



# THE UNCONSTITUTIONALITY 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.<sup>1</sup> 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.<sup>2</sup> In fact, two federal district courts have already found 8 U.S.C. § 1373 unconstitutional under the Tenth Amendment,<sup>3</sup> and another characterized it as “highly suspect.”<sup>4</sup> 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*.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

## 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.

<sup>1</sup> 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](#).

<sup>2</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

<sup>3</sup> *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503, at \*31 (E.D. Pa. June 6, 2018).

<sup>4</sup> *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.

<sup>5</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

<sup>6</sup> *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503 at \*33.

<sup>7</sup> *City of Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill Jul. 27, 2018).