

Colorado Senate Bill 17-281
71st General Assembly

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Senate Bill 17-281 (“SB 281”) suffers from numerous shortcomings, in terms of both policy and legality. It abdicates important decisions that impact Coloradans financially to federal policymakers. It does so based on a myth that has been disproven by data time and again. It perpetuates this myth by adopting a propaganda tool put in place by the federal government. And it puts Colorado law enforcement officials in a Catch-22 by attaching local financial penalties to current policies concerning immigration detainees—the law squarely supports the sheriffs’ present legal position of requiring a judicial warrant before prolonging the detention of inmates otherwise entitled to release. Finally, the bill adopts the Trump administration’s tactic of threatening the funding of local jurisdictions, and may suffer from similar legal defects that the federal coercion of so-called “sanctuary” jurisdictions does.

I. SB 281 abdicates local authority to federal policymakers.

Less than two weeks ago, on March 31, U.S. Attorney General Jeff Sessions wrote in a memorandum: “Local control and local accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage non-federal law enforcement agencies.”¹ Contrary to the logic that decisions about local policy, particularly concerning public safety, are best made on the local level, SB 281 abdicates to politicians in Washington policymaking decisions that should be made by local officials. It surrenders the local control and local accountability necessary for effective local policing to Washington.

A. Abdicating the definition of “sanctuary” to federal control.

The bill abdicates local decision making to the federal government first by making the determination of whether a local jurisdiction is a “sanctuary” jurisdiction dependent on a federal statute, 8 U.S.C. § 1373. Section 1373 purports to make unlawful any state or local law that stops state or local officials from sharing citizenship or immigration-status information with federal immigration officials. But Section 1373 has been roundly criticized by legal scholars as violating the Tenth Amendment because it dictates how local law enforcement does its job.² Instead of

¹ Attorney General Jeff Sessions, Memorandum for Heads of Dep’t Components and U.S. Att’ys (March 31, 2017), <https://www.justice.gov/opa/press-release/file/954916/download>.

² Ilya Somin, *Why Trump’s executive order on sanctuary cities is unconstitutional*, WASHINGTON 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=.0b6d9baee785; Bernard W. Bell, *De-Funding Sanctuary Cities*, YALE J. ON REG.: NOTICE & COMMENT (March 28, 2017), <http://yalejreg.com/nc/de-funding-sanctuary-cities-by-bernard-w-bell>; see also Letter from Christopher N. Lasch (joined by other law professors) to Bob Goodlatte, Chairman, Committee on the Judiciary and Zoe Lofgren, Ranking Member, Subcommittee on Immigration and Border Security at 6-10 (Sept. 26, 2016), <http://docs.house.gov/meetings/JU/JU01/20160927/105392/HHRG-114-JU01-20160927->

rejecting it, this bill embraces that arrogation of decision making authority by the federal government.

B. Abdicating the determination of “sanctuary” to federal authorities.

Under SB 281, an official notification from the Department of Justice or the Department of Homeland Security has conclusive weight in labelling a Colorado jurisdiction as a “sanctuary jurisdiction.”³ These federal decisions are unreviewable under the bill.⁴

It is impossible to say how these federal officials will define “sanctuary.” In its litigation response opposing the preliminary injunctive relief sought by cities bringing lawsuits challenging President Trump’s executive order defunding sanctuary cities,⁵ the federal government emphasizes the complete uncertainty as to how the administration will go about defining “sanctuary” jurisdictions:

Section 9 of the Order directs the Secretary to designate a state or local government as a “sanctuary jurisdiction.”

[A] series of future actions must occur before Section 9 could have any effect on a receipt of federal grant funds [including] (2) the Secretary must identify any state or local governments that constitute “sanctuary jurisdictions” and make formal designations to that effect;

The County [of Santa Clara] does not allege that the Federal Government has taken any of these actions. Nor does the County claim that it has been designated as a “sanctuary jurisdiction” or that it has been denied any federal funds. The County likewise does not allege that it has been notified that any funds will be denied. *None of those actions has occurred, and those events may never occur.*⁶

SD003.pdf (arguing Section 1373 must be “construed narrowly” to avoid “serious constitutional concerns”).

³ Proposed § 24-33.5-2003(2).

⁴ The penalty for localities under SB 281 for failing to comply with Section 1373—immediate loss of state funding—is thus more draconian than the current consequence, with respect to federal grants, of noncompliance. See OFFICE OF JUSTICE PROGRAMS, ADDITIONAL GUIDANCE CONCERNING COMPLIANCE WITH 8 U.S.C. § 1373 (Oct. 6, 2016), <https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf> (stating that “only the jurisdiction that fails to comply with Section 1373 is at risk for not being funded *after being provided an opportunity to correct its policies or practices.*”) (emphasis added).

⁵ President Donald J. Trump, Exec. Order 13,768, *Enhancing Public Safety in the Interior of the United States* § 9 (Jan. 25, 2017) [hereinafter “Exec. Order”], <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

⁶ *County of Santa Clara v. Donald J. Trump*, No. 3:17-cv-00574-WHO, Docket Entry 46 (Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction) at 11-12 (N.D. Cal. March 9, 2017) (emphasis added).

C. The costs for Colorado localities of SB 281's abdication of authority.

These federal decisions, to which SB 281 offers complete subservience, will have hugely important financial consequences for Colorado taxpayers. Being labelled a "sanctuary" means the jurisdiction will lose all state funding.⁷ Not only that—the jurisdiction will also be deemed to have waived its immunity from lawsuit.⁸ So costly litigation will be heaped upon jurisdictions that are labelled sanctuaries by federal officials.

The litigation SB 281 allows is unlikely to offer any real benefit to victims of crime in Colorado. When the estate of Kathryn Steinle (the victim in the most publicized case touted in support of anti-sanctuary measures like the President's executive order and SB 281) sued the City and County of San Francisco, claiming that Ms. Steinle's death was the result of San Francisco's "sanctuary" policy, a federal court dismissed the claims.⁹ The court held that San Francisco's policy, which prohibited the sheriff from notifying ICE of an inmate's release date in most cases, did not violate Section 1373—indeed the court held that "no plausible reading" of Section 1373 could "encompass[] the release date of an undocumented inmate."¹⁰ The court's rejection of other legal theories demonstrates the difficulty of pursuing claims based on the attenuated theory of causation that SB 281 appears to embrace by waiving immunity for such claims.¹¹

II. SB 281 rests on a myth of immigrant criminality.

The second problem with the bill is its reliance on fear rather than fact. The bill claims that "sanctuary" policies endanger the "safety and welfare of the people of Colorado."¹² But all available data contradict this claim. Numerous studies have demonstrated that immigrants are, without regard to immigration status, *less likely* to commit crimes than citizens.¹³ As Michael Tonry has written,

⁷ Proposed § 24-33.5-2003(7).

⁸ Proposed § 24-10-106.

⁹ *Steinle v. City and County of San Francisco*, No. 3:16-cv-02859-JCS, Docket Entry 48 (Order Regarding Motions to Dismiss) (N.D. Cal. Jan. 6, 2017).

¹⁰ *Id.* at 20.

¹¹ *Id.* at 25 (holding that the "complaint does not plausibly allege that Steinle's death resulted from a violation of any of the sources of law that Plaintiffs cite"); *id.* at 32 (holding that "[b]ecause nothing in this case distinguished Steinle from the general public at the time ... when Mirkarimi issued the March 13 memorandum—the City Defendants cannot be held liable for a due process violation on a theory of state-created danger.").

¹² Proposed § 24-33.5-2001(3).

¹³ RUBÉN RUMBAUT & WALTER EWING, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION (Feb. 21, 2007),

Mexican and Central American immigrants fit the classic pattern of self-selected economic migrants who can be expected to work hard and defer gratifications. Many are illegal. Even legal immigrants are affected by xenophobic state laws and unprecedentedly vigorous criminal justice system enforcement of immigration laws. That environment provides even more incentive than economic migrants have traditionally had to maintain a low profile and stay out of trouble. One consequence of high levels of legal and illegal Hispanic immigration is that their presence is credited with contributing significantly to the decline in American crime rates since 1991.¹⁴

And studies have specifically rebutted the notion that sanctuary policies jeopardize public safety.¹⁵ Most recently, in January of this year, a study concluded:

<https://www.americanimmigrationcouncil.org/research/myth-immigrant-criminality-and-paradox-assimilation> (concluding that U.S. crime “is not ‘caused’ or even aggravated by immigrants, *regardless of their legal status*”) (emphasis added); Jason L. Riley, *The Mythical Connection Between Immigrants and Crime—Newcomers to the U.S. are less likely than the native population to commit violent crimes or be incarcerated*, WALL STREET JOURNAL (July 14, 2015); *see also, e.g.*, JACOB I. STOWELL, IMMIGRATION AND CRIME: THE EFFECTS OF IMMIGRATION ON CRIMINAL BEHAVIOR (2007) (noting only negative correlation between immigrants and criminality); Ramiro Martínez, Jr. & Abel Valenzuela, Jr., eds., IMMIGRATION AND CRIME: ETHNICITY, RACE, AND VIOLENCE (2006) (same); RUBÉN RUMBAUT ET AL., DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST- AND SECOND-GENERATION YOUNG MEN (June 1, 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young> (noting lower rates of imprisonment for immigrants); Matthew T. Lee, Ramiro Martinez, Jr. & Richard Rosenfeld, *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 560, 571-74 (2001) (finding no correlation between recent immigration and higher crime rates); Ramiro Martinez & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUSTICE 485, 485-86, 495 (2000), available at http://www.ncjrs.gov/criminal_justice2000/vol_1/02j.pdf (finding “the bulk of empirical studies conducted over the past century have found that immigrants are typically underrepresented in criminal statistics”).

¹⁴ MICHAEL TONRY, RACE, ETHNICITY, CRIME, AND IMMIGRATION (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335705.

¹⁵ LOREN COLLINGWOOD, STEPHEN EL-KHATIB, & BENJAMIN GONZALEZ-O'BRIEN, THE POLITICS OF REFUGE: SANCTUARY CITIES, CRIME, AND UNDOCUMENTED IMMIGRATION (Oct. 16, 2016), http://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/shelter_nopols_blind_final.pdf (finding no statistically significant correlation between adoption of sanctuary policies and crime rates).

The data are clear: Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties. Moreover, economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher employment-to-population ratios, and lower unemployment.¹⁶

The Trump campaign and now the administration regularly claim, and base their immigration policy on the claim—contrary to the abundant studies that show immigrant criminality to occur at lower rates than citizen criminality—that immigrants cause crime. On the campaign trail, Trump promised to “end the sanctuary cities that have resulted in so many needless deaths.”¹⁷ Attorney General Sessions echoed this, claiming that “[c]ountless Americans would be alive today – and countless loved ones would not be grieving today – if the policies of these sanctuary jurisdictions were ended.”¹⁸

SB 281 adopts this flawed approach.

III. SB 281 adopts a discredited propaganda tool of the Trump administration.

SB 281’s explicit incorporation of the federal “declined detainer outcome report” required by President Trump’s executive order is a glaring example of reliance on the discredited myth of immigrant criminality. Section 9(b) of the executive order directed the Department of Homeland Security to “on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”¹⁹ SB 281 requires that report, as it pertains to Colorado, to be re-published by Colorado state officials.²⁰

¹⁶ TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

¹⁷ *Transcript of Donald Trump’s Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?_r=0.

¹⁸ DEP’T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, ATTORNEY GENERAL JEFF SESSIONS DELIVERS REMARKS ANNOUNCING SANCTUARY JURISDICTIONS (March 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-sanctuary-jurisdictions>.

¹⁹ Exec. Order § 9(b).

²⁰ Proposed § 24-33.5-2004.

The DHS report was issued three times following the executive order.²¹ Reports of errors were rampant. The list of jurisdictions with policies against detainer compliance was incorrect,²² and specific examples of prisoners released despite detainers having been lodged were contested as inaccurate.²³ In the second week of the report, San Francisco—known not to honor detainer requests—was listed as having a policy of “[d]etain[ing] an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.”²⁴

After only three issues of the report, it was discontinued due to the numerous inaccuracies.²⁵

IV. SB 281 flouts established law on immigration detainers.

The original version of SB 281, HB 1134, which failed to pass out of committee in the House, included a specific provision that would require local sheriffs to honor immigration detainers—requests issued by federal immigration officials, asking the local sheriff to prolong detention of a

²¹ U.S. Immigration & Customs Enforcement, Enforcement & Removal Operations, Weekly Declined Detainer Outcome Report For Recorded Declined Detainers Feb 11 – Feb 17, 2017, https://www.ice.gov/doclib/ddor/ddor2017_02-11to02-17.pdf; U.S. Immigration & Customs Enforcement, Enforcement & Removal Operations, Weekly Declined Detainer Outcome Report For Recorded Declined Detainers Feb 4 – Feb 10, 2017 https://www.ice.gov/doclib/ddor/ddor2017_02-04to02-10.pdf; U.S. Immigration & Customs Enforcement, Enforcement & Removal Operations, Weekly Declined Detainer Outcome Report For Recorded Declined Detainers Jan. 28 – Feb. 3, 2017, https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf.

²² Hamed Aleaziz, *Omission of SF from ICE report confuses immigration experts*, SAN FRANCISCO CHRONICLE (March 24, 2017), <http://www.sfchronicle.com/bayarea/article/Omission-of-SF-on-ICE-report-confuses-immigration-11026753.php> (noting omission of California jurisdictions known not to honor detainers);

²³ Darwin BondGraham, *ICE 'Public Safety Advisory' Criticizing Local Law Enforcement for Immigration Policies Appears to Contain Bad Data*, EAST BAY EXPRESS (March 21, 2017), <http://www.eastbayexpress.com/SevenDays/archives/2017/03/21/ice-public-safety-advisory-criticizing-local-law-enforcement-for-immigration-policies-appears-to-contain-bad-data>; *TCSO disputes DHS report on ICE detainers*, KVUE (March 21, 2017), <http://www.kvue.com/news/local/travis-county-declined-ice-detainers/423974103>.

²⁴ Report for Feb. 4 to Feb. 10.

²⁵ David Nakamura & Maria Sacchetti, *Trump administration suspends public disclosures of 'sanctuary cities'*, WASHINGTON POST (April 11, 2017), https://www.washingtonpost.com/politics/trump-administration-suspends-public-disclosures-of-sanctuary-cities/2017/04/11/7ea7f078-1ec8-11e7-ad74-3a742a6e93a7_story.html?utm_term=.21db48cb1c30.

prisoner beyond the time when the prisoner would otherwise be released.²⁶ While that language has been stripped from SB 281, the presence of the provision requiring reporting of declined detainers,²⁷ and statements made during the hearing before the Senate Judiciary Committee, leave little doubt that the bill is aimed at encompassing detainers while not specifically referencing them. Just as the President's executive order purporting to de-fund "sanctuary jurisdictions" without defining them has created suspicions that the order will be used to de-fund jurisdictions that do not hold prisoners for federal immigration officials, even so does SB 281, with its vague language²⁸ and deference to federal determinations of "sanctuary jurisdictions,"²⁹ create the possibility that detainer compliance will be considered mandatory under the bill.

I explained in my written testimony concerning SB 281's failed predecessor that requiring sheriffs to comply with detention requests would require sheriffs to violate state and federal law.³⁰

V. SB 281 attempts to impose policy decisions on localities through impermissible coercion.

SB 281, mimicking President Trump's executive order, threatens to de-fund entirely jurisdictions with "sanctuary" policies. Scholars and others have noted that any attempt to cut all federal funding would violate numerous constitutional provisions, including by operating as a coercive "gun to the head" of localities.³¹ Based as it is on the President's executive order, SB 281 incorporates all of its potential flaws as well.

²⁶ The Trump administration abolished all prior detainer forms and replaced them with DHS Form I-247A, which requests prolonged detention in every instance. DHS Form I-247A (March 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>.

²⁷ Proposed § 24-33.5-2004.

²⁸ Proposed § 24-33.5-2003(1)(d) (defining as "sanctuary" a jurisdiction that "encourages" harboring).

²⁹ Proposed § 24-33.5-2003(2).

³⁰ Christopher N. Lasch, Written Testimony, "Colorado Politician Accountability Act," H.B. 1134, 71st Gen. Assem. (Colo. Feb. 22, 2017), available at <http://ssrn.com/abstract=2922814>.

³¹ See, e.g., Letter from Mike Quigley and 32 other Members of Congress to President Donald J. Trump (March 14, 2017), <https://quigley.house.gov/sites/quigley.house.gov/files/SIL05DC-MU217031423340.pdf> (citing, *inter alia*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2566-67 (2012)); Letter from Annie Lai, et al. (on behalf of 292 law professors) to President Donald J. Trump (March 13, 2017), <https://www.ilrc.org/letter-law-profs-1373>); Erwin Chemerinsky et al., *Trump can't force 'sanctuary cities' to enforce his deportation plans*, WASHINGTON POST (Dec. 22, 2016), https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.e8883ecea5c7. See also CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS (March 23, 2017), https://www.everycrsreport.com/files/20170323_R44797_36eb380c05663646f82405ecc6d512de9bf7968a.pdf (discussing numerous legal issues raised by threatened funding cuts).

Conclusion

For all these reasons, I believe SB 281 is fatally flawed, from both a policy and a legal perspective.