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Initially perceived by many of us as a vehicle amassing the world's greatest repository of data and content to derive instant answers and more creative writing, AI's transformative potential is now becoming evident. Municipal lawyering will clearly be affected, and IMLA members need to be prepared.

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Federal Immigration Law and Local Authority—Where is the Line?

AMANDA KARRAS,
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Introduction

As fans of the hit-musical *Hamilton* will recall, Thomas Jefferson enters the stage in Act II with the song "What did I Miss?" (All of Act I and quite a lot, as it turned out). In that spirt, this article attempts to summarize the significant developments in immigration law since President Trump was sworn in for his second term. Immediately after his inauguration, he issued a blitz of Executive Orders on a wide range of topics, from the environment to diversity, equity, and inclusion to immigration. It was on this last subject that many local governments had found themselves in the federal government's crosshairs during the first Trump Administration.

While the legal ramifications of the President's current immigration Executive Orders are still coming to light, it may be helpful to review some recent history. In 2017, many cities and counties declared themselves "sanctuary jurisdictions" or enacted "welcoming ordinances" which made them targets of the federal government's immigration enforcement efforts.[1] Many other localities, however, did not consider themselves so-called sanctuary jurisdictions and that term was largely left undefined. Regardless of whether a city or county considered itself a "sanctuary" beginning in early 2017, all local governments were required to certify compliance with certain immigration-related conditions in federal grants. We are beginning to see parallels emerge between the first and second Trump presidency in this area, though there are additional wrinkles as well.

Immigration Policy 2.0: The President's newly-prioritized immigration policy began to take shape within hours after his inauguration. On January 20, 2025, he signed numerous immigration related Executive Orders, including one entitled "Protecting the American People Against Invasion."[2] This new Executive Order revoked several Biden-era immigration measures and directed new immigration enforcement priorities for the federal government. As relevant to local governments, Section 17 and Section 18 of the "Invasion" Executive Order provide:

> Sec. 17. Sanctuary Jurisdictions. The Attorney General and the Secretary of Homeland Security shall, to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that so-called "sanctuary" jurisdictions, which seek to interfere with the lawful exercise of Federal law enforcement operations, do not receive access to Federal funds. Further, the Attorney General and the Secretary of Homeland Security shall evaluate and undertake any other lawful actions, criminal or civil, that they deem warranted based on any such jurisdiction's practices that interfere with the enforcement of Federal law.
>
> Sec. 18. Information Sharing. (a) The Secretary of Homeland Security shall promptly issue guidance to ensure maximum compliance by Department of Homeland Security personnel with the provisions of 8 U.S.C. 1373 and 8 U.S.C. 1644 and ensure that State and local governments are provided with the information necessary to fulfill law enforcement, citizenship, or immigration status verification requirements authorized by law…[3]

This new Executive Order was not a carbon copy of the prior iteration from 2017 but contains some similarities. Specifically, the 2017 version, "Enhancing Public Safety in the Interior of the United States," stated that "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States." That Executive Order announced a policy to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." As with the new "Invasion" Executive Order, the 2017 precursor hinged largely on 8 U.S.C. §1373—which dictates 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." The 2017 Executive Order mandated that States and local governments comply with 8 U.S.C. §1373 and directed the Attorney General to 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."[4]

Both the 2025 and the 2017 Executive Orders direct the Attorney General to withhold federal funds from local governments under certain circumstances. We have already seen movement in that direction. On February 5, 2025, newly-installed Attorney General Pam Bondi issued a memorandum to all Justice Department employees entitled "Sanctuary Jurisdiction Directives" (Bondi Memo).[5] In the Bondi Memo, she mandates that "Sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice. The Department will exercise its own authority to impose any conditions of funding that do not violate applicable constitutional or statutory limitations."[6] The Bondi Memo then defines "sanctuary jurisdictions" as those that "refuse to comply with 8 U.S.C. §1373, refuse to certify compliance with§ 1373, or willfully fail to comply with other applicable federal immigration laws."[7] The Bondi Memo indicates that the federal government will require any jurisdiction that applies for grants to comply with 8 U.S.C. §1373.[8]

Immediately thereafter, on February 6, 2025, the Department of Justice (DOJ) sued the State of Illinois, Chicago, and Cook County for declaratory and injunctive relief, claiming that the state and localities' laws related to immigration violate the Supremacy Clause.[9] The next day, a coalition of local governments led by San Francsico and Santa Clara County, filed a lawsuit against the Trump Administration seeking to enjoin enforcement of the "Invasion" Executive Order and the Bondi Memo based on violations of the Tenth Amendment, Separation of Powers, Spending Clause, Due Process Clause, and the Administrative Procedure Act.[10] The lawsuit seeks to enjoin the Trump Administration from implementing any funding freeze related to their sanctuary policies. Based on both complaints as well as other actions by the President and Attorney General thus far, it is clear that state and local compliance with 8 U.S.C. §1373 and federal detainer requests (seeking to keep persons in custody for up to 48 hours for immigration removal purposes) will once again be at the forefront of conditions on grants and litigation between states / localities and the federal government. For those experiencing a sense of *deja vu,* it may be helpful to revisit some of the past litigation to better understand the legal landscape.

The 2017-2020 Litigation

In July 2017, the Department of Justice began imposing immigration-related conditions on the Edward Byrne Memorial Justice Assistance Grant ("Bryne JAG"), which is the leading source of federal justice funding to state and local jurisdictions.[11] The Byrne JAG grant "provides states and local governments with funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, …crime victim and witness initiatives."[12] The formula to allocate funds under the program is based on population and reported crime. The DOJ is required to issue grants in "accordance with the [specified] formula."[13]

The DOJ imposed three primary conditions to start, generally known as the "access condition," the "notice condition," and the "compliance condition." The "access condition" required grant recipients to allow DHS personnel to access their detention facilities to meet with undocumented immigrants to ascertain their right to remain in United States.[14] The "notice condition" required grant recipients to "provide at least 48 hours' advance notice to DHS (Department of Homeland Security) regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act."[15] The Chief Legal Officer of the jurisdiction was also required to certify compliance with 8 U.S.C. §1373 (the "compliance" condition").[16]

The conditions imposed on the Byrne JAG grant recipients became the focus of litigation between local governments and the Trump administration over the next several years. In subsequent solicitations, the DOJ imposed an additional condition on local governments pertaining to 8 U.S.C. §1324[17], and also sought to find statutory hooks for the notice and access conditions.[18] For example, the FY19 Byrne JAG solicitation contained a requirement that localities would not "publicly disclose federal law enforcement information in an attempt to conceal, harbor, or shield certain individuals from detection, including in violation of 18 U.S.C. §§1071 or 1072, or 8 U.S.C. §1324(a)."[19]

In response to the federal government's conditions on the Byrne JAG grant, states and local governments including (but not limited to), Chicago, New York City, Philadelphia, Los

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Angeles, San Francisco, and Providence, brought suit. The localities argued, among other things, that the Attorney General exceeded his authority and violated the Separation of Powers doctrine by imposing substantive conditions on the formula grant. The localities also argued that §1373 is unconstitutional under the Tenth Amendment and therefore the Attorney General could not require compliance with that law under *South Dakota v. Dole*.[20]

The majority of circuits agreed with the local governments that the imposition of the conditions on the formula grant was unlawful; however, the Second Circuit disagreed, creating a circuit split which remains unresolved.[21]

○ **Second Circuit Decision:** *City of New York v. U.S. Dep't of Justice,* 951 F.3d 84 (2d Cir. 2020). The Second Circuit upheld the DOJ's authority to impose the three conditions. It interpreted the Byrne JAG statute as providing broad discretion in setting grant conditions, including those at issue in the case. For example, the court held that the §1373 condition was authorized by the provision requiring grant applications to certify compliance with "all applicable Federal laws." 34 U.S.C. §10153(a)(5)(D). The Second Circuit also rejected the City's argument that §1373 is unconstitutional under the Tenth Amendment.

○ **Third Circuit Decision:** *City of Philadelphia v. Attorney General*, 916 F.3d 276 (3d Cir. 2019). The Third Circuit held that the DOJ lacked statutory authority to impose the conditions, emphasizing Byrne JAG's nature as a mandatory formula grant. Because the court found that the DOJ lacked the authority to impose the conditions, it did not reach the constitutional issues in the case.

○ **Seventh Circuit Decision:** *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020). The Seventh Circuit ruled that the conditions exceeded the DOJ's statutory authority and violated separation of powers principles. It held not only that imposing the three original conditions exceeded DOJ's authority, but so did the imposition of the "harboring" condition set forth in 8 U.S.C §1324. The Seventh Circuit did not reach the question of the constitutionality of §1373 because it concluded that §1373 could not be considered an "applicable federal law" under §10153; however, it characterized the district court's conclusion that §1373 is unconstitutional as "compelling."

○ **Ninth Circuit Decision:** *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City & Cnty. of San Francisco v. Barr*, **965 F.3d 753 (9th Cir. 2020).** The Ninth circuit found that the DOJ lacked the statutory authority to impose the Access and Notice conditions. The court did not address the §1373 condition as it held that the cities and state laws complied with the federal law.

○ **First Circuit Decision:** *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020). The First Circuit concluded that the DOJ's actions exceeded its authority and rejected the Second Circuit's reasoning.

Next Steps for Local Governments and Open Questions

Local government attorneys will need to review the case law in their jurisdiction to assess risks associated with policymaker preferences in this area. As of this writing, we do not know precisely what conditions the Attorney General or Secretary of Homeland Security will focus on (though §1373 and detainers seem a good bet) nor what funding may be targeted. In addition to the uncertainty around the funding that may be targeted and what conditions may be attached to that funding, there are several areas of the law in this area that are murky at best. For example, we do not know whether an administrative warrant issued by Immigration and Customs Enforcement (ICE) provides probable cause under the Fourth Amendment for local law enforcement officers to detain an individual pursuant to an ICE detainer request. We also do not know whether 8 U.S.C. §1373 violates the Tenth Amendment. And finally, we do not know what the terms "harbor," "conceal," and "shield" mean under 8 U.S.C. §1324. Each of these areas is briefly discussed below, but local government attorneys should carefully research the case law in their jurisdiction on these open questions. And there may be state laws that implicate these questions as well.

ICE Detainer Requests and the Fourth Amendment

One of the first things we learn as lawyers is that the Fourth Amendment requires the government to establish probable cause both to arrest and detain someone.[22] But what type of probable cause satisfies this requirement? In other words, does a local government have probable cause under the Fourth Amendment to detain someone purely pursuant to an administrative warrant issued by ICE? Circuit courts are split on the question of whether a local government violates the Fourth Amendment by holding an individual pursuant to an administrative warrant (or detainer) issued by ICE. The Second Circuit recently acknowledged the split while sidestepping the issue itself.[23]

On one side, the Fifth Circuit in *City of El Cenzio v. Texas* held that ICE detainers provide sufficient probable cause under the Fourth Amendment to uphold a Texas law requiring that localities hold individuals pursuant to detainer requests under the collective-knowledge doctrine.[24] The court rejected the city's arguments that state and local officers may only arrest individuals based on criminal probable cause.[25]

In contrast, First and Third Circuit case law indicates that an administrative

warrant issued by ICE does not provide a sufficient basis for a local government to hold an individual under the Fourth Amendment.[26] In *Galarza v. Szalczyk,* the Third Circuit concluded that ICE detainers are permissive and therefore do not require local governments to detain individuals subject to removal.[27] The court reasoned that because Lehigh County, Pennsylvania was free to disregard the detainer request but instead chose to honor it, the County would be liable for violating the Fourth Amendment rights of the individual who was detained (who happened to have been a U.S. citizen erroneously subjected to a detainer request).[28] Similarly, in *Morales v. Chadbourne,* a U.S. citizen was erroneously held pursuant to an ICE detainer after a state court ordered her released from criminal custody for the original offense which had resulted in her arrest.[29] She sued the ICE agents for civil damages, alleging the detainer violated her Fourth Amendment rights. The court held that because the detainer kept her in custody "for a new purpose after she was entitled to release, she was subject to a new seizure for Fourth Amendment purposes – one that must be supported by a new probable cause justification."[30]

Local government attorneys need to ensure they understand the risks associated with detainer requests based on their circuit's case law. As noted, the circuits are split, which means in some areas compliance may be permitted (or required, depending on state law), while in other jurisdictions, compliance with detainer requests may result in a finding that the locality has violated the Fourth Amendment, which could prove costly. For example, a group of individuals who were detained pursuant to ICE immigration detainer requests sued Suffolk County, New York for violating the Fourth Amendment based on the County's policy to honor all such detainer requests. The court rejected the notion that ICE detainers provided probable cause and concluded that the County had violated the Fourth Amendment.[31] The damages in the case against the County amounted to $60 million and ICE was notably dismissed from the litigation.[32] And aside from possible damage awards, local governments also face an unfunded mandate if detainer requests are deemed mandatory as housing immigrants in local jails without any federal funding will quickly sap local budgets and resources.

That said, localities that would like to comply with ICE detainer requests should review whether a "287G agreement" makes sense for their jurisdiction. 287G agreements allow local governments to assist immigration enforcement efforts under Section 287(g) of the Immigration and Nationality Act (INA). Through the agreement, ICE delegates to state or local law enforcement the authority to perform specified immigration officer functions under the agency's discretion.[33] Some case law suggests that if a locality wants to comply with ICE detainer requests, 287G agreements *may* provide some basis for probable cause to hold individuals pursuant to detainer requests.[34] However, the case law is uncertain as to whether a 287G agreement would completely insulate a locality from liability and it may vary by your jurisdiction.

8 U.S.C. §1373 – Anti-Commandeering

Central to local democracy is the idea that local governments, through their constituents, enact the policies that most comport with their citizens' interests and values within the bounds of federal and state law. Many local governments have enacted policies that either dictate that they do not collect immigration-related information during police officer interactions and/or do not share immigration related information with the federal government.

Some of these policies run headfirst into 8 U.S.C. §1373, quoted earlier in this article, which prohibits local governments from restricting their employees from sharing immigration-related information with the federal government. However, merely prohibiting the *collection* of this information would not, on its face, appear to violate the statute. Either way, it appears that §1373 will again be playing a central role in the conflict between the federal government's immigration enforcement priorities and local government policies.

That said, the statute rests on shaky constitutional ground. Several district courts concluded that §1373 was unconstitutional under the Tenth Amendment after the Supreme Court's decision in *New Jersey Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n,* 584 U.S. 453 (2018).[35] *See City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 330 (E.D. Pa. 2018), *aff'd in part, vacated in part sub nom. City of Philadelphia v. Att'y Gen. of United States*, 916 F.3d 276 (3d Cir. 2019) (concluding that "[b]ecause Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment."); *see also City of Chicago v. Sessions,* 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018), *aff'd and remanded sub nom. City of Chicago v. Barr*, 957 F.3d 772 (7th Cir. 2020), *opinion amended and superseded,* 961 F.3d 882 (7th Cir. 2020), and *aff'd and remanded sub nom. City of Chicago v. Barr,* 961 F.3d 882 (7th Cir. 2020) (concluding "Section 1373 impermissibly directs the functioning of local government in contravention of Tenth Amendment principles, and the Attorney General's reliance on the purported information sharing carve-out—which is not confirmed in *Printz* nor in any other controlling case—cannot save it. Section 1373 is thus unconstitutional on its face."). The Third and Seventh Circuits did not reach the issue on appeal under constitutional avoidance principles as they invalidated the conditions on a narrower basis. Conversely, the Second Circuit upheld the constitutionality of the law in *City of New York v. U.S. Dep't of Justice,* 951 F.3d 84 (2d Cir. 2020).

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There is therefore reason to believe that the law may be unconstitutional, but there is not a great weight of authority on this subject and there is at least one circuit case that indicates the law is valid. Unless and until the Supreme Court weighs in on this issue, the law remains uncertain in this area.

8 U.S.C. §1324 and Criminal Prosecution of Local Officials

Finally, a word on 8 U.S.C. §1324--the criminal "harboring statute" featured prominently in the Administration's immigration efforts and referenced earlier in this article. The terms "harbors," "shields," and "conceals" are undefined in the statute, and there appear to be no prosecutions under the statute against local officials. That said, the Acting Attorney General issued a memorandum on January 21, 2025, which directs a maximalist approach to prosecutions for immigration offenses, including for violations of §1324. The memo states, "[f]ederal law prohibits state and local actors from resisting, obstructing, and otherwise failing to comply with lawful immigration-related commands and requests pursuant to, for example, the President's extensive Article II authority…"[36] The memo goes on to instruct that U.S. Attorneys "shall investigate incidents involving such misconduct for violations of 18 U.S.C. §371 [conspiracy to commit offenses to defraud the United States], and violations of other statutes, such as 8 U.S.C. §§1324, 1373."[37]

While we do not know how the terms in §1324 will be interpreted by federal prosecutors or judges in the context of local officials, it is safe to assume that the federal government will be aggressive in seeking to enforce this statute. And while there is uncertainty around these terms, we have some clues from the first Trump Administration. For example, in the FY2019 Byrne JAG solicitation, local governments were required to certify they would not "publicly disclose federal law enforcement information in an attempt to conceal, harbor, or shield certain individuals from detection" including in violation of §1324.[38] And in that same time frame, Thomas Homan, the then-US Immigration and Customs Enforcement chief, indicated that the Justice Department was reviewing whether the then-Oakland mayor had obstructed justice by warning immigrants in her community of an impending ICE raid.[39]

We can therefore assume that any efforts by local officials to warn their communities of impending ICE activities may be seen as potentially violating §1324 (whether a judge would agree is an open question). Homan, who is also the incoming "border czar," has more recently indicated he is willing to jail Denver Mayor Mike Johnston over comments the mayor made about local police stopping federal forces from coming into the city to deport undocumented immigrants.[40] (The mayor later walked those comments back.)[41]

CONCLUSION

There are a lot of unknowns in this area, but we can be certain that local governments need a steady hand from their chief legal officers. City and county attorneys are going to be called on to navigate this thorny legal morass. IMLA will continue to provide resources to members in this area. If you are interested in keeping up to date on these issues, join our immigration working group. ML

NOTES

1. For a review of the first Trump Administration sanctuary city immigration policies, *see Tenth Amendment-Sanctuary for Sanctuary Cities,* Municipal Lawyer. March/April 2017, vol. 58, no. 2.
2. Executive Order: Protecting the American People Against Invasion (January 20, 2025) ("Invasion EO"), available at: https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/
3. *See Invasion EO*.
4. San Francisco filed suit challenging the validity of the Executive Order 13768, which was ultimately struck down by federal courts. City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018) (concluding that "[b]ecause the Executive Order directs Executive Branch administrative agencies to withhold funding that Congress has not tied to compliance with §1373, there is no reasonable argument that the President has not exceeded his authority.").
5. The Bondi Memo is available at: https://www.justice.gov/ag/media/1388531/dl?inline
6. *Id.*
7. *Id.*
8. The Bondi Memo also touches on criminal matters that may be relevant to localities, which is discussed more fully below.
9. *See* United States v. Illinois, No. 1:25-cv-1285 (N.D. Ill., Feb. 6, 2025). The federal government made similar arguments in its lawsuit against California during the First Trump administration. Those arguments – that the Supremacy Clause preempted California's law which limited cooperation between state and local governments and federal immigration authorities ran headfirst into the Tenth Amendment. United States v. California, 921 F.3d 865, 876 (9th Cir. 2019).
10. City & Cty. of San Francisco et. al v. Trump, et. al, No. 25-1350 (N.D. Cal., Feb. 7, 2025) available at: https://storage.courtlistener.com/recap/gov.uscourts.cand.444175/gov.uscourts.cand.444175.1.0_1.pdf
11. The FY2017 Byrne JAG Local Solicitation is available here: https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2017-11301.pdf
12. *See* Edward Byrne Memorial Jus-

tice Assistance Grant (JAG) Program Overview, available at: https://bja.ojp.gov/program/jag/overview
13. 34 U.S.C. §10156.
14. *See* note *11, FY2017* Byrne JAG Local Solicitation, p. 30.
15. *Id.* The Attorney General later amended this condition to clarify that "[i]n the event that ...the scheduled release date and time for an alien are such as not to permit the advance notice [of scheduled release]...it shall not be a violation of this condition to provide only as much advance notice as practicable." *See* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 862 (N.D. Ill. 2018), *aff'd and remanded sub nom.* City of Chicago v. Barr, 957 F.3d 772 (7th Cir. 2020), *opinion amended and superseded*, 961 F.3d 882 (7th Cir. 2020), and *aff'd and remanded sub nom*. City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020).
16. *Id.*
17. 8 U.S.C. §1324 is a criminal law that provides in relevant part:

> **a) Criminal penalties** … (iii) knowing 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; (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; …

8. U.S.C. §1324 was challenged on a First Amendment overbreadth basis in an unrelated context. The Supreme Court in *United States v. Hansen* upheld the law, reading the terms "encourage" and "induce" more narrowly to only apply in their criminal law sense for "solicitation" and "facilitation" and thus concluded that the law did not violate the First Amendment. United States v. Hansen, 599 U.S. 762, 774 (2023). The Court also found that the terms "encourage" and "induce" implicitly contain a *mens rea* requirement of intent. *Id.* at 779.
18. For example, later solicitations included requirements that localities not impede the exercise of DHS agents authority under 8 U.S.C. §1357(a), which was associated with the Access Condition. These subsequent solicitations also required localities to agree not "impede the exercise of authority of the federal government under 8 U.S.C. §1266(a) & (c) and 8 U.S.C. §1231(a)(4), which were associated with the Notice Condition. Later solicitations also included certifying compliance with 8 U.S.C. §1644 which is substantially similar to 8 U.S.C. §1373. The FY2019 Solicitation which contains the §1324 conditions can be found here: https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15141.PDF.
19. *Id.*
20. In *South Dakota v. Dole,* the Supreme Court explained that its "earlier opinions stand[] for the unexceptionable proposition that the [Spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 483 U.S. 203, 210 (1987).
21. The Supreme Court was considering three petitions raising these issues, but dismissed them after President Biden came into office on joint stipulation of the parties.
22. *See* Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (noting "[t]he standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense."). *Gerstein* held that the "Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114. The Supreme Court subsequently held that to comply with *Gerstein,* local governments must generally provide judicial determinations of probable cause within 48 hours of arrest. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
23. See Jimenez v. City of Cohoes Police Dep't, No. 23-955, 2024 WL 1551149, at *2, n.2 (2d Cir. Apr. 10, 2024).
24. City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018).
25. *Id.*
26. According to the Second Circuit in *Jiminez,* the Eighth Circuit, Ninth Circuit, and Fourth Circuit have also ruled on these issues:

> the Eighth Circuit has held that local officials are entitled to rely on an ICE official's probable-cause determination in a detainer and are therefore entitled to qualified immunity if the detention turns out to be erroneous. *See Mendoza v. U.S. Immigr. & Customs Enf't*, 849 F.3d 408, 419 (8th Cir. 2017). And the Ninth Circuit reversed a district court's conclusion that ICE violates the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not authorize civil immigration arrests; the court was presented with the question of whether probable cause may be imputed to state or local officers who act pursuant to an ICE detainer, but it ultimately remanded the case for consideration first of whether the ICE detainer database was sufficiently reliable to establish probable cause at all. *See Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 801, 818 & n.23, 819–24 (9th Cir. 2020). By contrast, the Fourth Circuit has

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held that, after *Arizona v. United States*, 567 U.S. 387, 410 (2012), state and local law enforcement officers violate the Fourth Amendment when they detain someone on the basis of a civil immigration warrant absent ICE's express authorization or direction, reasoning that civil immigration offenses are not crimes and therefore cannot by themselves give an officer probable cause to believe that an individual is engaged in criminal activity. *See Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465–68 (4th Cir. 2013).

Jimenez, 2024 WL 1551149, at *2. There are some factual distinctions in these cases and local government attorneys in these jurisdictions should review them carefully.

27.Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014).

28. *Id.* at 645. The County conceded at oral argument that its policies were unconstitutional and its sole defense was that it was required under federal law to comply with ICE detainer requests. *Id.* at 639.

29. Morales v. Chadbourne, 793 F.3d 208, 213 (1st Cir. 2015).

30. *Id.* at 217.

31. Castenada v. Cnty. of Suffolk, 17-CV-4267 (E.D.N.Y. Jan. 2, 2025). Part of the court's reasoning rested on New York state law that did not provide authority to make arrests in these circumstances. It is therefore important to understand both the state and federal law in your jurisdiction.

32. *See* Chantee Lans, *Federal Government Says Suffolk County Owes $60 Million in Damages, Fees While Assisting ICE*, ABC Eyewitness News (Jan. 8, 2025), available at: https://abc7ny.com/post/suffolk-county-fights-back-federal-government-says-owe-60-million-assisting-ice-detain-650-people/15779438/

33. *See* U.S. Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, available at: https://www.ice.gov/identify-and-arrest/287g

34. For example, the middle district of Tennessee explained:

> the "seizure" of aliens for known or suspected immigration violations can violate the Fourth Amendment when conducted under color of state law, because the predicate for a seizure is probable cause that the arrestee is committing or has committed a crime, and it is not a crime for a removable alien to remain present in the United States. *Lopez–Aguilar*, 296 F.Supp.3d at 974-75, 2017 WL 5634965, at *11.[6] Only when acting under color of federal authority—that is, as directed, supervised, trained, certified, and authorized by the federal government—may state officers effect constitutionally reasonable seizures for civil immigration violations. *Id.* at 977-98, 2017 WL 5634965, at *13. Detainers, standing alone, do not supply the necessary direction and supervision. *Id.* "[K]nowledge that an individual has committed a civil immigration violation does not constitute reasonable suspicion or probable cause of a criminal infraction" and therefore cannot justify a Fourth Amendment seizure…
>
> If Metro had been acting pursuant to an agreement with ICE, it **may** have had authority to take custody of Plaintiff, but Plaintiff alleges that Metro had no such agreement in April 2017.

Abriq v. Hall, 295 F. Supp. 3d 874, 880–81 (M.D. Tenn. 2018) (emphasis added).

35. For a comprehensive discussion of this issue, *see Amicus Corner: Betting on Sanctuary Jurisdictions,* Municipal Lawyer, July/August 2018, Vol. 59, No. 4.

36. Memorandum for All Department Employees from the Acting Attorney General re: Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement (January 21, 2025), available at: https://static.politico.com/66/35/5a5563a-1441faa1680058a5a3d1b/memorandum-from-the-acting-deputy-attorney-general-01-21-2025.pdf

37. That position was reiterated in the Bondi Memo.

38. *See supra* note 17.

39. *See U.S Immigration attacks Oakland Mayor for Warning of Raid that Arrested 150*, The Guardian, (Feb. 28, 2018), available at: https://www.theguardian.com/us-news/2018/feb/28/ice-immigration-raid-northern-california-oakland-mayor-warning

40. Armando Garcia, ABC News, *Trump Border Czar Tom Homan Say He's Willing to Jail Denver Mayor Over Mass Deportation Protest* (Nov. 26, 2024), available at: https://abcnews.go.com/US/trump-border-czar-tom-homan-jail-denver-mayor/story?id=116235385

41. *Id.*

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