals who have fled indescribable violence, their only option is to return to their homes and families in the United States. It is also important to note that many individuals have been charged with misdemeanors and immigration-related offenses that have been unjustly categorized as "aggravated felonies" because they are not U.S. citizens, making discussions around immigrants and felonies very misleading.<sup>4</sup> Further criminalizing individuals who simply wish to live with their families, or who are fleeing threats of homicide, gang-conscription, and gender-based violence in their home countries will do nothing to improve the broken U.S. immigration system.

Immigrants come to this country to reunite with family, work, and make meaningful contributions that enrich their communities. Several studies over the last century have affirmed that all immigrants, regardless of nationality or immigration status, are less likely than American citizens to commit violent crimes.<sup>5</sup> A recent report found a correlation between the immigration and the sharp decline in violent and property crime rates.<sup>6</sup> Immigration is correlated with significantly higher employment growth and a decline in the unemployment rate.<sup>7</sup>

CWS stands ready to work with members of both chambers to this end. CWS urges all Members of Congress to support immigration policies that treat our neighbors with the dignity and respect that all people deserve, and to affirm local law enforcement officer's efforts to build trust with their communities.

<sup>1</sup> Anita Kashu, "The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties." The Police Foundation. April 2009. <[www.policefoundation.org/sites/g/files/g798246f/Khashu\\_%282009%29\\_-\\_The\\_Role\\_of\\_Local\\_Police.pdf](http://www.policefoundation.org/sites/g/files/g798246f/Khashu_%282009%29_-_The_Role_of_Local_Police.pdf)>.

<sup>2</sup> Maria Miranga-Olivares, Plaintiff, v. Clackamas County, Defendant. United States District Court, D. Oregon, Portland Division. 11 April 2014. <[https://scholar.google.com/scholar\\_case?case=7183853698243436215&hl=en&as\\_sdl=20006](https://scholar.google.com/scholar_case?case=7183853698243436215&hl=en&as_sdl=20006)>.

<sup>3</sup> Immigration Enforcement in the United States: The Rise of a Formidable Machinery. The Migration Policy Institute. <<http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>>.

<sup>4</sup> "Aggravated Felonies: An Overview." Immigration Policy Center. March 2012. <[www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf)>.

<sup>5</sup> Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, The Wall Street Journal, July 14, 2015, <http://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798>.

<sup>6</sup> Walter A. Ewing, Daniel E. Martínez, Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, American Immigration Council (July 2015),

<http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states>.

<sup>7</sup> Jack Strauss & Hailong Qian, Immigrants or Jobs: Which Comes First to a Metro?, Jan. 23, 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2339192](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339192).



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September 26, 2016

The Honorable Bob Goodlatte  
Chairman, Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Zoe Lofgren  
Ranking Member, Subcommittee on Immigration and Border Security  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Lofgren:

I write, joined by the undersigned, concerning the important issues raised by the Subcommittee's hearing scheduled for September 27, 2016 at 10:00 a.m.—*New Orleans: How the Crescent City Became a Sanctuary City*. A press release announcing the hearing quoted remarks issued by Subcommittee Chairman Gowdy and House Judiciary Committee Chairman Goodlatte suggesting the “sanctuary” policy of the New Orleans Police Department “violate[s] federal law,”<sup>1</sup> specifically 8 U.S.C. § 1373 (“Section 1373”),<sup>2</sup> which provides, in relevant part:

**(a) In general**

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

**(b) Additional authority of government entities**

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government

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<sup>1</sup> JUDICIARY COMMITTEE CHAIRMAN BOB GOODLATTE, PRESS RELEASE, IMMIGRATION SUBCOMMITTEE TO EXAMINE DOJ'S ROLE IN CRAFTING NEW ORLEANS SANCTUARY POLICY (Sept. 23, 2016), <https://judiciary.house.gov/press-release/immigration-subcommittee-examine-doj-role-crafting-new-orleans-sanctuary-policy/>.

<sup>2</sup> *Id.* (providing hyperlink to <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIX-sec1373.pdf>) (8 U.S.C. § 1373).

entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

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

...<sup>3</sup>

The Subcommittee’s concerns are misplaced. As I explain herein, the NOPD policy, like sanctuary policies generally, does not violate federal law.

#### **A. There is no conflict between the current NOPD policy and federal law.**

Neither the current NOPD policy,<sup>4</sup> nor its February 2016 predecessor,<sup>5</sup> conflicts with Section 1373 as properly interpreted. The NOPD policy states it is to be construed in accordance with the federal statute,<sup>6</sup> and specifically allows NOPD members to “[s]end[] to ICE, or receiv[e] from ICE, information regarding the citizenship or immigration status of an individual.”<sup>7</sup>

The current NOPD policy does state a clear preference for disentangling the NOPD from federal immigration enforcement. The policy aims to make “all individuals, regardless of their immigration status, ... feel secure that contacting or being addressed by members of the NOPD

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<sup>3</sup> 8 U.S.C. § 1373(a).

<sup>4</sup> NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL, § 41.6.1 (“Immigration Status”) (revised Sept. 25, 2016) (“NOPD policy”), <http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-41-6-1-Immigration-Status-approval.pdf/>.

<sup>5</sup> The February 2016 version of the NOPD policy contained a broad prohibition on NOPD members’ disclosure of immigration-status information. While this prohibition made the question of the policy’s conflict with Section 1373 a closer one, the analysis presented in Section B of this letter explains why the Constitution requires a narrow reading of Section 1373 in order to honor local sovereignty and policymaking. Under such narrow interpretation, the February 2016 NOPD policy was lawful as a general confidentiality provision necessary to effectuate a local response to important civil rights concerns. *See also City of New York v. United States*, 179 F.3d 29, 36–37 (2d Cir. 1999) (dismissing facial challenge to constitutionality of Section 1373, but acknowledging the “circumscribed nature” of the analysis and leaving open the question whether a broad confidentiality policy prohibiting dissemination of immigration-status information generally would implicate the “not insubstantial” concerns with federal intrusion on state sovereignty posed by Section 1373).

<sup>6</sup> NOPD Policy ¶ 5; *see Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 603, 131 S. Ct. 1968, 1982, 179 L. Ed. 2d 1031 (2011) (noting that state-law provision requiring its terms to be “interpreted consistently” with federal statutory and regulatory provisions helped “guard[] against any conflict with the federal law.”).

<sup>7</sup> NOPD Policy ¶ 6.

will not lead to an immigration inquiry.”<sup>8</sup> And the policy contains provisions that prevent NOPD officers from inquiring into immigration status or taking action based on perceived immigration status.<sup>9</sup> But these policy aims and limits on NOPD members’ activity are entirely consistent with Section 1373.

The Subcommittee is doubtless aware of the memorandum issued by Department of Justice Inspector General Michael E. Horowitz in May 2016<sup>10</sup> (“the Horowitz memorandum”) addressing whether ten “judgmentally selected” jurisdictions<sup>11</sup> had laws or policies inconsistent with 8 U.S.C. § 1373. The Horowitz memorandum found some of the jurisdictions studied had laws “inconsistent with” Section 1373.<sup>12</sup> Other jurisdictions had policies relating to immigration detainees. While these jurisdictions admittedly did not “explicitly restrict[] the sharing of immigration status with ICE” the Inspector General nonetheless suggested that in practice such policies could be “inconsistent with and prohibited by” Section 1373.<sup>13</sup>

The Horowitz memorandum presents an unjustifiably sweeping view of the reach of Section 1373 and ignores substantial legal issues that would be raised by federal attempts to exercise the level of control the Horowitz memorandum claims over state and local police department policies and officers.

A case addressing a policy of the Los Angeles Police Department (“LAPD”) governing interactions with noncitizens is instructive. The LAPD policy, known as “Special Order 40,” did not restrict LAPD officers from communicating with federal immigration authorities, but instead “impose[d] limits on [their] ability to investigate the immigration status of aliens with whom they come into contact.”<sup>14</sup> The California appellate court rejected a facial challenge to Special Order 40, finding that it did not conflict with Section 1373: “[Special Order 40] does not address communication with ICE; it addresses only the initiation of police action and arrests for illegal entry. Section 1373(a) does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE.”<sup>15</sup> The court rejected a parallel preemption

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<sup>8</sup> NOPD Policy ¶ 1.

<sup>9</sup> *E.g.*, NOPD Policy ¶ 2 (“Members shall not initiate an investigation or take law enforcement action on the basis of actual or perceived immigration status, including the initiation of a stop, an apprehension, arrest, or any other field contact.”); *id.* ¶ 3 (“NOPD members shall not make inquiries into an individual’s immigration status, except as authorized by this Chapter.”).

<sup>10</sup> Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs (May 31, 2016) (hereinafter “Horowitz memorandum”), <https://oig.justice.gov/reports/2016/1607.pdf>.

<sup>11</sup> Horowitz memorandum at 3 (identifying the jurisdictions as the States of Connecticut and California; City of Chicago, Illinois; Clark County, Nevada; Cook County, Illinois; Miami-Dade County, Florida; Milwaukee County, Wisconsin; Orleans Parish, Louisiana; New York, New York; and Philadelphia, Pennsylvania).

<sup>12</sup> Horowitz memorandum at 5 (addressing Chicago Code § 2-173-030).

<sup>13</sup> Horowitz memorandum at 6-8 (addressing Cook County, Orleans Parish, Philadelphia, and New York City policies and ordinances).

<sup>14</sup> *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 724 (Cal. App. 2009).

<sup>15</sup> *Id.* at 731.

argument, in part because the court held Special Order 40 to be “a regulation of police conduct and not a regulation of immigration.”<sup>16</sup>

The NOPD policy here is indistinguishable from Special Order 40. Neither regulates communication with federal immigration officials. Instead, these policies regulate the conduct (not speech) of police officers. They conflict with neither the explicit terms of Section 1373 nor the structure of the system Congress created for immigration enforcement.

**B. The federal government cannot commandeer or coerce state and local police agencies to cooperate in federal immigration enforcement.**

As is demonstrated above, there is no conflict between the NOPD policy and federal law. Because there is no conflict, thorny legal questions concerning the relationship of the federal government to state and local governments are not implicated. Nonetheless, because the Horowitz memorandum stands as an official endorsement of a vision of vast federal power, and because it questions the legality of a prior version of the NOPD policy that may be discussed during the Subcommittee hearing, the federalism questions raised by the Horowitz memorandum’s interpretation of Section 1373 will be addressed briefly here.

***1. Federalism ensures political accountability.***

“Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”<sup>17</sup> While the States have “broad authority to enact legislation for the public good”<sup>18</sup>— a “general police power”<sup>19</sup>— the federal government is limited to those enumerated powers delegated to it by the people through the Constitution. The Tenth Amendment is the constitutional provision dedicated to preserving this “distinction between what is truly national and what is truly local.”<sup>20</sup> And the core Tenth Amendment teaching of the Supreme Court is that the federal government must legislate, within its enumerated powers, directly upon individuals, rather than upon local government.<sup>21</sup>

Thus, in *New York v. United States*, the Court declined to interpret federal legislation as “compel[ling] the States to regulate according to Congress’ instructions,” instead interpreting (consistent with the canon of constitutional avoidance) the legislation as providing “incentives”

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<sup>16</sup> *Id.* at 732.

<sup>17</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012).

<sup>18</sup> *Bond v. United States*, 134 S. Ct. 2077, 2086, 189 L. Ed. 2d 1 (2014).

<sup>19</sup> *United States v. Lopez*, 514 U.S. 549, 567, 115 S. Ct. 1624, 1634, 131 L. Ed. 2d 626 (1995).

<sup>20</sup> *Id.* at 567–68, 115 S. Ct. at 1634.

<sup>21</sup> *New York v. United States*, 505 U.S. 144, 166, 112 S. Ct. 2408, 2423, 120 L. Ed. 2d 120 (1992) (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”).

to the States that would encourage regulation according to Congress' wishes.<sup>22</sup> The Court went on to hold that the third "incentive" offered to the States<sup>23</sup> in that case was in fact a Hobson's choice between two paths in which Congress *directed* the States. Finding this to be no choice at all,<sup>24</sup> the Court struck down the legislation as violative of the Tenth Amendment.

Essential to the reasoning of *New York* is the notion of political accountability. Where Congress *encourages* a State to pursue Congress's policy choices, "the residents of the State retain the ultimate decision as to whether or not the State will comply,"<sup>25</sup> by accepting or rejecting such encouragement. "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."<sup>26</sup> But when Congress *compels* a State to pursue Congress's policy choices, "the accountability of both state and federal officials is diminished."<sup>27</sup> If Congress legislates on individuals directly, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."<sup>28</sup> At the end of the day, then, while Congress may in some cases preempt State policymaking through legislation directly addressing individuals, it may not commandeer State policymaking; the Tenth Amendment preserves the ability of "elected state officials [to] regulate in accordance with the views of the local electorate."<sup>29</sup>

In *Printz v. United States*,<sup>30</sup> the Court struck down a provision of the Brady Act that required local law enforcement to run background checks on gun purchasers. The underpinnings of *Printz* are the *New York* Court's concerns with political accountability. As in *New York*, the *Printz* Court found the legislation repugnant because of its effort to control local government: "While the Brady Act is directed to 'individuals,' it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. ... To say

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<sup>22</sup> *Id.* at 170, 112 S. Ct. at 2425 (1992).

<sup>23</sup> The incentive offered States the option of "either accepting ownership of [low-level radioactive] waste or regulating according to the instructions of Congress." *Id.* at 175, 112 S. Ct. at 2428.

<sup>24</sup> *Id.* at 177, 112 S. Ct. at 2429 ("A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.").

<sup>25</sup> *Id.* at 168, 112 S. Ct. at 2424.

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.* at 168-69, 112 S. Ct. at 2424.

<sup>29</sup> *Id.* at 169, 112 S. Ct. at 2424; *see also Lopez*, 514 U.S. at 576-77, 115 S. Ct. at 1638-39 (Kennedy, J., concurring) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. ... Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

<sup>30</sup> 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).



that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.”<sup>31</sup> Congress’s attempt to implement policy decisions through local officers obscured accountability, putting local government “in the position of taking the blame for [the federal policy’s] burdensomeness and for its defects.”<sup>32</sup> Taking control of local officers away from local government violates “an essential attribute of the States’ retained sovereignty”—“that they remain independent and autonomous within their proper sphere of authority.”<sup>33</sup>

In *Printz*, then, the Court found that “the whole *object* of the law” was “to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.”<sup>34</sup> No balancing of state and federal interests was required, because such a law offends “the very *principle* of separate state sovereignty. . . . [N]o comparative assessment of the various interests can overcome that fundamental defect.”<sup>35</sup> As the Court put it more recently, “Impermissible interference with state sovereignty is not within the enumerated powers of the National Government.”<sup>36</sup>

***2. Section 1373 must be construed narrowly to prevent it from becoming an impermissible attempt to direct local policymaking.***

It should be apparent from the foregoing discussion that Section 1373 raises serious constitutional concerns. First, Section 1373, if broadly construed, as it is in the Horowitz memorandum, would by its terms aim to “direct the functioning” of State and local government “entities” or “officials.”<sup>37</sup> That it would do so by means of a prohibition on state and local entities rather than a compulsion on them is of no constitutional moment. In contrast to 8 U.S.C. § 1357(g) (Section 287(g) of the Immigration and Nationality Act), which preserves the full sovereignty of State and local governments by giving them the choice of whether to enter into agreements permitting their officers and employees to participate in federal immigration enforcement,<sup>38</sup> and specifies that such intergovernmental agreements must comply with State and local law,<sup>39</sup> Section 1373 directly removes State and local choice over government “entities” and “officials.” Under Section 1373, state officials are not permitted to “regulate in accordance with the views of the local electorate.”<sup>40</sup> Local governments may choose to require communication

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<sup>31</sup> *Id.* at 930–31, 117 S. Ct. at 2382.

<sup>32</sup> *Id.* at 930, 117 S. Ct. at 2382.

<sup>33</sup> *Id.* at 928, 117 S. Ct. at 2381.

<sup>34</sup> *Id.* at 932, 117 S. Ct. at 2383.

<sup>35</sup> *Id.*

<sup>36</sup> *Bond v. United States*, 564 U.S. 211, 225, 131 S. Ct. 2355, 2366, 180 L. Ed. 2d 269 (2011).

<sup>37</sup> 8 U.S.C. § 1373.

<sup>38</sup> 8 U.S.C. § 1357(g)(1) (requiring written agreement between the Attorney General and the State or local government as a prerequisite to State or local officers exercising the powers of federal immigration officers).

<sup>39</sup> *Id.*

<sup>40</sup> *New York v. United States*, 505 U.S. at 169, 112 S. Ct. at 2424.

with ICE, or they may choose to allow it—but they may not choose to forbid it.<sup>41</sup> The political accountability ensured by the Tenth Amendment is absent.

The Supreme Court has said there is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>42</sup> The NOPD policy, like other state and local sanctuary policies, is directed at improving policing, by ensuring that witnesses and victims of crime trust that communicating with police will not trigger deportation.<sup>43</sup> Section 1373 directly interferes with and undermines the policing decisions of local governments that have enacted sanctuary policies. Section 1373’s requirement that local law enforcement officials cannot be prevented from voluntarily communicating immigration status information to ICE eviscerates any meaningful attempt to create community trust. As long as individual officers can communicate with ICE and thereby initiate deportation, the community trust is negated. In this way, the States are “put in the position of taking the blame”<sup>44</sup> for the federally imposed policy.

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<sup>41</sup> In a Fifth Circuit decision striking down the Brady Act a year before *Printz* was decided, the court wrote:

No choice is offered. The States may not say to Congress, “We are not interested in having state and local officials in our State, whose offices we create and duties we define, administer this federal regulatory scheme. If you want to conduct background searches of all persons purchasing handguns, look to your own federal background checkers.” Because the State has no walk-away opportunity, however costly or difficult, the States are victims of impermissible federal coercion.

*Koog v. United States*, 79 F.3d 452, 459–60 (5th Cir. 1996), *cert. denied sub nom. United States v. Gonzalez*, 521 U.S. 1118 (1997).

<sup>42</sup> *United States v. Morrison*, 529 U.S. 598, 618, 120 S. Ct. 1740, 1754, 146 L. Ed. 2d 658 (2000); *see also Kelley v. Johnson*, 425 U.S. 238, 247, 96 S. Ct. 1440, 1445, 47 L. Ed. 2d 708 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power”).

<sup>43</sup> NOPD policy, ¶ 1 (“To encourage crime reporting and cooperation in the investigation of criminal activity, all individuals, regardless of their immigration status, must feel secure that contacting or being addressed by members of the NOPD will not lead to an immigration inquiry and/or deportation.”); *See also, e.g., Bill Ong Hing, Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. Irvine L. Rev. 247, 297-303 (2011); *id.* at 303 (sanctuary policies “are intended to promote public safety. Their goal is to gain the immigrant community’s trust--trust that is needed for the community’s cooperation.”); PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 18 (2015) (“Immigrants often fear approaching police officers when they are victims of and witnesses to crimes and when local police are entangled with federal immigration enforcement. At all levels of government, it is important that laws, policies, and practices not hinder the ability of local law enforcement to build the strong relationships necessary to public safety and community well-being. It is the view of this task force that whenever possible, state and local law enforcement should not be involved in immigration enforcement.”).

<sup>44</sup> *Printz*, 521 U.S. at 930, 117 S. Ct. at 2382.

Just as in *Printz* the Supreme Court concluded that it would be local officials “who will be blamed” for the federal policy underlying the Brady Act, here any voluntary reporting of noncitizens to ICE by local police will be mistakenly interpreted as a local *policy*.<sup>45</sup>

State and local sanctuary policies, like that adopted by the NOPD, also aim to reduce or eliminate racial profiling correlated to the availability of immigration enforcement action following local police action,<sup>46</sup> and strive to provide police services equally to all residents, in order to comply with the Equal Protection Clause of the Constitution.<sup>47</sup> This creates an

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<sup>45</sup> See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1401 (2006) (“Local constituents are also likely to experience significant political accountability confusion with the double-negative prohibition of the 1996 laws. A constituent who hears that her co-worker has been reported to federal immigration authorities by a city police officer or teacher is more likely to conclude that it is the city's policy to engage in such reporting, rather than to attribute the reporting to a federal prohibition and the voluntary action of the individual city employee.”).

<sup>46</sup> TREVOR GARDENER II & AARTI KOHLI, *THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 4-6* (Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, U.C. Berkeley Law School, Policy Brief Sept. 2009), available at [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) (observing correlation between issuance of detainers and profiling of Latinos in Irving, Texas); AM. CIVIL LIBERTIES UNION OF N.C. LEGAL FOUND. & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNIV. OF N.C. AT CHAPEL HILL, *THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 44* (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> (noting concerns “that law enforcement officers equate Hispanic last names and appearances with criminality and use national origin and ethnicity without probable cause or reasonable suspicion to stop and detain residents.”); SARAH WHITE & SALMUN KAZEROUNIAN, *TENN. IMMIGRANT & REFUGEE RIGHTS COAL., THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGRATION ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6* (2011), available at <http://www.tnimmigrant.org/storage/The%20Forgotten%20Constitution.pdf> (concluding that “[i]mmigrants are targeted at disproportionate rates by officers of Bedford County law enforcement agencies, particularly the Shelbyville Police Department, as a pretext for making arrests that will enable jailers to contact ICE.”).

<sup>47</sup> The consent decree reached by the Department of Justice and the New Orleans Police Department in 2012 required, among other measures to achieve “bias-free policing,” that NOPD officers “not take law enforcement action on the basis of actual or perceived immigration status” and “not question victims of, or witnesses to, crime regarding their immigration status.” *United States v. City of New Orleans*, No. 2:12-cv-1924, Dkt. 2, *Consent Decree Regarding the New Orleans Police Department* (July 24, 2012) at ¶ 183. See also, e.g., Res. 2010-316, 2010 Bd. of Supervisors of the Cnty. of Santa Clara (Cal. 2010), available at <https://www.sccgov.org/sites/cco/overview/impact/Documents/Resolution-Advancing-Public-Safety---June-22,-2010.pdf> (finding that “laws like Arizona’s SB 1070 erode the relationship of trust between immigrant communities and local governments [and] subject individuals to racial profiling”).

additional issue affecting the federalism analysis. A federal court decision<sup>48</sup> interpreting Alabama’s House Bill 56 (“HB56”) illuminates some of the complex issues that are created by the interplay of state policy, Section 1373, and the Equal Protection Clause. Section 28 of HB56 required Alabama public schools to ascertain the immigration status of every enrolled student.<sup>49</sup> Noting that Section 1373 would subsequently permit this immigration-status information to be transmitted to federal authorities, the Eleventh Circuit held that Section 28 of HB56 presented an “increased likelihood of deportation or harassment upon enrollment in school” that would “significantly deter[] undocumented children from enrolling in and attending school,” in violation of their right to Equal Protection.<sup>50</sup>

The Eleventh Circuit struck down Section 28 of HB56, thus preventing the public schools from acquiring immigration-status information in order to satisfy the Equal Protection Clause. The logic of the court’s opinion applies equally here, where noncitizens, knowing that they might be subject to “increased likelihood of deportation” if they interact with local police, are “significantly deterred” from such interaction, depriving them of the right to Equal Protection in the provision of police services. This suggests additionally authority for local policies against the acquisition of immigration-status information. Additionally, where a non-reporting policy is implemented by local police in order to satisfy the Equal Protection Clause, a reviewing court might determine that Section 1373’s seemingly broad sweep, rather than the local policy, must yield in light of the constitutional value at stake.<sup>51</sup>

Finally, Section 1373’s control over the duties of government employees implicates state sovereignty because it arrogates to the federal government control over state resources. “Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies.”<sup>52</sup> The power to determine the duties of its officials is so central to State sovereignty that even the First Amendment cannot justify federal intrusion into a State or local government’s control of the speech of a police officer in the course of his or her duties.<sup>53</sup> A federal court thus

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<sup>48</sup> *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1248 (11th Cir. 2012).

<sup>49</sup> *Id.* at 1244.

<sup>50</sup> *Id.* at 1247 (citing *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982)).

<sup>51</sup> See Elizabeth McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 198-214 (2016) (arguing that despite the seemingly broad language of 8 U.S.C. § 1373, to the effect that it applies “[n]otwithstanding any other provision of Federal, State, or local law,” it is likely to be construed as consistent with other federal privacy laws”).

<sup>52</sup> *Koog*, 79 F.3d at 460 (citing *FERC*, 456 U.S. 742, 761, 102 S. Ct. 2126, 2138, 72 L.Ed.2d 532 (1982) (“[T]he power of the States to make decisions and set policy is what gives the State its sovereign nature. It would follow that the ability of a state legislative ... body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State’s role in the federal system.”) (citations omitted)).

<sup>53</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960, 164 L. Ed. 2d 689 (2006) (“We hold that when public employees make statements pursuant to their official duties, the

dismissed, notwithstanding Section 1373, a Houston police officer’s claim that her First Amendment rights were violated by the Houston Police Department’s policies limiting the circumstances in which HPD officers could transmit immigration-status information to ICE, finding such communications were made pursuant to her duties as an officer and therefore subject to her employer’s direction.<sup>54</sup>

Neither *Printz* nor *New York* require federal intrusion to impose any financial cost on a local government in order to effectively commandeer state resources.<sup>55</sup> But redirecting the efforts of state officials to the federal immigration enforcement effort implicates the *Printz* Court’s concern that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”<sup>56</sup> In a “world of fixed and limited law enforcement resources,” preventing the local government from being able to direct its officers away from “federal” work and toward “state” work amounts to commandeering.<sup>57</sup> “When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her.”<sup>58</sup>

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In conclusion, sanctuary policies like the NOPD policy here operate squarely within the core of the police power retained by the States. For Congress to assume control over these policy decisions—and over state officials—violates an “essential attribute of the States’ retained sovereignty,” that they “remain independent and autonomous within their proper sphere of authority.”<sup>59</sup> The NOPD, like many other jurisdictions around the nation, enacted its policy with the goals of creating and enhancing community trust, eliminating racial profiling, and fulfilling its “substantial interest in ensuring that all of its operations are efficient and effective.”<sup>60</sup> Those policy decisions are the NOPD’s and not the federal government’s to make, and Section 1373 must be narrowly construed to take into account local sovereignty as well as the Equal Protection concerns at issue in the NOPD efforts at reform.

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employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

<sup>54</sup> *Johnson v. Hurtt*, 893 F. Supp. 2d 817, 828-35 (S.D. Tex. 2012).

<sup>55</sup> *E.g. Printz*, 521 U.S. at 930, 117 S. Ct. at 2382 (“[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.”).

<sup>56</sup> *Id.* at 922, 117 S. Ct. at 2378.

<sup>57</sup> *See Koog*, 79 F.3d at 460.

<sup>58</sup> *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386–87, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011) (quoting *Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 128 L. Ed.2d 686 (1994) (plurality opinion)).

<sup>59</sup> *Id.* at 928, 117 S. Ct. at 2381.

<sup>60</sup> *Duryea*, 564 U.S. at 386, 131 S. Ct. at 2494.

Current events demonstrate the importance of these local policy decisions, as local police departments in Charlotte, North Carolina; Baltimore, Maryland; Chicago, Illinois; and elsewhere around the nation grapple with the pressing issues of how best to police our communities—how best to deliver police services fairly to all, how best to engender trust among all members of our communities, and how best to eliminate racial biases that have eroded trust.

The Horowitz memorandum gives insufficient attention to the complex issues of federalism raised by Section 1373 and similar attempts to impose federal solutions on local problems.<sup>61</sup> I write in the hope of encouraging the Subcommittee to give all appropriate consideration to these issues.

Thank you.

Respectfully yours,\*



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<sup>61</sup> The Horowitz memorandum mentions in passing the decision of the Third Circuit Court of Appeals in *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), but fails to mention the Tenth Amendment analysis in the decision, holding that to *require* states and localities to detain prisoners pursuant to immigration detainers would run afoul of the anti-commandeering doctrine.

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September 26, 2016

House Subcommittee on Border and Immigration  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear House Subcommittee,

As civil, labor, faith, and human rights organizations, we write to express support for the New Orleans Police Department's "Immigration Status" policy, as adopted in February 2016 as the result of deep consultation with a range of community stakeholders and the Department of Justice, in response to documented unconstitutional and discriminatory police practices targeting particularly the Latino community.

In 2010, the U.S. Department of Justice began an investigation into the New Orleans police because of reports of racial profiling and discrimination against Latino residents. The Congress of Day Laborers provided detailed documentation of rampant civil rights abuses and race-based community raids in the City of New Orleans.<sup>1</sup> In 2011, the Department of Justice revealed the results of their investigation, finding that the NOPD had engaged in a pattern and practice of targeting Latinos based on racial profiling for stops, interrogations, investigations, and arrests based on immigration status.<sup>2</sup>

A legacy of discriminatory local policing produced significant consequences on local police's ability to serve and protect all residents of New Orleans. The Department of Justice report on the NOPD documented that Latinos were afraid to report crimes to the police because officers frequently questioned crime victims about their immigration status and did not fully investigate crimes against Latinos. The Department also concluded that the systematic violations of civil rights eroded public confidence in the police, making policing "more difficult, less safe, and less effective."<sup>3</sup> Well-documented national research exists pointing to the fact that involvement of local police in immigration enforcement leads Latinos to underreport crimes and hesitate to come forward as witnesses.<sup>4</sup>

After these findings came to light, the New Orleans police entered into negotiations over a remediation plan with the Department of Justice. The result of those negotiations was the federal Consent Decree, which was approved by Judge Morgan of the Eastern District of Louisiana on

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<sup>1</sup> The New Orleans Workers' Center for Racial Justice, *The Criminal Alien Removal Initiative in New Orleans*, (December 2013), available at <http://nowcrj.org/wp-content/uploads/2008/11/CARI-report-final.pdf>.

<sup>2</sup> Civil Rights Div., U.S. Dep't of Justice, *Investigation of New Orleans Police Department*, (Mar. 16, 2011) at viii & x, available at [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf).

<sup>3</sup> *Id.* at v.

<sup>4</sup> See *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, University of Illinois at Chicago (May 2013), [https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure\\_Communities\\_Report\\_FINAL.pdf](https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf); *Police Chief's Guide to Immigration*, International Association of Chiefs of Police (2007), <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf> ("Many immigrant families are a combination of documented and undocumented individuals, which may account for a reluctance to report a crime if a victim/witness believes it may lead to a family member's deportation").



January 11, 2013.<sup>5</sup> The Consent Decree included broad remedial measures to correct discriminatory practices of the police and appointed a federal monitor to track compliance.<sup>6</sup> As part of the Consent Decree, the Department of Justice required the NOPD to “develop and implement a plan to provide all individuals within the City essential police services *regardless of immigration status, in order to build and preserve trust among community members,*”<sup>7</sup> including the dissemination of a “written policy.”<sup>8</sup>

The New Orleans Police Department coordinated a careful consultation with immigrant members of the community and a range of civil and immigrant rights organizations. After careful consideration of testimonials from individuals impacted by past unconstitutional and discriminatory police practices, and further consultation with the Department of Justice, the New Orleans Police Department adopted its February bias-free policing policy. The bias-free policing policy formalizes the New Orleans Police Department’s new commitment to nondiscrimination.

The policy also represented a commitment to respect the choices of the local community to not use local policing resources to further the goals of different federal agencies, including the Immigration and Customs Enforcement. NOPD committed to limit its involvement in promoting the practices of agents in a broken immigration system, understanding that involvement in deportations, raids, and racial-profiling goes against law enforcement best practices,<sup>9</sup> undoes NOPD efforts to protect communities through community-oriented policing, which are directed at gaining the trust and cooperation of immigrant communities,<sup>10</sup> and burdens already strained city resources for effectively fighting crime and protecting communities.<sup>11</sup>

As representatives of the New Orleans community and those most impacted by past discriminatory policing practices, we stand in firm commitment of the New Orleans Police Department’s February policy. This policy continues to rebuild trust in local police by combatting past practices that led to rampant racial profiling and is therefore in the best interest and safety of all local residents. It is also an important commitment to the civil, labor, and human rights of all members of our community, and the local choices made by a community through deep consultative processes.

Sincerely,

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<sup>5</sup> *U.S. v. City of New Orleans*, No. 12-cv-01924 (E.D. La. Jan. 11, 2013) (ECF No. 159).

<sup>6</sup> *U.S. v. City of New Orleans*, No. 12-cv-01924 (E.D. La. July 24, 2012) (ECF No. 2-1).

<sup>7</sup> *Id.* ¶ 183 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> See “Police Chiefs from Nation’s Major Cities Object to Legislative Proposals Requiring Local Police to Enforce Federal Immigration Law,” Major Cities Chiefs Association, June 2013; “Immigration Position,” “Major Cities Police Chiefs Association, October 2011, available at [www.majorcitieschiefs.com](http://www.majorcitieschiefs.com).

<sup>10</sup> Policy research shows the importance of these policies in gaining the trust and cooperation of immigrant communities. See Nik Theodore, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT, U. of Illinois at Chicago (May 2013); RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE’S FAILED “SECURED COMMUNITIES” PROGRAM, Aug. 2011, available at [www.ndlon.org](http://www.ndlon.org).

<sup>11</sup> More than 250 municipalities across the nation—recognizing the damage of ICE enforcement to civil rights, family, and community—have already enacted policies that eliminate local jail and police involvement in immigration enforcement. See ICE Detainer Map, Immigrant Legal Resource Center, available at [ilrc.org](http://ilrc.org).

The Congress of Day Laborers  
The National Guestworkers Alliance  
Stand with Dignity  
New Orleans Public Defenders  
Orleans Parish Prison Reform Coalition  
ACLU of Louisiana  
Voice of the Ex-Offender  
POWER Coalition  
Jesuit Social Research Institute/Loyola University New Orleans  
New Orleans Radical Arts & Healing Collective  
Fight for 15 New Orleans  
BreakOUT!  
The Center for Ethical Living and Social Justice Renewal  
VAYLA  
New Orleans European Dissent  
Black Youth Project 100 – New Orleans  
Louisiana National Lawyers Guild



October 15, 2015

Dear Senator:

As law enforcement leaders dedicated to preserving the safety and security of our communities, we have been alarmed to see various legislative proposals that would attempt to impose punitive, “one-size-fits-all” policies on state and local law enforcement. Rather than strengthening state and local law enforcement by providing us with the tools to work with the Department of Homeland Security (DHS) in a manner that is responsive to the needs of our communities, these proposals would represent a step backwards. Notably, a number of proposals to defund so-called sanctuary cities sweep too broadly, punishing state and local law enforcement agencies that engage in well-established community policing practices or adhere to federal court decisions that have found federal immigration detainers to violate constitutional protections. We oppose such proposals and urge Congress to adopt a different approach.

Law enforcement needs are specific to each community. There are thousands of state and local law enforcement agencies across the United States, all with differing priorities, challenges and concerns. A rural county sheriff’s department will have different needs than a big city police department. A state police agency will have different priorities than a university police department. Different communities may face different public safety concerns. Yet, current legislative proposals make little distinction between the needs of different communities.

Immigration enforcement is, first and foremost, a federal responsibility. Making our communities safer means better defining roles and improving relationships between local law enforcement and federal immigration authorities. But in attempting to defund “sanctuary cities” and require state and local law enforcement to carry out the federal government’s immigration enforcement responsibilities, the federal government would be substituting its judgment for the judgment of state and local law enforcement agencies. Local control has been a beneficial approach for law enforcement for decades – having the federal government compel state and local law enforcement to carry out new and sometimes problematic tasks undermines the delicate federal balance and will harm locally-based policing.

Rather than requiring state and local law enforcement agencies to engage in additional immigration enforcement activities, Congress should focus on overdue reforms of the broken immigration system to allow state and local law enforcement to focus their resources on true threats – dangerous criminals and criminal organizations. We believe that state and local law enforcement must work together with federal authorities to protect our communities and that we can best serve our communities by leaving the enforcement of immigration laws to the federal government.



We urge Congress to reject proposals that tie needed law enforcement funding to federal mandates to carry out various immigration enforcement functions. Our immigration problem is a national problem deserving of a national approach, and we continue to recognize that what our broken system truly needs is a permanent legislative solution – broad-based immigration reform.

Sincerely,

Chief Art Acevedo  
Austin Police Department  
Texas

Chief Richard Biehl  
Dayton Police Department  
Ohio

Chief Mike Brown  
Salt Lake City Police Department  
Utah

Sheriff Mark Curran  
Lake County Sheriff's Office  
Illinois

Sheriff Tony Estrada  
Santa Cruz County Sheriff's Office  
Arizona

Sheriff Paul Fitzgerald  
Story County Sheriff's Office  
Iowa

Assistant Chief Randy Gaber  
Madison Police Department  
Wisconsin

Chief Ron Haddad  
Dearborn Police Department  
Michigan

Chief Dwight Henninger  
Vail Police Department  
Colorado



## **LAW ENFORCEMENT IMMIGRATION TASK FORCE**

Chief Michael Koval  
Madison Police Department  
Wisconsin

Chief Brian Kyes  
Chelsea Police Department  
Massachusetts

Chief Jose Lopez  
Durham Police Department  
North Carolina

Sheriff Leon Lott  
Richland County Sheriff's Department  
South Carolina

Chief J. Thomas Manger  
Montgomery County Police Department  
Maryland

Sheriff William McCarthy  
Polk County Sheriff's Office  
Iowa

Sheriff Margaret Mims  
Fresno County Sheriff's Office  
California

Chief John Mina  
Orlando Police Department  
Florida

Chief Roy Minter  
Peoria Police Department  
Arizona

Lieutenant Andy Norris  
Tuscaloosa County Sheriff's Office  
Alabama

Commissioner Charles Ramsey  
Philadelphia Police Department  
Pennsylvania



Commissioner Keith Squires  
Utah Department of Public Safety  
Utah

Sheriff Richard Stanek  
Hennepin County Sheriff's Office  
Minnesota

Chief Michael Tupper  
Marshalltown Police Department  
Iowa

Sheriff Lupe Valdez  
Dallas County Sheriff's Office  
Texas

Chief Roberto Villaseñor  
Tucson Police Department  
Arizona