Judicial Watch

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BY FACSIMILE (512-472-6538) AND U.S. MAIL

September 18, 2008

The Honorable Greg Abbott
ATTORNEY GENERAL OF TEXAS
Price Daniel, Sr. Building
209 West 14th Street, 8th Floor
Austin, Texas 78701-8701

Re: Authority of the Legislature to prohibit local governmental entities from serving as "sanctuaries" for undocumented persons (RQ-0733-GA)

Dear Attorney General Abbott:

Judicial Watch, Inc. is an educational organization that seeks to promote accountability in government and fidelity to the rule of law. Towards these ends, Judicial Watch has worked with citizens of numerous states and local communities around the country as they have attempted to cope with the effects of illegal immigration.

This letter is also written with Texans for Immigration Reform ("TFIR") and the Immigration Reform Coalition of Texas ("IRCOT"). These groups are committed to reforms that secure the border and end illegal immigration into this country.

By copy of your letter of August 18, 2008, TFIR and IRCOT were invited to submit their views as to the question of the authority of the Legislature to prohibit local governmental entities from serving as "sanctuaries" for undocumented persons. See RQ-0733-GA. For the purpose of this letter, "sanctuary policy" is considered to be any restriction or limitation by a local governmental entity on communication between local police or officials and federal immigration

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authorities regarding a person's immigration status. For the reasons explained below, the Legislature is well within its authority to enact a prohibition on such restrictions.

Question

Does the Legislature have the authority to prohibit local governmental entities from serving as "sanctuaries" for undocumented persons?

Answer

Yes, the Legislature may prohibit local governmental entities from serving as "sanctuaries" for undocumented persons to the extent that a local government adopts any restriction or limitation on communication between local police or officials and federal immigration authorities regarding a person's immigration status. Any such enactment by the Legislature would be entirely consistent with federal law and would help remove any doubt as to the authority of local governments to adopt such policies.

Analysis

I. Sanctuary Policies Violate Federal Law.

It is clear that sanctuary policies adopted by a local government are contrary to federal law. This is because federal law proscribes any restriction or limitation by a local governmental entity on communication between local police or officials and federal immigration authorities regarding a person's immigration status. Specifically, Title 8, Section 1373 of the United States Code provides:

> (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 information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373.

Title 8, Section 1644 provides:

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

8 U.S.C. § 1644.

To the extent that a local government's sanctuary policy prohibits its police officers or other officials from communicating with federal immigration authorities, the policy is in direct violation of these statutes. This includes any prohibition on sharing information with federal immigration officials regarding the alien status of a person.

Similarly, to the extent that a local government prohibits or restricts a police officer from asking a person about his or her immigration status, it constitutes a substantial restriction on an officer's ability to communicate information to federal immigration officials about that person's immigration status. If an officer is not free to ask about a person's immigration status, then the officer certainly is restricted in his or her ability to share that information with federal immigration authorities.

Finally, any argument regarding whether police officers have or do not have an *affirmative* legal duty to report information about illegal aliens to federal immigration officials is not relevant to this issue. Sanctuary policies constitute a substantial restriction, if not outright prohibition, on officers' *voluntary* sharing of information with federal immigration officials. Sections 1373 or 1644 do not impose an affirmative duty on officers to provide information to federal immigration officials. The federal statutes prohibit restrictions on the obtaining and sharing of information regarding a person's immigration status. 8 U.S.C. §§ 1373 and 1644.

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II. Sanctuary Policies Are Preempted by Federal Law.

Separate and apart from whether sanctuary policies violate 8 U.S.C. §§ 1373 and 1644 directly is whether these same policies are preempted by federal law. As explained below, sanctuary policies of local governments are void as they are preempted by federal law.

The U.S. Supreme Court has declared that "the power to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Consequently, federal law preempts state or local enactments that constitute a "regulation of immigration," which is defined as any determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain. *De Canas*, 424 U.S. at 354-56. Federal law also preempts state or local regulatory power where "Congress has unmistakably so ordained" such a result. *De Canas*, 424 U.S. at 356; *see also Michigan Canners & Freezers Assoc., Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 ("1984) ("*Michigan Canners*") ("[I]n enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law."). Finally, federal law preempts state or local regulatory power where the state activity "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, U.S. 424 at 363; *Michigan Canners*, 467 U.S. at 469. Stated another way, a state or local regulation is preempted if it conflicts with federal law, making compliance with both state and federal law impossible. *Michigan Canners*, 467 U.S. at 469.

In regard to the first *De Canas* test, sanctuary policies would not appear to be preempted under this test as they do not constitute a "regulation of immigration." Sanctuary policies are preempted, however, under both the second and third *De Canas* tests, namely, by the existence of an unmistakable federal mandate in the form of 8 U.S.C. §§ 1373 and 1644 and because such policies stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress as expressed in 8 U.S.C. §§ 1373 and 1644.

In August of 1996, the U.S. Congress enacted Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). One month later, in September of 1996, the U.S. Congress enacted Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). These two provisions reflect a clear congressional intent to promote the free flow of information between state and local governments and officials and federal immigration officials regarding immigration.

Section 434 of PRWORA, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," has been codified at 8 U.S.C. § 1644. Section 642 of IIRIRA, entitled "Communication between Government Agencies

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and the Immigration and Naturalization Service," has been codified at 8 U.S.C. § 1373. The Conference Report accompanying Section 434 of PRWORA explains:

> The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS. The conferees believe that immigration law enforcement is as high a priority as other aspects of federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.

H.R. Conf. Rep. No. 104-725 (1996) at 383. Similarly, the Senate Report accompanying the Senate bill that became IIRIRA states that the provision:

> Prohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. Effective immigration enforcement requires a cooperative effort between all levels of government. The *acquisition, maintenance, and exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249 (1996) at 19-20 (emphasis added).

It is difficult to conceive of how Congress could have expressed its intent to maximize the flow of information between federal immigration officials and state and local authorities any more clearly when it enacted these statutes. Congress's use of the words "[n]otwithstanding any other provision of Federal, State, or local law" in both statutes clearly and expressly preempts any and all federal, state, or local provisions of law touching on or regulating this subject matter. Congress has unmistakably ordained that state and local governments may not restrict communication with federal immigration officials regarding a person's immigration status. Because sanctuary policies substantially restrict, if not prohibit, the exchange of such information, they are preempted by 8 U.S.C. §§ 1373 and 1644.

In addition, sanctuary policies stand as substantial obstacles to the accomplishment and execution of the full purposes and objectives of Congress. *De Canas*, 424 U.S. at 363. Both the House Conference Report and the Senate Report make unmistakably clear that it was Congress's

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purpose and objective to promote the enforcement of U.S. immigration laws and the detection and apprehension of illegal aliens by eliminating restrictions on the free flow of information between federal, state, and local officials. Even before the enactment of 8 U.S.C. §§ 1373 and 1644, the Attorney General of California issued a formal opinion in which he concluded that policies that restrict communication stand as substantial obstacles to the enforcement of U.S. immigration. *See* 75 Ops. Cal. Atty. Gen. 270, 275-77 (1992) (internal citations and quotations omitted) (emphasis added). Sanctuary policies are preempted by federal law because Congress has "unmistakenly so ordained" and because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

III. Municipalities Are Subject to the Authority of the Legislature.

Finally, the Legislature has the authority to prohibit local governmental entities from serving as "sanctuaries" for undocumented persons for the simple reason that municipalities are subject to the authority of the Legislature. *City of Hutchins v. Prasifka*, 442 S.W.2d 879, 883 (Ct. App., 11th Dist. 1969) ("A municipality is the creature of the State Legislature and in the absence of a constitutional bar the powers and privileges of a municipality may be changed or modified at the discretion of the Legislature."). Hence, it is entirely within the power of the Legislature to prohibit local governments from adopting any sanctuary policies.

Conclusion

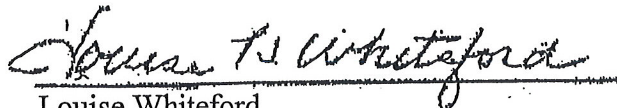
For the foregoing reasons, the Legislature has the authority to prohibit local governmental entities from serving as "sanctuaries" for undocumented persons.

Thank you for the opportunity to contribute our views on this important issue. If you have any questions, please do not hesitate to contact me.

Sincerely,

Thomas Fitton
President
Judicial Watch, Inc.

Rebecca Forest
Immigration Reform Coalition of Texas



Louise Whiteford
Texans for Immigration Reform

cc: The Honorable Frank J. Corte, Jr.
The Honorable Dan Patrick