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NOTE

An Analysis of Sanctuary Campuses: Assessing the Legality and Effectiveness of Policies Protective of Undocumented Students and of Potential Government Responses

JENNIFER SAFSTROM\*

ABSTRACT

*“I am originally from México but have lived in Washington State since I was [nine] months old . . . . In 2006, as a high school sophomore, I discovered my true immigration status in the United States. I was an undocumented Mexican-American and all of my hopes and dreams seemed to shatter at that point . . . . My parents came to the United States to give their children a better life, and that included an education . . . . When immigration reform does happen, I will then have an opportunity to apply my skills in the workforce without having to work in the shadows . . . . I am a first-generation Latina student and have made it my responsibility to represent my community with pride and progress though all odds are set against me.”<sup>1</sup>*

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1. *Student Testimonials*, FIN. AID & SCHOLARSHIPS, UNIV. WASH. BOTHELL, <https://www.uwb.edu/financial-aid/hb1079-undocumented/student-testimonies> [<https://perma.cc/D2ZZ-RMA2>] (last visited Mar. 5, 2018).

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#### INTRODUCTION

Immigration was a key issue of contention during the 2016 election.<sup>2</sup> During his campaign, President Trump vowed to deport undocumented immigrants, enhance border security, increase vetting of legal immigrants, and reduce the number of legal immigrants accepted into the United States.<sup>3</sup> Advocates have called for opposition to President Trump's immigration policies,<sup>4</sup> especially

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2. See, e.g., Louise Liu, *Here's Where Hillary Clinton and Donald Trump Stand on Immigration*, BUS. INSIDER (Nov. 7, 2016, 3:25 PM), <http://www.businessinsider.com/hillary-clinton-and-donald-trump-immigration-2016-11> [<https://perma.cc/9L2C-J4TU>] (describing the candidates' divergent policies on "one of the most controversial issues in [the 2016] election cycle—US immigration reform").

3. See, e.g., *id.* ("Trump is determined to build a wall and potentially deport some immigrants living in the U.S. illegally.").

4. See, e.g., Joe Heim, *Calls for 'Sanctuary' Campuses Multiply as Fears Grow over Trump Immigration Policy*, WASH. POST (Feb. 6, 2017), <https://www.washingtonpost.com/news/grade-point/>

given the uncertain and potentially broad enforcement priorities they would require.<sup>5</sup>

Within the first three months of Trump's presidency, the number of criminal and non-criminal arrests of undocumented immigrants increased over thirty percent<sup>6</sup> and included groups that "were [not] previously targeted."<sup>7</sup> Trump authorized the construction of new immigration detention centers to manage expanded enforcement.<sup>8</sup> He also reiterated his intent to build a wall along the U.S.–Mexico border, a campaign pledge that has now become a budget priority.<sup>9</sup> These efforts are aligned with Executive Order 13767, "Border Security and Immigration Enforcement Improvements," which calls for construction of a southern border wall, the expansion of "detention facilities," and expedited "removal proceedings."<sup>10</sup> Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," aimed to limit travel and entry into the U.S. of certain nationals, continued the suspension of the "Visa Interview Waiver Program,"

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wp/2017/02/06/calls-for-sanctuary-campuses-multiply-as-fears-grow-over-trump-immigration-policy/?utm\_term=.f711aa4d7001 [https://perma.cc/UCD8-PXBA] (describing "[t]he push for sanctuary campus status unfolding at Notre Dame" and "at schools across the country amid renewed fears about the fate of undocumented students" due to the election of President Trump).

5. For a discussion of one major area of enforcement uncertainty under the Trump administration, see Alan Gomez, *Colleges Brace to Shield Students from Immigration Raids*, USA TODAY (Jan. 26, 2017, 2:43 PM), <http://www.usatoday.com/story/news/2017/01/26/colleges-universities-shield-students-immigration-deportation-raids/96968540/> [https://perma.cc/U2TY-CSD3] ("[T]he Trump administration has not said it will specifically target young undocumented immigrants attending colleges and universities, including the 750,000 young undocumented immigrants who were granted deportation protections under President Obama's Deferred Action for Childhood Arrivals program, known as DACA.").

6. See Tal Kopan, *Immigration Arrests Rise in First Months of Trump Administration*, CNN (Apr. 17, 2017, 8:23 PM), <http://www.cnn.com/2017/04/17/politics/immigration-arrests-rise/> [https://perma.cc/5D6J-T4KS] ("The number of undocumented immigrant arrests rose by roughly one-third in the first weeks of the Trump administration . . . [as] removal authorities made 21,362 arrests from January 20 to March 13 of this year, including 5,441 non-criminals."); see also U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [https://perma.cc/2HLP-43TV].

7. Priscilla Alvarez, *Trump's Immigration Crackdown Is Overwhelming a Strained System*, ATLANTIC (Apr. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-immigration-court-ice/523557/> [https://perma.cc/B3B8-RD7V] (noting that the Trump Administration "issued new rules that broadened the criteria for who is considered a priority for deportation . . . such that ICE could target groups of undocumented immigrants it hadn't prioritized before").

8. See, e.g., Julián Aguilar, *White House Greenlights a New Immigration-Detention Center in Texas*, TEX. TRIB. (Apr. 14, 2017, 11:00 AM), <https://www.texastribune.org/2017/04/14/white-house-greenlights-new-immigration-detention-center-texas/> [https://perma.cc/X3E4-XN3P] (describing a private company's announcement of its planned construction of a new immigration-detention facility in Conroe, Texas "as part of a 10-year, renewable contract with federal Immigration and Customs Enforcement").

9. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018 1, 1–2 (2017), <https://www.gpo.gov/fdsys/pkg/BUDGET-2018-BLUEPRINT/pdf/BUDGET-2018-BLUEPRINT.pdf> [https://perma.cc/5Q4U-54VX] (outlining the Trump Administration's 2018 budget priorities, designed to "follow[] through on [Trump's] promise[s]" from the 2016 campaign, including construction of "a wall on the southern border with Mexico").

10. Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

and also suspended the “United States Refugee Admissions Program.”<sup>11</sup>

The Trump Administration’s memorandum accompanying Executive Order 13768, “Enhancing Public Safety in the Interior of the United States,” announced that the Department of Homeland Security (DHS) “no longer will exempt classes or categories of removable aliens from potential enforcement.”<sup>12</sup> In the same memorandum, the Administration directs Immigration and Customs Enforcement (ICE) to “expeditiously hire 10,000 agents and officers, as well as additional operational and mission support and legal staff necessary to hire and support their activities.”<sup>13</sup> The order also renders sanctuary cities—jurisdictions that are non-cooperative with federal immigration enforcement efforts<sup>14</sup>—ineligible to receive most federal grants.<sup>15</sup> The U.S. Department of Justice (DOJ) initiated a crackdown on nine sanctuary jurisdictions in furtherance of this mandate.<sup>16</sup> These changes demonstrate not only a shift in the scope of encouraged enforcement, but also an

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11. Exec. Order. No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), *reprinted as amended in* 82 Fed. Reg. 27,965 (June 14, 2017); *see also* Fauzia Amlani & Sara E. Herbek, *Travel Ban Update: Two U.S. District Courts Block President Trump’s Third Immigration Travel Ban*, NAT’L L. REV. (Oct. 21, 2017), <https://www.natlawreview.com/article/travel-ban-update-two-us-district-courts-block-president-trump-s-third-immigration> [<https://perma.cc/4DMJ-VVZR>] (“The Trump administration . . . imposed new travel restrictions . . . [banning] nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen . . . from entering the United States indefinitely, and . . . impos[ing] additional restrictions on the issuance of certain nonimmigrant visas to nationals six of those countries.”).

12. Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al. 1, 2 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/S7CV-E8CG>].

13. *Id.* at 5.

14. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (“Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States.”); *see also, e.g.*, Alan Gomez, *A Multimillion-Dollar Question: What’s a ‘Sanctuary City?’*, USA TODAY (Apr. 27, 2017, 9:56 AM), <https://www.usatoday.com/story/news/world/2017/04/26/multi-million-dollar-question-whats-sanctuary-city/100947440/> [<https://perma.cc/7B3A-PAW9>] (“‘Sanctuary city’ is not a legal term but a general term often used to describe more than 300 jurisdictions that don’t fully comply with federal immigration efforts.”).

15. *See* Exec. Order No. 13,768, *supra* note 14 (“[T]he Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”).

16. *See* Press Release, Dep’t of Justice, Department of Justice Sends Letter to Nine Jurisdictions Requiring Proof of Compliance with 8 U.S.C. § 1373 (Apr. 21, 2017), <https://www.justice.gov/opa/pr/departments-justice-sends-letter-nine-jurisdictions-requiring-proof-compliance-8-usc-1373> [<https://perma.cc/2BUG-C7FZ>] (announcing that the Department of Justice sent letters to “nine jurisdictions which were identified . . . as having laws that potentially violate” federal immigration law, to “remind the recipient jurisdictions that, as a condition for receiving certain financial year 2016 funding . . . , [each] agreed to provide documentation . . . validating that they are in compliance” with federal law); *see also, e.g.*, Michelle Mark, *Justice Department Targets 9 Jurisdictions in Escalating Crackdown on ‘Sanctuary Cities’*, BUS. INSIDER (Apr. 21, 2017, 1:33 PM), <http://www.businessinsider.com/doj-targets-9-jurisdictions-in-escalating-crackdown-on-sanctuary-cities-2017-4> [<https://perma.cc/YM6H-MPPK>] (explaining that the jurisdictions notified “must certify compliance before June 30 in order to receive certain grants for the fiscal year 2016,” including “New York City, Chicago, New Orleans, Philadelphia, Las Vegas, Milwaukee, the state of California, Miami-Dade County, and Cook County, Illinois”).

intention to ramp up deportations overall.<sup>17</sup>

Analogous to a sanctuary city, “a sanctuary campus is a college or university that has instituted policies to protect undocumented students from deportation.”<sup>18</sup> Understanding the legality of sanctuary campus practices and potential responses by the federal government facilitates debate regarding the scope, robustness, and appropriateness of these policies. This Note is designed to provide a legal analysis of the dialogue regarding sanctuary campus provisions and potential federal responses for legal advocates and scholars.<sup>19</sup> Part I provides substantive background information on immigration and higher education. Part II explores the legality of several of the most common sanctuary provisions. Finally, Part III assesses the constitutionality of several potential responses by the federal government.

## I. BACKGROUND

In the 1982 decision *Plyler v. Doe*, the United States Supreme Court held that, under the Equal Protection Clause, the undocumented status of children did not provide a sufficient basis for denying those children a public school education, a benefit the state offered citizens and legal residents.<sup>20</sup> The Court’s reasoning was clear: “denying [students] that education would create a ‘lifetime of hardship’ for undocumented children and a ‘permanent underclass’ of individuals.”<sup>21</sup> However, collegiate and postsecondary education is not covered by

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17. See Willa Frej, *Donald Trump’s DHS Says Immigration Authorities Can Deport Pretty Much Any Undocumented Person*, HUFFPOST (Feb. 22, 2017, 11:22 AM), [http://www.huffingtonpost.com/entry/dhs-deport-any-undocumented-person\\_us\\_58ac668ae4b02a1e7dac1561](http://www.huffingtonpost.com/entry/dhs-deport-any-undocumented-person_us_58ac668ae4b02a1e7dac1561) [https://perma.cc/E9MX-5G8N] (describing evidence that “President Donald Trump has declared an open season on the deportation of undocumented immigrants”).

18. Daniel Funke, *Here’s Where the Sanctuary Campus Movement Stands*, USA TODAY (Dec. 19, 2016, 3:10 PM), <http://college.usatoday.com/2016/12/19/heres-where-the-sanctuary-campus-movement-stands/> [https://perma.cc/L8AZ-CL8M].

19. For examples of sources contributing to this dialogue, see Rob Taylor, *Higher Ed. Under President Trump? His Campaign Near-Silence Leads to Worried Speculation*, 44 NO. 5 QUINLAN, SCH. L. BULLETIN NL 1 (2017); Leon Fresco, Marco J. Crocetti, & Marissa C. Serafino, *Analyzing The Legality Of Proposed Sanctuary City Measures*, LAW360 (Jan. 25, 2017, 12:36 PM), <https://www.law360.com/articles/884608/analyzing-the-legality-of-proposed-sanctuary-city-measures> [https://perma.cc/5VRZ-P4XE]; Alan Gomez, *Trump Can Punish ‘Sanctuary Cities’ that Protect Undocumented Immigrants*, USA TODAY (Jan. 10, 2017, 1:32 PM), <https://www.usatoday.com/story/news/nation/2017/01/10/donald-trump-sanctuary-cities-immigration-undocumented-immigrants/96204876/> [https://perma.cc/2X86-DRET].

20. 457 U.S. 202, 230 (1982).

21. Catherine Eusebio & Fermin Mendoza, *The Case for Undocumented Students in Higher Education*, EDUCATORS FOR FAIR CONSIDERATION, [http://www.e4fc.org/images/E4FC\\_TheCase.pdf](http://www.e4fc.org/images/E4FC_TheCase.pdf) [https://perma.cc/7FLA-UETN]; see also *Plyler*, 457 U.S. at 238–39 (“The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.”).

the *Plyler* decision.<sup>22</sup> As a result, undocumented students can be denied admission to state universities, in-state tuition privileges, and financial aid.<sup>23</sup>

According to recent estimates, there are currently over eleven million undocumented immigrants living in the United States.<sup>24</sup> Each year, approximately 65,000 high school graduates are undocumented students who have lived in the United States for at least five years.<sup>25</sup> However, some estimates show low enrollment rates for postsecondary education,<sup>26</sup> with no more than five to ten percent of undocumented high school graduates pursuing higher education.<sup>27</sup> The low enrollment is attributed to a myriad of obstacles, including unfavorable admissions policies,<sup>28</sup> limited access to extracurricular opportunities in high school,<sup>29</sup> and a lack of guidance through the college application process.<sup>30</sup> In addition, ineligibility for federal financial aid,<sup>31</sup> lack of access to in-state tuition rates,<sup>32</sup> and difficulties finding employment—both during the school year to finance

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22. See Michael A. Olivas, *Plyler v. Doe: Still Guaranteeing Unauthorized Immigrant Children's Right to Attend U.S. Public Schools*, MIGRATION POLICY INST. (Sept. 9, 2010), <http://www.migrationpolicy.org/article/plyler-v-doe-still-guaranteeing-unauthorized-immigrant-childrens-right-attend-us-public> [https://perma.cc/2HVG-5BH3] (“*Plyler* does not extend to college or other postcompulsory schooling . . .”).

23. *Fact Sheet: An Overview of College-Bound Undocumented Students*, EDUCATORS FOR FAIR CONSIDERATION, [http://www.e4fc.org/images/Fact\\_Sheet.pdf](http://www.e4fc.org/images/Fact_Sheet.pdf) [https://perma.cc/3MZZ-WA8X] (noting that undocumented immigrants are denied access to public colleges in Alabama, South Carolina, and Georgia; other institutions restrict access to lower, in-state tuition and financial aid) (last updated Jan. 2012).

24. Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/> [https://perma.cc/BWK9-J87R].

25. *Fact Sheet: An Overview of College-Bound Undocumented Students*, EDUCATORS FOR FAIR CONSIDERATION, [http://www.e4fc.org/images/Fact\\_Sheet.pdf](http://www.e4fc.org/images/Fact_Sheet.pdf) [https://perma.cc/3MZZ-WA8X] (last updated Jan. 2012).

26. See *id.* (estimating only 7,000 to 13,000 of those 65,000 undocumented high school graduates enroll in college in the United States each year).

27. See U.S. DEP’T OF EDUC., RESOURCE GUIDE: SUPPORTING UNDOCUMENTED YOUTH 1, 3 (Oct. 20, 2015), <https://www2.ed.gov/about/overview/focus/supporting-undocumented-youth.pdf> [https://perma.cc/S865-2H2J] (“[O]nly 5 to 10 percent of undocumented high school graduates continue their education and enroll in an institution of higher education.”).

28. See EDUCATORS FOR FAIR CONSIDERATION, *supra* note 25 (explaining that almost all private colleges and universities “classify undocumented students as international students and consider their financial situation in determining admissions,” meaning that “undocumented students compete with students from every country in the world for a handful of enrollment slots,” and their “ability to fund their entire four years of college is considered in admissions decisions”).

29. Cf. U.S. DEP’T OF EDUC., *supra* note 27, at 3 (delineating “access to extracurricular activities” as a factor correlated with success in undocumented students that can allow them to overcome “significant challenges” toward their “academic success”).

30. Cf. *id.* at 15 (“The admissions process for postsecondary institutions can be tough for undocumented youth, who face a number of additional hurdles . . . Counselors and educators can play an important supportive role for undocumented youth by helping them apply for college and determine financial aid options.”).

31. *15 Eye-Opening Facts on Undocumented Students*, ONLINECOLLEGE.ORG, <http://www.onlinecollege.org/2011/10/19/15-eye-opening-facts-on-undocumented-students/> [https://perma.cc/M4B8-GF9T] (“From federal Financial Aid restrictions to reduced opportunities, students with undocumented status face a lower quality of education and future careers than their legal classmates.”).

32. See *Undocumented Student Tuition: Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 29, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>



school-related expenses and post-graduation—pose added challenges to enrollment and degree completion.<sup>33</sup>

In large part due to President Trump’s rhetoric, the debate regarding sanctuary campuses has been thrust into the national spotlight. The term “sanctuary campus” does not have any independent “legal meaning”;<sup>34</sup> it is ambiguous and can be interpreted in various ways.<sup>35</sup> Rather than denoting a particular structure or set of protections, “sanctuary” is a general term that, in its simplest iteration, describes “a college or university that has instituted policies to protect undocumented students from deportation.”<sup>36</sup> The “sanctuary campus” designation is not a term of art;<sup>37</sup> it is an amorphous label that has been used both “by people who support the idea as a badge of honor and, at the same time, by people who oppose it.”<sup>38</sup>

The immigration debate is uniquely contextualized in the sphere of higher education institutions. First, diversity plays a special role in higher education, as “[d]iversity encourages students to question their own assumptions, to test received truths, and to appreciate the complexity of the modern world.” Diversity, in other words, “is fundamental to the very concept of education,”<sup>39</sup> and the cultivation of diversity is legally recognized as a compelling interest in postsecondary

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[<https://perma.cc/G34C-QG5X>] (noting only “18 states have provisions allowing for in-state tuition rates for undocumented students”).

33. See ROBERT T. TERANISHI, CAROLA SUÁREZ-OROZCO & MARCELO SUÁREZ-OROZCO, UNDOCUSCHOLARS PROJECT, IN THE SHADOWS OF THE IVORY TOWER: UNDOCUMENTED UNDERGRADUATES AND THE LIMINAL STATE OF IMMIGRATION REFORM 1, 15 (2015), <http://undocuscholars.org/assets/undocuscholarsreport2015.pdf> [<https://perma.cc/5RZ5-Y95X>] See generally *Trends in Higher Education: Average Published Undergraduate Charges by Sector and by Carnegie Classification, 2017-18*, COLL. BD., (2017), <https://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2016-17> [<https://perma.cc/KL3G-XURR>] (explaining that “[p]ublic four-year tuition and fee prices range from \$8,230 at bachelor’s colleges and \$8,670 at master’s institutions to \$10,830 at doctoral universities. Average published prices for these types of institutions in the private nonprofit sector are \$33,450, \$29,960, and \$42,920, respectively.”) These figures do not include the additional costs for room and board, books, school supplies, transportation expenses, and other associated costs of attendance.

34. Michael A. Olivas, *Conronym and Controversy*, INSIDE HIGHER ED (Nov. 29, 2016), <https://www.insidehighered.com/views/2016/11/29/sanctuary-campuses-wont-provide-real-sanctuary-immigrant-students-essay> [<https://perma.cc/7G74-THRA>].

35. See Funke, *supra* note 18 (“To some, a sanctuary designation means that a university will protect its undocumented students from federal deportation measures at all costs. Others think a sanctuary campus is more of an unofficial “safe space” for students to learn without fear of xenophobia.”).

36. *Id.*

37. Sophie Quinton, *Controversy Over ‘Sanctuary’ Campuses Is Misleading, Legal Analysts Say*, PBS NEWSHOUR (Dec. 17, 2016, 2:22 PM), <http://www.pbs.org/newshour/runtdown/sanctuary-campus-controversial/> [<https://perma.cc/67Q2-SB58>] (“[T]he term ‘sanctuary’ is politically and emotionally explosive. For advocates, it suggests a compassionate response to injustice. For critics, it indicates a willingness to defy the law to shelter unauthorized immigrants or potential terrorists.”).

38. Funke, *supra* note 18 (quoting Hiroshi Motomura, an immigration law expert at UCLA).

39. Press Release, Ass’n Am. Univs., Statement on Diversity by the Bd. of Dirs. of the Assoc. of Am. Univs. (Dec. 18, 2015), <https://www.aau.edu/newsroom/press-releases/statement-diversity-board-directors-association-american-universities> [<https://perma.cc/4VTB-Z5LJ>].

education.<sup>40</sup> Undocumented students enrich the diversity of higher education institutions through their varied national origins, languages, and religious backgrounds; beyond their diverse backgrounds, age of immigration, family status, socioeconomic standing, and other life experiences provide additional dimensions of diversity.<sup>41</sup> Campus diversity plans include such goals as establishing “pipeline programs and funding to increase matriculation of undocumented, low-income, first-generation, [and] minority . . . applicants,” and diversity plans broadly recognize the value of “intersectional” identities.<sup>42</sup>

Institutions of higher learning are also legally significant entities in the current immigration debate. Their importance was exemplified by the February 2017 emergency injunction of Executive Order 13,769, “Protecting the Nation From Foreign Terrorist Entry Into the United States.” In *Washington v. Trump*, the Ninth Circuit Court of Appeals, upheld the lower court’s grant of injunction of the Executive Order, and found that the challenging states had standing precisely because “the teaching and research missions of their universities [we]re harmed by the Executive Order’s effect on their faculty and students.”<sup>43</sup> The opinion emphasized that states’ proprietary interests were impacted by disruptions to public colleges and universities; this allows states to exercise third-party standing “to assert the rights of the students, scholars, and faculty affected by the Executive Order.”<sup>44</sup> The United States District Court for the District of Hawaii echoed this reasoning in its March 2017 injunction of Executive Order 13780, ruling “that the state had preliminarily demonstrated its universities and tourism industry would

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40. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (establishing “the interest of diversity [a]s compelling in the context of a university’s admissions program”); see also, e.g., *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (upholding racial diversity as a compelling state interest for consideration in state college admissions decisions because of the important “educational benefits” it creates) (quoting *Fisher v. Univ. of Tex. (Fisher I)*, 136 S. Ct. 2411, 2419 (2013)); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (finding an Equal Protection violation where “the University’s use of race in its current freshman admissions policy [wa]s not narrowly tailored to achieve respondents’ asserted compelling interest in diversity”); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”).

41. See TERANISHI, SUÁREZ-OROZCO & SUÁREZ-OROZCO, *supra* note 33, at 5 (surveying “the demographic profile of undocumented students, revealing the extent to which they are a remarkably diverse population”).

42. See, e.g., BROWN UNIV., PATHWAYS TO DIVERSITY AND INCLUSION: AN ACTION PLAN FOR BROWN UNIVERSITY 1, 16, 46 (Feb. 1, 2016), <https://brown.edu/web/documents/diversity/actionplan/diap-full.pdf> [<https://perma.cc/5SKQ-B6TC>].

43. 847 F.3d 1151 (9th Cir. 2017).

44. *Id.* at 1160. In summary, the court explained:

We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order. The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.

*Id.* at 1161.

be hurt, and that harm could be traced to the executive order.”<sup>45</sup> This reasoning was reiterated in the Ninth Circuit’s injunction of the updated executive order.<sup>46</sup> Subsequently, injunctions to modified versions of the Executive Order have also been issued.<sup>47</sup> Although the legal status of this Executive Order and others is subject to ongoing challenge, these judicial opinions serve as examples of courts’ view of institutions of higher education as important legal actors in the realm of immigration. Since public colleges and universities provide a basis for Article III standing, state institutions are likely to remain a key battleground for immigration policy disputes.

Finally, institutions of higher education are under substantial pressure to take a public stance on sanctuary policies. Administrators are facing immediate calls to action by students, faculty, and the community at large to respond to political developments related to immigration.<sup>48</sup> The responses of school leaders will have an immediate impact on the policies and operations of higher education institutions and on undocumented students and staff therein.

## II. THE LEGAL VIABILITY AND EFFECTIVENESS OF CAMPUS SANCTUARY POLICIES

This Part will focus on three key sanctuary campus pledges: safeguarding student information, disallowing immigration officials onto campus, and preventing school officers from acting on behalf of immigration officials. These are among the most common sanctuary provisions and have significant federal implications, in addition to consequences at the state and university level.<sup>49</sup> These policies,

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45. Matt Zapotosky et al., *Federal Judge in Hawaii Freezes President Trump’s New Entry Ban*, WASH. POST (Mar. 16, 2017), [https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1\\_story.html?pushid=breaking-news\\_1489618137&tid=notifi\\_push\\_breaking-news&utm\\_term=.2cff717f197f](https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?pushid=breaking-news_1489618137&tid=notifi_push_breaking-news&utm_term=.2cff717f197f) [https://perma.cc/6WBR-5BMX]; see also *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1131 (D. Haw. 2017) (“[T]he State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) [its] economy is likely to suffer a loss of revenue due to a decline in tourism; [and] (3) such harms can be sufficiently linked to [and result from] the Executive Order.”).

46. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam), *vacated*, 874 F.3d 1112 (9th Cir.) (mem.). The court articulates its reasoning, in part, as follows:

The State’s standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State’s interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body. . . . We further conclude that the State has shown that its injury is fairly traceable to EO2 and that enjoining EO2 would redress its harm.

*Id.* at 765.

47. See Amlani & Herbek, *supra* note 11.

48. See, e.g., Shannon Najmabadi, *How Colleges Are Responding to Demands That They Become ‘Sanctuary Campuses.’* CHRON. HIGHER EDUC. (Dec. 2, 2016), <http://www.chronicle.com/article/How-Colleges-Are-Responding-to/238553> [https://perma.cc/9AAB-756A] (“Petitions and protests in support of undocumented immigrant students sprang up at colleges nationwide in the weeks following the election, spurred by President-elect Donald J. Trump’s promise to eliminate the Deferred Action for Childhood Arrivals policy that the Obama Administration put in place through executive action.”).

49. See generally Yara Simón, *28 Universities That Vow to Offer Sanctuary to Their Undocumented Students*, REMEZCLA (Nov. 22, 2016), <http://remezcla.com/lists/culture/sanctuary-campus-daca/> [https://perma.cc/HF2H-H2YE] (describing the degree to which particular universities are addressing these and

which provide procedural safeguards for students in some cases, do not serve as a total bar to immigration enforcement on campuses.

#### A. NONDISCLOSURE OF STUDENT INFORMATION

Several universities have pledged to keep students' immigration statuses confidential.<sup>50</sup> However, these schools each carve out an exception for when such information is required or compelled by law.<sup>51</sup> These commitments to nondisclosure are permitted, and sometimes even mandated, by the Family Educational Rights and Privacy Act (FERPA). For public institutions, sanctuary policies could potentially conflict with provisions of the Immigration and Nationality Act (INA), which prohibits restricting federal, state, or local government entities from sharing immigration information with federal authorities. However, those INA provisions in question are subject to several textual and historical arguments which indicate FERPA may supersede these immigration mandates, calling into question the relationship between the two statutes.

##### 1. Family Educational Rights and Privacy Act (FERPA)

FERPA regulates the disclosure of student information and "applies to all schools that receive funds under an applicable program of the U.S. Department of Education."<sup>52</sup> Under FERPA, schools are typically required to obtain written consent to "release any information from a student's education record."<sup>53</sup> FERPA defines a student's education record to include "records, files, documents, and

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other major, related goals). Some institutions have incorporated additional protections into their sanctuary policies that are not analyzed in this paper. *See id.* Examples include: legal services for undocumented students; non-discrimination in admissions; support for the DACA program; opposition to a federal immigration registry; and financial assistance through aid, scholarships, and tuition discounts. *See id.*

50. *See, e.g.,* Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUMBIA DAILY SPECTATOR (Nov. 22, 2016), <http://columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students/> [<https://perma.cc/V7FY-HP2K>] ("[Columbia] University will neither allow immigration officials on our campuses without a warrant, nor share information on the immigration status of students with those officials unless required by subpoena or court order, or authorized by a student."); Alexandra Retter & Marlese Lessing, *UConn Supports Undocumented Students*, DAILY CAMPUS (Feb. 20, 2017), <http://dailycampus.com/stories/2017/2/20/uconn-supports-undocumented-students> [<https://perma.cc/3QR8-F4N7>] (quoting UConn President Susan Herbst as saying that "[i]nformation regarding a person's immigration status contained within the records of the UConn Police Department will not be disclosed unless such disclosure is compelled by law"); *Protecting the Interests of our International Community of Scholars*, UNIV. MICH. (Jan. 28, 2017), <http://president.umich.edu/news-communications/on-the-agenda/protecting-the-interests-of-our-international-community-of-scholars/> [<https://perma.cc/95L3-28UN>] ("We do not provide information on immigration status to anyone except when required by law.").

51. *See* Holmes, *supra* note 50; Retter & Lessing, *supra* note 50; *Protecting the Interests of our International Community of Scholars*, *supra* note 50.

52. *Family Educational Rights and Privacy Act (FERPA)*, FAMILY POLICY COMPLIANCE OFFICE, U.S. DEPT' OF EDUC., <https://ed.gov/policy/gen/guid/fpco/ferpa/index.html> [<https://perma.cc/JS9Q-VT29>] (last updated Mar. 1, 2018).

53. *Id.*; *see also* 20 U.S.C. § 1232g(b)(1) (2013) (specifying restrictions on release of "education records" by "any educational agency or institution"). Many legally admitted international students have waived their rights under FERPA through the visa process. The American Council on Education explains:

other materials which—(i) contain information directly related to [the] student; and (ii) are maintained by an educational agency or institution.”<sup>54</sup> Under this definition, any information about students’ immigration statuses would be part of their education records.

However, a student’s education record does not include records created or maintained by a law enforcement arm of the educational institution.<sup>55</sup> A student’s education record also does not include “directory information” such as “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, . . . dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.”<sup>56</sup> In other words, the school may release any of this information without the student’s permission. As a result, there is a substantial amount of information that might be colloquially referred to as “private” but is not part of the student education record that universities must keep confidential under FERPA. What information is shared and how it is distributed is left to the discretion of the university.

Additionally, FERPA establishes a number of exceptions, under which schools are allowed to disclose student information that is part of the student’s education record without consent. This includes disclosure to the following officials: “school officials” with “legitimate educational interests”; other schools to which the student is applying to transfer; specified officials for audit or evaluation purposes; appropriate parties in connection with the student’s “application for, or receipt of, financial aid”; “organizations conducting certain studies for or on behalf of” the school; “accrediting organizations”; to comply with a “judicial order” or “lawfully issued subpoena”; appropriate officials in case of “health and safety” emergencies; and state and local authorities within a “juvenile justice system.”<sup>57</sup>

In short, the commitment made by various higher education institutions to protect students’ information, unless legally compelled to disclose it, does not violate

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The Student Exchange Visitor Program (SEVP) requires that institutions participating in SEVP are subject to on-site review at any time. An ICE Field Representative . . . has the authority to ask for information about students on temporary student and training visas (F and J) administered by or present at the institution, but currently not about DACA or undocumented students.

DAN BERGER, AM. COUNCIL ON EDUC., IMMIGRATION POST-ELECTION Q & A: DACA STUDENTS, “SANCTUARY CAMPUSES,” AND INSTITUTIONAL OR COMMUNITY ASSISTANCE. (Peter McDonough ed., Dec. 2016), <http://www.acenet.edu/news-room/Documents/ACE-Issue-Brief-Immigration-DACA-Sanctuary-Campus.pdf> [<https://perma.cc/RNW6-YXGA>].

54. 20 U.S.C. § 1232g(a)(4)(A)(i)–(ii) (2013).

55. *Id.* § 1232g(a)(4)(B)(ii) (2013); *cf. Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, CLERY CTR., <http://clerycenter.org/policy-resources/the-clery-act/> [<https://perma.cc/ADA7-DYHN>] (last visited Mar. 13, 2018) (explaining that under the Clery Act’s mandatory disclosure of criminal conduct, immigration offenses are not included, but criminal offenses like homicide, sexual assault, robbery, hate crimes, Violence Against Women Act (VAWA) offenses, and other disciplinary incidents—such as weapons, drugs, or alcohol offenses—are encompassed in the Act).

56. 20 U.S.C. § 1232g(a)(5)(A) (2013).

57. *Id.* § 1232g(b)(1)(A)–(D), (G), (J)–(L) (2013); *see also* FAMILY POLICY COMPLIANCE OFFICE, *supra* note 52 (listing the exceptions to FERPA disclosure restrictions).

the law; rather, it is in keeping with schools' existing obligations under FERPA. Universities that opt to safeguard student information, even if they do so with the intent of protecting undocumented students, are adhering to their FERPA obligations and are thus likely beyond reproach or retribution under the law.

However, to comply with FERPA's mandates, institutions may not offer comprehensive protection to undocumented students. Those who advocate in favor of stronger protections for undocumented students have been critical of FERPA, noting that it offers insufficient protection for student privacy rights.<sup>58</sup> Courts have interpreted the law enforcement exception of FERPA broadly, generously granting judicial orders and subpoenas; this could undermine institutional protections for schools seeking to implement rigorous privacy protections.<sup>59</sup> Moreover, if a school willingly violates existing privacy and disclosure mandates, students have limited redress for several reasons. FERPA does not establish a private right of action,<sup>60</sup> it is historically unenforced,<sup>61</sup> and violations of FERPA seldom amount to tort or common law claims.<sup>62</sup> Additionally, there are no procedural or remedy requirements for processing complaints.<sup>63</sup>

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58. Cf. Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 60–61 (2008) (“[R]ecent amendments to FERPA[] . . . are modest and largely weaken student privacy protection.”).

59. See, e.g., John E. Theuman, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C.A. § 1232g), 112 A.L.R. Fed. 1 (1993). There is a risk the following rationale could be expanded in the federal enforcement of immigration:

Government's discovery request to county board of education regarding information on student transfers and requests and makeup of student body fell within law enforcement purpose exception to Family Educational Rights and Privacy Act's (FERPA's) general prohibition on release of students' personal information without parental consent; Government filed underlying lawsuit to enforce Civil Rights Act and achieve goal of desegregation and was seeking records to demonstrate that school was still operating as racially identifiably white school in violation of statute and enforce compliance with the Act.

*Id.* at 37 (summarizing the District Court's reasoning in *United States v. Bertie County Board of Education*, 319 F. Supp. 2d 669 (E.D.N.C. 2004)). See also Lynn M. Daggett, *Sharing Student Information with Police: Balancing Student Rights with School Safety*, AM. BAR. ASSOC. SEC. ST. & LOC. GOV'T L. 1, 4–5 (2012), [https://www.americanbar.org/content/dam/aba/events/state\\_local\\_government/2012/10/2012\\_fall\\_councilmeeting/Daggett\\_Paper.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/state_local_government/2012/10/2012_fall_councilmeeting/Daggett_Paper.authcheckdam.pdf) [<https://perma.cc/XC4T-9XWR>] (explaining that, under “the emergency exception,” no FERPA violation was found when a school shared student records with a “doctor who had performed hand surgery on the student”).

60. See, e.g., Theuman, *supra* note 59 (referencing *Francois v. Univ. of D.C.*, 788 F. Supp. 31 (D.D.C. 1992), which held that even if a university released a transcript of a student's academic record to the United States Attorney's Office “without proper notification” in violation of FERPA, the student had no private cause of action under FERPA because only the Secretary of Education or the administrative head of the education agency may take appropriate actions to enforce FERPA).

61. See Daggett, *supra* note 59, at 65 (“The federal government may sue to enforce FERPA, but has done so only once.”).

62. See *id.* (“FERPA violations amount to tort and other common-law claims only under unusual circumstances.”).

63. See *id.* at 66 (clarifying that there are no hearing, timeline, or other procedural requirements for processing complaints, nor any compensation or other recourse for the student). Daggett explains:

As the dissent in *Gonzaga* notes, the [Family Policy Compliance Office (FPCO)] . . . complaint and termination of federal funding remedies “provide[] no guaranteed access to a formal

Institutions that aim to offer the highest level of protection can choose what, if any, directory information to disclose.<sup>64</sup> When a school opts to disclose directory information, it must “give public notice of the categories of information which it has designated” to share and allow a reasonable period of time for students (or parents) to notify the institution that their personal information should not be released.<sup>65</sup> An annual notice of student rights is required, but the school may choose how to notify students and parents, for example by “special letter” or by “inclusion in a PTA bulletin, student handbook, or newspaper article.”<sup>66</sup>

Institutions that wish to maximize protections for undocumented students could choose to limit the amount of directory information that is disclosed, ensure that the means of distributing an annual notice of rights is effective, communicate the implication(s) of action (or inaction) regarding directory opt-in or -out procedures, and convey how students can exercise their rights.<sup>67</sup> Providing rights-related information in multiple languages or designating a point of contact for questions and follow up could enhance the robustness of FERPA’s protections. Schools could also stop collecting immigration-status information in the admissions process, during student interactions with campus officers, and in other university procedures. If that information were not collected, it could not be obtained even where a valid warrant is issued. Schools could also seek state and local provisions that reinforce or expand upon the protections established in FERPA.<sup>68</sup>

## 2. Immigration and Nationality Act Sections 1373 and 1644

Separate from an institution’s obligations under FERPA, public colleges and universities that seek to establish themselves as sanctuary campuses may be in violation of INA section 1373. This provision mandates that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration

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administrative proceeding or to federal judicial review; rather, it leaves to [FPCO] discretion the decision whether to [even] follow up on individual complaints.”

*Id.* (footnote omitted).

64. FAMILY POLICY COMPLIANCE OFFICE., *supra* note 52 (explaining that “schools may disclose, without consent, ‘directory’ information,” but do not have to).

65. 20 U.S.C. § 1232g(a)(5)(B) (2013).

66. FAMILY POLICY COMPLIANCE OFFICE, *supra* note 52.

67. *See id.*

68. *See e.g., Student Data Privacy*, NAT’L CONFERENCE OF STATE LEGISLATURES. (Feb. 10, 2017), <http://www.ncsl.org/research/education/student-data-privacy.aspx> [https://perma.cc/52MA-5QAS] (highlighting key state policy approaches); *Student Data Privacy Legislation: A Summary of 2016 State Legislation*, DATA QUALITY CAMPAIGN (Sept. 2016), <https://2pido73em67o3eytaqlcp8au-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/DQC-Legislative-summary-09302016.pdf> [https://perma.cc/RP7V-SEF7] (summarizing 2016 state “student privacy” legislation); Michael Whitener, *State Student Privacy Laws: A Game Changer for Service Providers*, INT’L ASS’N PRIVACY PROF’LS. (Nov. 23, 2015), <https://iapp.org/news/a/state-student-privacy-laws-a-game-changer-for-service-providers/> [https://perma.cc/WHR2-B4X8] (noting that, in 2015, “47 states . . . introduced 186 bills addressing student data privacy, and 15 states passed 28 new student data privacy laws”).

status, lawful or unlawful, of any individual.”<sup>69</sup> This directive is also echoed in INA section 1644, which provides:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.<sup>70</sup>

Under a strict reading, it would seem these INA provisions would compel public institutions to disclose information about a student’s immigration status. However, the application of this provision is limited: the INA only forbids restrictions placed on a *government entity or official*,<sup>71</sup> meaning that private institutions are exempt.<sup>72</sup>

These provisions also apply narrowly, only specifying information related to “citizenship or immigration status.”<sup>73</sup> Whereas the INA could impact this specific subset of information, FERPA’s disclosure protections cover a much broader umbrella of information; although an institution may have to disclose immigration status, the INA does not require disclosure of all the information a university must keep confidential under FERPA.<sup>74</sup> It is important to note that these provisions do not compel disclosure; they only prohibit restrictions on disclosure, including limits imposed by any public college or university on its employees. This means “*any public employee* who acquires personal information about an unauthorized immigrant in the course of his or her official duties is free to contact ICE to report a suspected immigration violation.”<sup>75</sup>

Notwithstanding INA section 1373 and 1644,<sup>76</sup> FERPA may ensure students’ privacy because “neither the text nor the legislative history of sections 1644 or 1373 reveals an intent by Congress to repeal existing federal privacy laws.”<sup>77</sup> Sections 1373 and 1644 both prohibit “restrictions on the communication of immigration status information between federal and state or local entities ‘[n]otwithstanding any other provision of Federal, State, or local law.’”<sup>78</sup> Despite the prefatory language of “notwithstanding,” given Congress’ demonstrated lack of intent to expressly repeal, the language does not “support a broad construction of the substantive provision that would give rise to such inconsistencies.”<sup>79</sup>

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69. 8 U.S.C. § 1373(a) (1996).

70. *Id.* § 1644.

71. *Id.* § 1373.

72. See Ivan E. Bodensteiner & Rosalie Berger Levinson, *Defendants—Private Individuals and State Action Requirement*, 1 ST. & LOC. GOV’T C.R. LIABILITY, § 1:4 1, 3 (2017).

73. 8 U.S.C. § 1373.

74. See 20 U.S.C. § 1232g(a)(4)(A) (2013).

75. 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, 199 (2016).

76. IMMIGRATION RESPONSE INITIATIVE, HARVARD UNIV., SANCTUARY CAMPUS TOOLKIT (2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf> [https://perma.cc/4WPD-X58V].

77. McCormick, *supra* note 75, at 206.

78. *Id.* at 201.

79. *Id.* at 204.



Accordingly, the phrase “notwithstanding” “‘should not be understood to refer . . . to federal statutes that themselves prohibit or restrict such disclosures,’” which give context to the statutory language.<sup>80</sup>

First, these provisions in the INA should not have the effect of repealing privacy protections in other legislation, absent a clear expression of congressional intent of doing so. This reasoning is based on the clear statement rule, which requires Congress to speak clearly when it wants to act with a certain effect.<sup>81</sup> Requiring a clear statement of congressional intent to broadly repeal privacy protections means that “[section] 1644 and [section] 1373 could have been drafted in a manner which would have left no ambiguity about their intent.”<sup>82</sup> Because Congress did not specify its intent to repeal other legislation, the INA “provisions must be read in a way that will allow them to be reconciled with existing privacy protections,”<sup>83</sup> including FERPA.

Second, the DOJ’s Office of Legal Counsel (OLC)<sup>84</sup> previously considered the “relationship between section 1373 and a federal statute barring disclosure of census-related information”<sup>85</sup> and concluded that section “1373 did not act to repeal the census privacy law.”<sup>86</sup> OLC determined that the restrictions in section 1373 applied “only to disclosure prohibitions or restrictions other than those imposed by federal statute.” This conclusion was derived, in part, from the interpretive oddities that would occur if section 1373 were read as applying both prospectively and retroactively to federal statutes.<sup>87</sup> Thus, as in the census context, the INA should not be interpreted to override privacy laws, including FERPA.

Finally, an analysis of the legislative history does not indicate Congress’s intent to use the INA to supersede other federal legislation granting privacy protections.

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80. *Id.*

81. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 208 (1983) (describing this rule as a presumption that Congress does “not intend to interfere with the traditional power and authority . . . unless it signaled its intention in neon lights”).

82. McCormick, *supra* note 75, at 202.

83. *Id.*

84. The Office of Legal Counsel explains:

Pursuant to 28 U.S.C. § 510, the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions and legal advice to the various Executive Branch agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice.

*Opinions*, OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE <https://www.justice.gov/olc/opinions-main> [<https://perma.cc/H52A-G6U9>] (last updated June 5, 2016). Thus, while the Office of Legal Counsel under the Trump Administration might reach a different conclusion, it would be in direct conflict with analysis previously relied upon.

85. McCormick, *supra* note 75, at 203 (citing Memorandum from Randolph D. Moss, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, for Gen. Counsel, Dep’t of Commerce (May 18, 1999), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1999-05-18-census-confidentiality.pdf> [<https://perma.cc/NN72-4MPH>]).

86. *Id.* The OLC did not explicitly consider section 1644 in its memorandum, given the similarities in the language of these two provisions, the reasoning employed in the analysis of section 1373 is arguably analogous if applied to the second provision. *Id.*

87. *Id.*

The House Conference Report on section 1373 “refers only to the impact of [the provision] on state or local entities” and the Senate Report “suggests that Congress was primarily concerned with state and local restrictions, not federal statutory restrictions.”<sup>88</sup> From the report, it can be inferred that the thrust of the statute was geared to have an impact on state and local entities; federal consequences were not discussed. In the House Conference Report regarding section 1644, there is explicit reference to FERPA,<sup>89</sup> but no clear language that “suggests that Congress intended to supersede the disclosure protections in FERPA.”<sup>90</sup> In fact, the report’s language may “more appropriately be read as an expression of Congress’s intent to invalidate the state and local measures, but leave intact the privacy protections provided under FERPA and the other federal laws referenced.”<sup>91</sup>

Ultimately, it is unclear what relationship these two statutes would have relative to one another, but there are arguments favoring FERPA’s applicability in the absence of a subpoena to disclose student immigration status. Public institutions of higher learning must carefully assess the relationship between FERPA and the INA. Upon legal challenge, if FERPA supersedes, then referring to the previous section’s analysis of the protections and areas of discretion within FERPA would be most appropriate. However, if the INA provisions are found to be controlling, then this would limit public institutions’ implementation of sanctuary policies that prohibit the disclosure of immigration information.

#### B. DISALLOWING IMMIGRATION OFFICIALS ONTO CAMPUS

The University of Pennsylvania,<sup>92</sup> University of Idaho,<sup>93</sup> and Portland State University,<sup>94</sup> in addition to several other schools,<sup>95</sup> have vowed to disallow immigration officials from conducting enforcement activities on campus. However,

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88. *Id.* at 205 (referencing H.R. REP. NO. 104-828, at 249 (1996) (Conf. Rep.) and S. REP. NO. 104-249, at 19–20 (1996)).

89. *Id.* (quoting H.R. REP. NO. 104-725, at 391 (1996) (Conf. Rep.)).

90. *Id.*

91. McCorkmick, *supra* note 75, at 205–06.

92. Rebecca Heilweil, *Penn, Trump’s Alma Mater, Becomes Sanctuary Campus for Undocumented Students*, PHILA. MEDIA NETWORK (Dec. 1, 2016, 1:08 AM), [http://www.philly.com/philly/education/20161201\\_UPenn\\_Donald\\_Trump\\_s\\_alma\\_mater\\_becomes\\_sanctuary\\_campus\\_for\\_undocumented\\_students.html](http://www.philly.com/philly/education/20161201_UPenn_Donald_Trump_s_alma_mater_becomes_sanctuary_campus_for_undocumented_students.html) [https://perma.cc/DQ8L-NH5T] (“The University of Pennsylvania will not allow Immigration and Customs Enforcement (ICE)/Customs and Border Protection (CBP)/U.S. Citizenship and Immigration Services (USCIS) on our campus unless required by warrant.”).

93. Shanon Quinn, *University of Idaho Faculty Senate Addresses Immigration Concerns*, SPOKESMAN-REVIEW (Mar. 1, 2017, 9:57 AM), <http://www.spokesman.com/stories/2017/mar/01/university-of-idaho-faculty-senate-addresses-immig/> [https://perma.cc/47ZV-CTXV] (“The [Faculty] Senate also requested other steps be taken to address growing concerns of noncitizen students, including . . . making students aware of certain campus areas not open to the public, and therefore not open to immigration officials without a warrant, such as classrooms during class times and dorm rooms.”).

94. Wim Wiewel, *Portland State Is a Sanctuary University*, PORTLAND STATE UNIV., <https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university> [https://perma.cc/XFJ4-75DZ] (last visited Nov. 8, 2017) (“Portland State University will not facilitate or consent to immigration enforcement activities on our campus unless legally compelled to do so or in the event of clear exigent circumstances such as an imminent risk to the health or safety of others.”).

95. *See* Simón, *supra* note 49.

these schools have all stated an exception to this pledge: when they are legally compelled to grant access under a court order.<sup>96</sup> Some have explicitly carved out exceptions for safety or health concerns.<sup>97</sup> In assessing the existing search and access requirements with which schools must comply, there are some procedural safeguards these policies might offer, but they do not serve as a total bar to immigration enforcement on campus. Traditionally, the Executive Branch has advocated for limited immigration enforcement at schools. If this were to change, Fourth Amendment considerations in issuing warrants may offer some protections to undocumented students. However, Fourth Amendment doctrine has not always favored illegally residing immigrants and may be used to undermine sanctuary efforts.<sup>98</sup>

Recent administrations of both political parties have recognized schools as sensitive spaces for immigration enforcement. During President George W. Bush's Administration, in a letter authored to a member of Congress, the Director of ICE noted that "arresting fugitives at schools, hospitals, or places of worship is strongly discouraged, unless the alien poses an immediate threat to national security or the community."<sup>99</sup> Similarly, during President Barack Obama's tenure, the Director of ICE issued a memorandum to guide enforcement actions in sensitive locations, including "pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools."<sup>100</sup> Arrests, interviews, searches, and surveillance efforts at sensitive locations required either prior approval from ICE (including an assessment of potential disruption) or exigent circumstances (such as national security, terrorism, imminent risk of death or harm to person or property, or comparable threat to public safety).<sup>101</sup>

However, these traditional practices are not binding, and thus do not determine future enforcement policies or priorities. If enforcement is increased, the level of protection for undocumented students may be influenced or determined by how each school defines its private and public areas of campus in creating an objective

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96. See *supra* notes 92–94.

97. See Wiewel, *supra* note 94.

98. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984) (holding that the exclusionary rule is not applicable in civil deportation proceedings and that Lopez-Mendoza, an illegally residing immigrant, was not entitled to benefit from the full scope of protections offered by the Fourth Amendment).

99. Letter from Karen Lang, Dir., Immigration & Customs Enf't, to Congresswoman Zoe Lofgren (Mar. 14, 2007), <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf> [<https://perma.cc/2S5Q-HNHK>]; see ANTHONY J. BENEDETTI & WENDY S. WAYNE, A PRACTICE ADVISORY ON ICE USE OF ADMINISTRATIVE WARRANTS AND TRUE WARRANTS IN IMMIGRATION AND CRIMINAL ENFORCEMENT, COMM. FOR PUB. COUNSEL SERVS., IMMIGRATION IMPACT UNIT, COMMONWEALTH OF MASS. 6 (Feb. 19, 2013), <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf> [<https://perma.cc/2S5Q-HNHK>].

100. Memorandum from John Morton, Dir., Immigration & Customs Enf't, to Field Office Dirs., Special Agents in Charge & Chief Counsel 2 (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/LRF9-ZB7P>].

101. *Id.* at 1.

expectation of privacy.<sup>102</sup> This privacy assessment is part of the analysis in obtaining a search warrant, even under the lower evidentiary standard in the civil context. “Both exclusion and deportation orders have long been understood to be civil directives” not a form of criminal punishment.<sup>103</sup> In *Fong Yue Ting v. United States*, the Supreme Court characterized such orders not as “punishment for a crime . . . but [as] a method of enforcing the return to his own country of an alien who has not complied with the conditions . . . [Congress] has determined that his continuing to reside [in the U.S.] shall depend.”<sup>104</sup>

ICE relies on administrative warrants signed by a designated official within ICE itself, “issued pursuant to the various enforcement provisions outlined in the [INA]” that provide an agent with the authority “to arrest a person suspected of violating immigration laws.”<sup>105</sup> Because administrative warrants are not issued by a neutral magistrate, they “do not give ICE officials authority to enter a place where there is a reasonable expectation of privacy,” such as an individual’s residence or the non-public area of a business, without consent.<sup>106</sup>

ICE can also obtain a warrant from a neutral magistrate or judge, often referred to as a true warrant.<sup>107</sup> These are civil, not criminal warrants, and thus subject to a lower evidentiary standard. For example, to obtain a true warrant for a non-public commercial space, immigration enforcement agents need only demonstrate “sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials”<sup>108</sup> and “need not identify the specific undocumented individuals that are the subject of the search.”<sup>109</sup> Where there is a greater expectation of privacy, such as a home, the burden of proof for a true warrant approximates probable cause, the standard for criminal warrants;<sup>110</sup> a court must assess both the objective and subjective expectation of privacy in making warrant determinations.

The expected level of privacy would in turn dictate the type of warrant needed for enforcement and thus the evidentiary burden that must be satisfied before obtaining that warrant. As such, the location’s privacy level will, in part, dictate the extent to which the university would be able to prevent immigration officials from entering parts of campus. Courts have granted dormitories, both individual

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102. See *Overview of the Fourth Amendment*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 3, 6–8 (2017) (“The Supreme Court has adopted a two-part test to determine whether a person has a legitimate expectation of privacy. First, the individual must have a subjective expectation of privacy in a location or thing. Second, society must be prepared to recognize that expectation as objectively reasonable.”).

103. Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1198 (2008); see generally IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK (10th ed. 2006) (summarizing immigration laws, cases, and regulations).

104. 149 U.S. 698, 730 (1893).

105. BENEDETTI & WAYNE, *supra* note 99, at 1.

106. BENEDETTI & WAYNE, *supra* note 99, at 2.

107. See *id.*

108. *Id.* (citing *Blackie’s House of Beef, Inc. v. Castillo & INS*, 659 F.2d 1211, 1225 (D.C. Cir. 1981)).

109. *Id.*

110. *Id.*; see *United States v. Castellanos*, 518 F.3d 965, 971–72 (8th Cir. 2008); *Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1022 (N.D. Ill. 1982).

rooms and some public spaces within the building, the same expectation of privacy as a home or other residence.<sup>111</sup> Classrooms, school buildings, or outside courtyards are not easily categorized spaces, but a location is more likely to be seen as private if few “people have access to it, [if it] is usually restricted to the public,” and if “students and staff need an ID card to access it.”<sup>112</sup> Public colleges and universities, or schools with open-door policies that permit members of the general public to move around campus freely, might be presumed to have a lower expectation of privacy. Since many areas of campus are less easily classified, making the expected level of privacy more ambiguous, institutions have more power to define the expected level of privacy. Courts may take an institution’s own designations regarding privacy expectations on its campus into account when assessing the subjective element of the reasonable expectation of privacy.

Schools seeking to be protective of undocumented students could establish written policies that (1) require officers to obtain a warrant prior to entering campus and (2) guide interactions with immigration enforcement officers, including maps or visual aids.<sup>113</sup> Institutions that wish to be more protective can opt to establish set policies and provide training for staff (for example, campus police or university administrators) on how to engage with immigration officials and to ensure the federal authorities have the appropriate legal permissions to obtain the requested access, information, or documents.<sup>114</sup> Within these protocols, schools can request the involvement of their institution’s general counsel, ensure that immigration officers provide their “name, identification number and agency affiliation,” and request copies of warrants or authorizations.<sup>115</sup>

However, it is also important to note that under existing precedent “violations of the Fourth Amendment ordinarily cannot be remedied in deportation proceedings through application of the exclusionary rule, unless they are so ‘egregious’ as to ‘transgress notions of fundamental fairness.’”<sup>116</sup> Also, the Fourth Amendment

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111. See e.g., *State v. Houvner*, 186 P.3d 370, 375 (Wash. Ct. App. 2008) (finding reasonable expectation of privacy in the shared hallway of a dormitory).

112. IMMIGRATION RESPONSE INITIATIVE, *supra* note 76, at 18.

113. See, e.g., *id.* at 16–20; Elizabeth Redden, *What’s in a Name?*, INSIDE HIGHER ED (Dec. 2, 2016), <https://www.insidehighered.com/news/2016/12/02/outlining-commitments-undocumented-immigrant-students-some-presidents-avoid-term> [https://perma.cc/JDW9-Q9T4] (surveying examples of written policies at universities and providing a broad overview of their associated goals). For examples of such written policies currently in place at universities, see *FAQ ICE at UC System Campus*, DIV. STUDENT AFFAIRS, UNIV. CAL. BERKELEY (Mar. 20, 2017), <http://sa.berkeley.edu/faq-ice-uc-system-campus> [https://perma.cc/UR3K-HSSE]; *Visas and Immigration: FAQs*, REVES CTR., COLL. WILLIAM & MARY [https://www.wm.edu/offices/revescenter/issp/visasandimmigration/faq\\_daca\\_executive\\_orders/index.php#sanctuary](https://www.wm.edu/offices/revescenter/issp/visasandimmigration/faq_daca_executive_orders/index.php#sanctuary) [https://perma.cc/B965-AJEQ] (last visited Mar. 14, 2018).

114. See, e.g., Charles F. Robinson, *Frequently Asked Questions for University Employees About Possible Federal Immigration Enforcement Actions on University Property*, OFFICE OF THE GEN. COUNSEL, REGENTS UNIV. CAL. (Mar. 20 2017), <https://www.universityofcalifornia.edu/sites/default/files/frequently-asked-questions-federal-immigration-enforcement-uc.pdf> [https://perma.cc/D3ZP-FLMU].

115. *Id.*

116. *Kalhan*, *supra* note 103, at 1199 (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051–52 (1984)); see Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 450–52 (1997).

may not “offer substantial protection of privacy interests in immigration and citizenship status” proceedings because the Fourth Amendment does not apply in many domestic enforcement situations.<sup>117</sup> Moreover, the Court has given wide latitude “to interrogate individuals concerning their status in almost any context,” even when the potential for excessive government coercion, selective or arbitrary enforcement, and manipulation” exists.<sup>118</sup> Other cases demonstrate the limited protections the Fourth Amendment offers for undocumented individuals.<sup>119</sup>

In sum, institutions which aim to be more protective can limit the entry of enforcement officials, except in situations when a valid warrant is issued. Courts need to assess the expected level of privacy for campuses in making warrant determinations, which may be influenced by an institution’s own privacy expectations for different areas of campus.

#### C. PREVENTING SCHOOL OFFICERS FROM ACTING AS IMMIGRATION ENFORCEMENT AGENTS

Several schools, including New York University,<sup>120</sup> the University of Florida,<sup>121</sup> and the University of Michigan,<sup>122</sup> have stated that their campus officers will not participate in immigration enforcement actions. Officers play a significant role on campuses.<sup>123</sup> According to a DOJ report, 92% of public colleges and universities have sworn and armed campus officers; nationally, 81% can patrol off-campus areas and 86% can make arrests.<sup>124</sup>

117. See Kalhan, *supra* note 103, at 1206.

118. *Id.* at 1208.

119. *Id.* at 1206–08. One example is the case of *INS v. Delgado*, in which the Court upheld workplace raids conducted without individualized suspicion. 466 U.S. 210, 212, 221 (1984). Similarly, in *Muehler v. Mena*, the Court held there was no Fourth Amendment violation when a federal immigration agent accompanied officers on a drug raid and conducted an interrogation of a suspect. 544 U.S. 93, 102 (2005).

120. Letter from Andrew D. Hamilton, President, N.Y. Univ., to Members of the N.Y. Univ. Cmty. (Nov. 29, 2016), <http://www.nyu.edu/content/dam/nyu/president/documents/11.29.16-letter-from-andrew-hamilton.pdf> [https://perma.cc/N8U6-EKE2] (“NYU’s public safety officers do not inquire as to an individual’s immigration status . . . and would not be participating in any enforcement activities with federal immigration authorities.”).

121. Paige Fry, *Students Petition for UF as Sanctuary Campus*, INDEP. FLA. ALLIGATOR (Feb. 3, 2017, 2:00 PM), [http://www.alligator.org/news/campus/article\\_5285aab6-e9cc-11e6-bc21-67f900319c5f.html](http://www.alligator.org/news/campus/article_5285aab6-e9cc-11e6-bc21-67f900319c5f.html) [https://perma.cc/K2HV-M6TW] (quoting a university spokesperson as stating that “University Police will . . . not take law enforcement actions under the immigration law because that is the role of the U.S. Immigration and Customs Enforcement.”).

122. *Protecting the Interests of Our International Community of Scholars*, OFFICE OF THE PRESIDENT, UNIV. MICH. (Jan. 28, 2017), <http://president.umich.edu/news-communications/on-the-agenda/protecting-the-interests-of-our-international-community-of-scholars/> [https://perma.cc/95L3-28UN] (“Campus police will not partner with federal, state, or other local law enforcement agencies to enforce federal immigration law except when required to do so by law.”).

123. Melinda D. Anderson, *The Rise of Law Enforcement on College Campuses*, ATLANTIC (Sept. 28, 2015), <https://www.theatlantic.com/education/archive/2015/09/college-campus-policing/407659/> [https://perma.cc/LU53-FS3Y] (noting that “the numbers of campus officers have continued to expand” and “[o]fficers have increasingly gained the ability to arrest and patrol outside jurisdictions, and [that] the growth to law-enforcement hires has outpaced that of student enrollment”).

124. *Id.*

Generally, only federal officers can act to enforce immigration policies. However, if campus officers are deputized, meaning that local agents are given authority to stand in the shoes of federal agents by the federal government, they may be required to act in enforcing immigration policies.<sup>125</sup> State and local rules govern whether campus officers will be deputized to enforce immigration policies.<sup>126</sup> Campus policies may provide guidance for non-university police officers who attempt to enter campus but cannot stop officers with a valid warrant from entering the school.

Institutions that have pledged not to allow campus officers to voluntarily assist with immigration enforcement are acting consistent with federal law, which “does not obligate local law enforcement—including sworn campus police officers—to devote resources to the enforcement of federal immigration laws.”<sup>127</sup> In fact, campus police cannot enforce administrative warrants issued by ICE unless they are deputized.<sup>128</sup> Also, campus officers do “not have the authority to participate in a search authorized for potential civil immigration law violations.”<sup>129</sup>

Under the INA, however, local law enforcement agencies are permitted to form cooperative agreements with immigration enforcement officials and agents on a voluntary basis to assist with enforcement efforts.<sup>130</sup> The 287(g) program established in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “allows a state [or] local law enforcement entity to enter into a partnership with ICE.”<sup>131</sup> Agencies that wish to participate must sign a memorandum of agreement and consent to established officer selection and training requirements.<sup>132</sup> Currently, seventy-five law enforcement agencies operating in twenty states participate in the 287(g) program<sup>133</sup> and have substantially assisted in enforcement efforts.<sup>134</sup> Institutions seeking to adopt sanctuary measures would

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125. *See Deputy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“1. A person appointed or delegated to act as a substitute for another, esp. for an official. 2. Someone whose job is to help a sheriff, marshal, etc.”).

126. *See* 8 U.S.C. § 1357(g) (2006) (specifying that “to the extent consistent with State and local law,” immigration officer duties may be carried out by a qualified “officer or employee of [a] State or subdivision” when “the [U.S.] Attorney General . . . enter[s] into a written agreement” with the State or subdivision to that effect).

127. Berger, *supra* note 53, at 9.

128. IMMIGRATION RESPONSE INITIATIVE, *supra* note 76, at 19.

129. *Id.*

130. Berger, *supra* note 53.

131. U.S. IMMIGRATION & CUSTOMS ENF’T, FACT SHEET: DELEGATING OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (2009), [http://bento.cdn.pbs.org/hostedbento-prod/filer\\_public/productions/ndn/pdf/Section287\\_g.pdf](http://bento.cdn.pbs.org/hostedbento-prod/filer_public/productions/ndn/pdf/Section287_g.pdf) [<https://perma.cc/97E4-6BRL>].

132. *Id.*

133. U.S. IMMIGRATION & CUSTOMS ENF’T, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287 (G) IMMIGRATION AND NATIONALITY ACT (2018), <https://www.ice.gov/factsheets/287g> [<https://perma.cc/CE7V-E45F>].

134. A. Elena Lacayo, *The Impact of Section 287(g) of the Immigration and Nationality Act on the Latino Community*, NAT’L COUNCIL LA RAZA (2010), <http://immigrantsandiego.org/wp-content/themes/techified/download/287greportfinal.pdf> [<https://perma.cc/24EY-JQL4>] (“A recent OIG report found that in fiscal year 2008, deputized 287(g) officers identified and removed 33,831 individuals, or 9.5% of all ICE removals.”).

not be forced to join the 287(g) program but could be impacted if state or local police within the jurisdiction enter into a 287(g) agreement.<sup>135</sup>

Beyond voluntary action or inaction pursuant to federal policies, enacted or proposed legislation at the state and local level may be particularly influential on sanctuary campus policies, particularly related to enforcement efforts by campus police. In Wisconsin, for example, the “University of Wisconsin Police Department and Madison Police Department officers have full authority from the state Legislature to enforce laws and applicable rules on campus without seeking permission of the university.”<sup>136</sup> In Texas, the legislature passed a bill to facilitate immigration enforcement that affected school campuses. This legislation imposes “civil fines for non-cooperation by local entities including campus police departments,” but also “puts sheriffs and other police chiefs at risk of criminal charges and other serious sanctions if they do not help the federal government enforce immigration laws by complying with requests to detain immigrants.”<sup>137</sup> Analysis of the legislation prior to its enactment noted it would prevent college police forces from being “able to prevent officers from asking about arrestees’ immigration status or keep them from communicating with immigration officials” and require campus officers to “hold a person while [federal] officials determined whether that person was in the” United States legally.<sup>138</sup>

Proponents of sanctuary policies fear increased targeting of the undocumented immigrant population, which could reduce trust in the police, adversely impact cooperation with ongoing investigations, and result in an under-reporting of crime.<sup>139</sup> However, those who favor stronger enforcement efforts emphasize the tensions that may result from noncooperation between agencies and risks to community safety from nonenforcement.<sup>140</sup> Ultimately, the wide variation in state and local law and the range of cooperative agreements to which individual

135. The program also has drawback at the federal level. Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POLICY INST. (Jan. 2011), <https://www.migrationpolicy.org/pubs/287g-divergence.pdf> [https://perma.cc/H5BB-NR4V] (noting current drawbacks to participation in the program, including the costs associated with redirected resources, training, and detention).

136. Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/> [https://perma.cc/2Y87-J6TQ]; see also Elizabeth Redden, *Can a Campus be a Sanctuary?*, INSIDE HIGHER ED (Nov. 15, 2016), [https://www.insidehighered.com/news/2016/11/15/growing-movement-calls-universities-limit-their-cooperation-federal-immigration?mc\\_cid=0cdad2e794&mc\\_eid=5018bae6c8](https://www.insidehighered.com/news/2016/11/15/growing-movement-calls-universities-limit-their-cooperation-federal-immigration?mc_cid=0cdad2e794&mc_eid=5018bae6c8) [https://perma.cc/WVW6-2G99].

137. Tom Dart, *Texas Bill Would Punish Police Who Do Not Comply with Immigration Enforcers*, GUARDIAN (Apr. 27, 2017, 12:49 AM), <https://www.theguardian.com/us-news/2017/apr/27/texas-sanctuary-cities-bill-police-detain-immigrants> [https://perma.cc/T9JC-N28F].

138. Rick Seltzer, *Required to Detain*, INSIDE HIGHER ED (Feb. 17, 2017), <https://www.insidehighered.com/news/2017/02/17/texas-bill-could-force-campus-police-play-role-immigration-matters> [https://perma.cc/HC84-CELY].

139. Frank Stoltze, *Pasadena Ends Agreement with Immigration Authorities*, S. CAL. PUB. RADIO (Feb. 17, 2017), <http://www.scpr.org/news/2017/02/17/69158/pasadena-ends-agreement-with-immigration-authoriti/> [https://perma.cc/P3E6-N6W8].

140. Berger, *supra* note 53.



campuses are bound can result in an institution's discretion being quite broad or highly limited.

### III. ASSESSMENT OF THE LEGALITY AND RISKS OF POTENTIAL GOVERNMENT RESPONSES TO CAMPUS SANCTUARY POLICIES

This Part addresses the range of potential government responses to sanctuary policies. It also assesses the risks universities face when adopting sanctuary policies. This Part concludes that, although there would be limitations on the federal government's ability to punish sanctuary campuses, these federal responses are likely to present real obstacles to the adoption and continuation of protective measures. The mere threat of federal action would have a strong deterrent impact because, even if an institution is ultimately successful, there are likely to be substantial costs involved in challenging these actions, both in terms of the time and financial expense that institutions would face.

Specifically, to assess the government's options to oppose sanctuary campuses, this Part assesses: (A) the possibility of a suit for harboring an undocumented person under section 1324 of the INA, which prohibits sheltering or protecting illegally entering or residing immigrants; (B) the potential consequences for future federal funding; and (C) the potential consequences for current federal funding. The discussion of federal funding consequences includes an analysis of clear notice, anti-commandeering, and spending clause principles, in addition to First Amendment concerns.

#### A. HARBORING SUIT

When assessed narrowly, none of the proposed conduct of universities appears to leave institutions clearly out of compliance with federal legislation. Even if a school failed to comply with an individual provision, the consequences are not likely to cripple institutions because of limited enforcement efforts and relatively lax penalties. However, a criminal charge of harboring may have much more severe individual and institutional consequences, or at least serve as an effective deterrent to sanctuary campuses. This charge may be possible under section 1324 of the INA (the "harboring provision"), which prohibits concealing, shielding, or harboring unauthorized individuals who enter and remain in the United States.<sup>141</sup>

Under the most aggressive enforcement stance, the Department of Justice could bring a suit under section 1324 of the INA. There does not appear to be a case addressing enforcement of this provision on a university campus.<sup>142</sup> However, section 1324 of the INA is of particular concern because it was

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141. See 8 U.S.C. § 1324 (2005); KERLEN HERLING, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., HARBORING: OVERVIEW OF THE LAW, (Aug. 28, 2009), <https://cliniclegal.org/sites/default/files/finalharboring103107logo.pdf> [<https://perma.cc/FR3G-QN93>].

142. Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 46 (2012) (stating that although "[t]ens of thousands of undocumented students attend college each year . . . no university employee has ever been prosecuted or convicted with federal anti-harboring provisions for simply doing their job educating undocumented students").

specifically mentioned along with other statutes in a memorandum, entitled “Renewed Commitment to Criminal Immigration Enforcement,” that was circulated within the DOJ April 11, 2017. In the memo, Attorney General Jeff Sessions stressed the “[c]onsistent and vigorous enforcement of [these] key laws . . . [that] disrupt organizations and deter unlawful conduct” as a “high priority . . . to establish lawfulness in our immigration system.”<sup>143</sup>

Section 1324 of the INA prohibits “bringing in illegal aliens, transporting or moving illegal aliens within the United States, and inducing an alien to come to the United States,”<sup>144</sup> generally encompassing efforts to aid or abet the illegal entry of aliens into the country. Most relevantly, this provision imposes criminal penalties on any person who:

[K]nowing[ly] or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.<sup>145</sup>

Section 1324 of the INA could create broad liability, both for institutions and individuals, for any action that assists an undocumented immigrant from remaining in the U.S. As Catholic Legal Immigration Network, the nation’s largest network of non-profit immigration programs, explains:

Under the relevant case law, harboring means “to afford shelter to,” and includes any conduct “tending to substantially facilitate an immigrant’s remaining in the U.S. illegally.” However, in some courts, such as the U.S. Court of Appeals for the Sixth and maybe the Ninth and Eleventh Circuits, harboring must be done with the “intent” to assist the immigrant’s attempt to evade or avoid detection.<sup>146</sup>

Several circuits have upheld a broad reading of the statute. The Second Circuit, for example, upheld a harboring conviction against a citizen who hired an illegally residing immigrant as a domestic worker because the defendant, though not acting

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143. Memorandum from Att’y Gen. Jeff Sessions, U.S. Dep’t of Justice, to all federal prosecutors (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/98SF-V7JF>]. Additional provisions referenced in the Memorandum include: 8 U.S.C. § 1328, concerning the “importation of aliens for immoral purposes;” 8 U.S.C. § 1325, regarding “improper entry by aliens;” 8 U.S.C. § 1326, regarding “[r]eentry of removed aliens;” 18 U.S.C. § 1028A, concerning “[a]ggravated identity theft;” 18 U.S.C. § 1546, covering “[f]raud and misuse of visas, permits, and other documents;” and 18 U.S.C. § 111, which addresses “assaulting, resisting, or impeding officers.” *Id.*

144. Emily Breslin, *The Road to Liability is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People under 8 U.S.C. § 1324(a)(1)(A)(III)*, 11 RUTGERS J.L. & RELIGION 214, 215 (2009).

145. 8 U.S.C. § 1324(a)(1)(A)(iii) (2005).

146. HERLING, *supra* note 141 (emphasis omitted).

in a clandestine manner, shielded the alien from discovery by authorities.<sup>147</sup> In another case, the Second Circuit held that “conduct that is intended both to substantially help an unlawfully present alien remain in the [U.S.], and also to help prevent detection of alien by authorities” constitutes harboring.<sup>148</sup> Several courts have upheld the provision’s constitutionality and deemed that it is not impermissibly vague.<sup>149</sup>

In the broadest sense, sanctuary efforts by a university that facilitate the ongoing presence of undocumented students, or shield those individuals from detection by federal authorities, could fall within an expansive reading of harboring. Such a construction would encompass a university’s efforts to shelter illegally residing students from detection by providing material support.

One possible work around to this provision is to avoid the “knowing” requirement. Schools could avoid soliciting information that would disclose a student’s immigration status. Even indirect questions, such as requesting a student’s social security number, could be eliminated.<sup>150</sup> However, institutions that do have current knowledge of their students’ immigration status or that become aware through students’ disclosure would satisfy the “knowing” element of the provision. Thus, schools may not be able to buffer themselves from liability if immigration status is already known or disclosed at any point. More importantly, a policy to avoid knowing students’ immigration status may fall into the category of “reckless disregard,” as refusal to collect this information may constitute a “conscious” or “serious indifference” to the consequences non-collection.<sup>151</sup>

It is difficult to predict how the anti-harboring provision would be applied in the sanctuary campus context in terms of assessing the potential liability for institutions and individuals. Given the government has brought harboring cases against both individuals and organizations, it is unclear the extent to which individuals could face personal liability, in addition to the institutional liability of the colleges and universities.<sup>152</sup> As noted, there does not appear to be a case analogous to the circumstances currently being considered, of universities (either as an

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147. *United States v. George*, 779 F.3d 113, 115, 119 (2d Cir. 2015) (explaining that although the defendant knew aliens needed authorization to work or live in the United States, defendant “hired [the employee] without ever asking to see such authorization or having [the employee] fill out any employment authorization forms”).

148. *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013) (noting that the defendant “engage[d] in conduct . . . intended both to substantially help an unlawfully present alien remain in the [United States]—such as by providing him with shelter, money, or other material comfort—and also . . . intended to help prevent the detection of the alien by the authorities”).

149. For examples of appellate courts dismissing vagueness claims under section 1324 as meritless or frivolous, see *United States v. Gonzalez-Hernandez*, 534 F.2d 1353, 1354 (9th Cir 1976); *United States v. Cantu*, 501 F.2d 1019, 1021 (7th Cir. 1974); *Martinez-Quiroz v. United States*, 210 F.2d 763, 764 (9th Cir. 1954).

150. *Aldana et al.*, *supra* note 142, at 61–62.

151. *Disregard*, BLACK’S LAW DICTIONARY (10th ed. 2014).

152. Patricia S. Wall & Lee Sarver, *Liability of College Faculty and Administrators*, 24 RES. HIGHER EDUC. J. 1 (Aug. 2014), <http://www.aabri.com/manuscripts/141849.pdf> [<https://perma.cc/Q9GH-JZ5Y>] (speaking generally of some circumstances under which college faculty and administrators may be individually liable).

institution or individuals as representatives as such) facing legal action under section 1324.<sup>153</sup>

If a harboring-related claim were successfully brought, the punishment under the statute is a fine, up to twenty years imprisonment, or both.<sup>154</sup> Also, “the unit of prosecution is now based on each alien in respect to whom a violation occurs,” whereas previous enforcement focused on “each transaction, regardless of the number of aliens involved.”<sup>155</sup> Rather than a charge for each overarching act of noncompliance, such as the implementation of a single policy, it seems possible that a claim could be filed for each undocumented student who benefits from the sanctuary policy. This possibility heightens the risks. Because the INA provides a mechanism for criminal sanctions, and thus it may be a more appealing mechanism for enforcement for federal actors who are staunch opponents of sanctuary provisions, rather than pursuing civil alternatives.<sup>156</sup>

The ability of federal entities to obtain compliance through the threat of criminal sanctions, rather than through funding statutes, would provide leverage against university actors. Given the potentially high risk posed by section 1324 sanctions, especially in the face of high uncertainty regarding the scope of this provision, there could be a substantial deterrent impact, even if claims under this statute are not ultimately successful.

#### B. NEW LEGISLATION

This section addresses current federal proposals related to sanctuary efforts. This section concludes that some proposed legislation might be impermissible because of its overly broad scope, coercive conditions, and impositions on state officials. However, a more narrowly tailored proposal could be permissible. This section introduces the proposals and then analyzes the constitutional principles that would be utilized to analyze such legislation.

##### 1. Current Federal Proposals

Federal representatives have introduced several bills during the current session to safeguard sanctuary cities, including proposals to nullify Executive Order 13768<sup>157</sup> and limit compliance with immigration detainer requests.<sup>158</sup> However,

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153. Aldana et al., *supra* note 142, at 47.

154. 8 U.S.C. § 1324(a)(1)(B) (2005); Jon Feere, *The Myth of the “Otherwise Law-Abiding” Illegal Alien*, CTR. FOR IMMIGRATION STUDIES (Oct. 2013), <http://cis.org/myth-law-abiding-illegal-alien> [<https://perma.cc/AZP4-EDGU>] (“Punishment ranges from one to 10 years, but can reach up to 20 years if the alien places a person’s life in jeopardy during the process, if the aliens presented a life-threatening health risk to people in the United States, or if aliens were transported in groups of 10 or more . . .”).

155. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL 9-73.100 (2017), <https://www.justice.gov/usam/criminal-resource-manual-1907-title-8-usc-1324a-offenses> [<https://perma.cc/FB4Y-K38A>].

156. HERLING, *supra* note 141.

157. *See A Bill to Nullify the Effect of the Recent Executive Order That Makes the Vast Majority of Unauthorized Individuals Priorities for Removal and Aims to Withhold Critical Federal Funding to Sanctuary Cities*, S. Res. 415, 115th Cong. (2017); *Protect Our Sanctuary Cities Act*, H.R. Res. 1076, 115th Cong. (2017).

158. *See Safeguarding Sanctuary Cities Act of 2017*, H.R. Res. 748, 115th Cong. (2017).

legislators in opposition to sanctuary cities have also introduced bills to stop sanctuary jurisdictions from obtaining federal funds and to force cooperation with federal enforcement officials.<sup>159</sup>

One proposal, H.R. 483, entitled “No Funding for Sanctuary Campuses Act,” specifically addresses sanctuary policies in higher education.<sup>160</sup> This resolution would prohibit sanctuary institutions from receiving funding under Title IV of the Higher Education Act of 1965, which provides student assistance in the form of grants, loans, federal work-study, and other mechanisms.<sup>161</sup> This proposed bill broadly defines sanctuary campuses as institutions with policies that restrict immigration-related information sharing or refuse to comply with detainer requests, including under section 1373. It also encompasses institutions that violate 8 U.S.C. § 1324, including the aforementioned harboring provision.<sup>162</sup> These provisions would likely encompass all of the sanctuary policies discussed in Part II. Moreover, the proposed legislation encompasses institutions that provide undocumented immigrants with “postsecondary education benefit[s] provided on the basis of residence within a State . . . to the same extent as a citizen or national . . . eligible for such benefit[s].”<sup>163</sup> Finally, it includes those campuses that have a policy or practice that limits DHS, of which ICE is a subsidiary entity, from “recruiting in a manner that is at least equal . . . to any other employer.”<sup>164</sup> The only policies that would constitute an exception to the sanctuary designation are those that protect an “individual who comes forward as a victim or a witness to a criminal offense.”<sup>165</sup>

There are aspects of the bill that would likely be constitutional. For instance, the condition requiring equal access to the DHS for campus recruiting would likely be upheld. It bears striking resemblance to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, a 2006 Supreme Court decision, which upheld against a First Amendment challenge a statute withholding funds from universities that refused to give military recruiters access to the campus and student body.<sup>166</sup>

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159. See Stop Dangerous Sanctuary Cities Act, S. Res. 87, 115th Cong. (2017); Stop Dangerous Sanctuary Cities Act, H.R. Res. 400, 115th Cong. (2017); Mobilizing Against Sanctuary Cities Act, H.R. Res. 83, 115th Cong. (2017); No Transportation Funds for Sanctuary Cities Act, H.R. Res. 824, 115th Cong. (2017).

160. See No Funding for Sanctuary Campuses Act, H.R. Res. 483, 115th Cong. (2017).

161. *Id.*

162. *Id.*

163. *Id.*; see generally Gilberto Sorio Mendoza, *Tuition Benefits for Immigrants*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jul. 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> [<https://perma.cc/XC4J-SF42>] (explaining that unauthorized immigrants are eligible for in-state tuition in twenty states, that some states authorize in-state tuition for unauthorized immigrants if certain conditions are met, and that several public institutions use private sources of funding to support financial aid for undocumented students, all of which are examples of educational benefits made available by the state to undocumented, legally residing, and citizen students alike).

164. H.R. Res. 483, 115th Cong. (2017).

165. *Id.*

166. 547 U.S. 47, 70 (2006); see Peter Beinart, *Milo Yiannopoulos Tested Progressives—and They Failed*, ATLANTIC (Feb. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/02/everyone-has-a-right-to-free-speech-even-milo/515565/> [<https://perma.cc/SV8N-L4DE>]. The sanctuary campus issue

Similarly, if universities are deemed to be in violation of section 1324 because their policies constitute harboring or abetting, their actions would not serve as a valid defense against the withdrawal of funding, because the underlying conduct is illegal.<sup>167</sup> Just as the Solomon Amendment did not hinder a school's speech but required campus access for military recruiters, sanctuary campus legislation would require certain conduct from institutions to remain eligible for federal funds while "schools remain free under the statute to express whatever views they may have on the" issue.<sup>168</sup>

## 2. Spending Clause

In *South Dakota v. Dole*<sup>169</sup> and *National Federation of Independent Business (NFIB) v. Sebelius*,<sup>170</sup> the Supreme Court addressed the constitutionality of threats of withholding funds or agencies being allowed to cut off funds that have already been allocated under the Spending Clause.<sup>171</sup> Under the prongs of the assessment,<sup>172</sup> the proposed No Funding for Sanctuary Campuses Act could reasonably be deemed to "promote the general welfare,"<sup>173</sup> as there are articulable risks of illegal immigration, both for those entering the country<sup>174</sup> and those already in the U.S.<sup>175</sup> It is also likely that the funding would be deemed related "to the federal interest in particular national projects or programs"<sup>176</sup> because conditions on the conduct of higher education institutions are directly related to

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also parallels some of the discussions regarding President Trump's Twitter threat to cut federal funds to Berkeley for failing to support free speech. *Id.* Generally, public institutions "cannot censor or prohibit events, or charge differential fees" to their student groups. *Id.* If there was differential treatment of the college Republican group or conservative speakers, this would be an impermissible viewpoint distinction. *Id.* However, some argue that the security risks posed by a separate, non-speech related motivation to the decision-making process. *Id.*

167. See generally 8 U.S.C. § 1324 (2005).

168. *Rumsfeld*, 547 U.S. at 60.

169. 483 U.S. 203 (1987).

170. 567 U.S. 519 (2012).

171. *NFIB*, 567 U.S. at 575; *Dole*, 483 U.S. at 206.

172. "[T]here are four separate types of limitations on the spending power: the expenditure must be for the general welfare, the conditions imposed must be unambiguous, they must be reasonably related to the purpose of the expenditure, and the legislation may not violate any independent constitutional prohibition." *Dole*, 483 U.S. at 213 (internal citations omitted).

173. *NFIB*, 567 U.S. at 632 (quoting *Dole*, 483 U.S. at 207).

174. Ray Walser & Jessica Zuckerman, *The Human Tragedy of Illegal Immigration: Greater Efforts Needed to Combat Smuggling and Violence*, HERITAGE FOUND. (June 22, 2011), <https://www.heritage.org/immigration/report/the-human-tragedy-illegal-immigration-greater-efforts-needed-combat-smuggling> [<https://perma.cc/HT8P-T7AK>] (noting the risks to those immigrating illegally, including "kidnapping, murder, and rape at the hands of violent drug cartels and ever more ruthless human smugglers" and along with the risks of "[c]rossing treacherous desert areas [that] exposes the travelers to heat exhaustion and dehydration").

175. Ronald Da Silva, *Examples of Serious Crimes by Illegal Aliens*, FED'N FOR AM. IMMIGRATION REFORM (2017), <http://www.fairus.org/issue/examples-of-serious-crimes-by-illegal-aliens> [<https://perma.cc/V9M3-S5UM>] (providing examples of crimes committed by illegally residing immigrants, including, among others, murder, manslaughter, and racketeering).

176. *E.g.*, *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); see also *NFIB*, 567 U.S. at 632 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

funding for those same institutions. The conditions in the proposed bill are more facially connected to immigration, unlike those in other bills that attempt to cut general funding, such as for infrastructure or transportation.<sup>177</sup>

However, it would be possible to argue that cutting all higher education funding provided in Title IV of the Higher Education Act is not sufficiently related, as most of the funds are not used to directly support immigration policies or undocumented students. Given the broad use of higher education funds,<sup>178</sup> and given that only a small percent of these funds benefit undocumented students, this argument appears persuasive.<sup>179</sup> Conversely, these conditions might be permissible, as courts do not require a tight fit between the interest at stake and the funding in question. For instance, “Title IX’s nondiscrimination guarantee reaches all of the operations of any educational institution that receives federal funding.”<sup>180</sup> In the same way that science departments and sports teams are connected by Title IX, so too might immigration policies and educational funding be deemed sufficiently related.

Even so, there are several respects in which the conditions imposed by the proposed bill are in apparent conflict with Supreme Court precedent. First, at least one of the conditions is not clearly unambiguous.<sup>181</sup> The notice requirement has been interpreted by courts with varying levels of stringency based on: “(a) notice of the *remedy* for violation of a funding condition, (b) notice of how the substantive rule imposed by that condition *applies* to particular facts, and (c) notice of the *facts* in a given case that violate that condition.”<sup>182</sup> The proposed bill defines sanctuary campuses as institutions that do not comply with section 1324’s anti-harboring provision.<sup>183</sup> However, as previously discussed, it is not clear what actions would constitute a violation of this provision. As a result, it is possible an institution may be categorized as a sanctuary campus—even if it attempted to comply with the condition—because of the ambiguity in the judicial

177. *See, e.g.*, No Transportation Funds for Sanctuary Cities Act, H.R. Res. 824, 115th Cong. (2017).

178. U.S. DEP’T OF EDUC., Federal Student Aid Annual Report—FY 2013 (2013), <https://www2.ed.gov/about/reports/annual/2013report/fsa-report.pdf> [<https://perma.cc/J3RK-M5KD>]. *See also* Alexandra Hegji, *The Higher Education Act (HEA): A Primer*, CONG. RESEARCH SERV. (Jan. 2, 2014), <http://www.higheredcompliance.org/resources/nps70-020614-12%20%284%29.pdf> [<https://perma.cc/EF7A-5EX2>] (“Title IV programs . . . provide financial assistance to students and their families. In FY2013, approximately \$137.6 billion in financial assistance was made available to 15 million students under these programs.”).

179. *See generally* Shanien Nasiripour & Lance Lamber, *Colleges Could Lose Billions If They Defy Trump*, BLOOMBERG (March 2, 2017), <https://www.bloomberg.com/graphics/2017-university-funding/> [<https://perma.cc/3UBW-PS5C>].

180. Emily J. Martin, *Title IX and the New Spending Clause*, AM. CONSTITUTION SOC’Y (Dec. 2012), [https://www.acslaw.org/sites/default/files/Martin\\_-\\_Title\\_IX\\_and\\_the\\_New\\_Spending\\_Clause\\_1.pdf](https://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf) [<https://perma.cc/AM99-MEN9>].

181. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

182. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 394 (2008).

183. *See* No Funding for Sanctuary Campuses Act, H.R. Res. 483, 115th Cong. § 493E(a)(1)–(2) (2017).

interpretation of section 1324. The lack of notice of what remedy is available, of which actions are in violation of the requirement, and how the condition would be imposed, all contribute to its ambiguity.

Second, the condition must not be, in itself, unconstitutional. In *Agency for International Development v. Alliance for Open Society International*, for example, the Supreme Court held it was impermissible to implement funding conditions that “seek to leverage funding to regulate speech outside the contours of the program itself” instead of “defin[ing] the limits of the government spending program,” or “specify[ing] the activities Congress wants to subsidize.”<sup>184</sup> Similarly, given that many private and public institutions are designated nonprofit organizations, the proposed funding conditions could be seen as forcing schools to adopt a particular anti-immigration policy or stance. The targeting of a pro-sanctuary viewpoint could be interpreted as a condition that is inherently unconstitutional. This is not direct government speech<sup>185</sup> and is distinct from access to campus issues that also implicate the First Amendment.<sup>186</sup> Alternatively, the condition could be deemed unconstitutional if it found to be animus-based. In *Dole*, the Court noted that “a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress’ broad spending power.”<sup>187</sup>

Finally, the condition must not be coercive. In *Dole*, conditioning five percent of highway funding on states’ setting a minimum drinking age was permissible.<sup>188</sup> However, in *NFIB*, the Court concluded that the Medicaid expansion provisions in the Affordable Care Act were unconstitutionally coercive.<sup>189</sup> The majority explained that changing the conditions for federal grant programs is impermissible if “such conditions take the form of threats to terminate other significant independent grants . . . [or] penalize States that choose not to participate . . . by taking away their existing . . . funding.”<sup>190</sup>

Key considerations in assessing the constitutionality of the proposed bill, including the effect of federal funds on the state budget, the percentage of federal funding at stake, the degree of administrative entrenchment of these programs, and the extent to which federal and state funding is intertwined, point to a lack of authority for such drastic action.<sup>191</sup> As a result, denying all federal higher education grants for the purpose of compelling cooperation with the enforcement of federal immigration policy is likely to be seen as coercive because of the severity of the funding cut (all federal funds under the Higher Education Act) and the

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184. 133 S. Ct. 2321, 2328 (2013).

185. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (noting that “compelled funding of government speech does not alone raise First Amendment concerns”).

186. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006).

187. *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987).

188. See *id.* at 211–12.

189. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012).

190. *Id.* at 580, 585.

191. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U.L. REV. 577, 605–09 (2013).



amount of funding in question (approximately \$137.6 billion for fourteen million students<sup>192</sup>).<sup>193</sup>

### 3. Anti-Commandeering

The anti-commandeering doctrine, established in the Supreme Court's decisions *New York v. United States*<sup>194</sup> and *Printz v. United States*,<sup>195</sup> "prohibits the federal government from commandeering state governments: more specifically, from imposing targeted, affirmative, coercive duties upon state legislators or executive officials" under the Tenth Amendment.<sup>196</sup> In the proposed No Funding for Sanctuary Campuses Act, institutions that do not comply with information sharing efforts, such as those outlined in section 1373, are subject to punitive measures.<sup>197</sup> Therefore, this mandate on states must be analyzed in the context of anti-commandeering doctrine.

It is possible that section 1373 violates the anti-commandeering doctrine because, in "forbidding higher-level state and local officials from mandating that lower-level ones refuse to help in enforcing federal policy,"<sup>198</sup> the policy encroaches on "[s]tates as independent and autonomous political entities."<sup>199</sup> In *Printz*, the Brady Handgun Violence Prevention Act of 1993 impermissibly "assigned the duty of conducting a [background] check to the 'chief law enforcement officer' of each city or county, who was required to send the information produced to the federal government."<sup>200</sup> The mandated information sharing required in the proposed bill to defund sanctuary campuses might be similarly impermissible because "the Federal Government may not compel the States to

192. U.S. DEP'T OF EDUC., *Federal Student Aid Annual Report—FY 2013* (2013), <https://www2.ed.gov/about/reports/annual/2013report/fsa-report.pdf> [https://perma.cc/J3RK-M5KD].

193. See Kelly Knaub, *Agency Examines Sanctuary Policies, Curbs On Fed. Funds*, LAW360 (Mar. 30, 2017, 9:05 PM), <https://www.law360.com/articles/907756/agency-examines-sanctuary-policies-curbs-on-fed-funds> [https://perma.cc/838E-9GNL]; see generally Mary O'Leary, *Yale Law Prof Sees Constitutional Issues in Trump Immigration Orders; Reform Advocate Lauds Enforcement*, NEW HAVEN REG. (Jan. 29, 2017, 9:54 PM), <http://www.nhregister.com/government-and-politics/20170129/yale-law-prof-sees-constitutional-issues-in-trump-immigration-orders-reform-advocate-lauds-enforcement> [https://perma.cc/H4JL-SGZ4]; Jane Chong, *Sanctuary 101, Part III: Can Trump Condition Federal Funds This Way?*, LAWFARE (Mar. 15, 2017), <https://www.lawfareblog.com/sanctuary-101-part-iii-can-trump-condition-federal-funds-way> [https://perma.cc/3MUU-9DGD].

194. 505 U.S. 144, 176 (1992) ("The Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.").

195. 521 U.S. 898, 963 (1997) (Stevens, J., dissenting).

196. Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 158, 161 (2001).

197. See No Funding for Sanctuary Campuses Act, H.R. Res. 483, 115th Cong. (2017).

198. Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities Is Unconstitutional*, WASH. POST (Jan. 26, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.8678aa95fc59](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.8678aa95fc59) [https://perma.cc/6V46-MM7J].

199. *Printz*, 521 U.S. at 928.

200. Garrett Epps, *Trump's Sloppy, Unconstitutional Order on 'Sanctuary Cities'*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trumps-sloppy-unconstitutional-order-on-sanctuary-cities/514883/> [https://perma.cc/BQ52-PQHQ] (internal quotation omitted).

enact or administer a federal regulatory program.”<sup>201</sup>

In another case, the Second Circuit upheld section 1373 against legal challenge. In its carefully crafted language, “the Second Circuit left open the possibility that a city or state could enforce a law forbidding law enforcement from revealing immigration status to anyone, but not one . . . [that only bars] telling the federal government.”<sup>202</sup> This language would indicate that a broader rule against information sharing, rather than a provision that narrowly targets non-disclosure specifically or exclusively to the federal government, may be permissible.

Supporters of section 1373 or the proposed legislation may argue this policy merely empowers local officials who wish to report information, rather than imposing a burdensome, affirmative mandate. However, the requirements set forth in No Funding for Sanctuary Campuses Act impede on states’ autonomy, making the proposed legislation unlikely to survive legal challenge.

### C. CURRENT FUNDING

To assess the current threats to funding, this subpart outlines the available federal funds at stake. In sum, it is unlikely that current funding could be withheld given that higher education funding is not explicitly conditioned on compliance with immigration legislation.

#### 1. Federal Funding at Stake

Funding under the Higher Education Act amounts to approximately \$137.6 billion for fourteen million students.<sup>203</sup> Pell Grants, which are “grants awarded to college students from low-income families[,] hit an all-time high of about \$36 billion” in 2010.<sup>204</sup> For instance, the federal government spent over \$184 billion in grants and loans between 2015 and 2016.<sup>205</sup> Another example is research and development (R&D) grants, which have previously amounted to more than \$40 billion in federal appropriations.<sup>206</sup> At some institutions, over 60% of their R&D budgets are accounted for through these federal grants.<sup>207</sup> According to The Pew Charitable Trusts, “[a]n additional \$1.6 billion supported other mainly need-based financial aid grants.”<sup>208</sup> “Veterans’ educational benefits,” totaling \$12.2 billion, “[g]eneral-purpose appropriations”, totaling \$3.8 billion, and “[o]ther

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201. *Printz*, 521 U.S. at 933.

202. Epps, *supra* note 200.

203. *See supra* note 178.

204. Kellie Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER ED (June 2, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments> [<https://perma.cc/T7LL-FHUK>].

205. *Trends in Student Aid 2016*, COLL. BD. (Dec. 2016), [https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid\\_0.pdf](https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf) [<https://perma.cc/RRQ9-ASJK>].

206. *10 Universities That Receive the Most Government Money*, HUFFINGTON POST (Apr. 29, 2013), [http://www.huffingtonpost.com/2013/04/27/universities-government-money\\_n\\_3165186.html](http://www.huffingtonpost.com/2013/04/27/universities-government-money_n_3165186.html) [<https://perma.cc/DRK9-X8E7>].

207. *Id.*

208. PEW CHARITABLE TRUSTS, *FEDERAL AND STATE FUNDING OF HIGHER EDUCATION* 1, 11 (Jun. 2015), [http://www.pewtrusts.org/~media/assets/2015/06/federal\\_state\\_funding\\_higher\\_education\\_final.pdf](http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf) [<https://perma.cc/QP8B-PU8D>].

federal grant programs,” totaling \$2.2 billion, are also significant federal education expenses.<sup>209</sup>

## 2. Effects of Executive Order 13768 and Other Cuts

Dozens of sanctuary cities and hundreds of sanctuary counties have adopted a wide variety of policies with the intent to protect undocumented immigrants.<sup>210</sup> On January 25, 2017, President Trump issued Executive Order 13768, entitled “Enhancing Public Safety in the Interior of the United States.”<sup>211</sup> The order established that sanctuary jurisdictions “are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.”<sup>212</sup> Specifically, funding will be withheld from sanctuary jurisdictions that violate 8 U.S.C. § 1373’s mandate that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>213</sup> If enforced, cities stand to lose billions of dollars in federal funding.<sup>214</sup> The order is subject to legal challenge,<sup>215</sup> but some jurisdictions have capitulated.<sup>216</sup> A preliminary injunction was issued in April 2017.<sup>217</sup>

Unless federal funds used for higher education are explicitly conditioned on immigration compliance, it would not be possible to eliminate current funding streams of both entitlement-based spending and discretionary funding.<sup>218</sup> Withholding current funding would be assessed under the “clear notice” standard, the same grounds that could also serve to challenge the Executive Order.<sup>219</sup> “Supreme Court precedent mandates that the federal government may not impose conditions on grants to states and localities unless the conditions are

209. *Id.*

210. Alan Berube, *Sanctuary cities and Trump’s executive order*, BROOKINGS INST. (Feb. 24, 2017), <https://www.brookings.edu/blog/unpacked/2017/02/24/sanctuary-cities-and-trumps-executive-order/> [<https://perma.cc/97RA-5SUN>].

211. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

212. *Id.*

213. Somin, *supra* note 198.

214. Octavio Blanco, *Sanctuary Cities Risk Billions in Defiance of Trump*, CNN MONEY (Nov. 19, 2016), <http://money.cnn.com/2016/11/19/news/economy/sanctuary-cities-trump-funding/> [<https://perma.cc/BN5F-JGSK>] (noting that estimates for current federal funding include \$10.4 billion for New York City and \$6 million for Santa Fe).

215. *See e.g.*, Thomas Fuller, *San Francisco Sues Trump Over ‘Sanctuary Cities’ Order*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/san-francisco-lawsuit-trump-sanctuary-cities.html> [<https://nyti.ms/2jS6FO9>]; Sonali Kohli, *34 Cities and Counties Urge a Federal Judge to Block Trump’s ‘Sanctuary Cities’ Executive Order*, L.A. TIMES (Mar. 23, 2017), <http://www.latimes.com/local/lanow/la-me-ln-sanctuary-cities-amicus-brief-20170322-story.html> [<https://perma.cc/T2D9-G47W>].

216. Kate Samuelson, *Miami-Dade Is No Longer a ‘Sanctuary’ for Undocumented Immigrants*, TIME (Jan. 27, 2017), <http://time.com/4651518/miami-dade-mayor-sanctuary-city-donald-trump/> [<https://perma.cc/F7U2-ZFLS>].

217. *See* Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017).

218. *See, e.g.*, Chong, *supra* note 193.

219. *See, e.g.*, Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 121 (2016) (describing the requirement that clear notice be given before conditioning funds from a federal to a state entity).

‘unambiguously’ stated in the text of the law”); because “few if any federal grants to sanctuary cities are explicitly conditioned on compliance with Section 1373,” it would seem that there are limited funds at risk when the clear notice principle is applied.<sup>220</sup> Adding a condition to federal funding post-hoc undermines the States’ ability to “knowingly decide whether or not to accept those funds” from the outset, based on a clear understanding of the expectations tied to the federal appropriation.<sup>221</sup> Although the Executive Order is likely vulnerable on clear notice grounds, if sanctuary cities were to lose funding, then funding for higher education institutions would also be in jeopardy due to the loss of direct appropriations and the likely shifts in state spending needed to compensate for the loss of federal dollars.

### 3. Implications of State Allocation of Federal Funds

Although there is a potential loss of federal funds to universities as a result of federal action to withdraw funds, states that wish to reward or punish institutions that have implemented sanctuary policies can alter their mechanisms for appropriating federal and state funds to specific institutions. However, states have little control in the allocation of federal funds, which are typically provided through (1) direct support to institutions, often for research or facilities, and (2) grants or loans to students.<sup>222</sup> For instance, the \$31.3 billion of federal funding for Pell grants<sup>223</sup> follows individual students based on financial need.<sup>224</sup> Universities do not have any discretion in this allocation.

### 4. State Funding at Stake

A potentially greater risk is that institutions will face changes in state funding in response to their sanctuary policies. Collectively, state investments in higher education are comparable in size to federal investments,<sup>225</sup> although total and per-pupil spending by states for higher education varies substantially.<sup>226</sup> Moreover, the

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220. Somin, *supra* note 198.

221. *Id.*

222. *Federal Funds for Higher Education—History, Federal Support for Students, Federal Support for Research*, STATE UNIV., <http://education.stateuniversity.com/pages/1988/Federal-Funds-Higher-Education.html> [<https://perma.cc/4LJG-MEEH>] (last visited Apr. 17, 2018).

223. PEW CHARITABLE TRUSTS, *supra* note 208.

224. *What Is a Pell Grant?*, COLL. BD. (2017), <https://bigfuture.collegeboard.org/pay-for-college/grants-and-scholarships/what-is-a-pell-grant> [<https://perma.cc/4YTC-73W2>] (last visited Apr. 17, 2018).

225. *See* PEW CHARITABLE TRUSTS, *supra* note 208; *see generally* Danielle Douglas-Gabriel, *Dear Mr. President: This Is How Federal Funding to Universities Works*, WASH. POST (Feb. 2, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/02/02/dear-mr-president-this-is-how-federal-funding-to-universities-works/?utm\\_term=.428468f81e4e](https://www.washingtonpost.com/news/grade-point/wp/2017/02/02/dear-mr-president-this-is-how-federal-funding-to-universities-works/?utm_term=.428468f81e4e) [<https://perma.cc/DH6M-QJPQ>] (describing federal funding mechanisms for higher education).

226. *See* Michael Mitchell et al., *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 15, 2016), <http://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up> [<https://perma.cc/5PMS-5XEE>].

ratio of federal to state funding varies substantially by state and institution.<sup>227</sup>

Thirty-seven states have current or pending funding formulas that account for performance indicators “such as course completion, time to degree, transfer rates, the number of degrees awarded, or the number of low-income and minority graduates.”<sup>228</sup> State actors (the legislature, governor, or both), could modify performance formulas to explicitly or implicitly respond to institutions’ immigration policies.

Explicit anti-sanctuary conditions could also be attached to the distribution of state funds, regardless of the model of the funding formula.<sup>229</sup> For instance, under a new Georgia law, “[p]rivate colleges that don’t cooperate with federal immigration authorities would lose state funding for scholarships and research.”<sup>230</sup> The law was not expected to have an immediate impact because no higher education institutions in Georgia had yet adopted sanctuary policies, but it is a clear deterrent. One of the law’s sponsors acknowledged “he wanted to ensure no schools adopt such a policy.”<sup>231</sup> Similar legislation is being considered in Alabama, Indiana and Pennsylvania.<sup>232</sup>

#### CONCLUSION

There are several enforcement mechanisms that the federal government can adopt to limit the validity or effectiveness of sanctuary campuses, particularly with regards to financial controls. Executive or legislative efforts to undermine sanctuary campuses would be subject to numerous legal challenges. Such efforts would undoubtedly set back the efforts of countless institutions seeking to include undocumented immigrants in higher education.

However, there are a number of policies that higher education institutions can reasonably adopt to protect undocumented students. Although there are potential challenges to these sanctuary policies, the existing legal framework makes it possible for institutions to act in ways that are protective of undocumented students. Although there are strong constitutional arguments that could allow sanctuary campuses to ultimately prevail, the institutions that wish to tackle these federal mandates face lengthy, costly, and risky lawsuits.

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227. See PEW CHARITABLE TRUSTS, *supra* note 208.

228. *Performance-Based Funding for Higher Education*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jul. 31, 2015), <http://www.ncsl.org/research/education/performance-funding.aspx> [https://perma.cc/P7AF-MSM4].

229. See Ellen Wexler, *More State Funds, on One Condition*, INSIDE HIGHER ED (June 17, 2016), <https://www.insidehighered.com/news/2016/06/17/new-california-budget-increases-higher-education-funding-one-condition> [https://perma.cc/4KVJ-YRNC] (stating that California universities will be provided more funding, “but only if they enroll more in-state students”).

230. *Georgia Bans Funding to ‘Sanctuary’ Campuses Under New Law*, U.S. NEWS (Apr. 27, 2017, 10:17 AM), <https://www.usnews.com/news/best-states/georgia/articles/2017-04-27/georgia-bans-funding-to-sanctuary-campuses-undeer-new-law> [https://perma.cc/T2Q6-UXFW].

231. *Id.*

232. *Id.*

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