Setting the Record Straight About Sanctuary Policies

A Response to Threats Against Sanctuary Cities[1]

January 22, 2025

Recently, America First Legal sent letters to various state and local officials across the country[2], wrongly and deceptively arguing that sanctuary policies are not only illegal in spite of clear law saying that they are, but also unethically threatening criminal prosecution based on wholly unheard-of theories of criminal liability that have no grounding in existing law. Acting Deputy Attorney General Emil Bove, formerly one of President Trump's New York criminal defense attorneys, similarly issued a memo vaguely calling for such prosecutions as well as legal action against sanctuary jurisdictions ("the DOJ memo").[3] Despite these threats, however, the fact remains that sanctuary policies are not illegal. Rather, sanctuary policies are not only entirely legal, they are also one piece of a smart and constitutional approach to policing designed to serve all members of a community. These bullying tactics from the Trump Administration and its allies are not new. State and local officials should see these letters and this memo for what they are – nothing more than attempts to intimidate, coerce, and extort them – and disregard these blatant scare tactics as worth little more than the paper they are written on.

Sanctuary Policies Do Not Violate Federal Law.

Sanctuary policies do not violate or conflict with federal law. While there is no set, legal definition of what constitutes a "sanctuary policy," in general, such policies limit the circumstances under which state and local governments and law enforcement agencies will use their resources to cooperate with federal immigration enforcement efforts. States and local governments and law enforcement agencies undertake such policies so as to better serve their communities. Such policies make clear to noncitizens that they have nothing to fear from cooperating with the local law enforcement agency or with state and local government officials. Such policies also allow state and local officials to make the decisions about how to best use

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[2] America First Legal claims to have sent such letters to 249 state and local officials across the country. America First Legal, *America First Legal Puts Elected Officials in Sanctuary Jurisdictions across the United States on Notice and Warns of Legal Consequences for Violating Federal Immigration Laws* (Dec. 23, 2024), https://aflegal.org/america-first-legal-puts-elected-officials-in-sanctuary-jurisdictions-across-the-united-states-on-notice-and-warns-of-legal-consequences-for-violating-federal-immigration-laws.

[3] Emil Bove, Acting Deputy Attorney General, *Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement* (Jan. 21, 2025), https://www.washingtonpost.com/documents/2f9af176-72c5-458a-adc4-91327aa80d11.pdf.

limited law enforcement and government resources. This allows law enforcement and government officials to more effectively police and provide services to all residents of their communities.[4]

Federal Law *Permits* Some Cooperation with Federal Immigration Enforcement But *Does Not Require* Any Cooperation.

First, sanctuary policies do not violate or conflict with federal law because they do not impede or interfere with federal immigration enforcement.[5] They do not prevent federal immigration agencies from deporting people. Nor can they reasonably be said to allow state or local officials to conceal or shield people from detection by federal immigration officials. Rather, sanctuary jurisdictions simply refuse to cooperate with federal immigration efforts. Federal immigration may (and does) still happen in sanctuary jurisdictions; the difference is simply that federal agents will have to carry out enforcement actions themselves, without the assistance of sanctuary jurisdiction officials. Sanctuary policies represent a choice by state and local officials to refrain from assisting in federal immigration enforcement, but they do not prevent federal immigration officials from enforcing federal immigration law – and that choice is absolutely legal.[6]

Indeed, neither the federal Immigration and Nationality Act (INA) nor any other federal law requires state and local governments to assist with federal immigration enforcement. Contrary to the reckless assertions in America First Legal's letters and the DOJ memo, there simply is no federal law requiring state and local jurisdictions to cooperate with any immigration enforcement actions. Notably, neither these letters nor the DOJ memo cite any law compelling such cooperation.[7] Sanctuary jurisdictions cannot violate laws that do not exist.

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[4] American Immigration Council, *Sanctuary Policies: An Overview* (Oct. 1, 2020), https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview.

[5] Actively impeding federal officials from enforcing federal immigration law likely would be unlawful. *See, e.g.*, 18 U.S.C. § 372 (making it unlawful to impede U.S. officials in the discharge of their duties).

[6] *See, e.g.*, *United States v. New Jersey*, No. 20-CV-1364-FLW-TJB, 2021 WL 252270, at *8 (D.N.J. Jan. 26, 2021) (New Jersey's sanctuary policy "does not obstruct the federal government's objectives, because the [Immigration and Nationality Act (INA)], itself, contemplates that state and local governments have 'the *option*, not the *requirement*, of assisting federal immigration authorities.' Simply because New Jersey's choice in this regard may make it more difficult for federal law enforcement to detain removable [noncitizens] does not, in and of itself, frustrate the objectives of the INA. Indeed, [New Jersey's sanctuary policy] does not compel state or local law enforcement officers to interfere with any commands of federal law. More importantly, the INA simply does not contemplate that States are obligated to assist in the federal government's enforcement of civil immigration law." (quoting *United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019))).

[7] The letters do include a long footnote citing various provisions of the INA, but, even in the letter's own words, these provisions simply "permit[]" – but in no way require – state and local jurisdictions to participate in federal immigration enforcement. *See, e.g.*, America First Legal, Letter to Jim McDonell, Los Angeles Chief of Police at 3 & n.12 (Dec. 23, 2024), https://www.borderreport.com/wp-content/uploads/sites/28/2025/01/AFL-Sanctuary-City-Letters.pdf.

In sum, sanctuary policies are not illegal because such jurisdictions do not actively interfere with federal immigration enforcement[8] and there is no law requiring that jurisdictions actively assist federal immigration enforcement.

The Constitution Protects States and Localities By Prohibiting the Federal Government from Coercing Them Into Enforcing Federal Immigration Law.

Second, sanctuary jurisdictions' refusal to actively cooperate with federal immigration enforcement is not only legal, it is protected by the U.S. Constitution. While state and local governments cannot prevent the federal government from enforcing federal law, through the Tenth Amendment's longstanding "anti-commandeering doctrine," state and local governments have a constitutional right to opt out from enforcing federal law.[9] Quite simply, under the U.S. Constitution, the federal government cannot conscript state and local governments to enforce federal law.[10] Sanctuary policies fall squarely within this zone of constitutional protection, as courts to have considered the matter have held.[11] Sanctuary policies do not seek to prevent

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[8] *See City of Chicago v. Sessions*, 888 F.3d 272, 282 (7th Cir. 2018), *vacated in part on other grounds*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018) ("[T]he Attorney General repeatedly characterizes the issue as whether localities can be allowed to thwart federal law enforcement. That is a red herring. . . . [N]othing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities.").

[9] *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 925 (1997) (the anticommandeering doctrine provides that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs").

[10] *See, e.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018) (explaining how the Constitution "withhold[s] from Congress the power to issue orders directly to the States").

[11] *See, e.g.*, *McHenry Cnty. v. Kwame Raoul*, 44 F.4th 581, 592 (7th Cir. 2022) (noting that the federal government cannot require state cooperation with federal immigration detention "without running afoul of the Tenth Amendment") (quoting *United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019)); *United States v. California*, 921 F.3d 865 (9th Cir. 2019) ("California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts. The United States stresses that, in crafting the INA, Congress expected cooperation between states and federal immigration authorities. That is likely the case. But when questions of federalism are involved, we must distinguish between expectations and requirements. In this context, the federal government was free to expect as much as it wanted, but it could not require California's cooperation without running afoul of the Tenth Amendment."); *United States v. New Jersey*, 2021 WL 252270, at *12 n.9 ("[I]f the Court were to adopt the United States' reading of [8 U.S.C. §] 1373, it would likely run afoul of the Tenth Amendment's anti-commandeering doctrine."); *Cnty. of Ocean v. Grewal*, 475 F. Supp. 3d 355, 379 (D.N.J. 2020), *aff'd sub nom. Ocean Cnty. Bd. of Comm'rs v. Att'y Gen. of State of New Jersey*, 8 F.4th 176 (3d Cir. 2021) ("Put simply, even if the [New Jersey sanctuary policy] 'obstructs federal immigration enforcement, the United States' position that such obstruction is unlawful runs directly afoul of the Tenth Amendment and the anticommandeering rule.'" (quoting *United States v. California*, 921 F.3d at 888)); *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018) (noting that "the Tenth Amendment prevents Congress from compelling Texas municipalities to cooperate in immigration enforcement"); *Galarza v. Szalczyk*, 745 F.3d 634, 644 (3d Cir. 2014) ("[I]t is clear to us that reading [8 C.F.R.]§ 287.7 to mean that a federal detainer filed with a state or local [law enforcement agency] is a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment.").

federal enforcement of immigration law; rather, they simply opt state or local governments out from enforcing federal law, a choice that has long been protected by the U.S. Constitution. Tellingly, neither the America First Legal letters nor the DOJ memo even attempt to engage with the Tenth Amendment or the anti-commandeering doctrine, much less any of the case law directly addressing sanctuary policies.

Two common sanctuary policies provide good examples. Many sanctuary jurisdictions have a policy of not asking about immigration status during law enforcement encounters. No federal law requires them to do so.[12] Thus, it cannot be unlawful not to ask immigration status. Another common sanctuary policy is to refuse to honor all or some requests by DHS for a law enforcement agency to continue to hold somebody past the point they would otherwise be lawfully released so that DHS can take custody of the person. These immigration hold requests are often known as immigration detainers. The federal regulation empowering the immigration agencies to issue such hold requests is explicit that those requests are just that—a "request"—and not mandatory.[13] Accordingly, it is well within the law for state and local officials to decline to honor such requests. The Tenth Amendment's anti-commandeering doctrine protects the right of state and local jurisdictions to enact these policies. Sanctuary policies do not provide for interference in federal immigration efforts, which would likely be illegal.[14] Rather, they simply provide that the immigration agencies may undertake whatever enforcement operations they feel are necessary, but that the state and local jurisdictions will not also take part in them. The courts have been clear that it is well within the constitutional prerogative of state and local jurisdictions to make such a choice; they cannot be conscripted into enforcement of federal law.

There are No Legal Grounds for Criminal Prosecution of Sanctuary Officials.

Both the DOJ memo and the America First Legal letters irresponsibly threaten sanctuary city elected officials with criminal prosecution under 8 U.S.C. § 1324, which makes it unlawful to smuggle, transport, harbor, or encourage to enter or remain in the U.S. certain noncitizens. No sanctuary policy can reasonably be interpreted as satisfying the elements of § 1324. Tellingly, neither the DOJ memo nor the America First Legal letters cite any such prosecutions, even

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[12] 8 U.S.C. § 1373 does not require that state and local officials inquire as to immigration status, nor does it require that officials take any particular law enforcement action because of immigration status. It does not prevent state and local officials from prohibiting some communication with immigration officials. Rather, it simply prohibits state and local officials from preventing voluntary communication with immigration officials regarding immigration status alone. *See, e.g.*, *United States v. California*, 921 F.3d at 891–93 (determining that § 1373 is limited to immigration status). Not inquiring as to immigration status thus does not violate this law; state and local officials cannot share information they do not have. America First Legal's letter completely disregards existing law in claiming a broader interpretation of § 1373.

[13] *See, e.g.*, 8 C.F.R. § 287.7(a) ("The detainer is a request . . . ."); *City of Philadelphia v. Att'y Gen. of United States*, 916 F.3d 276, 281 (3d Cir. 2019) ("A detainer is a *request*, not a *demand*." (citing *Galarza v. Szalczyk*, 745 F.3d 634, 642 (3d Cir. 2014))); Department of Homeland Security, DHS Form I-247A, "Immigration Detainer – Notice of Action," https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf ("IT IS THEREFORE *REQUESTED* THAT [the law enforcement agency take certain actions]" (emphasis added)).

[14] *See supra*, note 5.

though the harboring statute has been on the books for 75 years, sanctuary policies are nearly 40 years old, and members of the first Trump Administration similarly publicly threatened to prosecute state and local officials because of their sanctuary policies years ago.[15] Moreover, as discussed above, sanctuary policies are legitimate state and local policies protected by the Tenth Amendment.[16] Accordingly, attempts to prosecute state and local officials for sanctuary policies would be unconstitutional under at least the Tenth and First Amendments, and would amount to an unconstitutional effort to coerce state and local officials to take part in federal immigration enforcement.[17]

Conclusion

America First Legal has resorted to these baseless and unethical[18] threats in an attempt to scare and bully sanctuary jurisdiction officials for doing nothing more than obeying the governing law. The DOJ memo weaponizes the agency in an even more blatant attempt at coercion. Neither the America First Legal letters nor the DOJ memo include any actual legal analysis beyond vague, generalized citations to statutes. Indeed, that allies of increased immigration enforcement feel the need to send these letters reflects their desperation – they cannot use the law to compel sanctuary jurisdictions to enforce federal immigration law, so they turn to misleading and unethical threats and attacks. State and local officials can reject these patently false and deceptive attempts to intimidate them and stand behind their sanctuary policies in their efforts to more effectively police and govern their communities.

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[15] *See, e.g.*, Nicole Rodriguez, *The Trump Administration Wants to Arrest Mayors of 'Sanctuary Cities*,' Newsweek (Jan. 16, 2018), https://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010 (reporting Congressional testimony by then-DHS Secretary Kirsten Nielsen that she had asked the Department of Justice to review whether sanctuary jurisdiction officials could be prosecuted federally, as well as calls by then-ICE director Thomas Homan for such prosecutions).

[16] *See City of Los Angeles v. Sessions*, CV 18-7347-R, 2019 WL 1957966, at *5 (C.D. Cal. Feb. 15, 2019) ("In addition, regarding the anticommandeering principle discussed above, an interpretation of Section 1324(a) that would apply to States and local governments and subject them to criminal punishment would be a violation of the Tenth Amendment."). In addition, there is another reason that sanctuary jurisdictions cannot be prosecuted under § 1324: "the provisions in Section 1324(a) are not directed at States or local governments, but instead apply to any person which the [INA] defines as an 'individual or an organization.' And an organization includes corporate entities, not States or local governments." *Id.* (quoting 8 U.S.C. § 1101(b)(3) and citing 8 U.S.C. § 1101(a)(28)).

[17] Because there are no grounds for criminal liability in the first instance, there can be no criminal conspiracy. *See* 18 U.S.C. § 371 (requires conspiracy "to commit any offense" as an element). Further, because, in the ordinary course, there are no legal grounds to allege that sanctuary policies unlawfully impede federal officials from discharging their duties, *see supra* pp. 1–3 & n.6, there can be no conspiracy to impede either. *See* 18 U.S.C. § 372 (requiring conspiracy to "prevent" federal officials from "discharging any duties" as an element). Similarly, because there are no grounds for prosecution under § 1324, there can be no civil or criminal RICO liability. *See* 18 U.S.C. § 1961 (defining § 1324 as a predicate RICO offense).

[18] *See, e.g.*, Utah State Bar Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 10 (2003) (discussing how a civil rights lawyer made an unethical extortionate threat when publicly threatening city officials with serious criminal charges).