

# KEY LEGAL CONSIDERATIONS RELATING TO “SANCTUARY CAMPUS” POLICIES AND PRACTICES

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## **Abstract**

*Following President Trump’s election and his administration’s subsequent announcement it intends to end the Deferred Action for Childhood Arrivals (DACA) program, college campus communities are focused on what steps they can legally take to protect and support their undocumented students. A number of campuses have self-identified as “sanctuary campuses.” But the policies and practices implemented at such campuses vary and the legal questions about what campuses can do to protect their students do not turn on the label. This article explores the various meanings attached to “sanctuary campus” and the legal import of that label. We then analyze the legal issues that restrict the actions campuses can take to support and protect undocumented students. These include: (1) campus administrators’ legal obligations to provide information and documents to Immigration and Customs Enforcement (ICE) agents and officers; (2) the extent to which campuses can block ICE or other federal law enforcement from campus or specific parts of campus; and (3) the risk that actions taken by campuses in support of undocumented immigrants could violate the federal law prohibiting “harboring” unauthorized aliens or assisting others that do so.*

## **I. Introduction**

An estimated 200,000 to 225,000 United States college students are undocumented immigrants.<sup>1</sup> Concerns about President Donald J. Trump’s campaign promises to make deportation of millions of illegal immigrants a top priority sparked widespread campus protests shortly after his election.<sup>2</sup> Protestors demanded a variety of actions. Many called for their campus to become a “sanctuary” that would protect undocumented students from deportation as much as legally possible.

Many undocumented students received temporary protection from deportation under the Deferred Action for Childhood Arrivals (DACA) Executive Order issued

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1 Kaitlin Mulhere, *Undocumented and Stressed*, Inside Higher Ed. (Jan. 26, 2015), <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges>.

2 See e.g., Catherine E. Shoichet & Azadeh Ansari, *‘Sanctuary Campus’ Protests Target Trump Immigration Policies*, CNN (Nov. 16, 2016), <http://www.cnn.com/2016/11/16/politics/sanctuary-campus-protests/index.html>.

by President Obama in 2012.<sup>3</sup> DACA enabled certain undocumented immigrants who came to the United States as children to apply for deferred immigration enforcement—the use of prosecutorial discretion to defer actions to remove them—for a period of two years, subject to renewal. Although DACA never conferred lawful immigration status on those who applied, it allowed them to remain in the U.S., to obtain temporary work permits, and protected them from deportation while covered by the policy.<sup>4</sup> On September 5, 2017, the Trump Administration announced that it would rescind the DACA program and no new requests would be accepted. The Trump Administration also initially announced that no DACA renewals would be processed after March 5, 2018, absent Congressional action. However, two courts have since issued injunctions requiring that DACA renewals continue as litigation challenging the Trump administration’s rescission of DACA proceeds through the courts.<sup>5</sup> As a result, it is unclear how long students who have been protected from deportation and granted temporary work authorization by DACA will continue to enjoy those benefits. Moreover, thousands of undocumented students who were never protected by DACA<sup>6</sup> may believe they are more at risk of deportation under Trump administration policies.

Since President Trump’s election, and with renewed vigor following the Trump administration’s announcement that it intended to end the DACA program, campus communities are focused on what steps they can legally take to protect and support their undocumented students. Practices and policies in place at some self-identified “sanctuary campuses” may be tested. But what does it mean to be a sanctuary campus? There is no single answer to this question. The more than 100 “campus sanctuary” petitions submitted to schools across the country in the fall of 2016 called for a variety of actions.<sup>7</sup> And, campuses responded in different ways. At least eleven *institutions have declared themselves sanctuary campuses*.<sup>8</sup> But

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3 Mulhere, *supra* note 1.

4 In contrast, non-citizens that meet the requirements for Legal Permanent Residency can reside and work indefinitely in the United States and recipients of temporary visas enjoy lawful status in the United States for the period of their visa.

5 The Department of Homeland Security’s Citizens and Immigration Services division has indicated that it is not accepting DACA applications from individuals who have never before been granted deferred action under DACA but that in accordance with federal court orders issued on January 9, 2018 and February 13, 2018, it is continuing to accept requests to renew a grant of deferred action under DACA on the same terms in place before DACA was rescinded on September 5, 2017. See Dep’t of Homeland Sec., *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

6 Mulhere, *supra* note 1. One study found that close to 44% of undocumented students had not received DACA protections.

7 Carla Javier & Jorge Rivas, *Students from 100 universities are fighting for ‘sanctuary campuses’ to defy Trump’s deportation plans*, Splinter News (Nov. 21 2016), <https://splinternews.com/students-from-100-universities-are-fighting-for-sanctua-1793863883>.

8 These include Portland State University, Reed College, Wesleyan University, Pitzer College, SantaFe Community College, University of Pennsylvania, Oregon State University, Connecticut College, Drake University, Swarthmore College, and Scripps College. See Chris Lydgate, *Kroger Declares Reed a Sanctuary College*, Reed Magazine (Nov. 18, 2016), [http://www.reed.edu/reed\\_magazine/sallyportal/posts/2016/sanctuary-college.html](http://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html); Michael S. Roth, *Wesleyan University a Sanctuary*

even among that group, the policy commitments made by campus officials are not uniform. Moreover, the policies and practices at many campuses that have declined to declare themselves a sanctuary do not differ significantly from those that have identified themselves as a sanctuary campus.

The legal ramifications of sanctuary campus status are of course largely dictated not by the label but by campus policies and practices. Below, we explore the various meanings attached to “sanctuary campus” and the legal import of that label. We then analyze the legal issues that restrict the actions campuses can take to support and protect undocumented students. These include: (1) campus administrators’ legal obligations to provide information and documents to Immigration and Customs Enforcement (ICE) agents and officers; (2) the extent to which campuses can block ICE or other federal law enforcement from campus or specific parts of campus; and (3) the risk that actions taken by campuses in support of undocumented immigrants could violate the federal law prohibiting “harboring” unauthorized aliens or assisting others that do so.

## II. What is a Sanctuary Campus?

Each letter issued by a university official declaring a campus a sanctuary has its own characteristics.<sup>9</sup> A November 30, 2016 letter signed by the University of Pennsylvania’s President, Provost and Executive Vice President declared that “Penn is and has always been a ‘sanctuary’—a safe place for our students to live and to learn.”<sup>10</sup> It also made several commitments that mirrored those made by other schools—some that self-identify as a sanctuary and some that do not. These

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*Campus*, Roth on Wesleyan (Nov. 20, 2016), <http://roth.blogs.wesleyan.edu/2016/11/20/wesleyan-university-a-sanctuary-campus/>; Wim Wiewel, President, Portland State Univ., *Portland State is a Sanctuary University*, <https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university> (last visited Nov. 19, 2017); Melvin L. Oliver, President, Pitzer Coll., *President Oliver and the Board of Trustees Declare Pitzer a Sanctuary College* (Nov. 30, 2016), <https://www.pitzer.edu/president/president-oliver-and-board-of-trustees-declare-pitzer-a-sanctuary-college/>; Robert Nott, SFCC *Declared a ‘Sanctuary Campus’ for Immigrants*, *New Mexican*, (Nov. 30, 2016) [http://www.santafenewmexican.com/news/education/sfcc-declared-a-sanctuary-campus-for-immigrants/article\\_cb2a01c6-52d4-55d7-b888-f6d4a16b0ecc.html](http://www.santafenewmexican.com/news/education/sfcc-declared-a-sanctuary-campus-for-immigrants/article_cb2a01c6-52d4-55d7-b888-f6d4a16b0ecc.html); Amy Gutmann, President, Vince Price, Provost, & Craig R. Carnaroli, Exec. Vice President, Univ. of Pa., *A Message to the Penn Community Concerning Our DACA and Undocumented Community Members*, *Penn News* (Nov. 30, 2016), <https://news.upenn.edu/message-penn-community-concerning-our-daca-and-undocumented-community-members>; Edward J. Ray, President, Or. State Univ., *Oregon State is a Sanctuary University* (Nov. 21, 2016), <http://life@osu.edu/dept/ncs/lifeatosu/2016/oregon-state-is-a-sanctuary-university/>; Letter from Katherine Bergeron, President, Conn. College, to Members of the Conn. Coll. Cmty. (Dec. 1, 2016), <https://www.conncoll.edu/media/new-media/president-bergeron/letters/Dec-1-16.pdf>; Marty Martin, President, Drake Univ., *President Martin’s Message on the Recent Executive Order Restricting Immigration and Travel*, *Drake News* (Jan. 31 2017), <http://news.drake.edu/2017/01/31/president-martins-message-on-the-recent-executive-order-restricting-immigration-and-travel/>; Letter from Thomas E. Spock, Chair of Bd. Managers & Valerie Smith, President of Swarthmore Coll., *Swarthmore Board Pledges Sanctuary for Undocumented Students, All Community Members* (Dec. 2, 2016), <http://www.swarthmore.edu/news-events/swarthmore-board-pledges-sanctuary-undocumented-students-all-community-members>; Lara Tiedens, President of Scripps Coll., *Office of the President: Message in Response to Petition* (Dec. 11, 2016), <http://inside.scrippscollege.edu/news/office-of-the-president-message-in-response-to-petition>.

9 See *supra* note 8 (collecting letters).

10 See Amy Gutmann et al. *supra* note 8.

commitments include: (1) not to share any information about any undocumented student with ICE or the Customs and Border Protection (CBP)/ U.S. Citizenship and Immigration Services (USCIS) unless presented with valid legal process; (2) not to allow officers of these agencies on its campus unless required to do so by warrant; (3) to prevent campus police from complying with ICE detainer requests<sup>11</sup> for nonviolent crimes;<sup>12</sup> and (4) to ensure continued financial aid to undocumented and DACA students to enable these students to complete their studies.<sup>13</sup>

Other institutions, including Drake University, have made more general statements identifying their campus as a sanctuary:

We are and will be “a place of refuge or safety”—our chosen definition of “sanctuary”—for all of our students, faculty, and staff. We will do all that we can, within the framework of the law, to defend our students’ and employees’ rights. We will protect private information. We will provide programming and education regarding immigrants’ rights. We will continue to advocate for our government’s policies to align with our nation’s best aspirations for equity, opportunity, and inclusion.<sup>14</sup>

Many other institutions have declined to self-identify as a sanctuary campus. The President of Brown University explained that she had concluded that private colleges cannot actually offer “legal sanctuary from members of law enforcement or Immigration and Customs Enforcement” and thus she had determined it would “irresponsible” to lead students to believe otherwise.<sup>15</sup> Pennsylvania State University similarly issued a message to the community that noted that sanctuary campus “is an ambiguous term that is subject to multiple interpretations and has no legal validity. If used, it could imply that our university has the authority to exempt our campus from federal immigration laws, when in fact no university has that authority.”<sup>16</sup>

#### ***A. Sanctuary from immigration enforcement in churches and schools is custom not law.***

Campuses that fear that they will mislead students if they label themselves a sanctuary are not alone. Despite a long history of churches acting as sanctuaries, Roman Catholic Cardinal, Donald Wuerl, leader of the Washington Archdiocese,

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11 An ICE detainer request is issued by an authorized immigration officer to any other Federal, State, or local law enforcement agency advising the recipient that DHS seeks custody of an alien presently in custody of that agency and asks that they hold the alien for 48 hours (excluding Saturdays, Sundays and holidays) beyond when he or she would otherwise be released in order to allow DHS to assume custody. *See* 8 C.F.R. 287.7.

12 The University of Pennsylvania letter referenced a City of Philadelphia practice that blocks City and campus police from complying with such orders. *See supra* note 8.

13 *See id.*

14 *See* Marty Martin, *supra* note 8.

15 Jon Street, ‘No basis in law’: Two Ivy League School Presidents Take a Stand Against ‘Sanctuary Campuses’, *Blaze* (Dec. 6, 2016), <http://www.theblaze.com/news/2016/12/06/no-basis-in-law-two-ivy-league-school-presidents-take-a-stand-against-sanctuary-campuses/>.

16 *See A Message to the Community*, PennState News (Dec. 23, 2016), <http://news.psu.edu/story/448939/2016/12/23/message-university-community>.

recently warned that although the church opposes deportation of people already living in the United States, it may not be able to provide any true protection for undocumented aliens. He explained:

“When we use the word sanctuary, we have to be very careful that we’re not holding out false hope. We wouldn’t want to say, ‘Stay here, we’ll protect you,’” he said, explaining that he’s not sure churches can legally guarantee protection to people who might move into a church building, or that federal agents would necessarily respect the boundaries of a church as a place that they cannot enter. “With separation of church and state, the church really does not have the right to say, ‘You come in this building and the law doesn’t apply to you.’ But we do want to say we’ll be a voice for you.”<sup>17</sup>

Churches have historically served as a sanctuary for individuals who fear deportation only because immigration officials have refrained from raiding churches to avoid the bad optics of such raids. The federal government has in some instances prosecuted church leaders for harboring illegal aliens even when the clergy were motivated by humanitarian goals like protecting political refugees.<sup>18</sup>

Although churches cannot provide full legal protection from deportation, such situations have not dissuaded many from declaring themselves sanctuaries. One report indicates that the church sanctuary movement has grown to include some 800 congregations, many of which recognize that they are engaged in a form of civil disobedience.<sup>19</sup> Moreover, even though immigration officials do have legal authority to raid both churches and schools they have not traditionally done so. Thus far, the Trump administration has not signaled any intent to depart from this tradition.

The practice of avoiding immigration raids at churches and schools is documented in an October 24, 2011 memorandum authored by then Director of ICE, John Morton, regarding “Enforcement Actions at or Focused on Sensitive Locations.”<sup>20</sup> According to ICE’s website, ICE “previously issued and implemented a policy” that remains in effect.<sup>21</sup> The Morton memorandum defines sensitive locations to include places of worship and schools—including post-secondary colleges

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17 Julie Zauzmer, *Cardinal Wuerl Voices Catholic Support for Immigrants But Urges Caution About Sanctuary Church*, Wash. Post (Mar. 2, 2017), [https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/02/cardinal-wuerl-voices-catholic-support-for-immigrants-but-urges-caution-about-sanctuary-churches/?utm\\_term=.9295d8ed3f56](https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/02/cardinal-wuerl-voices-catholic-support-for-immigrants-but-urges-caution-about-sanctuary-churches/?utm_term=.9295d8ed3f56).

18 See e.g. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); see also *Tucson Ecumenical Council v. Ezell*, 704 F. Supp. 980 (D. Ariz. 1989) (church vehicle was subject to forfeiture where a minister used the vehicle to knowingly transport undocumented aliens).

19 Sarah Pulliam Bailey, *This Undocumented Immigrant Just Announced That She is Seeking Sanctuary at a Church. Now She Waits*. (Feb. 15, 2017), WASH. POST, [https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/15/this-undocumented-immigrant-just-announced-shes-seeking-sanctuary-at-a-church-now-she-waits/?utm\\_term=.51deca94a49b](https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/15/this-undocumented-immigrant-just-announced-shes-seeking-sanctuary-at-a-church-now-she-waits/?utm_term=.51deca94a49b).

20 Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, on Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

21 U.S. Immigration and Customs Enforcement, FAQ on Sensitive Locations and Courthouse Arrests, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited June 22, 2018).

and universities. It does not, however, prohibit ICE enforcement actions at these locations. Instead, as a general rule, it requires that “planned enforcement action at or focused on a sensitive location” have the prior approval of the Assistant Director of Operations, Homeland Security Investigations; the Executive Associate Director of Homeland Security; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the Executive Associate Director of ERO. Even this requirement for approval by senior officials is not mandatory in all circumstances, though. Under the following exigent circumstances, enforcement activities may proceed without such approval:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.<sup>22</sup>

The memorandum also explicitly explains that it provides guidance for ICE officers in exercising their discretionary law enforcement functions and does not affect their statutory authority. It further states that “[n]othing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.”<sup>23</sup>

On February 8, 2017, ICE agents arrested several Latino men outside a homeless shelter housed in a church in Alexandria, Virginia.<sup>24</sup> The move prompted several elected officials to raise concerns about the church being targeted by ICE.<sup>25</sup> However, an ICE spokeswoman emphasized that the arrests took place across the street from the church, not on church property, and explained that the agency’s “sensitive location” policy was followed.<sup>26</sup> She further explained that “DHS is committed to ensuring that people seeking to participate in activities or utilize services provided at any sensitive location are free to do so without fear or hesitation.”<sup>27</sup>

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22 See John Morton, *supra* note 201.

23 *Id.*

24 Julie Carey, *ICE Agents Arrest Men Leaving Fairfax County Church Shelter*, NBC Wash. (Feb. 15, 2017), <http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html>.

25 Tess Owen, *Cold as Ice: Immigration Agents Arrested Men as They Left a Church Hypothermia Shelter in Virginia*, Vice News (Feb 16, 2017), <https://news.vice.com/story/ice-agents-arrest-men-leaving-hypothermia-shelter-in-virginia>.

26 See Julie Carey, *supra* note 24.

27 See Tess Owen, *supra* note 25.

**B. Guidance relating to ICE's exercise of prosecutorial discretion is subject to change.**

Although to date ICE has not departed from the “sensitive location” policy documented in the 2011 memorandum, it could choose to do so at any time. The Trump Administration has taken other steps to depart from Obama-era enforcement practices. Specifically, the new administration has articulated immigration enforcement priorities in a manner that sweeps a wider group of undocumented aliens into priority groups for removal. It has also reaffirmed its intention to proceed with removal proceedings against all foreign nationals who are in the country in violation of law—even those not identified as a priority. Most recently the Trump Administration adopted a “zero tolerance policy” of criminally prosecuting every adult arrested for entering the U.S. illegally.<sup>28</sup>

On February 20, 2017, then Secretary of Homeland Security, John F. Kelly, issued a Memorandum titled “Enforcement of the Immigration Laws to Serve the National Interest” (Immigration Enforcement Memo).<sup>29</sup> This memorandum provides guidance for Department of Homeland Security (DHS) officers when implementing President Trump’s January 25, 2017 Executive Order (EO) titled “Enhancing Public Safety in the Interior of the United States.”<sup>30</sup>

The Immigration Enforcement Memo rescinded guidance issued during the Obama Administration that clearly expressed that removal of certain aliens who were not criminals was not an enforcement priority. In contrast, the Immigration Enforcement Memo identifies priorities that sweep more widely and makes clear that aliens not specifically identified as a priority are not *deprioritized* for removal.<sup>31</sup> In other words, while the Immigration Enforcement Memo instructed the DHS to focus its limited enforcement resources on certain categories of aliens, it also directed that DHS will not decline to bring enforcement action against those who are not so described.

In a statement following the announcement of the administration’s intent to phase out DACA, President Trump stated that he had “advised the Department of Homeland Security that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.”<sup>32</sup> Nonetheless, the shift in priorities announced in the Immigration Enforcement Memo suggests undocumented students, including DACA recipients, may be at increased risk of removal.

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28 Associated Press, *Sessions: Zero-tolerance” policy may cause families to be split at border*, CBS News (May 8, 2018), <https://www.cbsnews.com/news/sessions-zero-tolerance-policy-may-cause-families-to-be-split-at-border/>.

29 Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest (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).

30 *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

31 See John Kelly, *supra* note 29.

32 David Nakamura, *Trump Administration Announces End of Immigration Protection Program for ‘Dreamers,’* Wash. Post (Sept. 5, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/?utm\\_term=.151da24046af](https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/?utm_term=.151da24046af).

### C. Proposed legislation targets “sanctuary campuses”

At least two campus administrators have cited concerns about losing funding when declining to identify as a sanctuary campus. New Mexico State University President Garrey Carruthers said the University would “not declare itself a sanctuary,” and specifically would not ban ICE officials from campus because doing so could jeopardize federal funding and the institution’s ability to issue visas to international students and visiting scholars.<sup>33</sup> Similarly, Emory University President Claire Sterk has observed that “[d]eclaring ourselves a sanctuary campus, which has potent symbolism, could have the collateral effect of reducing funding for teaching, education and research, directly harming our students, patients and the beneficiaries of our research.”<sup>34</sup>

Such concerns reflect a fear that sanctuary campuses will be punished by new legislation or executive branch actions that restrict funding to such campuses. Indeed, President Trump’s repeated efforts to restrict federal funding for sanctuary cities suggest campuses have reason to be cautious. University counsel and administrators should track proposed legislation that targets sanctuary campuses as well as developments related to sanctuary cities as the latter may result in precedents that could affect colleges and universities.

On March 13, 2018, the Fifth Circuit largely upheld a Texas law first enacted in May 2017 that prohibits local and campus police forces from adopting policies that would prevent officers from asking about arrestees’ immigration status or thwarting communication with immigration officials and requires campus police comply with ICE detainer requests.<sup>35</sup> Pennsylvania legislator Jerry Knowles (R-Berks/Carbon/Schuylkill) has also introduced a bill targeting sanctuary campuses. His bill would make colleges and universities ineligible for state aid if their governing body adopts a rule, order or policy that would (1) prohibit the enforcement of a federal law or the laws of Pennsylvania pertaining to an immigrant or immigration; (2) refuse federal authorities access to a campus; (3) direct employees not to communicate, coordinate or cooperate with federal authorities regarding an individual’s immigration status; or (4) apply an adverse employment action against an employee of an institution of higher education for communicating, coordinating or cooperating with federal authorities regarding an immigration issue.<sup>36</sup>

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33 Dr. Garrey Carruthers, Chancellor, N.M. State Univ., *New Mexico State University President Comments on Effort to Create A Sanctuary Campus* (Dec. 2, 2016), <http://krwg.org/post/new-mexico-state-university-president-comments-efforts-create-sanctuary-campus>.

34 Melissa Cruz, ‘Sanctuary Campuses’ Defy Trump—Though at Risk, *RealClear Politics* (Feb 18, 2017), [http://www.realclearpolitics.com/articles/2017/02/18/sanctuary\\_campuses\\_defy\\_trump\\_though\\_at\\_a\\_risk\\_133117.html](http://www.realclearpolitics.com/articles/2017/02/18/sanctuary_campuses_defy_trump_though_at_a_risk_133117.html) (referencing proposed state legislation in Georgia that would affect state funding for public and private colleges in the state).

35 *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018) (affirming the district court’s injunction against enforcement of Section 752.053(a)(1) only as it prohibits elected officials from “endors[ing] a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws.”).

36 H.B. 14, 2017-2018 Leg., Reg. Sess. (Pa. 2017).

At the federal level, in January 2017, Representative Duncan Hunter (R-CA) introduced the “No Funding for Sanctuary Campuses Act” (H. R. 483), which would amend Title IV of the Higher Education Act of 1965 to make sanctuary campuses ineligible for Title IV funding (which includes most federal student financial aid programs such as the Pell Grant, Direct Loan, Perkins Loans and the Federal Work Study programs). The bill has been referred to the House Committee on Education and the Workforce and defines “sanctuary campus” as a campus that has in effect an “ordinance, policy, or practice” that prohibits or restricts the institution or its employees from:

- (i) sending, receiving, maintaining, or exchanging with any Federal, State, or local government entity information regarding the citizenship or immigration status (lawful or unlawful) of any individual;
- (ii) complying with a request lawfully made by the Secretary of Homeland Security ... to comply with a detainer for, or notify about the release of, an individual; or
- (iii) otherwise complying with section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373).<sup>37</sup>

The bill further indicates that sanctuary campuses include any institution that (1) “brings in, or harbors, an alien in violation of section 274 (a)(1)(A) of the Immigration and Nationality Act;” (2) makes aliens without lawful immigration status eligible for in-state tuition to the same extent as a citizen or national of the United States is eligible for such benefits; or (3) prevents the Department of Homeland Security from recruiting students on an equal basis with other employers.<sup>38</sup>

The prospects for enactment of these bills are unclear. But, the types of conduct they target may help institutions understand what policies and practices may draw scrutiny from state and federal agencies. In addition to tracking the progression of these and similar pieces of proposed legislation, educational institutions may also benefit from tracking the legal battle related to the Trump Administration’s efforts to withhold federal funding from sanctuary cities. The way in which the administration attempts to define “sanctuary jurisdictions” and the outcome of its efforts to withhold federal funding from such jurisdictions could ultimately affect campuses.

#### ***D. Trump Administration aims to withhold funding from “sanctuary cities”***

On January 25, 2017, President Trump issued an Executive Order (EO) titled “Enhancing Public Safety in the Interior of the United States”. Among other things, the EO declared that cities that do not comply with federal immigration enforcement agents “are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”<sup>39</sup>

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

38 *Id.* The bill also includes an exception carving out campus policies that might otherwise cause the campus to be labeled a sanctuary campus if the policies apply only when a student comes forward as a victim or witness to a criminal offense. *See Id.* § 493E(a)(2).

39 Exec. Order No. 13,768, *supra* note 30, at § 9.

The EO does not define sanctuary jurisdictions beyond identifying them as those that willfully refuse to comply with 8 U.S.C. § 1373 (Section 1373).<sup>40</sup> Section 1373(a) provides that a 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.” This restriction is consistent with previously issued U.S. Department of Justice (DOJ) guidance to grant recipients, including certain self-described sanctuary cities, which reminded recipients that they must comply with Section 1373 as a condition of receipt of federal funds under specific grant programs.<sup>41</sup>

Multiple cities challenged the EO on constitutional grounds<sup>42</sup> and on April 25, 2017, a federal district court in California entered a nationwide preliminary injunction blocking enforcement of the section of the EO that declared jurisdictions that refused to comply with Section 1373 ineligible for federal grants.<sup>43</sup> That court explained that:

The Constitution vests the spending powers in Congress, not the President, so the Order cannot constitutionally place new conditions on federal funds. Further, the Tenth Amendment requires that conditions on federal funds be unambiguous and timely made; that they bear some relation to the funds at issue; and that the total financial incentive not be coercive. Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.<sup>44</sup>

The Trump Administration’s efforts to directly condition specific grants on a jurisdiction’s cooperation with its immigration enforcement efforts has also been blocked by several courts. In July 2017, DOJ announced that the Edward Byrne Memorial Justice Assistance Grants (Byrne JAG grants) would only be available to jurisdictions that (1) complied with any DHS request for at least 48 hours’ notice of the date and time of release of any unauthorized person, (2) allowed unrestricted access to their prisons for the conduct of interviews of detainees, and (3) certified compliance with Section 1373. The Federal Circuit Court of Appeals for the Seventh

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40 *Id.*

41 See Memorandum from Karol V. Mason, Asst. Att’y Gen., Office of Justice Programs, U.S. Dep’t of Justice, to Michael Horowitz, Inspector Gen., U.S. Dep’t of Justice, on Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (July 7, 2016), [http://culberson.house.gov/uploadedfiles/2016-7-7\\_section\\_1373\\_-\\_doj\\_letter\\_to\\_culberson.pdf](http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf); Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice, to Karol V. Mason, Asst. Att’y Gen., Office of Justice Programs, U.S. Dep’t of Justice, on Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), <https://www.oig.justice.gov/reports/2016/1607.pdf>.

42 See e.g. Brian Amaral, *2 Mass. Sanctuary Cities Sue Trump Over Funding Cut Threat*, Law360 (Feb. 9, 2017), <https://www.law360.com/articles/890080/2-mass-sanctuary-cities-sue-trump-over-funding-cut-threat>.

43 *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017), *reconsideration denied*, No. 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. July 20, 2017), appeal docketed, Nos. 17-16886 and 17-16887 (9th Cir. Sept. 18, 2017).

44 *Id.*

Circuit recently held that the Attorney General lacked the authority to impose these conditions and upheld a nationwide injunction blocking DOJ from conditioning the Byrne JAG grants on local compliance with federal immigration authorities.<sup>45</sup>

Perhaps of even greater consequence, one federal district court addressing the constitutionality of the same conditions on the Byrne JAG grants recently held not only that the conditions were unconstitutional but that Section 1373 itself was unconstitutional.<sup>46</sup> Relying on a recent U.S. Supreme Court decision, *Murphy v. NCAA*, which legalized sports gambling at the state level, the court explained 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.”<sup>47</sup>

The legal battles related to the executive branch’s ability to place conditions of federal grant programs will no doubt continue, and future court decisions may have implications for colleges and universities. This will certainly be the case where campus police officers operate within a sanctuary jurisdiction that may have policies, laws or ordinances preventing or limiting cooperation between campus police and federal immigration enforcement officials.<sup>48</sup>

### III. Existing law should guide campus decision-making

Although much is unclear about what a sanctuary campus is and how future legislative and executive branch actions will affect such campuses—however they may be defined—a number of legal authorities that are currently in place should guide institutions’ policies and practices.

#### A. *Sharing documents and information with immigration officials*

Although student campus sanctuary petitions varied, many sought a commitment from institutions not to share in the first instance or to withhold upon inquiry information about students’ immigration status from ICE and CBP agents. Below we examine the extent to which an institution may keep confidential, or decline, to share immigration status and other student information with ICE and CBP agents upon request.

1. *Absent a warrant or subpoena, no specific legal requirement compels institutions to provide records to immigration officials that identify undocumented students.*

With a few exceptions, including students participating in a Student and Exchange Visitor Program (SEVP) (discussed below), federal law does not clearly

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45 See *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018).

46 *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503 (E.D. Pa. June 6, 2018).

47 *Id.* at \*33.

48 Oregon State University has recognized this dynamic and explained to its community that “Oregon is already a sanctuary state. Oregon law provides that no state law enforcement agency (such as the Oregon State Police) that serves the OSU Corvallis campus—can use state resources ‘for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the U.S. in violation of federal immigration laws.’” See Edward J. Ray, *supra* note 8.

require that institutions turn student information over to ICE of CBP agents absent a warrant or subpoena. Section 1373 prevents state and local entities from prohibiting or restricting a government entity or official from providing information to ICE. However, as noted above, one federal district court recently held that this statute is unconstitutional. Moreover, courts have not addressed whether, and under what set of facts, public or private higher education institutions are “state or local entities” within the meaning of the statute.

Even if the cooperation obligation in Section 1373 is constitutional and applies to some higher education institutions, that obligation does not appear to override the privacy protections provided by the Family Educational Rights and Privacy Act (FERPA).<sup>49</sup> FERPA generally forbids schools to disclose educational records or personally identifiable information derived from such records to a third party unless the eligible student (or if under 18 years old his or her parent) has provided written consent.<sup>50</sup> Student consent is not required when an institution is complying with a judicial order or lawfully-issued subpoena.<sup>51</sup> However, schools complying with a lawfully-issued subpoena or court order must make a “reasonable effort to notify” the student before compliance with the subpoena.<sup>52</sup> Therefore, even if Section 1373 were to be interpreted to apply to universities and colleges, those that have practices and policies that protect the confidentiality of citizenship or immigration status of their students by requiring a court order or lawfully-issued subpoena before disclosing school records or personally identifiable student information to immigration officials could now reasonably argue under these developing sanctuary city cases that they do not violate the statute. And schools that allow exceptions to their confidentiality policies where an undocumented student is suspected by the campus police of committing a crime based on their own investigation or based upon a valid judicial warrant are less likely to be challenged by other law enforcement agencies beyond ICE.

Of course, institutions that fail to comply with a court order or subpoena could be held in contempt of court. But, it is unclear whether an ICE administratively issued subpoena, without more, is a “lawfully- issued subpoena” that triggers the general FERPA exception to consent in the first place. ICE issues administrative subpoenas for books and records through its own internal processes and those

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49 In 1999, the Department of Justice Office of Legal Counsel (OLC) examined the relationship between Section 1373 and a federal statute barring disclosure of census-related information. The OLC concluded that Section 1373 did not act to repeal the census privacy law. See *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, 23 Op. O.L.C. Supp. 5 (1999), [http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/](http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1999-05-18-census-confidentiality.pdf)

1999-05-18-census-confidentiality.pdf. The same analysis by extension suggests that Section 1373 did not repeal FERPA and other privacy protections in federal law. See Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement And A Poor Substitute For Real Reform*, 20 Lewis & Clark L. Rev. 165, 205 (2016).

50 20 U.S.C. § 1232g (2012); 34 C.F.R. § 99.30(a) (2015). FERPA applies to all schools, public and private, that receive funds under an applicable program of the U.S. Department of Education. *Id.*

51 See 34 C.F.R. § 99.31(a)(9).

52 See *id.* § 99.31(a)(9)(ii).

administrative subpoenas are not issued by a court.<sup>53</sup> When an employer refuses to comply with an administrative subpoena, ICE agents can only enforce it after securing a judicial order from a federal judge.

At other times, ICE may secure court-issued subpoenas from the outset. Whether the FERPA provision that allows institutions to release personally identifiable information without student consent in response to a “lawfully-issued subpoena” extends to administrative ICE subpoenas that have not been reviewed by a court has not been addressed in federal guidance or court decisions.<sup>54</sup>

In addition, FERPA notably excludes certain information from the definition of “educational records,” including “records maintained by a law enforcement unit of the educational agency ... that were created by that law enforcement unit for the purpose of law enforcement.”<sup>55</sup> A school is therefore allowed to disclose such records without student consent or legal process. Similarly, FERPA permits public disclosure of “directory information” without the student’s consent. However, each school must inform students what information is considered “directory information” and provide students an opportunity to withhold consent for disclosure of “directory information.” If this is done properly, an institution is permitted to disclose “directory information” without student consent, a court order, or lawfully-issued subpoena.

With respect to both exceptions to the consent requirement, FERPA *permits but does not mandate* disclosure of the information without student consent. Thus, a campus policy to require a warrant or court order before sharing information that falls into these FERPA exceptions would not run afoul of FERPA. However, where campus officials are state government employees, enacting such a policy may present risks under Section 1373 if the information protected is arguably “citizenship or immigration status” of the student. For instance, if ICE requested the residence address of an enrolled student, and that student had not objected to the institution sharing his or her directory information, even though address is not citizenship or immigration status information, ICE may, as it has in the *City of Philadelphia* litigation, take the position that an institutional policy that prevents employees from sharing this address information in the absence of a lawfully-issued subpoena is counter to the obligation under Section 1373 not to prohibit such information sharing.

## 2. Document retention programs

Institutions should maintain a document retention program that provides for periodic archiving or destruction of documents pursuant to a regular document maintenance schedule. Such programs must comply with other applicable regulatory requirements for maintenance of student records, records pertaining to visas, and any other applicable document retention rules. Any policy that singles out certain

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53 See 8 U.S.C. §1225(d)(4),

54 According to an IRS memorandum, the Department of Education considers an administrative subpoena issued by the IRS “lawfully-issued” for purposes of FERPA. Internal Revenue Serv., Office of Chief Counsel, Memorandum No. 200302046 (Oct. 31, 2002), <https://www.irs.gov/pub/irs-wd/0302046.pdf>.

55 20 U.S.C. § 1232g(a)(4)(B)(ii).

types of documents for destruction because of their potentially incriminating nature would not likely be construed by government authorities (or courts) as part of a regular document retention program. In fact, such a program might suggest concealment, or an attempt to avoid, frustrate, or otherwise impede an immigration investigation.<sup>56</sup>

Moreover, the government may view document destruction policies that amount to an attempt to conceal aliens or impede an immigration investigation as inconsistent with provisions of the Immigration and Nationality Act (INA) that prohibit the aiding or abetting of another person who is harboring or encouraging an undocumented alien to remain in the United States.<sup>57</sup> Or depending upon the circumstances, a document destruction policy that selectively destroys documents identifying students with non-legal immigration status could be construed as evidence that the institution intended to conceal or otherwise harbor undocumented students. In addition, selective destruction of documents that identify undocumented students carries some risk implicating Section 1373. Section 1373 provides not only that persons or agencies may not restrict or prevent the sharing of citizenship or immigration status information with immigration authorities but also may not adopt policies that (for information it otherwise collects or is required to collect) restrict a federal, state, or local government entity from maintaining “information regarding the immigration status, lawful or unlawful, of any individual” in any way.<sup>58</sup>

The Student and Exchange Visitor Information System provides ICE access to certain student records without a subpoena and provides a mechanism for DHS to deter certain campus policies and practices.

While in many circumstances, institutions can demand a subpoena before turning student information over to ICE, an institution’s ICE-authorized acceptance of international students in the F, M, and J nonimmigrant categories and concomitant enrollment in the Student and Exchange Visitor Information System (SEVIS) provides the government an administrative tool to come onto campus and obtain student information contained in SEVIS without formal process. In addition, ICE’s broad authority to certify (or to decline to certify) an institution’s participation in the Student and Exchange Visitor Program (SEVP) could be used to encourage

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56 Various criminal obstruction of justice statutes – for instance, 18 U.S.C. §§ 1503, 1505, 1510, and 1512 – can be and have been used to punish individuals and entities who have destroyed or concealed information relating to pending or potential investigations. See *United States v. McKnight*, 799 F.2d 443 (8th Cir. 1986) (destruction of bank documents subject to grand jury subpoena); *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984) (Section 1505 conviction stemming from obstruction of Department of Energy audit by document destruction); *United States v. Jahedi*, 681 F. Supp. 2d 430 (S.D.N.Y. 2009) (document destruction in violation of Sections 1503 and 1512(c)(1)); *United States v. Perraud*, 672 F. Supp. 2d 1328 (S.D. Fla. 2009) (destruction of documents related to pending SEC investigation); *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (withholding and destroying documents sought in civil discovery); *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977) (defendant aware of grand jury investigation, and caused document to be destroyed knowing that it might be sought by grand jury), *aff’d*, 571 F.2d 572 (3d Cir. 1977).

57 See 8 U.S.C. § 1324(a)(1)(A)(v).

58 See *id.* § 1373(b).

institutions to cooperate with immigration enforcement efforts in other ways. SEVP certification is required for an institution to enroll nonimmigrant foreign students.

All schools in the United States that enroll F-1, and/or M-1 nonimmigrant students must be certified by SEVP. Schools petition for certification by submitting a Form I-17, "Petition for Approval of School for Attendance by Nonimmigrant Student," in the SEVIS portal. Within ICE, SEVP approves or denies these requests for certification. Once certified, the school has access to SEVIS and may issue Form I-20, "Certificate of Eligibility for Nonimmigrant Student Status," which prospective nonimmigrant students need to secure visas.<sup>59</sup> To maintain certification, the school must comply with SEVP regulations and policies, as well as record keeping and reporting requirements.<sup>60</sup>

The SEVIS system tracks the records of these nonimmigrant and visiting students and their continued participation in their educational programs. Further, SEVP-certified institutions are subject to on-site review related to SEVP participating students at any time, without a warrant or subpoena. These institutions are also required to maintain and produce information and documents related to F-1 or M-1 students to DHS at any time upon request.<sup>61</sup> Although DHS agents need not provide a subpoena for such requests, the institution may request that notice be given in writing. An institution has three days to respond to such a written request (or ten days if the information request is about a class of students).<sup>62</sup> However, if a student is in custody, the institution must respond "orally on the same day the request for information is made . . . and DHS will provide a written notification that the request was made after the fact, if the school so desires."<sup>63</sup> In addition, DHS regulations require that F-1 and M-1 students waive their privacy rights under FERPA and prevent educational institutions from invoking FERPA protections in order to avoid disclosing student information that it is otherwise required to provide to DHS.<sup>64</sup>

In addition to providing ICE access to student records for SEVP-participating students without need of a warrant or subpoena, the broad authority ICE has to deny SEVP certification to an institution could be used to encourage institutions to cooperate with immigration enforcement efforts in other ways. SEVP-related regulations list a number of reasons for denial of SEVP certification, but the list is non-exhaustive. The regulations authorize DHS/ICE to withdraw or deny SEVP

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59 Information about students holding J-1 visas is also in SEVIS. Sponsoring organizations must issue a form DS 2019 in order for visiting students to secure their J-1 visas. These visas are authorized by the US Department of State, which follows a process analogous to the process for issuing a Form I-20 for F and M visas.

60 See generally 8 C.F.R. § 214.3.

61 The Note to 8 C.F.R. § 214.3(g)(1) provides that DHS officers "may request any or all of the data in [8 C.F.R. § 214.3(g)(1)(i)-(x)] on any individual student or class of students upon notice."

62 See *id.*

63 *Id.*

64 See 8 C.F.R. § 214(1)(h).

certification for “any valid and substantive reason.”<sup>65</sup> Whether ICE could use such a general provision as authority to enforce immigration policy, including a policy against sanctuary campuses, is an open question.

#### *4. Implications for cooperation agreements with law enforcement*

Campus policies relating to sharing information with immigration law enforcement agencies must be formulated with other legal obligations in mind. In many instances, the laws that establish campus police departments outline the obligations of such forces to cooperate with local police departments. Similarly, some campus police departments have entered contractual agreements with local municipal police departments that must be considered.

A campus police department may have cooperation obligations under the law that established its authority. Practices adopted in response to a call for a sanctuary campus could be inconsistent with those obligations. Similarly, many universities have entered into memoranda of understanding with state or local police departments that detail commitments to work together, and the implementation of sanctuary campus policies might frustrate the purpose of such agreements or the ability of such organizations to work cooperatively. The extent to which such tension arises may depend in part on local law enforcement policies and practices relating to federal immigration law enforcement. Even absent any conflicting legal obligations, institution administrators may want to consider how adopting “sanctuary” policies or practices for undocumented students who are victims of or witnesses to crimes or more generally for any ICE-related inquiry that is not accompanied by a judicial warrant might affect the university’s ability to cooperate with state and local police on a range of matters.

#### ***B. Permitting ICE officials on campus***

Many sanctuary campus petitions called on institutions to prevent ICE officers from entering campus without a warrant. Below we analyze (1) the extent to which campuses can require a warrant before ICE (or other law enforcement) agents enter campus and (2) the risk that such a policy could be found to violate Section 1373’s information-sharing requirement or the provisions of the INA that make it illegal to harbor an alien.

Immigration officers have authority “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.”<sup>66</sup> But this statute does not describe any particular place or manner for the exercise of ICE authority. ICE interrogation can include a brief detention, not amounting to arrest, as outlined in 8 C.F.R. § 287.8(b). For making arrests without a warrant, any immigration officer has the power “to arrest any alien in the United States, if he has reason to believe that the alien ... arrested is in the United States in violation of any ... law or regulation and is likely to escape before a warrant can be obtained

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65     *See id.* § 214.4(a)(2).

66     8 U.S.C. § 1357(a)(1).

for his arrest.”<sup>67</sup> Courts have interpreted “reason to believe” to mean probable cause in this context, which exists when “the facts and circumstances within the arresting officers’ knowledge” are sufficient in themselves to warrant a prudent person’s “belief that an offense has been or is being committed.”<sup>68</sup>

Immigration officers are not permitted to exercise these powers in a manner that violates the Fourth Amendment, which prohibits “unreasonable searches and seizures.”<sup>69</sup> Courts have analyzed Fourth Amendment challenges brought by non-citizens.<sup>70</sup> The U.S. Supreme Court, however, has not directly held that Fourth Amendment protections extend to undocumented aliens residing in the U.S.<sup>71</sup> Even if undocumented aliens do enjoy such protections, those facing removal may be without a meaningful remedy for unconstitutional searches and seizures. The exclusionary rule, which routinely prevents use of evidence secured through an unconstitutional search or seizure in a criminal trial, does not apply equally in an immigration removal proceeding. In *INS v. Lopez-Mendoza*, the U.S. Supreme Court held that the exclusionary rule did not generally apply to removal proceedings but noted that its decision “[did] not deal ... with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>72</sup> Thus, while non-citizens may theoretically be protected from unreasonable searches and seizures, it is possible that evidence obtained through an unconstitutional search may still be relied on in a removal proceeding.

Perhaps more importantly to universities and colleges, the Fourth Amendment does not necessarily require that ICE officers secure a warrant before setting foot on campus. Students’ Fourth Amendment protections would require a warrant only for searches and seizures conducted in places in which an individual has a reasonable expectation of privacy.<sup>73</sup> Because many parts of a university campus are open to the public and accessible by roads and walkways, students may have difficulty establishing that they have an expectation of privacy in the entire campus. Campuses may therefore be unable to legally (or practically) require a warrant for ICE agents to access the public spaces on campus. In contrast, students likely do have an expectation of privacy in restricted buildings, dormitories, or other living spaces so campuses may be able to legally require a warrant before ICE agents enter those spaces.

The school’s own property interests in controlling access to its facilities—particularly to places on campus that are regularly open to the public—may also

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67 *Id.* § 1357(a)(2).

68 *See, e.g., United States v. Olivares*, 496 F.2d 657, 660 (5th Cir. 1974) (internal quotation marks omitted).

69 U.S. Const. amend. IV.

70 *See, e.g., INS v. Delgado*, 466 U.S. 210, 213 n.1, 218 (1984); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1022-23 (N.D. Ill. 1982).

71 *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (explaining that this issue was not squarely before the court in the current case or in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

72 *Id.*

73 *See Katz v. United States*, 389 U.S. 347 (1967).

be limited. DHS regulations confer enforcement powers on immigration officials. Among other things, those regulations provide that immigration officers can perform site inspections without a warrant. Site inspections are “enforcement activities undertaken to locate and identify aliens illegally in the United States, or aliens engaged in unauthorized employment, at locations where there is a reasonable suspicion, based on articulable facts, that such aliens are present.”<sup>74</sup> The regulations also describe the warrant requirement for non-public areas of a business or residence:

An immigration officer may not enter into the non-public areas of a business, a residence including the curtilage of such residence, or a farm or other outdoor agricultural operation, except as provided in section 287(a)(3) of the Act [relating to searches of vehicles “a reasonable distance” from the external boundary of the United States and vessels within U.S. territorial waters], for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer’s report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained.<sup>75</sup>

This provision recognizes that some areas of a business are non-public and therefore would require a warrant or consent to access. However, it also posits that immigration officers can access other areas of a business that are clearly public without a warrant.

Accordingly, ICE officials can likely access, without a warrant, areas of a campus that are open and plainly accessible. Colleges and universities might ask immigration officials to check in with campus security before entering such areas of campus, but such advance notice would be a courtesy and not a legal requirement. Any such requirement, of course, would need a provision for exigencies such as “hot pursuit” of dangerous suspects who may cause harm to students or campus employees, or if law enforcement action were delayed in order to comply with a campus demand for advanced notice, an institution could face scrutiny and potentially third-party liability for any harms that result due to the delay. In May 2016, for instance, the family of a woman murdered by an unauthorized alien in San Francisco filed a wrongful death suit against the city and its sheriff, alleging that a sanctuary city policy facilitated the murder.<sup>76</sup>

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74 See 8 C.F.R. § 287.8(f)(1).

75 See *id.* § 287.8(f)(2).

76 See Richard Gonzales, *Family of Kate Steinle Files Wrongful Death Lawsuit*, NPR (May 27, 2016), <http://www.npr.org/sections/thetwo-way/2016/05/27/479784842/family-of-kate-steinle-file-wrongful-death-lawsuit>. There is some risk that if an institution’s policy limits law enforcement’s capacity to respond to exigent circumstances, the institution could face a third-party liability claim from an injured party. Students have asserted that campuses have a duty to protect students from crimes committed by a third party under a number of legal theories, including the institution’s status as a landowner, the special relationship theory, and duties owed by campus police who undertake to protect students. See Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

A policy with a good-faith insistence upon legal process before entering areas of campus in which students have a reasonable expectation of privacy and in which the school has a valid interest in the orderly conduct of its business of providing an appropriate learning environment is likely defensible under the harboring provision of the INA (discussed at length below).

Even when campus officials have a good-faith basis to insist on a warrant (or a subpoena for records), they should do so in a manner that does not actively frustrate law enforcement efforts. For instance, if, while awaiting service of a warrant, a campus official was to hide the undocumented persons or destroy records, a court or law enforcement authority could take the position that an institution has run afoul of the harboring provision discussed below. Moreover, such steps might also trigger separate obstruction of justice charges if the student was a criminal suspect or enhancements under the U.S. Sentencing Guidelines for harboring, as they would be willfully impeding the investigation of ICE officials.<sup>77</sup>

Although campus officials may not legally obstruct an immigration investigation, campus officials (including campus police) do not have a broad affirmative duty to report violations of immigration laws.<sup>78</sup> Provisions of the INA allow state and local law enforcement to enter into agreements with federal authorities to enforce the immigration laws, but the INA provides that “[n]othing in this subsection shall be construed to require any State or political subdivision of a State” to enter into such arrangements.<sup>79</sup> Thus, institutions do not generally have an affirmative obligation to notify immigration officials about student-related matters or to assist such officials beyond the normal legal requirements to comply with legal process or other lawful requests.<sup>80</sup>

Although the INA does not require immigration enforcement cooperation agreements, as noted above, ICE’s broad authority to deny SEVP certification to an institution could be used to encourage cooperation. In addition, specific institutions may have cooperation and reporting obligations that require campus police to take certain actions under the state or local laws that establish the authority of those police departments. Campuses should take care to ensure that no campus

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77 See U.S. Sentencing Guidelines Manual § 3C1.1 (U.S. Sentencing Comm’n 2015). See also *United States v. Manzano-Huerta*, 809 F.3d 440 (8th Cir. 2016) (affirming the conviction of a defendant prosecuted for violating the harboring statute with an obstruction enhancement because he provided materially false information to law enforcement about the employment status of an unauthorized employee).

78 There is no general affirmative duty for citizens to report violations of the immigration laws. See *United States v. Driscoll*, 449 F.2d 894, 896 (2d Cir. 1971) (defendant aware of alien smuggling had no duty to alert authorities); see also *Doe v. City of New York*, 860 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2008) (holding that although the Metropolitan Transit Authority was a government entity subject to the requirements of Section 1373, Section 1373 did not impose an affirmative duty to report information to federal immigration authorities), *aff’d*, 890 N.Y.S.2d 548 (N.Y. App. Div. 2009).

79 8 U.S.C. § 1357(g)(9).

80 Of course, although an individual is not required to affirmatively assist authorities, various federal statutes prohibit obstruction of civil, administrative, and criminal investigations and proceedings. See *supra* note 56.

sanctuary policies or practices undermine their ability to meet these obligations. Similarly, many universities have entered into memoranda of understanding with state or local police departments that detail commitments to work together. Administrators should therefore carefully consider whether any policies they adopt undermine the campus police department's ability to cooperate with local police in the ways required by law or by any existing agreement with state or local police.

### *C. Institutions cannot "harbor" illegal aliens.*

Another consideration that must guide campuses' policy development is whether any rules or practices designed to support and protect students without legal immigration status could be construed to violate the harboring provision of the INA. Practices relating to campus housing, financial aid, and document destruction could come under such scrutiny.

The harboring provisions of the INA impose criminal penalties and fines on persons who do any of the following with an unauthorized alien: (i) bring into the United States, (ii) transport within the United States, (iii) conceal, harbor, or shield from detection in any place, or (iv) encourage or induce to come to, enter, or reside in the United States.<sup>81</sup> For subparts (ii), (iii), and (iv), the defendant need not know that the alien is unauthorized; "reckless disregard" of this fact is sufficient. The statute also penalizes attempts to commit those acts, as well as conspiring or aiding and abetting such acts.

Courts have interpreted the harboring prohibition broadly, generally considering "shielding," "harboring," and "concealing" to encompass "conduct tending substantially to facilitate an alien's 'remaining in the United States illegally.'"<sup>82</sup> This broad interpretation of key terms of the harboring provision could be applied to conclude that activities that do not involve active or affirmative concealment of unauthorized aliens is still harboring. For example, when in the 1980s, students proposed that the University of California system offer unauthorized refugees "sanctuary" in private student housing, federal immigration officials indicated that facilitators of such a program could face prosecution.<sup>83</sup> However, some recent court decisions have begun to limit the meaning of "harboring" under the statute by requiring that the defendant do more than simply provide shelter or transportation to an undocumented alien. These cases suggest that "harboring" means keeping an alien in any place, moving an alien, or providing physical protection with the intent to conceal from government authorities.

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81 8 U.S.C. § 1324(a). A "person" under the statute can be either "an individual or an organization." *See id.* § 1101(b)(3).

82 *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975). *See also* 3C Am. Jur. 2d *Aliens and Citizens* § 2588 (citing *Lopez*, 521 F.2d 437 and *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977)). *But see United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009) (rejecting the requirement that actions substantially facilitate an alien's remaining in the U.S. and holding instead that "concealing, harboring, or shielding from detection an alien is unlawful conduct, regardless of how effective a defendant's efforts to help the alien might tend to be").

83 *See* Bill Billiter, *'Sanctuary' for Central Americans Becomes a UC Cause*, LA Times (Feb. 1, 1985), [http://articles.latimes.com/1985-02-01/local/me-5929\\_1\\_sanctuary-movement](http://articles.latimes.com/1985-02-01/local/me-5929_1_sanctuary-movement).

This narrowed definition was recently referenced in *United States v. McClellan*.<sup>84</sup> There, a restaurant owner was convicted under the harboring provision for employing and providing housing for unauthorized aliens. The *McClellan* court affirmed that the defendant had violated the harboring statute because the defendant had not *simply provided housing*, but rather had “deliberately safeguard[ed] members of a specified group from the authorities.”<sup>85</sup> The court explained, “[A] defendant is guilty of harboring for purposes of § 1324 by ‘providing . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.’”<sup>86</sup>

In sum, federal case law is unclear with regard to what level of intent is required for harboring. Some courts have required that the defendant act with clandestine intent to hide the alien,<sup>87</sup> while others have required that the defendant’s actions “substantially facilitate” the alien’s unlawful stay,<sup>88</sup> and still others have held that “simple sheltering” is sufficient to trigger statutory liability.<sup>89</sup>

Separate from establishing liability for concealing, harboring, or sheltering an alien, Section 1324 also targets those who “encourage or induce” an unauthorized person to come to, enter, or reside in the United States.<sup>90</sup> Federal courts have explained that a defendant “encourages” an unauthorized alien to “reside” in the United States when the defendant takes some action “to facilitate the alien’s ability to live in this country indefinitely.”<sup>91</sup> Defendants have been convicted under this provision for doing as little as occasionally employing an alien housekeeper while offering advice on how to avoid deportation.<sup>92</sup> More typically, cases involve employers providing additional aid to unauthorized employees if such aid encourages them to stay.<sup>93</sup>

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84 794 F.3d 743 (7th Cir. 2015).

85 *Id.* at 751 (internal quotation marks omitted).

86 *Id.* at 749-50 (quoting *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012)); *see also United States v. Vargas-Cordon*, 733 F.3d 366, 381 (2d Cir. 2013) (explaining that harboring requires that the defendant intended to facilitate an illegal alien’s remaining in the United States and to prevent the alien’s detection by immigration authorities).

87 *See e.g., id.*

88 *See Lopez*, 521 F.2d 437; *Cantu*, 557 F.2d 1173.

89 *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (“harbor” means “to afford shelter to”).

90 8 U.S.C. § 1324(a)(1)(A)(iv).

91 *United States v. Thum*, 749 F.3d 1143, 1148 (9th Cir. 2014).

92 *United States v. Henderson*, 857 F. Supp. 2d 191, 209 (D. Mass. 2012) (quoting *DelRio-Mocci v. Connolly Pros. Inc.*, 672 F.3d 241, 248 (3d Cir. 2012)) (explaining that encouragement entails “affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been”).

93 *See, e.g., Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295 (11th Cir. 2010) (finding that defendants had “encouraged or induced” illegal aliens to reside in the United States by knowingly supplying them with jobs and social security numbers to facilitate their employment, because the “Court [gives] a broad interpretation to the phrase ‘encouraging or inducing’ in this context, construing it to include the act of ‘helping’ aliens come to, enter, or remain in the United States”).

Although the outside parameters of liability under the harboring statute is unclear, there is some danger that institutional efforts to assist undocumented students, perhaps by knowingly providing institutional financial aid, could trigger such liability. Such actions could be interpreted as encouraging or inducing an illegal alien to reside in the United States. Specifically, knowingly funding an undocumented alien student's education in the United States could be challenged as "encouraging" him/her to reside in the United States in violation of immigration laws.

Although this risk does exist, with rare exception, harboring enforcement actions have historically targeted defendants who reaped some financial gain from harboring (like retaining a cheap source of labor).<sup>94</sup> As noted above, a harboring enforcement action against a university was threatened in at least one instance.<sup>95</sup> But, there is no clear legal precedent establishing that providing financial aid, counseling services, dormitory housing, or other student services violates (or does not violate) the harboring provisions of the INA.

The federal circuit courts have taken a varied approach to the interpretation of the harboring provision and therefore this area of the law is particularly unsettled. If an institution were liable under the harboring provision, penalties can be severe and include both prison time and fines. Each violation—which means "for each alien in respect to whom such a violation occurs"—can carry a prison sentence of up to five years. If the harboring is done for a commercial purpose, the potential sentence doubles to ten years. Fines of up to \$500,000 per violation can also be imposed. Additionally, the statute authorizes seizures and forfeitures, providing, "[a]ny conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a [harboring] violation . . ., the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture."<sup>96</sup>

The harboring provision of the INA references "any person," and thus individual employees acting at the direction of an institution could also be prosecuted. Although we are not aware of prior cases involving criminal or civil liability of university employees under the harboring provision of the INA, church employees have faced penalties for their roles in sanctuary practices.<sup>97</sup> Fines for individuals are limited to \$250,000 per violation.<sup>98</sup>

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94 Most cases deal with employers providing additional aid to unauthorized employees that encourages them to stay. *See, e.g., Edwards*, 602 F. 3d 1276. The Harboring Provision allows for a greater penalty for those convicted of harboring for some commercial gain, but defendants motivated by humanitarian goals are liable under the statute as well. *See Aguilar*, 883 F. 2d 662.

95 *See Billiter, supra* note 83.

96 8 U.S.C. § 1324(a) and (b)(1).

97 *See e.g. Aguilar*, 883 F.2d 662 (affirming the conviction and sentence of probation for Arizona church officials who led a well-publicized sanctuary program).

98 *See* 18 U.S.C. § 3571; *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010).

#### IV. Conclusion

American immigration policy has been on a roller coaster ride since the September 11, 2001 terrorist attacks. The election of President Trump signaled that his anti-immigrant campaign rhetoric would soon be followed by executive policies aimed to increase enforcement of existing immigration laws.

Students, faculty, and other campus constituencies across the country have responded by urging that their campuses be declared “sanctuaries,” where administrators would take all legal measures to protect students from deportation and removal proceedings. But there is no consensus about the meaning of sanctuary campus, even among those campuses who have declared themselves as such. And, even though the specific commitments made by campuses in response to student petitions were often modest, adopting the term “sanctuary” may have dramatic symbolic and political consequences. For some, the term suggests support and compassion for students. But to critics, it signals a willingness to defy the law to shelter unauthorized immigrants.

College administrators must thus navigate territory where both the meaning of sanctuary is vague and the policies of the executive branch with regard to immigration enforcement and relative to funding for sanctuary jurisdictions is still developing. With so much uncertainty, it is essential that institutions understand the current law, and monitor a number of key developments on the horizon. As discussed above, the idea that churches and schools can provide legal sanctuary from deportation and removal proceedings is based on tradition and optics, not an actual non-discretionary legal restriction on the authority of ICE officials. Moreover, several legislative proposals are pending that, if enacted, would restrict funding to sanctuary campuses; but these proposals themselves might be subject to legal or constitutional challenge. Institutions would be wise to track not only these proposals but also the legal battles surrounding the Trump Administration’s attempts to withdraw federal funding from state and local jurisdictions that have adopted sanctuary policies.

Specific policies and practices that campuses may adopt or have recently adopted must also be examined in relation to the harboring provisions of the INA and in relation to Section 1373, which prevents state and local entities from adopting policies that prevent government entities or employees from providing citizenship or immigration status information to immigration authorities. Of course, when student information is shared, such disclosures must not violate FERPA. Non-collection of immigration status information, except where collection is required by law, may be a strategy that enables the institution to avoid ICE distractions. Any approach must also include tracking future court decisions that address the constitutionality of Section 1373.

In addition, campuses should consider whether their actions could be construed to frustrate or impede an immigration investigation or otherwise violate criminal obstruction of justice laws. Moreover, institutions need to be aware that participation in the SEVP program provides DHS broad authority to review certain student records and that ICE has broad authority to withdraw SEVP certification. Finally, sanctuary policies and practices need to be examined for consistency with laws

that grant authority to campus police forces and any agreements with local and federal law enforcement agencies.

With regard to ICE's agents access to campus, agents can likely legally exercise their authority on public parts of campus without a warrant. Institutions may insist on a warrant for entry into private dormitories and other areas where students have an expectation of privacy. In so doing, they must also ensure that they do not run afoul of law enforcement cooperation agreements, and that they avoid any activities that could be deemed to be willfully obstructing an investigation.

Finally, institutions should carefully monitor legal decisions construing the harboring provisions of the INA . There is little precedent that addresses when a college may be guilty of harboring an illegal alien. The interpretation of the harboring provisions is largely unsettled and thus it would be prudent to remain attentive to future interpretations of "harboring" by governmental officials, law enforcement and the courts.