THE UNCONSITUTIONALITY OF 8 U.S.C. § 1373 AND ITS IMPLICATIONS FOR SANCTUARY POLICIES

Why Jurisdictions Limiting Cooperation with ICE Should Feel Relieved

INTRODUCTION

The Trump Administration has repeatedly attacked states and local jurisdictions that have 'sanctuary policies' and claim that they violate federal law. The legal argument largely relies on federal law 8 U.S.C. § 1373, which prohibits state and local governments from enacting laws or policies that limit communication with ICE about "information regarding the immigration or citizenship status" of individuals.[1] According to the federal government, 8 U.S.C. § 1373 requires jurisdictions to comply with numerous ICE requests and, by extension, make sanctuary policies unlawful.

Recently, however, the Supreme Court of the United States has provided a powerful tool for jurisdictions with sanctuary policies to attack the constitutionality of 8 U.S.C. § 1373.[2] In fact, two federal district courts have already found 8 U.S.C. § 1373 unconstitutional under the Tenth Amendment,[3] and another characterized it as "highly suspect."[4] These decisions have important implications for jurisdictions who wish to adopt policies against aiding the federal government in deporting immigrants.

NEW COURT RULINGS PROHIBIT THE FEDERAL GOVERNMENT FROM TELLING STATES AND LOCALITIES HOW TO REGULATE

In May 2018, the Supreme Court of the United States issued an important decision in *Murphy v. National Collegiate Athletic Association*.[5] Although this case dealt with a federal law that prohibited state authorization and licensing of sports gambling schemes, the Court's findings have sweeping implications in the immigration field.

Specifically, the Court ruled that the Tenth Amendment not only prohibits the federal government from affirmatively **compelling** a state or local jurisdiction to enact laws and policies, but it also prevents the federal government from **prohibiting** a state or local jurisdiction from enacting new laws or policies. According to the Court, the basic principle is that the Tenth Amendment bars the federal government from issuing direct orders to state and local jurisdictions, and therefore applies in either scenario.

In June 2018, the U.S. District Court in the Eastern District of Pennsylvania became the first court to take the Supreme Court's findings and apply them to 8 U.S.C. § 1373.[6] Observing that 8 U.S.C. § 1373 **prohibits** government entities from enacting laws or policies, the district court cited *Murphy* to hold that 8 U.S.C. § 1373 is unconstitutional under the Tenth Amendment of the U.S. Constitution. In July 2018, the Northern District of Illinois agreed.[7]

BIG IMPLICATIONS FOR LOCAL SANCTUARY POLICIES

So far, 8 USC § 1373 has been found unconstitutional by two courts and 'constitutionally suspect' by a third. Everywhere else, it is still the law. But as more courts review it, the statute may be struck down in more jurisdictions.

Where 8 U.S.C. § 1373 has been struck down, it may be lawful for a state or locality to limit communications with ICE about individuals' immigration status.

- Advocates should use these findings to push for adopting or strengthening sanctuary policies in their communities, and demand that local governments not report anyone to ICE.
- Jurisdictions with sanctuary policies should use these court rulings to defend their policies.
- Communities should educate their law enforcement agencies and local governments that there is no legal obligation to share immigration status information with federal agents, and that policies against collaboration with ICE are entirely legal and good policy choices.

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[1] 8 U.S.C. § 1373. For more information about 8 U.S.C. § 1373 and sanctuary policies, see our Fact Sheet on Sanctuary Policies and 8 U.S.C. § 1373.
[2] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).
[3] *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503, at *31 (E.D. Pa. June 6, 2018).
[4] *United States v. California*, No. 2:18-cv-00490 at *35 (E.D. Cal, July 5, 2018). However, the court did not make a ruling on the constitutionality of § 1373 because it found that California's laws did not conflict with the statute anyway.
[5] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).
[6] *City of Philadelphia*, No. CV 17-3894, 2018 WL 2725503 at *33.
[7] *City of Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill Jul. 27, 2018).

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January 27, 2020

Chief Herbert
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Dear Chief Hebert,

Thank you for providing the Criminal Justice Training Council and our office with a copy of the Winooski Police Department Fair and Impartial Policing (FIP) Policy, effective March 1, 2018. Vermont's FIP statute, 20 V.S.A. § 2366, requires the Council, in consultation with our office to review agencies' FIP policies to ensure the following statutory requirements:

> [Each agency] shall adopt a fair and impartial policing policy that includes each component of the Criminal Justice Training Council's model fair and impartial policing policy. Such agencies and constables may include additional restrictions on agency members' communication and involvement with federal immigration authorities or communications regarding citizenship or immigration status. Agencies and constables may not adopt a policy that allows for greater communication or involvement with federal immigration authorities than is permitted under the model policy.

20 V.S.A. § 2366(a)(1).

In comparing the Winooski policy to the Council's model policy, we noted that it did not include any of the model policy's references to two federal immigration statutes — 8 U.SC. §§ 1373 and 1644. Among other things, those two statutes provide that a local government entity 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."

Vermont's FIP statute, 20 V.S.A. § 2366, provides, in relevant part, "To the extent any State or local law enforcement policy or practice conflicts with the lawful[1] requirements of 8 U.S.C. §§ 1373 and 1644, that policy or practice is, to the extent of the conflict, abolished." *Id.*, at subsection (f). Accordingly, the Council's model policy included several provisions stating that various restrictions on officers or agency communications were not intended to conflict with the lawful requirements of those two federal statutes.

As noted above, the Winooski policy does not specifically mention Sections 1373 or 1644. However, it does provide that nothing in the policy "is intended to violate federal law." Construing this phrase to mean that nothing in the Winooski FIP policy is intended to conflict with the lawful requirements of Sections 1373 and 1644, we can say that the Winooski policy includes each element of the Council's model policy. Consequently, we can also say that the Winooski policy complies with the Vermont FIP statute, 20 V.S.A. § 2366(a)(1).

Respectfully,

David Scherr

[1] That FIP statute's reference to the "lawful requirements" of Sections 1373 and 1644 accounts for the fact that questions have arisen about whether the laws are constitutional. However, to date, the only federal court decision applicable to Vermont, *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999) rejected claims that Sections 1373 and (by implication) 1644 are unconstitutional on their face.

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Julie Kalish
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Executive Director

January 17, 2020

Dear Members of the Burlington City Council:

It is my understanding that Burlington is considering amending the Burlington Police Department's Fair and Impartial Policing Policy (FIPP) to provide greater protections against law enforcement entanglement with federal immigration enforcement. Because the model FIPP is insufficiently protective and contains too many loopholes and concessions to federal overreach, I write on behalf of the American Civil Liberties Union of Vermont to support this important and meaningful step and to address the legal context that has caused some to oppose such amendments.

As you are aware, a federal law, 8 U.S.C. § 1373, purports to bar government entities and officials from "prohibit[ing], or in any way restrict[ing], 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." Since 2017, the U.S. Department of Justice (DOJ) has been withholding or threatening to withhold certain federal funds—JAG/Byrne funds—from jurisdictions it deems to be violating this statute. In the face of those threats, Vermont has significantly weakened the model FIPP's information-sharing restrictions, notwithstanding serious doubt as to both § 1373's constitutionality and the DOJ's authority to require compliance with § 1373 as a condition of receiving JAG/Byrne funds.[1]

Recognizing that many municipalities want to adopt more protective policies than the model FIPP, the legislature last session amended 20 V.S.A. § 2366 to make explicitly clear what we believed was already the case in existing law: the model policy establishes a baseline set of protections that all agencies are required to adopt, and individual agencies may choose to include stronger, more robust protections in their own policies.[2] We urge municipalities—including Norwich—to exercise this discretion and flexibility to adopt a policy that will better protect immigrant communities and further the trust between law enforcement and civilians.

Section 1373 has been significantly questioned and limited by the federal courts in recent years. Under the Tenth Amendment's anticommandeering principle, Congressional attempts to directly compel—or commandeer—states and localities to further a federal regulatory scheme violate the constitution. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (holding that the federal government cannot commandeer state and local entities to expend funds and resources to enforce a federal regulatory scheme such as immigration).

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[1] The Vermont Attorney General has joined amicus briefs arguing that § 1373 is unconstitutional and the DOJ's threats are unlawful in the Eastern District of Pennsylvania and the Third, Seventh, and Ninth Circuits.

[2] *See* H.518, An Act Relating to Fair and Impartial Policing (2019), *available at* https://legislature.vermont.gov/bill/status/2020/H.518.

Twenty years ago, in *City of New York v. United States*, the Second Circuit upheld the constitutionality of § 1373 under the Tenth Amendment because the statute does not impose an affirmative obligation on states or localities and instead merely prohibits certain actions. 179 F.3d 29, 35 (2d. Cir. 1999) ("[Section 1373 does] not directly compel states or localities to require or prohibit anything. Rather, [§ 1373] prohibit[s] state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with [federal immigration authorities]."). However, the Second Circuit's analysis of § 1373 relied on a now-outdated distinction between an affirmative obligation and a prohibition by Congress on states (that is, between Congress ordering the states to do something versus ordering them not to do something), in which only the former violated the anticommandeering principle. In 2018, the Supreme Court held that the anticommandeering principle applies equally to Congressional requirements and prohibitions, eliminating the distinction the Second Circuit had relied on in *City of New York*. *Murphy*, 138 S. Ct. at 1478. *Murphy* has thus called the constitutionality of § 1373 into serious question.

In light of *Murphy*, federal courts have questioned *City of New York* and § 1373's proscription on states, including one district court in the Second Circuit that has already departed from *City of New York* and has declared § 1373 unconstitutional. *See State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) (ruling that "this Court is not bound by *City of New York* and must follow the Supreme Court's clear direction in *Murphy*" to find that § 1373 violates the Tenth Amendment); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) ("[T]he Court believes that *Murphy*'s holding deprives *City of New York* of its central support . . . ."); *United States v. California*, 314 F. Supp. 3d 1077, 1108 (E.D. Cal. 2018) ("[T]he Supreme Court's holding in *Murphy* undercuts portions of the Second Circuit's reasoning and calls its conclusion into question."); *see also City of Chicago*, 321 F. Supp. 3d at 872 ("Section 1373 is thus unconstitutional on its face"); *City of Philadelphia v. Sessions*, 309 F.Supp.3d 289, 330 (E.D. Pa. 2018) ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment."); *United States v. California*, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect."); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) ("In agreement with every court that has looked at these issues, I find that . . . Section 1373 is unconstitutional . . . ."); *City of Los Angeles v. Sessions*, No. CV 18-7347-R, 2019 WL 1957966, at *4 (C.D. Cal. Feb. 15, 2019) ("[Section 1373 is] unconstitutional as applied to States and local governments under the Tenth Amendment's anti-commandeering principle.") To our knowledge, no court has found § 1373 constitutional since *Murphy*.

In addition, regardless of § 1373's constitutionality, the DOJ has no authority to attach conditions to receipt of JAG/Byrne funds that Congress itself did not impose. The JAG/Byrne program is a "formula grant" program, meaning that the funds are distributed to grantees according to a statutorily imposed formula that considers population and violent crime rate. The DOJ does not have any

discretion to determine how or if those funds are distributed so long as the grantee meets the conditions imposed by Congress. Notwithstanding this lack of authority, the DOJ has attempted to impose additional conditions not imposed by Congress, including requiring grantees to certify compliance with § 1373. Many courts have held that that the DOJ may not do so. *See, e.g.*, *City of Philadelphia v. Attorney General*, 916 F.3d 276, 291 (3d Cir. 2019) ("[W]e hold that Congress has not empowered the Attorney General to enact the Challenged Conditions."); *State of New York*, 343 F. Supp. 3d at 221 ("Consistent with every other court that has considered these issues, the Court concludes that Defendants did not have lawful authority to impose these conditions."); *City & County of San Francisco*, 349 F. Supp. 3d at 934 ("In agreement with every court that has looked at these issues, I find that: the challenged conditions violate the separation of powers. . . ; the Attorney General exceeds the Spending Power in violation of the United States Constitution by imposing the challenged conditions; [and] the challenged conditions are arbitrary and capricious . . . ."); *City of Evanston v. Barr*, __ F. Supp. 3d __, 2019 WL 4694734, at *8 (N.D. Ill. Sept. 26, 2019) ("For the foregoing reasons, the Attorney General lacks statutory authority to impose the [§ 1373-compliance] questionnaire condition, and it is *ultra vires*."); *City of Providence v. Barr*, __ F. Supp. 3d. __, 2019 WL 5991039, at *2 (D.R.I. Nov. 14, 2019) ("In addition to the many courts that have struck down the three conditions for FY 2017, every court to consider the restrictions for FY 2018 has also struck them down. . . . [N]othing in the Byrne JAG statute grant[s] the Attorney General the authority to impose conditions that require states or local governments to assist in immigration enforcement." (citations and internal quotation marks omitted)). Again, to our knowledge, no court has ruled to the contrary.

In summary, every court that has heard challenges to the DOJ's threats to withhold JAG/Byrne funds has determined that the DOJ cannot require states and municipalities to permit their employees to share information with federal immigration enforcement, either because the DOJ lacks authority to impose a condition of compliance with § 1373 and/or because § 1373 itself is unconstitutional. I urge you not to let unlawful threats from the federal government stand in the way of meaningful and significant protections for the immigrant community.

Sincerely,

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STATE OF VERMONT
OFFICE OF THE CHITTENDEN COUNTY STATE'S ATTORNEY

November 20, 2020

MEMORANDUM REGARDING FAIR AND IMPARTIAL POLICING POLICIES

I. Call to Action to Vermont Municipalities to Adopt Fair and Impartial Policing Policies that are Stronger and More Protective than the State's Model Policy[1]

The Office of the Chittenden County State's Attorney, in the interest of supporting fair and impartial public safety and criminal justice goals, stands with Migrant Justice of Vermont[2] and the ACLU of Vermont[3] in urging all Vermont municipalities and counties to adopt fair and impartial policing policies that strengthen and improve upon the State's baseline Fair and Impartial Policing Policy ("FIP" or "FIPP").[4] Likewise, in light of the intent of the Vermont legislature,[5] detailed below,[6] and supported by the proper interpretation of federal caselaw,[7] also detailed below, all municipalities and counties in Vermont should adopt fair and impartial policies that strengthen and improve upon the State's baseline FIPP.

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[1] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY] (The model policy specifies that law enforcement may not "arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer.'") (the Council's webpage is linked here: https://vcjtc.vermont.gov/content/model-fair-and-impartial-policing-policy).

[2] See Migrant Justice, https://migrantjustice.net/; see also Alan J. Keays, New policing policy doesn't do enough to protect immigrants, advocates say, VTDigger.Org (Dec. 12, 2017), https://vtdigger.org/2017/12/12/council-adopts-police-anti-bias-policy-amid-calls-for-changes/; Migrant Justice & ACLU to testify on problems with Vermont's Fair & Impartial Policing Policy, VermontBiz (Jan. 23, 2019), https://vermontbiz.com/news/2019/january/23/migrant-justice-aclu-testify-problems-vermont%E2%80%99s-fair-impartial-policing-policy.

[3] See ACLU of Vermont, https://www.acluvt.org/; see also Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (citing H.518, An Act Relating to Fair and Impartial Policing, (2019), available at (https://legislature.vermont.gov/bill/status/2020/H.518).

[4] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY] (The model policy specifies that law enforcement may not "arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer.'") (the Council's webpage is linked here: https://vcjtc.vermont.gov/content/model-fair-and-impartial-policing-policy).

[5] Christopher Lasch et al., Article: Understanding 'Sanctuary Cities', 59 B.C. L. Rev. 1703, 1766 (The purpose of the 2014 Vermont law was to prohibit local law enforcement from policing alleged federal civil immigration violations as well as curtail discriminatory law enforcement practices that often result when local law enforcement involves itself with assisting with the enforcement of federal immigration laws – the 2014 law "was precipitated in part by specific instances of discriminatory traffic stops of noncitizens" in Vermont.).

[6] H.518, An Act Relating to Fair and Impartial Policing, (2019), available at (https://legislature.vermont.gov/bill/status/2020/H.518).

[7] The most recent Circuit Court to opine on the federal government's use of federal law to incorporate immigration-related conditions to the JAG program, decided on April 30, 2020, was the Seventh Circuit, in City of Chi. v. Barr, 957 F.3d 772 (7th Cir. 2020), where the Court held that the U.S. Attorney General did not have the legal authority to impose immigration reporting conditions (notice, access, and compliance) on Byrne JAG grants and where the Court held that the United States Supreme Court made it clear in Murphy v. NCAA, 138 S. Ct. 1461 (2018) that regardless of whether a federal law commands state action or precludes it, "Congress cannot issue direct orders to state legislatures."

It is the position of the Office of the Chittenden County State's Attorney that it is the job of the federal government, and not municipalities and counties, to enforce federal civil immigration law.[8] It is the position of the Office of the Chittenden County State's Attorney that discriminatory practices and adverse criminal justice outcomes often accompany the enforcement of federal immigration laws.[9] It is the position of the Office of the Chittenden County State's Attorney that discrimination, in all of its forms, should play no part in the proper administration of justice and public safety in Vermont.[10]

It is the position of the Office of the Chittenden County State's Attorney that issues involving racial profiling during traffic stops and incidents involving use-of-force are inextricably related.[11] The data is clear, people of color are "disproportionately" subjected to contact with law enforcement[12] and therefore disproportionately subjected to use-of-force.[13] The goals of Vermont's fair and impartial policing legislation cannot be achieved until we address the reasons for why racial disparities in Vermont's law enforcement data continue to persist.

All municipalities and counties in Vermont must recognize past, and ongoing, discrimination suffered by migrant communities, immigrant communities, and black, indigenous and people of color ("BIPOC")[14] while actively working to produce corrective actions to dramatically reform the future.

II. Fair and Impartial Policing Policies in Vermont

In 2009 police departments in Chittenden County began collecting statistics for traffic stops to determine whether racial disparities existed.[15] Also, in 2009, the Vermont Advisory Committee to the United States Commission on Civil Rights issued a revealing report that detailed "the history of racial profiling by law enforcement officers in Vermont."[16] The 2009 report recommended that to better

[8] See generally Murphy v. NCAA, 138 S. Ct. 1461 (2018).

[9] Kate Evans, ARTICLE: Immigration Detainers, Local Discretion, and State Law's Historical Constraints, 84 Brooklyn L. Rev. 1085, 1085-1140 ("The direct effects detainers have on criminal justice outcomes begin with the extended pre-trial detention they provoke. Local officials often refuse to accept bond . . . [and] [a]ccording to one study, individuals subject to immigration detainers were in custody three times longer than other similarly situated inmates. For instance, Enrique Uroza, a college student in Utah, posted bail ten minutes after it was set by the Utah criminal court. Nonetheless, county officials held him for another thirty-nine days based on an immigration detainer before a state court ordered his immediate release.").

[10] Alexander v. Hunt, No. 5:16-cv-192, 2018 U.S. Dist. LEXIS 134572, at *3-5 (D. Vt. Aug. 9, 2018) (internal citations and quotations omitted) (In a 2018 decision, the United States District Court for the District of Vermont found that: "unjustified racial disparity in stops and searches by police will *ipso facto* cause the deprivation of, the equal protection rights of stopped and searched citizens….[The data shows that] Bennington police searched Black drivers at more than five and a half times the rate they searched White drivers, and searched more than 10% of the Black drivers they stopped. These allegations are sufficient to support a reasonable inference that the racial disparity in policing frequently cause[d] the deprivation of a citizen's constitutional rights.").

[11] Vermont State Police traffic stop data shows continued racial disparities, WCAX (Aug. 19, 2020), https://www.wcax.com/2020/08/19/vermont-state-police-traffic-stop-data-shows-racial-disparities/.

[12] Michael Frett, Racial disparities persist in latest Vermont State Police traffic stop report, The Saint Albans Messenger (Aug. 19, 2020), https://www.samessenger.com/news/racial-disparities-persist-in-latest-vermont-state-police-traffic-stop-report/article_42f94704-e25e-11ea-a2d5-c3d4e91d1666.html ("According to VSP, Black operators accounted for 2.78 percent of all stops in 2019 despite accounting for only 1.2 percent of Vermont's overall population, per a 2017 U.S. Census Bureau estimate."); Céline McArthur, UVM study finds anti-bias training had minimal effect on police behavior, WCAX, (Aug. 24, 2020), https://www.wcax.com/2020/08/24/uvm-study-finds-anti-bias-training-had-minimal-effect-on-police-behavior/.

[13] In Burlington, this disparity is also represented by the data. See 2019 Use of Force Report, Burlington Police Department (2019), available at (https://www.burlingtonvt.gov/sites/default/files/u585/Reports/BPD%20Use%20of%20Force%20Report.pdf); see also Open Data Sets, Use-Of-Force, Burlington Police Department (2012-2018), available at (https://www.burlingtonvt.gov/Police/Data/OpenData).

[14] See The BIPOC Project, https://www.thebipocproject.org/ (The BIPOC Project aims to build authentic and lasting solidarity among Black, Indigenous and People of Color (BIPOC), in order to undo Native invisibility, anti-Blackness, dismantle white supremacy and advance racial justice. We use the term BIPOC to highlight the unique relationship to whiteness that Indigenous and Black (African Americans) people have, which shapes the experiences of and relationship to white supremacy for all people of color within a U.S. context.); see also https://www.nytimes.com/article/what-is-bipoc.html; https://www.dictionary.com/e/acronyms/bipoc/.

[15] Alexander v. Hunt, No. 5:16-cv-192, 2018 U.S. Dist. LEXIS 134572, at *3-5 (D. Vt. Aug. 9, 2018) (internal citations and quotations omitted)

[16] Id.

understand the breadth of racial profiling in Vermont and to enact reform, law enforcement should collect data concerning traffic stops and race.[17] In 2010, the Vermont State Police began to collect race data and in 2012 "the Vermont legislature mandated the adoption of bias-free policing policies and made a non-binding recommendation that all police departments in the state collect roadside stop race data."[18]

In 2014 the State of Vermont passed a law[19] that required all local law enforcement agencies to adopt fair and impartial policing policies.[20] The purpose of the law was to prohibit local law enforcement from policing alleged federal civil immigration violations as well as curtail discriminatory law enforcement practices that often result when local law enforcement involves itself with assisting with the enforcement of federal immigration laws.[21] The 2014 law "was precipitated in part by specific instances of discriminatory traffic stops of noncitizens" in Vermont.[22]

In 2016 the Vermont State Police, the Institute on Race and Justice, and the Center for Criminal Justice Policy Research at Northeastern University completed a five-and-a-half year study of race data collected by the Vermont State Police.[23] The study found clear disparities, including: "that non-white drivers were more likely to be stopped, given citations and searched than white drivers in Vermont;" that "the percentage of black drivers searched after a traffic stop was nearly five times that of white drivers;" and that there was "a greater likelihood that Hispanic, Asian and Native American drivers would be stopped, cited or searched compared to white drivers."[24]

In response to the 2014 law and the data noted above, the Vermont Criminal Justice Training Council ("the Council" or "VCJTC") adopted the State's model FIPP in 2017.[25] However the 2017 policy that was adopted by the Council was a watered down version of a prior draft from 2016 that had circulated with consensus buy-in from stakeholder groups.[26] The more protective version of the FIPP,

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[17] Id.
[18] Id.
[19] Christopher Lasch et al., Article: Understanding 'Sanctuary Cities', 59 B.C. L. Rev. 1703, 1766 (In 2014 the State of Vermont passed a law requiring that all local law enforcement agencies adopt a "model fair and impartial policing policy" that prohibits policing civil immigration violations. Among other restrictions, the model policy adopted in 2017 specifies that local law enforcement in Vermont may not: (1) ask for a "person's civil immigration status unless it is necessary to the ongoing investigation of a criminal offense"; (2) use suspicion of a person's undocumented status as a basis for initiating contact, detaining, or arresting that person; or (3) attempt "to enforce federal criminal law" where the only violation is "unauthorized presence in the country[,] . . . a civil infraction." And, in 2017, the California Values Act was enacted, similarly prohibiting local law enforcement from expending resources "to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes . . . .").
[20] See id; citing 2014 Vermont Laws No. 193, § 3 (S. 184) (June 17, 2014), http://libguides.law.du.edu/ld.php?content_id=35254870 (amending 20 V.S.A. § 2366).
[21] See id.
[22] See id (The purpose of the law was to prohibit local law enforcement from policing alleged federal civil immigration violations as well as curtail discriminatory law enforcement practices that often result when local law enforcement involves itself with assisting with the enforcement of federal immigration laws – the 2014 law "was precipitated in part by specific instances of discriminatory traffic stops of noncitizens" in Vermont.).
[23] Vermont State Police: An Examination of Traf5ic Stop Data July 1, 2010-December 31, 2015, (May 24, 2016), https://vsp.vermont.gov/sites/vsp/files/documents/VSPPresentation05242016.pdf.
[24] Steve Zind, Study Finds Racial Disparities In Vermont State Police Traffic Stops, Vermont Public Radio (May 25, 2016), https://www.vpr.org/post/study-finds-racial-disparities-vermont-state-police-traffic-stops#stream/0 (citing Vermont State Police: An Examination of Traf5ic Stop Data July 1, 2010-December 31, 2015, (May 24, 2016), https://vsp.vermont.gov/sites/vsp/files/documents/VSPPresentation05242016.pdf.
[25] See Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY] (The model policy specifies that law enforcement may not "arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer.'") (the Council's webpage is linked here: https://vcjtc.vermont.gov/content/model-fair-and-impartial-policing-policy) (The model policy specifies that law enforcement may not "arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer.'" P VIII(d)).
[26] See "No Polimigra Policy," Migrant Justice, available at https://drive.google.com/file/d/18zvdDotpfOK5SxiokvUcPV5hxXC7SISS/view (According to Migrant Justice the 2016 version of the model FIPP provided for stronger protections for the migrant community. However, the 2017 version, that was adopted, contained a broad sweeping "Savings Clause" which provided a loophole for local and State law enforcement to ignore the rest of the policy if they believed it might violate a contested portion of federal law.).

from 2016, was set aside by the Council because of threats made by the Trump administration.[27] Notably, in March 2017, prior to the Council adopting a final version of the FIPP in December 2017, Vermont Attorney General T.J. Donovan convened a task force that provided guidance concerning the 2016 version of the policy, including that "[i]mmigration is a federal policy issue between the United States government and other countries, not local and state entities and other countries. Absent formal agreements with federal immigration agencies, federal law does not grant local and state agencies authority to enforce civil immigration law . . . ."[28]

The 2017 model policy "specifies that local law enforcement in Vermont may not: (1) ask for a 'person's civil immigration status unless it is necessary to the ongoing investigation of a criminal offense'; (2) use suspicion of a person's undocumented status as a basis for initiating contact, detaining, or arresting that person; or (3) attempt 'to enforce federal criminal law' where the only violation is 'unauthorized presence in the country[,] . . . a civil infraction.'"[29] The underlying purpose of the 2014 law was to "limit local involvement with immigration enforcement."[30]

But the Council's policy also included a "savings clause" which stated that "pursuant to 8 U.S.C §§ 1373 . . . " local law enforcement "may not prohibit, or in any way restrict, any government agent or official from sending to, or receiving from, federal immigration authorities information regarding the citizenship or immigration status, lawful or unlawful, of any individual [nor] . . . prohibit, or in any way restrict, the sending, receiving, maintaining, or exchanging information regarding the immigration status of any individuals. [And that] [n]othing in this policy is intended to violate 8 U.S.C §§ 1373 . . . ."[31] The Council's inclusion of the "savings clause" and other references to 8 U.S.C § 1373 is antithetical to the rest of the policy and results in divergent, partial, and biased criminal justice impacts.

However in a plain reading[32] of 20 V.S.A. § 2366[33] the language of the statute is clear that law enforcement agencies and departments are compelled to comply only with the "lawful requirements"[34] of federal statute.[35] Consequently, the lawfulness of 8 U.S.C § 1373, detailed below, is presently in

[27] See id.
[28] See Guidance to Vermont Cities & Towns Regarding Immigration Enforcement, Thomas J. Donovan Jr., Vermont Attorney General (Mar. 2017), https://drive.google.com/file/d/0B5YYnAgnZQMnOEFVYWZpbi03OGs/view.
[29] See Christopher Lasch et al., Article: Understanding 'Sanctuary Cities', 59 B.C. L. Rev. 1703, 1766.
[30] See Note: Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported By Intergovernmental Agreements, 44 Vt. L. Rev. 645, 653-654 ("Despite such official resistance to recent federal deportation policies, some Vermont law enforcement agents have exhibited willingness to assist federal immigration authorities.").
[31] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY].
[32] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2381, 207 L. Ed. 2d 819 (2020) (The Court noting that a "plain reading" of a statute is fundamental principle of statutory interpretation.).
[33] 20 V.S.A. § 2366 (f).
[34] Black's Law Dictionary (11th ed. 2019) (Black's Law Dictionary defines "lawful" as "[n]ot contrary to law; permitted or recognized by law; rightful <the police officer conducted a lawful search of the premises.").
[35] Id.

question,[36] and has been held as unconstitutional in the most recent Federal Circuit Court decision from earlier this year.[37]

In 2019 the Vermont Legislature recognized that many municipalities may want to adopt fair and impartial policies that were more protective than the model FIPP.[38] Thus, the legislature amended 20 V.S.A. § 2366 to make it clear that the State's model policy established only a baseline set of protections that all agencies are required to adopt, at a minimum, and that individual agencies may elect to include stronger, more robust protections in their own policies.[39]

In sum, the statewide model FIPP falls short of what community stakeholders have advocated for in at least the following four key areas:[40]

- First, the model policy allows local agencies and departments to share confidential information with immigration agents, so long as it is justified on grounds of "public safety" or "law enforcement needs."[41]
- Second, the model policy fails to prohibit a law enforcement presumption and pretext that a person who happens to come into contact with local law enforcement is suspected of having recently crossed the border.[42]
- Third, the model policy allows for local departments and agencies to report the immigration status of victims and witnesses of crimes to deportation agents.[43]
- Fourth, the model policy grants immigration agents access to individuals in police custody.[44]

In 2018 the City of Winooski, in collaboration with Migrant Justice and ACLU of Vermont, became the first municipality in Vermont to adopt a stronger and more protective policy than the State's baseline.[45] The Winooski FIPP makes it clear that enforcement of civil immigration law is a "federal

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[36] See State of New York v. Dep't of Justice, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) (ruling that "this Court is not bound by City of New York and must follow the Supreme Court's clear direction in Murphy" to find that § 1373 violates the Tenth Amendment); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) ("[T]he Court believes that Murphy's holding deprives City of New York of its central support . . . ."); United States v. California, 314 F. Supp. 3d 1077, 1108 (E.D. Cal. 2018) ("[T]he Supreme Court's holding in Murphy undercuts portions of the Second Circuit's reasoning and calls its conclusion into question."); see also City of Chicago, 321 F. Supp. 3d at 872 ("Section 1373 is thus unconstitutional on its face"); City of Philadelphia v. Sessions, 309 F.Supp.3d 289, 330 (E.D. Pa. 2018) ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment."); United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect."); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) ("In agreement with every court that has looked at these issues, I find that . . . Section 1373 is unconstitutional . . . ."); City of Los Angeles v. Sessions, No. CV 18-7347-R, 2019 WL 1957966, at *4 (C.D. Cal. Feb. 15, 2019) ("[Section 1373 is] unconstitutional as applied to States and local governments under the Tenth Amendment's anti- commandeering principle.").

[37] City of Chi. v. Barr, 957 F.3d 772 (7th Cir. 2020).

[38] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020); citing H.518, An Act Relating to Fair and Impartial Policing, (2019), available at (https://legislature.vermont.gov/bill/status/2020/H.518) ("Such agencies and constables may include additional restrictions on agency members' communication and involvement with federal immigration authorities or communications regarding citizenship or immigration status. Agencies and constables may not adopt a policy that allows for greater communication or involvement with federal immigration authorities than is permitted under the model policy.").

[39] Id.

[40] See "No Polimigra Policy," Migrant Justice, available at https://drive.google.com/file/d/18zvdDotpfOK5SxiokvUcPV5hxXC7SISS/view.

[41] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY].

[42] See "No Polimigra Policy," Migrant Justice, available at https://drive.google.com/file/d/18zvdDotpfOK5SxiokvUcPV5hxXC7SISS/view.

[43] See id.

[44] See id.

[45] Kevin Christie, Column: Seeking language that can work for Hartford, The Valley News (Sept. 3, 2019), https://www.vnews.com/Column-Understanding-the-Fair-and-Impartial-Policing-Policy-28189887; see also Major victory for Vermont's "no más polimigra" policy!, Migrant Justice (Jun. 22, 2016), available at https://migrantjustice.net/news/major-victory-for-vermonts-no-m%C3%A1s-polimigra-policy.

responsibility."[46] Notably, the purpose of the Winooski FIPP provides that people who live in our communities "are more likely to engage with law enforcement and other officials by reporting emergencies, crimes, and acting as witnesses; to participate in economic activity; and to be engaged in civic life if they can be assured they will not be singled out for scrutiny on the basis of their personal characteristics or immigration status."[47]

III. Recommendations to Improve the State's FIPP

Like the policy adopted in Winooski, municipalities, and counties, should work with stakeholders that represent the people that live in their community to adopt improved fair and impartial policing policies that represent the specific needs of the community that it hopes to serve. After Winooski enacted its FIPP, Hartford, Burlington, and Norwich adopted comparable policies that provided for similar protections.[48] Most recently, the Addison County Sheriff's Department adopted a policy comparable to the Winooski FIPP. For the purpose of improving upon the State's model policy, improved municipal and county FIPPs, in addition to including provisions provided for in the Winooski model, should also include the following elements:[49]

- Like the policy adopted in Winooski, and as noted in the Vermont Attorney General's 2017 guidance,[50] express mention that the enforcement of civil immigration law is a "federal responsibility."[51]
- Express mention that information about an individual shall not be shared with federal immigration authorities unless necessary to an ongoing investigation of a felony, for which there is probable cause, and the investigation of that felony is unrelated to the enforcement of federal civil immigration law.
- Remove, or exclude, language similar to the State's "savings clause"[52] and all other references to 8 U.S.C § 1373.
- Express mention of the Constitution's Fourth Amendment[53] and the Vermont Constitution's Article 11[54] which provides for the protection against unreasonable search and seizure and which applies equally to all individuals residing in Vermont.

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[46] See Fair and Impartial Policing (Policy), Winooski Police Department (Mar. 1, 2018), available at https://www.winooskivt.gov/DocumentCenter/View/767/Fair-and-Impartial-Policing-Policy.
[47] See Id.
[48] Sarah Asch, Burlington council passes fair and impartial policing resolution, VTDigger (Mar. 10, 2020), https://vtdigger.org/2020/03/10/burlington-council-passes-fair-and-impartial-policing-resolution/ (Notably Hartford's enacted an ordinance applying to all municipal employees.).
[49] Many of the bullet-points below were edited or adopted in part by the Winooski Police Department's FIPP (citing Fair and Impartial Policing (Policy), Winooski Police Department (Mar. 1, 2018), available at https://www.winooskivt.gov/DocumentCenter/View/767/Fair-and-Impartial-Policing-Policy).
[50] See Guidance to Vermont Cities & Towns Regarding Immigration Enforcement, Thomas J. Donovan Jr., Vermont Attorney General (Mar. 2017), https://drive.google.com/file/d/0B5YYnAgnZQMnOEFVYWZpbi03OGs/view.
[51] See Fair and Impartial Policing (Policy), Winooski Police Department (Mar. 1, 2018), available at https://www.winooskivt.gov/DocumentCenter/View/767/Fair-and-Impartial-Policing-Policy.
[52] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY].
[53] See United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990) (reasoning that non-residents do enjoy Fourth Amendment protection if at the time of the search the subject maintains a voluntary attachment to the United States); United States v. Atienzo, No. 2:04-CR-00534 PGC, 2005 U.S. Dist. LEXIS 31652, at *19 (D. Utah Dec. 6, 2005) ("having rejected the categorical position that all illegal aliens as a class lack sufficient connection to this country to assert Fourth Amendment rights, the court has no legal arguments before it disputing Atienzo's specific position that *he* has sufficient connections. In light of the posture of the case, the simplest course is for the court to then accept the uncontested specific view that Atienzo can claim Fourth Amendment protection.").
[54] See State v. Bryant, 2008 VT 39, ¶ 39, 950 A.2d 467, 482 ("The interest protected by Article 11, like the Fourth Amendment, 'is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life.' United States v. White, 401 U.S. 745, 790 (1971) (Harlan, J., dissenting)").

- Note that an "immigration detainer" is an administrative agreement used by federal immigration agents to compel cooperation with local agencies[55] and that municipal and county law enforcement officers shall not engage in federal "immigration detainers" because "detainers" produce adverse public safety and criminal justice results.[56] Express mention that the costs and impacts flowing from federal immigration detainer requests are often adverse, wide-reaching, and severe.[57] Those impacts may include: longer pre-trial detention, the imposition of stiffer sentences, the erosion of trust in law enforcement, the reduction in crime reporting by witnesses and victims of crime, and an increased likelihood of racial profiling and biased policing practices.[58] Express mention that municipal and county employees shall not arrest or detain any individual based on an immigration "administrative warrant" or "immigration detainer"[59] because administrative warrants and immigration detainers[60] have not been issued or reviewed by a neutral magistrate and do not have the authority of a judicial warrant.

- Express mention that personal characteristics and/or immigration status, including the existence of a civil immigration detainer, shall not affect the detainee's ability to participate in pre-charge or police-initiated pre-court processes such as referral to a diversion program or a Community Justice Center and that personal characteristics and/or immigration status shall not be used as a pretext for citation, arrest, or continued custody under Rule 3 of the Vermont Rules of Criminal Procedure.

- Express mention, concerning victim and witness interactions, that the cooperation of migrant and immigrant communities is essential to prevent and solve crimes and maintain the safety and security of all people living in a community. Express mention that fair and impartial policies are intended to support victims of crimes and witnesses of crime and to enhance trust and safety between law enforcement and the people who live in a community. Express mention that municipal and county employees shall not ask about or investigate immigration status of crime victims and witnesses because federal law does not require law enforcement officers to ask about the immigration status of crime victims or witnesses. Express mention that, even if a victim or witness is also a suspect, municipal and county employees shall not ask about, or investigate, immigration status of crime victims or witnesses unless information regarding immigration status is an essential element of a crime (such as human trafficking). Express mention that municipal and county employees shall ensure that all people who come into contact with law enforcement are made aware, and understand, that full victim services are available to victims and witnesses regardless of immigration status.

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[55] Kate Evans, ARTICLE: Immigration Detainers, Local Discretion, and State Law's Historical Constraints, 84 Brooklyn L. Rev. 1085, 1085-1140.

[56] Id ("The direct effects detainers have on criminal justice outcomes begin with the extended pre-trial detention they provoke. Local officials often refuse to accept bond in the criminal proceeding for someone subject to an immigration detainer and thus require the person to remain detained pending the disposition of his or her criminal case.").

[57] Id.

[58] Id.

[59] Id. ("A key means of conscription is the immigration detainer. Immigration detainers are administrative forms used by federal immigration agents that ask local law enforcement officers to notify immigration agents of the migrant's expected date of release from jail or prison, rearrest the migrant, and hold him or her in local jails beyond the time justified by local criminal charges. If a detainer is issued, individuals may be held even if bail is posted or the charges are dropped.[59] Detainers are not limited to people suspected of being in the United States without authorization, but are also used to target long-time lawful permanent residents who may have violated immigration laws. Through detainers, the federal government enlists local law enforcement officers in arresting and detaining migrants in order to widen the net of the deportation system far beyond what federal agents could achieve on their own.")

[60] Id.

- Express mention that municipal and county employees should communicate that employees of a municipality or county serve a mission to provide assistance and ensure safety under Vermont law, and not to enforce federal immigration laws.
- Express mention that unless there is a judicially issued criminal warrant municipal and county employees shall not grant federal immigration authorities access to individuals in municipal or county custody.

Regardless of 8 U.S.C. § 1373, detailed below, many positive improvements to the State's model policy, noted above, have little to do with federal law and everything to do with sensible fair and impartial practices in public safety.[61] Despite the underlying intent of the Vermont Legislature to limit local involvement with immigration enforcement and federal deportation policies, some Vermont law enforcement agencies have demonstrated an enthusiasm to provide local voluntary assistance to federal immigration authorities.[62]

Like the FIPP that was adopted in Winooski,[63] all Vermont towns and cities should do the work to strengthen the State's baseline FIPP and make it clear that enforcement of civil immigration law is a federal responsibility.[64] To truly accomplish State and local public safety goals and outcomes, all members of our communities should feel comfortable engaging with law enforcement without fear that they will face amplified scrutiny on the basis of personal characteristics or immigration status. People who are members of immigrant and migrant communities and individuals and families who are black, indigenous, and people of color deserve protection and an opportunity to thrive in our State.

IV. 8 U.S.C § 1373

Noted above, in the State's model FIPP it provides that "nothing in this policy is intended to violate 8 U.S.C § 1373…."[65] Notably, 8 U.S.C. § 1373[66] has been used by the federal government to threaten sanctuary cities and jurisdictions that adopt fair and impartial policing and other protective policies.[67] 8 U.S.C. § 1373 is a provision of the Immigration and Nationality Act ("the INA"),[68] which

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[61] See generally Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020).

[62] Note: Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported By Intergovernmental Agreements, 44 Vt. L. Rev. 645, 653-654.

[63] Fair and Impartial Policing (Policy), Winooski Police Department (Mar. 1, 2018), available at https://www.winooskivt.gov/DocumentCenter/View/767/Fair-and-Impartial-Policing-Policy.

[64] Id.

[65] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY] (The model policy specifies that law enforcement may not "arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer.'") (the Council's webpage is linked here: https://vcjtc.vermont.gov/content/model-fair-and-impartial-policing-policy).

[66] Meryl Chertoff, Executive Director, SALPAL, City of Chicago v. Barr: A Victory for Sanctuary Jurisdictions and 21st Century Federalism, The Georgetown Project on State and Local Government Policy and Law ("SALPAL"), available at (https://www.law.georgetown.edu/salpal/explainer-city-of-chicago-v-barr/) (Stating that 8 U.S.C. §1373 is the "federal law that prohibits state and local governments from restricting their own officials from communicating information regarding the citizenship or immigration status of any individual to the Immigration and Naturalization Service….[and] [i]n the 2017 Byrne JAG announcement, DOJ announced three new conditions on awards, known as the notice, access and compliance provisions. These respectively require all recipients of Byrne JAG funding to enact laws or regulations, or otherwise notify federal agents of the release date of aliens held in a correctional facility; and to provide access for federal agents to the person prior to that release. It also requires the state or local governments to certify compliance with 8 U.S.C. § 1373.").

[67] Id; see also Cal. ex rel. Becerra v. Sessions, 284 F. Supp. 3d 1015, 1027-28 (N.D. Cal. 2018) (Holding that "[t]he federal government's contention that the State's fear of enforcement is speculative bears little weight. The federal government has actively sought to enforce Section 1373 against jurisdictions whose laws are undeniably similar to the State's confidentiality statutes. For example, the federal government seeks to enforce Section 1373 against Vermont's Model Fair and Impartial Policing Policy, in which officers are required to communicate that they will not report immigrants or immigration status of victims or witnesses to crimes. Letter to Vermont from Alan R. Hanson, Acting Assistant Attorney General for the OJP at the DOJ, Supplemental RJN, Exh. H (Dkt. No. 61). The requirements of Vermont's law closely mirror that of California's confidentiality statutes. The same is true of Philadelphia's policy regarding victims of crimes, against which the federal government has also sought to enforce Section 1373. See RJN, Exh. R, Letter to Philadelphia from Alan R. Hanson, Acting Assistant Attorney General for the OJP at the DOJ (Dkt. No. 27-3). And in its November letter to the State regarding Section

purports[69] to bar local and state government entities from forbidding or in any way limiting, any government entity from cooperating with federal immigration officials "information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[70] The INA[71] is the comprehensive federal statute which grants "extensive and complex" power to Congress over the enforcement of immigration law.[72]

Since 2017 the federal government has threatened to deny federal funding to cities and towns with sanctuary provisions and fair and impartial policies if those jurisdictions are not in compliance with 8 U.S.C. § 1373.[73] Notably, many, but not all, of federal courts that have reviewed 8 U.S.C. § 1373 have ruled against the federal government in its attempts to use federal funding as a "cudgel to force local jurisdictions to comply" with a "mass deportation" agenda.[74]

Likewise, in Vermont, the Trump administration formalized their threat to withhold funding from state and local entities and took issue with Vermont's "fair and impartial policing policy, along with a training bulleting at the [Vermont State Police]. . . ." Specifically, the U.S. Department of Justice ("DOJ") informed Vermont's Department of Public Safety that Vermont's policies and training violated 8 U.S.C. § 1373.[75] In February of 2019, after a prolonged disagreement between the State and the DOJ, the federal government released more than "$2 million in federal funds that. . . had been [withheld] from Vermont due to the alleged non-compliance . . . ."[76]

On January 17, 2020 the ACLU of Vermont submitted a letter in support of Burlington's efforts to amend the baseline FIPP.[77] In its letter, the ACLU of Vermont addressed concerns regarding 8 U.S.C. § 1373 ("Section 1373") and noted that the DOJ has consistently invoked Section 1373 to threaten local and state governments from adopting more protective "sanctuary"[78] or "fair and impartial" [79] policing

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1373's relationship to the Values Act, the federal government indicated that it "reserves the right to identify additional bases of potential violations of Section 1373." RJN, Ex. P.").

[68] *See* 8 U.S.C. § 1101.

[69] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020).

[70] See Cal. ex rel. Becerra v. Sessions, 284 F. Supp. 3d 1015, 1022-23 (N.D. Cal. 2018) (Citing 8 U.S.C. § 1373 and noting that "[t]hrough the Immigration and Nationalization Act ("INA"), 8 U.S.C. §§ 1101 et seq., Congress granted the executive branch near plenary power over the regulation and enforcement of immigration laws in the U.S. See Arizona v. United States, 567 U.S. 387, 396, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). Most pertinent to this lawsuit, Section 1373 of the INA, which was passed in 1996, prohibits local governments from restricting government officials or entities from communicating information regarding immigration status to the U.S. Immigration and Customs Enforcement ("ICE"). It states in relevant part: (a) In General. Notwithstanding any other provision of Federal, State, or local law, 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. (b) Additional Authority of Government Entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service. (2) Maintaining such information. (3) Exchanging such information with any other Federal, State, or local government entity.") (emphasis added).

[71] *See* 8 U.S.C. § 1101.

[72] State v. Dep't of Justice, 951 F.3d 84, 112–13 (2d Cir. 2020) (citing *Arizona v. United States*, 567 U.S. at 395, 132 S.Ct. 2492).

[73] Meryl Chertoff, Executive Director, SALPAL, City of Chicago v. Barr: A Victory for Sanctuary Jurisdictions and 21st Century Federalism, The Georgetown Project on State and Local Government Policy and Law ("SALPAL"), available at (https://www.law.georgetown.edu/salpal/explainer-city-of-chicago-v-barr/).

[74]Ilya Somin, Losing so much he may get tired of losing – Trump suffers setback in yet another sanctuary city case, The Washington Post (Nov. 24, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/24/losing-so-much-he-may-get-tired-of-losing-trump-suffers-setback-in-yet-another-sanctuary-city-case/; see also Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020).

[75] Peter Hirschfeld, Fair and Impartial Policing: Is it Happening in Vermont?, Vermont Public Radio (Aug. 29, 2020), https://www.vpr.org/post/fair-and-impartial-policing-it-happening-vermont#stream/0.

[76] Id.

[77] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (As noted above, Burlington later adopted a strengthened FIPP).

[78] See Cal. ex rel. Becerra v. Sessions, 284 F. Supp. 3d 1015, 1022-23 (N.D. Cal. 2018).

[79] See id.

policies.[80] Specifically DOJ has withheld or threatened to withhold JAG/Byrne federal grants ("JAG" or "JAG Grants" or "Byrne Grants")[81] from jurisdictions that the DOJ deems to be in violation of Section 1373—or that fail to certify that they are, or will remain, in compliance.[82] The JAG grants[83] program "is the leading source of federal justice funding to state and local jurisdictions" and provides state and local governments "with critical funding necessary to support a range of program areas…."[84] Because of DOJ's threats to withhold federal funding, invoking Section 1373, Vermont's model FIPP contains significantly weakened provisions concerning restrictions on information-sharing.[85]

V. Federal Caselaw and Challenges to DOJ's use of Section 1373

Concerning the constitutional context, most of the legal challenges to the DOJ's use of Section 1373, involving sanctuary cities and jurisdictions with fair and impartial policing polices, have arisen under the Tenth Amendment's anticommandeering doctrine.[86] Generally, the anticommandeering doctrine stands for the basic principle that it is unconstitutional for the federal government to directly commandeer states and localities to further a "federal regulatory scheme."[87]

For example, in 2018 the Supreme Court, in Murphy v. NCAA, held "that Congress cannot issue direct orders to state legislatures."[88] The Court's decision in Murphy built from a prior decision in 1997 where it held that "the Federal Government may not command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[89] In Murphy, the Court acknowledged that the "legislative powers granted to Congress are sizable, but they are not unlimited . . . . [and] all other legislative power [not enumerated] is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."[90] Put another way, the anticommandeering doctrine represents the legal limit to congressional authority.[91] Although the Court did not specifically address Section 1373 in Murphy, the takeaway is that it is unconstitutional for the federal government to directly compel or

[80] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020).
[81] United States Department of Justice, Edward Byrne Memorial Justice Assistance Grant ("JAG") Program, available at (https://bja.ojp.gov/program/jag/overview) ("The JAG program is the leading source of federal justice funding to state and local jurisdictions. The JAG Program provides states, tribes, and local governments with critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.").
[82] Meryl Chertoff, Executive Director, SALPAL, City of Chicago v. Barr: A Victory for Sanctuary Jurisdictions and 21st Century Federalism, The Georgetown Project on State and Local Government Policy and Law ("SALPAL"), available at (https://www.law.georgetown.edu/salpal/explainer-city-of-chicago-v-barr/).
[83] United States Department of Justice, Edward Byrne Memorial Justice Assistance Grant ("JAG") Program, available at (https://bja.ojp.gov/program/jag/overview).
[84] See id.
[85] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (Noting that the Vermont Attorney General has joined amicus briefs arguing that § 1373 is unconstitutional and that the DOJ's threats are unlawful in the Eastern District of Pennsylvania and the Third, Seventh, and Ninth Circuits).
[86] See Murphy v. NCAA, 138 S. Ct. 1461 (2018); Printz v. United States, 521 U.S. 898 (1997); see also New York v. United States, 505 U.S. 144 (1992); Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (holding that the federal government cannot commandeer state and local government entities to expend funds and resources to enforce a federal regulatory scheme such as immigration).
[87] Id.
[88] Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018) (holding that "federal legislation prohibiting States from authorizing sports gambling violates the Tenth Amendment's anticommandeering rule because it unequivocally dictates what a state legislature may and may not do") (emphasis added) (internal quotations and citations omitted).
[89] Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (internal quotations and citations omitted).
[90] Murphy v. NCAA, 138 S. Ct. 1461, 1476, 200 L. Ed. 2d 854 (2018).
[91] Id (citing *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (where the Court held a provision of an act of Congress as unconstitutional because the Constitution does not empower Congress to subject state governments to the type of instruction where a law required a State to take title to low-level radioactive waste or to regulate according to the instructions of Congress and in enacting this provision, Congress issued orders to either the legislative or executive branch of state government).[91]

commandeer states and localities to further a "federal regulatory scheme"—and the enforcement of civil immigration law is a "federal regulatory scheme."[92]

In the wake of Murphy, attempts by the federal government to use federal statutes to commandeer state and local entities to expend local resources to enforce a federal regulatory scheme have been consistently questioned.[93] For example in 2014 the Third Circuit held that the federal government could not commandeer state and local entities to expend funds and resources to enforce a federal regulatory scheme such as immigration.[94] The Court held that it was a violation of the Tenth Amendment, noting the anticommandeering doctrine,[95] when a "federal immigration detainer"[96] filed with state or local law enforcement results in "a command to detain an individual on behalf of the federal government, [and that such a demand] violate[s] the anti-commandeering doctrine of the Tenth Amendment. [And] immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme."[97]

Prior to Murphy, twenty years ago, in City of New York v. United States, the Second Circuit upheld the constitutionality of Section 1373 under the Tenth Amendment because the statute did not impose an affirmative obligation[98] on states or localities and instead merely prohibited certain actions.[99] However in Murphy, the Court held that the Tenth Amendment's anticommandeering principle applies equally to both requirements and prohibitions set forth by Congress, thus eliminating the "distinction the Second Circuit had relied on in City of New York . . . ."[100] Ultimately, the decision in Murphy called into question the constitutionality of the federal government's use of federal law, like Section 1373, to commandeer the state into enforcing a federal regulatory scheme.[101]

In light of Murphy, a growing number of federal district courts have questioned the constitutionality of Section 1373's conscription on states and localities to enforce federal immigration law.[102] For example, in 2018 the Federal District Court for the Southern District of New York, State of

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[92] See id; see also Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (holding that the federal government cannot commandeer state and local government entities to expend funds and resources to enforce a federal regulatory scheme such as immigration).

[93] Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020).

[94] Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (the issue before the Court was whether federal law, 8 C.F.R. § 287.7, compelled state and local law enforcement agencies to detain those suspected of being in the United States illegally or whether § 287.7 merely provided authorization of the issuance of detainers as requests to local and state agencies).

[95] See id.

[96] U.S. Immigration and Customs Enforcement (ICE), Detainers, available at (https://www.ice.gov/detainers) ("U.S. Immigration and Customs Enforcement (ICE) issues detainers and requests for notification to law enforcement agencies (LEAs) to provide notice of its intent to assume custody of an individual detained in federal, state, or local custody. Detainers are placed on aliens arrested on criminal charges for whom ICE possesses probable cause to believe that they are removable from the United States. A detainer requests that a LEA notify ICE as early as practicable – ideally at least 48 hours – before a removable alien is released from criminal custody and then briefly maintain custody of the alien for up to 48 hours to allow DHS to assume custody for removal purposes. A request for notification requests that a LEA notify ICE as early as practicable – ideally at least 48 hours – before a removable alien is released from criminal custody.").

[97] Galarza v. Szalczyk, 745 F.3d 634, 644 (3d Cir. 2014) (emphasis added).

[98] Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (However, the ACLU of Vermont notes that the Second Circuit's analysis of § 1373 "relied on a now-outdated distinction between an affirmative obligation and a prohibition by Congress on states (that is, between Congress ordering the states to do something versus ordering them not to do something), in which only the former violated the anticommandeering principle.").

[99] City of New York v. United States, 179 F.3d 29, 35 (2d. Cir. 1999) (holding that "[1373 does] not directly compel states or localities to require or prohibit anything.").

[100] See Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (citing Murphy v. NCAA, 138 S. Ct. 1461, 1466-67 (2018)).

[101] Id.

[102] See State of New York v. Dep't of Justice, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) (ruling that "this Court is not bound by City of New York and must follow the Supreme Court's clear direction in Murphy" to find that § 1373 violates the Tenth Amendment); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) ("[T]he Court believes that Murphy's holding deprives City of New York of its central support . . . ."); United States v. California, 314 F. Supp. 3d 1077, 1108 (E.D. Cal. 2018) ("[T]he Supreme Court's holding in Murphy undercuts portions of the Second Circuit's reasoning and calls its conclusion into question."); see also City of Chicago, 321 F. Supp. 3d at 872 ("Section 1373 is thus unconstitutional on its face"); City of Philadelphia v. Sessions, 309 F.Supp.3d 289, 330 (E.D. Pa. 2018) ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth

New York v. Dep't of Justice, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018), held that Section 1373, as applied to federal funding requirements, is unconstitutional because the Court should follow the Supreme Court's clear direction in Murphy to find that the DOJ's use of a federal regulatory scheme, such as § 1373, violates the Tenth Amendment.[103]

However, earlier this year, on appeal, the District Court's decision in State of New York v. Dep't of Justice was overturned and reversed by the Second Circuit.[104] The Second Circuit held the DOJ's use of Section 1373, concerning Byrne grant applications, was "constitutional." [105] The Court concluded that the Attorney General is authorized to impose all three challenged conditions, commanding compliance with Section 1373, concerning Byrne grant applications. [106] Regarding the three "challenged conditions", the Court held that, first, the DOJ can impose a "Certification Condition" because it "is statutorily authorized by 34 U.S.C. § 10153(a)(5)(D)'s requirement that applicants comply with 'all other applicable Federal laws,' [and it] does not violate the Tenth Amendment's anticommandeering principle . . . ."[107] Second, that the "Notice Condition is statutorily authorized by 34 U.S.C. § 10153(a)(4)'s reporting requirement, § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority . . . ."[108] Third, that the "Access Condition is statutorily authorized by 34 U.S.C. § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority."[109]

The Second Circuit distinguished the Supreme Court's decision in Murphy, noting that in Murphy "the States' police power allowed them to decide whether to permit sports gambling within their borders. [But] [t]hat conclusion is not so obvious in the immigration context where it is the federal government that holds 'broad,'[110] and 'preeminent' power."[111] And, the Court noted that "Title 8 of the United States Code, commonly known as the Immigration and Nationality Act ('INA')[112] is Congress's 'extensive and

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Amendment."); United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect."); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) ("In agreement with every court that has looked at these issues, I find that . . . Section 1373 is unconstitutional . . . ."); City of Los Angeles v. Sessions, No. CV 18-7347-R, 2019 WL 1957966, at *4 (C.D. Cal. Feb. 15, 2019) ("[Section 1373 is] unconstitutional as applied to States and local governments under the Tenth Amendment's anti- commandeering principle.").

[103] See State of New York v. Dep't of Justice, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) (ruling that "this Court is not bound by City of New York and must follow the Supreme Court's clear direction in Murphy" to find that § 1373 violates the Tenth Amendment).

[104] New York v. United States DOJ, 951 F.3d 84, 123-24 (2d Cir. 2020) (Holding that "(1) The Attorney General was statutorily authorized to impose all three challenged conditions on Byrne grant applications. [(a.)] The Certification Condition (1) is statutorily authorized by 34 U.S.C. § 10153(a)(5)(D)'s requirement that applicants comply with "all other applicable Federal laws," and (2) does not violate the Tenth Amendment's anticommandeering principle; [(b.)] The Notice Condition [**82] is statutorily authorized by 34 U.S.C. § 10153(a)(4)'s reporting requirement, § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority; [(c.)] The Access Condition is statutorily authorized by 34 U.S.C. § 10153(a)(5)(C)'s coordination requirement, [*124] and § 10155's rule-making authority. (2) The Attorney General did not overlook important detrimental effects of the challenged conditions so as to make their imposition arbitrary and capricious. Accordingly, (1) We REVERSE the district court's award of partial summary judgment to plaintiffs;
(2) We VACATE the district court's mandate ordering defendants to release withheld 2017 Byrne funds to plaintiffs, as well as its injunction barring defendants from imposing the three challenged immigration-related conditions on such grants; and (3) We REMAND the case to the district court,[(a.)] with directions that it enter partial summary judgment in favor of defendants on plaintiffs' challenge to the three immigration-related conditions imposed on 2017 Byrne Program grants; and [(b.)] insofar as there remains pending in the district court plaintiffs' challenge to conditions imposed by defendants on 2018 Byrne Program grants, for further proceedings consistent with this opinion.").

[105] Id.

[106] New York v. United States DOJ, 951 F.3d 84, 123-24 (2d Cir. 2020).

[107] Id.

[108] Id.

[109] Id (the Court reversed the "district court's award of partial summary judgment to plaintiffs;" vacated "the district court's mandate ordering defendants to release withheld 2017 Byrne funds to plaintiffs, as well as its injunction barring defendants from imposing the three challenged immigration-related conditions on such grants;" and remanded "the case to the district court . . . with directions that it enter partial summary judgment in favor of defendants on plaintiffs' challenge to the three immigration-related conditions imposed on 2017 Byrne Program grants; and . . . insofar as there remains pending in the district court plaintiffs' challenge to conditions imposed by defendants on 2018 Byrne Program grants, for further proceedings consistent with this opinion.").

[110] *Arizona v. United States*, 567 U.S. at 394, 132 S.Ct. 2492.

[111] *Toll v. Moreno*, 458 U.S. at 10, 102 S.Ct. 2977.

[112] *See* 8 U.S.C. § 1101.

complex' codification of that power."[113] The Court reasoned that Section 1373 does not commandeer state and local governments to enact or administer a federal regulatory scheme.[114] Nor does Section 1373 affirmatively enlist state and local governments into federal government service.[115] Instead, the Second Circuit interpreted Section 1373 only as a prohibition on state and local governments from "directly restricting the deliberate" or "voluntary exchange" of immigration-related information, concerning individuals who come into contact with local or state law enforcement, with federal immigration authorities.[116]

Thus, in the Second Circuit, and its federal lower courts, including the District of Vermont, Section 1373 has been interpreted as constitutional and therefore not in violation of the Tenth Amendment when applied to federal funding conditions enumerated by the DOJ.[117] "These conditions," the Court reasoned, "help the federal government enforce national immigration laws and policies [and] ensure that applicants [in the JAG grant program] satisfy particular statutory grant requirements imposed by Congress and subject to Attorney General oversight."[118]

Despite the Second Circuit's holding, many Federal Circuit Courts, citing Murphy, have held that the DOJ's use of federal law, like Section 1373, to compel cooperation[119] from local law enforcement to enforce immigration law is unconstitutional.[120] These circuits have held, generally, that the federal government must be enjoined from imposing the challenged conditions concerning the federal (Byrne/JAG) grants here at issue, concerning Section 1373.[121]

For example, in the Ninth Circuit, in City of Los Angeles v. Barr, 941 F.3d 931 (9th Cir. 2019), the Court ruled against federal imposition of "notice and access conditions."[122] In the Third Circuit, in City of Philadelphia v. Attorney Gen., 916 F.3d 276 (3d Cir. 2019), the Court ruled against the federal government on all three conditions.[123] The Third Circuit held that "Congress has not empowered the Attorney General to enact the Challenged Conditions."[124] Likewise, in the Seventh Circuit, in City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018), the Court ruled against "notice and access conditions."[125]

It is important to highlight the most recent decision concerning Section 1373 and the JAG program.[126] On April 30, 2020 the Seventh Circuit, in City of Chi. v. Barr, 957 F.3d 772 (7th Cir. 2020), Court held that the U.S. Attorney General (the "AG") did not have the legal authority to impose immigration reporting conditions (notice, access, and compliance) on Byrne JAG grants.[127] The Court found that the language, structure, and purpose of the Act governing the JAG program made reference

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[113] New York v. United States DOJ, 951 F.3d 84, 123-24 (2d Cir. 2020) (citing *Arizona v. United States*, 567 U.S. at 395, 132 S.Ct. 2492).
[114] Id.
[115] Id.
[116] Id.
[117] Id ("Those conditions require grant applicants to certify that they will (1) comply with federal law prohibiting any restrictions on the communication of citizenship and alien status information with federal immigration authorities, see 8 U.S.C. § 1373; (2) provide federal authorities, upon request, with the release dates of incarcerated illegal aliens; and (3) afford federal immigration officers access to incarcerated illegal aliens.").
[118] New York v. United States DOJ, 951 F.3d 84, 123-24 (2d Cir. 2020).
[119] See Kate Evans, ARTICLE: Immigration Detainers, Local Discretion, and State Law's Historical Constraints, 84 Brooklyn L. Rev. 1085, 1085-1140 (United States Court of Appeals for the Fourth Circuit "invalidated the arrest by local officers of a woman waiting to start her shift at work on the basis of an immigration warrant. The court reasoned that the lack of probable cause of criminality or specific authorization for the police officers to act as immigration agents meant that the arrests lacked any lawful basis.").
[120] New York v. United States DOJ, 951 F.3d 84, 123-24 (2d Cir. 2020).
[121] Id; see also Lia Ernst, Staff Attorney ACLU of Vermont, Letter to Members of the Burlington City Council, ACLU of Vermont (Jan. 17, 2020) (Noting that "the DOJ has no authority to attach conditions to receipt of JAG/Byrne funds that Congress itself did not impose.").
[122] City of Los Angeles v. Barr, 941 F.3d 931 (9th Cir. 2019).
[123] City of Philadelphia v. Attorney Gen., 916 F.3d 276 (3d Cir. 2019).
[124] See, e.g., City of Philadelphia v. Attorney General, 916 F.3d 276, 291 (3d Cir. 2019).
[125] City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018) (ruling as to Notice and Access Conditions).
[126] City of Chicago. v. Barr, 957 F.3d 772 (7th Cir. 2020).
[127] 34 U.S.C. § 10151.

only those federal laws that applied directing to federal grants and that Section 1373 was not incorporated into the JAG program.[128] The Court reasoned that granting the AG the broad power to incorporate Section 1373 into the JAG program and command local and state government to enforce federal immigration law raised serious constitutional concerns, including federalism and the separation of powers doctrines.[129] The Court concluded that the federal government could not impose such conditions on state and local government because the power to impose conditions is not within the scope of the AG's powers.[130]

The Seventh Circuit concluded that the United States Supreme Court made it clear in Murphy: "that regardless of whether a federal law commands state action or precludes it, Congress cannot issue direct orders to state legislatures.[131] Accordingly, the language in § 1373 is "problematic under the Tenth Amendment even if it merely operated to preclude the state from taking certain actions."[132] The April decision by the Seventh Circuit provides a model for the proper legal interpretation concerning the DOJ's use of Section 1373.

Despite the recent Second Circuit decision, there is a growing body of federal caselaw that questions the constitutionality of Section 1373.[133] While it is important to note that the holding in the Second Circuit controls the legal interpretation of the law in the Federal District of Vermont, it is not the only interpretation, it is not the most recent, and its holding does not represent the majority of Federal Circuit Courts.

Like in pivotal Supreme Court cases[134] involving marriage equality, LGBTQ+ protections, reproductive rights, and racial discrimination, challenges to unconstitutional statutes, where the lawfulness of a statute is in question, like Section 1373, sometimes requires local government decisionmakers to take a stand. Because Section 1373 does violate the constitution's anti-commandeering mandate, as noted by the most recent Circuit Court decision from April of this year, consistent with recent Supreme Court decisions,[135] local decisionmakers should raise "anti-commandeering objections."[136]

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[128] City of Chicago. v. Barr, 957 F.3d 772 (7th Cir. 2020).
[129] Id.
[130] City of Chicago. v. Barr, 957 F.3d 772 (7th Cir. 2020) (citing 34 U.S.C. § 10102).
[131] Id (citing Murphy, 138 S. Ct. at 1478) (emphasis added).
[132] Id.
[133] See generally City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) ("[T]he Court believes that Murphy's holding deprives City of New York of its central support . . . ."); United States v. California, 314 F. Supp. 3d 1077, 1108 (E.D. Cal. 2018) ("[T]he Supreme Court's holding in Murphy undercuts portions of the Second Circuit's reasoning and calls its conclusion into question."); see also City of Chicago, 321 F. Supp. 3d at 872 ("Section 1373 is thus unconstitutional on its face"); City of Philadelphia v. Sessions, 309 F.Supp.3d 289, 330 (E.D. Pa. 2018) ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment."); United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect."); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) ("In agreement with every court that has looked at these issues, I find that . . . Section 1373 is unconstitutional . . . ."); City of Los Angeles v. Sessions, No. CV 18-7347-R, 2019 WL 1957966, at *4 (C.D. Cal. Feb. 15, 2019) ("[Section 1373 is] unconstitutional as applied to States and local governments under the Tenth Amendment's anti- commandeering principle.").
[134] See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 483 (1982) (where the Court struck down a Washington state constitutional initiative that prevented local school districts from adoption of voluntary desegregation plans because the constitutional initiative restructured the political process by removing authority away from local school decisionmakers to remedy racial imbalances and by "lodging decision-making authority over the question at a new and remote level of government"); see also Romer v. Evans, 517 U.S. 620 (1996) (Concerning Colorado's Amendment 2, which banned the adoption of municipal legislation protecting LGBTQ+ persons from discrimination. The Supreme Court held that when the State attempted to prevent local LGBTQ+ friendly local majorities from adopting anti-discrimination legislation, the Amendment failed to withstand even rational basis scrutiny.").
[135] City of Chicago. v. Barr, 957 F.3d 772 (7th Cir. 2020) (citing Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (the Court holding that a federal law prohibiting New Jersey from modifying or repealing its laws regarding sports gambling was unlawful under the anti-commandeering doctrine)); see also Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (The Court's clear majority, seven justices, agreed that new conditions imposed by the federal government upon on federal Medicaid money was in violation of the Constitution because the federal requirements functioned as a "gun to the head.").
[136] See Constitutional Cities: Sanctuary Jurisdictions, Local Voice, And Individual Liberty, 50 Colum. Human Rights L. Rev. 1, 9 (Fall 2018) ("The anti-commandeering mandate also protects individual liberty interests, not just rights of state or local government per se. This means that local government officials and local residents [should] be able to raise anti-commandeering objections to federal laws even if state

VI. Incidents Involving Law Enforcement, Racial Profiling, and Arguments in Favor of Strengthening FIPPs in Vermont Communities

Police departments and individual officers "have broad policymaking discretion to arrest" some members of our communities and not arrest others.[137] In fact, the judicial system assumes that "individual officers are the principal discretion-wielding actors in policing."[138] The examples below illustrate the extent of officer discretion. Beyond notions of morality, and of right and wrong, FIPPs that provide for more protection than the state's model policy should be drafted to encourage officers to exercise fair and impartial discretion and eradicate discriminatory practices and norms.

In Vermont, even before racial data[139] became available, BIPOC individuals and individuals from immigrant and migrant communities were subjected to widespread and improper discrimination—including racial profiling by law enforcement.[140] As noted by the United States District Court for the District of Vermont, "unjustified racial disparity in stops and searches by police will *ipso facto* cause the deprivation of . . . equal protection rights . . . ."[141]

In light of Vermont's history, although not an exhaustive list, it is important to highlight the stories below:

- In 2013 Shamel Alexander was riding in a taxi in Bennington when it was stopped for an alleged "equipment violation, but [which] quickly turned it into an investigation of Alexander— despite a lack of reasonable suspicion to believe he was committing any crime. Alexander was arrested for a drug offense, but his subsequent conviction was unanimously overturned by the Vermont Supreme Court,[142] which held that the police violated his Fourth Amendment rights against unreasonable search and seizure."[143]

- As noted above, in 2016 the Vermont State Police, the Institute on Race and Justice, and the Center for Criminal Justice Policy Research at Northeastern University completed a five-and-a-half year study of race data that found "that non-white drivers were more likely to be stopped, given citations and searched than white drivers in Vermont;" that "the percentage of black drivers searched after a traffic stop was nearly five times that of white drivers;" and that there

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officials order local governments to comply with these federal mandates. In other words, state officials may not waive the commandeering objection.").

[137] Nirej S. Sekhon, Redistributive Policing, 101 J. Crim. L. & Criminology 1171, 1171–72 (2011) ("From this perspective, it follows that any arrest supported by probable cause is a legitimate one"); see generally Whren v. United States, 517 U.S. 806, 813 (1996). Note that Professor Sekhon, a professor at a Georgia State University, "studies the design and regulation of criminal justice institutions. Writing at the intersection of law, sociology, and political theory, Sekhon's recent work has focused on municipal policing and how criminal courts and public defenders can play more active roles in shaping police practices. Sekhon's scholarship explores the nature and function of modern policing with the aim of understanding its relationships to crime, race, and poverty. His most recent articles appear in the Columbia Law Review and the Ohio State Law Journal.") (Source Georgia State University, https://law.gsu.edu/profile/nirej-sekhon/.)

[138] Id.

[139] Steve Zind, Study Finds Racial Disparities In Vermont State Police Traffic Stops, Vermont Public Radio (May 25, 2016), https://www.vpr.org/post/study-finds-racial-disparities-vermont-state-police-traffic-stops#stream/0 (citing Vermont State Police: An Examination of Traffic Stop Data July 1, 2010-December 31, 2015, (May 24, 2016), https://vsp.vermont.gov/sites/vsp/files/documents/VSPPresentation05242016.pdf.

[140] Report on Racial Profiling in Vermont, Vermont Advisory Committee to the U.S. Commission on Civil Rights (2009), available at (https://www.usccr.gov/pubs/docs/VTRacialProfiling.pdf).

[141] Alexander v. Hunt, No. 5:16-cv-192, 2018 U.S. Dist. LEXIS 134572, at *3-5 (D. Vt. Aug. 9, 2018) (internal citations and quotations omitted).

[142] State v. Alexander, 2016 VT 19, 201 Vt. 329, 139 A.3d 574 (2016) (holding that the police impermissibly expanded the scope of lawful traffic stop, and lacked reasonable suspicion to prolong the seizure of defendant).

[143] Bennington agrees to settle racial profiling case for $30,000, VermontBiz (Jun. 24, 2020), available at (https://vermontbiz.com/news/2020/june/24/bennington-agrees-settle-racial-profiling-case-30000) (citing State v. Alexander, 2016 VT 19, 201 Vt. 329, 139 A.3d 574 (2016)).

was "a greater likelihood that Hispanic, Asian and Native American drivers would be stopped, cited or searched compared to white drivers."[144]

- In 2017, Professors Stephanie Seguino and Nancy Brooks published a report that was subsequently cited by the United States District Court for the District of Vermont,[145] which analyzed the "Bennington Police Department's stop data from 2014 to 2016," and which showed that "Bennington police officers stopped Black drivers at a rate almost 2.5 times higher than their share of the driving population;" and that "racial disparity in stops was not isolated to the behavior of a few officers, but rather was observable in data for 22 of the 24 officers;" and that "Bennington police officers searched Black drivers at more than five and a half times the rate they searched White drivers, and that a lower percentage of Black than White drivers were found to have committed arrestable offenses after being searched."[146]

- In a 2018 decision, the United States District Court for the District of Vermont found that: "unjustified racial disparity in stops and searches by police will *ipso facto* cause the deprivation of, the equal protection rights of stopped and searched citizens . . . . [and that based on the data concerning race and traffic stops that] it is reasonable to infer [that the Bennington Police Department and Municipality of Bennington] knew to a moral certainty that Bennington police officers would be faced with decisions whether to stop or search Black motorists, that there was a history of officers mishandling these situations, and that the wrong choice would frequently cause the deprivation of citizens' constitutional rights to equal protection."[147]

- In 2017, according to video that was shared with Vermont media outlets, during a traffic stop, a Franklin County sheriff's deputy discovered that a driver couldn't speak English.[148] Video footage revealed that once the deputy learned that the man did not "have a Vermont driver's license. He radioed for backup from a 'Romeo unit.' Within 10 minutes, U.S. Border Patrol agents were standing next to the green truck. The deputy held up a document for the feds to see. 'This is all I have for ID on him,' the deputy said. '**Yeah, he's wet**,' said a grinning Border Patrol agent, apparently employing a racial epithet."[149] The interaction appeared to run "afoul of the state's 'model' Fair and Impartial Policing policy."[150] In the video footage, "**U.S. Border Patrol agents can be heard referring to the driver as 'wet' and talking about whether a**

[144] Vermont State Police: An Examination of Traffic Stop Data July 1, 2010-December 31, 2015, (May 24, 2016), https://vsp.vermont.gov/sites/vsp/files/documents/VSPPresentation05242016.pdf.
[145] Bennington agrees to settle racial profiling case for $30,000, VermontBiz (Jun. 24, 2020), available at (https://vermontbiz.com/news/2020/june/24/bennington-agrees-settle-racial-profiling-case-30000) ("A civil rights lawsuit brought by Shamel Alexander against the Town of Bennington and its police department has been settled out of court, with the city agreeing to a $30,000 cash settlement to resolve claims of systemic racial profiling by Bennington police. ACLU of Vermont senior staff attorney Lia Ernst: "Our client is grateful to have this case resolved, having shined a spotlight on system-wide discriminatory police practices in Bennington. This settlement does not alleviate the need for top-to-bottom changes to a deeply troubled police department and to a municipal leadership that continues to deny there is even a problem with unconstitutional police practices in Bennington. The people of Bennington deserve far better." Bennington had twice asked a federal judge to dismiss the lawsuit—and was twice rejected. In denying the defendants' second motion to dismiss, U.S. District Judge Geoffrey Crawford ruled that, based on facts alleged, it was reasonable to infer that, "had Bennington appropriately trained or supervised its police officers with respect to racial disparities in stops and searches, Alexander would not have been stopped or searched and his equal protection rights would not have been violated." The court's decision cited a Vermont study showing that Bennington police stopped Black drivers far out of proportion to their share of the driving population and were five times more likely to search Black drivers than white drivers—while searches of Black drivers were less likely to uncover an arrestable offense").
[146] Alexander v. Hunt, No. 5:16-cv-192, 2018 U.S. Dist. LEXIS 134572, at *3-5 (D. Vt. Aug. 9, 2018).
[147] Alexander v. Hunt, No. 5:16-cv-192, 2018 U.S. Dist. LEXIS 134572, at *3-5 (D. Vt. Aug. 9, 2018) (internal citations and quotations omitted).
[148] Taylor Dobbs, Footage Shows Feds Using Ethnic Slur During Traffic Stop, Seven Days (Dec. 8, 2017) available at (https://www.sevendaysvt.com/OffMessage/archives/2017/12/08/footage-shows-feds-using-ethnic-slur-during-traffic-stop).
[149] Id.
[150] Id.

Spanish-speaking woman on the scene was 'a wet.'"[151] **The agents were using the derogatory epithet "wetback," "which has been used to describe undocumented immigrants from Latin America**."[152]

- In December 2019, a Vermont farmworker was turned over to immigration agents after being detained by the Chittenden County Sheriff's Department.[153] The individual was a passenger in a car that was initially pulled over for speeding.[154] After being pulled over, the individual was detained and subsequently **deported to Mexico.**[155] Under the State's model policy, the Sheriff's department defended their course of action, concluding that **department "had cause to call Border Patrol based on his suspicion of 'human smuggling.'"** The department noted that the individuals in the car were '**averting their gazes**.'"[156] Many have noted that the actions taken by the department indicate "the need to strengthen the state's Fair and Impartial Policing Policy."[157]

The law in Vermont concerning fair and impartial policing "was precipitated in part by specific instances of discriminatory traffic stops of noncitizens."[158] Including an instance where a Vermont sheriff's department "illegally detained a Mexican national after a traffic stop, '**chiefly because of his nationality and skin color**,' and held him for about an hour to contact the Border Patrol. This and other similar incidents prompted the state legislature to mandate that all jurisdictions adopt fair and impartial policing practices and order the crafting of a model policy."[159]

The State's model policy provides a baseline of protective language but its reference to Section 1373 provides law enforcement with a loophole resulting in a back-pocket excuse to ignore the underlying purpose of the policy. While the model policy provides "anti-bias and equality rationales for its disentanglement provisions,"[160] to actually implement "fair and equal access" to pubic safety and "protection for all members of a community, including immigrants and U.S. citizens in mixed-status families,"[161] the test is whether those who might fear being the subject of deportation remain "concerned that a call to the police could lead to deportation of a parent or spouse."[162]

VII. Racial Disparities in Traffic Stop Data, Use-Of-Force Data, and Other Instances of Disproportionate Interactions with Law Enforcement Are Not Unrelated to Improving Upon the State's FIPP

The most recent Vermont traffic stop data, released by the Vermont State Police, is clear, in Vermont, "Black drivers continue to be disproportionately pulled over. . . ."[163] In Vermont, "[r]acial disparities in traffic stops continues, with Black drivers still more likely to be stopped and searched than

[151] Id (emphasis added).
[152] Id (emphasis added).
[153] Deported but not Defeated, Migrant Justice (Feb. 4, 2020), https://migrantjustice.net/Chiri-HRC.
[154] Id.
[155] Id.
[156] Id (emphasis added).
[157] Id.
[158] Christopher Lasch et al., Article: Understanding 'Sanctuary Cities', 59 B.C. L. Rev. 1703, 1766.
[159] Id (citing Kathleen Masterson, Vermont Sheriff Department Pays to Settle Instance of Discrimination, VPR (June 14, 2016), http://digital.vpr.net/post/vermont-sheriff-department-pays-settle-instance-discrimination#stream/0 [https://perma.cc/74RK-E2MY]) (emphasis added).
[160] Christopher Lasch et al., Article: Understanding 'Sanctuary Cities', 59 B.C. L. Rev. 1703, 1766.
[161] Id.
[162] Id.
[163] Michael Frett, Racial disparities persist in latest Vermont State Police traffic stop report, The Saint Albans Messenger (Aug. 19, 2020), https://www.samessenger.com/news/racial-disparities-persist-in-latest-vermont-state-police-traffic-stop-report/article_42f94704-e25e-11ea-a2d5-c3d4e91d1666.html ("According to VSP, Black operators accounted for 2.78 percent of all stops in 2019 despite accounting for only 1.2 percent of Vermont's overall population, per a 2017 U.S. Census Bureau estimate.").

white drivers. . . ."[164] People of color disproportionately come into conduct with law enforcement because the goals of fair and impartial policing have not yet been realized. Accordingly, this disparity is also represented by use-of-force data because issues involving use-of-force and fair and impartial policing are not unrelated.

A series of incidents in Burlington in 2018[165] involving the use-of-force[166] provides an example of why it is important to include issues concerning traffic stop data and use-of-force data together when considering fair and impartial policing. The Burlington Police Department ("BPD") has kept track of race data and use-of-force incidents from 2012-2018.[167] The data shows that that black, indigenous, and people of color are more likely to be the subject of a use-of-force incident involving a BPD officer.[168]

According to 2019 U.S. Census Bureau estimates,[169] "Black or African American…" individuals represented 5.3% of the population of Burlington, (or about 2270 residents), individuals described as "Asian…" represented 6.3% of the population, individuals described "Hispanic or Latino…" represented 2.8% of the population, individuals described as "Two or More Races…" represented 2.7% of the population, and individuals described as "American Indian or Alaska Native…" represented 0.3% of the population.[170]

According to self-reported data made available by BPD from 2012-2018,[171] and referenced in the BPD report[172] on use-of-force issued last year:

- "21% of subjects of force are black, which is similar to the percent of black offense suspects (18%) and arrestees (17%)."[173] "Black or African American" individuals are disproportionately the subject of use-of-force.
- "Approximately one-fifth of use-of-force subjects are black, which is significantly higher than the share of black residents in Burlington. That rate, however, tracks closely with both the percent of offense suspects and the percent of arrestees who are black…."[174]
- From 2012-2018, according to the BPD's reported incidents, there were 397 instances where BPD officers reported to have applied "use-of-force" on "African American[s]."[175] This number does not

[164] Céline McArthur, UVM study finds anti-bias training had minimal effect on police behavior, WCAX, (Aug. 24, 2020), https://www.wcax.com/2020/08/24/uvm-study-finds-anti-bias-training-had-minimal-effect-on-police-behavior/.
[165] Derek Brouwer, Man Hurt During Arrest Sues Burlington Police For Excessive Force, Seven Days (Jan. 8, 2020), available at (https://www.sevendaysvt.com/OffMessage/archives/2020/01/08/man-hurt-during-arrest-sues-burlington-police-for-excessive-force).
[166] Note: in June 2020 the Burlington Police Commission approved a new use-of-force policy for the city police department, available at (https://www.burlingtonvt.gov/sites/default/files/DD05%20Use%20of%20Force%20Policy.6.30.2020.pdf); see also https://www.sevendaysvt.com/OffMessage/archives/2020/06/16/burlington-police-commission-approves-new-use-of-force-policy.
[167] It is important to note a series of caveats concerning the BPD data. The data that is available is the information that has been provided by BPD. Therefore, the data only reflects the "reported" data and may not reflect the actual volume of incidents involving use-of-force. The use-of-force data is taken from 2012-2018 but the most recent census data is current as of 2019. The BPD data does not show whether or not the subject of a use of force incident was a resident or a nonresident of the City of Burlington. The data does not provide an explanation for how the non-permanent and changing student population may impact these numbers and/or if the BPD has accounted for these variables over the years. It is unclear if BPD has accurate numbers concerning the number of people living in Burlington from 2012-2018 and how information was accounted for concerning the percentage of people within the race-designations noted and recorded by BPD and how the designations have been accounted for over that time period.
[168] 2019 Use of Force Report, Burlington Police Department (2019), available at (https://www.burlingtonvt.gov/sites/default/files/u585/Reports/BPD%20Use%20of%20Force%20Report.pdf); see also Open Data Sets, Use-Of-Force, Burlington Police Department (2012-2018), available at (https://www.burlingtonvt.gov/Police/Data/OpenData).
[169] City of Burlington, Quick Facts, U.S. Census Bureau (2019), available at (https://www.census.gov/quickfacts/fact/table/burlingtoncityvermont/RHI225219#RHI225218).
[170] Id.
[171] 2019 Use of Force Report, Burlington Police Department (2019), available at (https://www.burlingtonvt.gov/sites/default/files/u585/Reports/BPD%20Use%20of%20Force%20Report.pdf); see also Open Data Sets, Use-Of-Force, Burlington Police Department (2012-2018), available at (https://www.burlingtonvt.gov/Police/Data/OpenData).
[172] Id.
[173] Id.
[174] Id.

include individuals described by the data/portal as "Asian," "Hispanic/Latino," "Other/Not Reported."

- Approximately every 6 days "African American[s]" were the subject of a "use force" incident in Burlington.[176]
- If individuals that the BPD recorded as "Asian," "Hispanic/Latino," "Other/Not Reported" are included with "African American" individuals, the cumulative number of use-of-force incidents was 519.[177] Meaning, 519 instances where BPD reported the use-of-force over a seven year period, excluding "White" individuals.[178]
- Approximately every 5 days the BPD applied the use-of-force on individuals recorded by BPD as "Asian," "Hispanic/Latino," "Other/Not Reported," and "African American."[179]
- The 2012-2018 data reports that there were 1379 incidents involving use-of-force where the subject was recorded as "White." Meaning, every 1.85279 days individuals recorded as "White" by BPD were the subject of use-of-force.[180]
- In total, from 2012-2018, there were 1897 total reported incidents of use-of-force.[181]
- From 2012-2018, the BPD reported that a use-of-force incident occurred every 1.3 days.[182]
- From 2012-2018, concerning medical treatment of individuals involved in use-of-force incidents. 300 individuals were transported to the emergency room as a result of the incident; 195 individuals were evaluated at the scene, and 57 individuals were admitted to the hospital. In total, there were 552 instances involving the use-of-force where some form of medical evaluation took place.[183]
- Concerning race, instances of use-of-force occurred more frequently than once per week where individuals recorded by BPD as non-"White" in Burlington were the subject of that force.[184]
- According to the data above, there are approximately 16 times as many "White" residents as "African American or black" residents in Burlington (85% divided by 5.3% = 16.037% of 2019 estimated U.S. Census population). However, "African American or black" residents are much more likely to be the subject of use-of-force when measured against total population. Despite being 85% of the total population, "White" individuals are only 3.473 times more likely to be the subject of use of force when compared to "African American or black" residents (6.4347 divided by 1.85279 = 3.473).

Because BIPOC are overwhelmingly the subject of use-of-force incidents by law enforcement, Vermont must do more to make sure that use-of-force disparities are addressed and incorporated into efforts to improve fair and impartial policing policies.[185] Consequently, the goals of Vermont's fair and impartial policing legislation cannot be achieved until we address the reasons for why racial disparities in Vermont's law enforcement data continue to persist.

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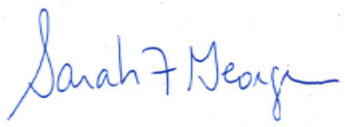
[175] Id.
[176] Id.
[177] Id.
[178] Id.
[179] Id.
[180] Id.
[181] Id.
[182] Id.
[183] Id.
[184] Id.
[185] And be viewed in context with available data and anecdotal evidence.

VIII. Conclusion:

The State's model FIPP provides helpful language in terms of the importance of impartial policing. But the State's model FIPP also provides too many loopholes that might be used as a pretext to undermine the fundamental purpose of fair and impartial policing policies. Therefore, pursuant to H. 518 of 2019,[186] Vermont municipalities and counties should adopt fair and impartial policing policies that are stronger and more protective than the State's model.[187] Specifically, municipalities and counties should "include additional restrictions" concerning communication and involvement with federal immigration authorities and communication regarding citizenship or immigration status.[188]

While fair and impartial policies will not undo the harm inflicted as a result of historical and ongoing white supremacy, xenophobia, racial injustice, and a deeply troubled criminal justice system, improving fair and impartial policies is a basic step that all communities should undertake. Vermont must do more to protect all people living in this State.



Sarah F. George
Chittenden County State's Attorney

[186] See H.518, An Act Relating to Fair and Impartial Policing, (2019), available at (https://legislature.vermont.gov/bill/status/2020/H.518) ("Such agencies and constables may include additional restrictions on agency members' communication and involvement with federal immigration authorities or communications regarding citizenship or immigration status. Agencies and constables may not adopt a policy that allows for greater communication or involvement with federal immigration authorities than is permitted under the model policy.").
[187] Vermont Criminal Justice Training Council, Model Fair and Impartial Policing Policy (2017), http://libguides.law.du.edu/ld.php?content_id=41582278 [https://perma.cc/65SB-SCMY].
[188] See H.518, An Act Relating to Fair and Impartial Policing, (2019), available at (https://legislature.vermont.gov/bill/status/2020/H.518).

1. State statutes related to the responsibility of public officers and the criminality of not carrying out their prescribed duties (for police officers: to uphold the law). This includes:
    a. Neglect of duty by public officers: https://legislature.vermont.gov/statutes/section/13/067/03006
    b. Police officers: https://legislature.vermont.gov/statutes/section/24/055/01931
    c. Same powers as sheriffs: https://legislature.vermont.gov/statutes/section/24/055/01935
    d. Oath of Office (generic to all Town officers): https://legislature.vermont.gov/statutes/section/24appendix/143/00305
    e. Authority of police officers (same throughout VT): https://legislature.vermont.gov/statutes/section/24appendix/143/00105
    f. Subchapter relating to sheriffs: https://legislature.vermont.gov/statutes/chapter/24/005

2. Resources provided for the group from Town Charter and State Statutes:
    a. **143-107. Form of government**

"Pursuant to its provisions and subject only to the limitations imposed by the Vermont Constitution and by this charter, all powers of the Town shall be vested in an elective council, hereinafter referred to as the Selectboard, which shall enact ordinances, codes, and regulations, adopt budgets, and determine policies, and which shall execute the laws and administer the government of the Town. The Town shall have a Town Manager as provided in sections 502 and 503 of this charter. (Amended 2005, No. M-10 (Adj. Sess.), § 2, eff. May 1, 2006; 2011, No. M-17 (Adj. Sess.), § 2, eff. May 8, 2012.)"
https://legislature.vermont.gov/statutes/section/24APPENDIX/143/00107

b. 143-503. Responsibilities and authority of Town Manager:

(c) Authority and duties in particular. The Town Manager shall be charged with full authority and be responsible for the following:

(1) To organize, reorganize, continue, or discontinue any Town departments as the Selectboard may determine;

(2) To direct and supervise the administration of all departments, offices, and agencies of the Town except as otherwise provided by this charter or other State statute;

(3) To carry out the policies determined by the Selectboard and report to the Selectboard on their disposition;

Town manager responsibility

(13) To remain ultimately responsible to the Selectboard for all administrative actions under his or her jurisdiction although he or she may hold subordinate employees' offices or agents responsible for the faithful discharge of their duties;

(16) To oversee the preservation of the public peace and the health and safety of persons and property, and to uphold the enforcement of this charter, ordinances, and State and federal laws as applicable
https://legislature.vermont.gov/statutes/section/24APPENDIX/143/00503

c. 143-103. Powers of the Town

c) In this charter, no mention of a particular power shall be construed to be exclusive or to restrict the scope of the powers which the Town would have if the particular power were not mentioned, unless this charter otherwise provides."

Josh Arneson <jarneson@richmondvt.gov> Nov 30, 2020, 2:32 PM (3 days ago)

to Susan

Susan,

This is a follow up on the FIPP information and guidance that you have provided over the past year. We have been discussing this in more detail in the past couple of months and I'm hoping that you can answer an interesting question that came up.

- Should a revised FIPP such as Winooski's be adopted by a town, and should a lawsuit be brought by a town employee (such as a police officer) because s/he was restricted in their communication process with a federal agency, against whom would the lawsuit be brought? The town or the agent who authorized the policy? Or both?

Thanks for any guidance that you can provide on this topic.

Josh Arneson

Town Manager
Town of Richmond
P.O. Box 285
Richmond, VT 05477
(802) 434-5170

Susan Senning Dec 1, 2020, 11:34 AM (2 days ago)

to me

Hi Josh,

It's important for me to note that anyone can sue anyone else, for any reason but that does not mean the lawsuit will be successful. I have attached a **draft** Official Immunity Info Sheet that I think will provide lots of useful information; please do note that this is still in **draft** form and has not been made available for wide release. As such, please use it for internal purposes only at this time.

We also have prepared a Sovereign Immunity Info Sheet which is online here. This is the other "piece" to the immunity issue and should also provide useful information. The VLCT Board of Directors issued a statement/perspective on police reform, which you can find here.

Finally, I would recommend contacting PACIF Law Enforcement Consultant Trevor Whipple if you have not already. He is a former Chief and can provide his advice, model policies PACIF has developed, and maybe any additional elements on the topic for the department and town's consideration. He can be reached at twhipple@vlct.org and is always happy to help members. It might also be worth checking in with PACIF Underwriting to see what they say about coverage for any such lawsuit.

I hope this helps.

Sincerely,
Susan

Note: Due to COVID-19, the VLCT Municipal Assistance Center (MAC) is experiencing a high number of legal questions and therefore it may take longer than usual for MAC to respond. Please also understand that if your question is unrelated to COVID-19 or is not an urgent matter, our response time will be extended. If you have an urgent matter and you haven't received a response from MAC, please contact your municipal attorney.

In light of concerns about COVID-19 I am currently working remotely. Addressing member concerns and questions remains a high priority for all VLCT staff. We appreciate your patience as we adapt to virtual communications. Visit https://www.vlct.org/coronavirus for recommendations and resources from VLCT and links to the CDC and VT Dept. Health.

Susan E. Senning, Esq.
Staff Attorney I, Municipal Assistance Center
89 Main Street, Suite 4
Montpelier, VT 05602-2948
1-800-649-7915
www.vlct.org

F & I Policy revisions-commentary

Fred Satink <fsatink@vlct.org>

Sep 16, 2020, 9:04 AM

to me, Kyle, Trevor

Thanks Josh for your patience on awaiting my response.

Your question regarding proposed changes to the town's Fair & Impartial Policing policy – specifically those that relate to communications with ICE is a difficult one. PACIF's current model Fair and Impartial Policing policy has language to ensure that there is no violation of law, as it relates to such communications. Thus, we believe that using it with *subtle* adjustments for each community is the preferred approach.

This email provides some clarification on the potential insurance coverage implications of the proposed policy change, so that the guidance can be considered as part of reviewing the proposed policy changes. It is not our intent to sway the town's decision either way, but to simply provide insurance coverage advisory information. Trevor Whipple has kindly reviewed the policy you provided and made a number of observations and comments. I have attached that for your review. The fact that each situation or claim has its own unique set of factors and characteristics, makes it extremely difficult to determine whether a given scenario qualifies for coverage. In reality, each "incident" is evaluated on its own merits and facts, and is adjudicated according to the Agreements, Conditions, Definitions, and Exclusions in the PACIF coverage documents. With regard to the proposed policy change, Exclusion "6." in the Public Officials Liability coverage (page 86) may come into play. For the 2020 policy, it reads:

"For any loss brought about or contributed to by the fraud, dishonesty, or bad faith of a Member *or arising from the deliberate violation of any federal, state, or local statute, ordinance, rule or regulation*. This exclusion will not apply to the Named Member if the fraud, dishonesty, bad faith or deliberate violation of statute, ordinance, rule or regulation was not committed by or with the knowledge and consent of the Named Member."

What this means is that if a claim occurs, and it is determined that the town deliberately violated a law, there may be no public officials liability coverage. I should note that other lines of coverage are not impacted by the above exclusion. I also want to advise that we anticipate making changes to the 2021 coverage document that places similar language into the **general liability** coverage – analogous to what commercial carriers already have. As such, if that language is adopted by the board and becomes effective 2021, this could pose additional risk to the town in terms of potentially having a claim denied because of a deliberate violation of law. To determine if these exclusions might come into play – or more accurately, would implementing the revised policy violate federal law – specifically, 8 USC 1373 https://www.law.cornell.edu/uscode/text/8/1373 and 8 USC 1644 https://www.law.cornell.edu/uscode/text/8/1644 (as these relate to law

enforcement cooperation with ICE), the town may wish to consult with legal counsel to clarify the issue.

We greatly respect the autonomy of our individual municipal members, and therefore only provide this information in an advisory role, to fulfill your request for an insurance coverage opinion on this issue. I appreciate you reaching out to us for our input and apologize for my delay in getting this back to you. I hope you find this explanation and attached comments helpful. Please feel free contact me if you have any questions on the coverage issues. Of course, Trevor is also available to assist on all issues law enforcement.

Best regards,
Fred

Frederick J. Satink
Vermont League of Cities & Towns
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Make vehicle and building changes on your own. Register for our new member Policy Portal !

In light of COVID-19 concerns, I am working remotely. As always, addressing member concerns and questions remains a priority for all VLCT staff. Please be patient as communications may be slightly slower than under normal circumstances.