December 23, 2024

Via email
Governor Phil Scott
Office of Governor Phil Scott
109 State Street, Pavilion
Montpelier, VT 05609
phil.scott@vermont.gov

Dear Governor Scott:

Federal law is clear: aliens unlawfully present in the United States are subject to removal from the country, and it is a crime to conceal, harbor, or shield them.[1] It is also a crime to prevent federal officials from enforcing immigration law.[2] These laws were duly enacted by the people's elected representatives. Under the Supremacy Clause of the U.S. Constitution, they are the law of the land and supersede any State or local laws to the contrary. In our democratic republic, *all* State and local officials must comply with them.

Federal law imposes serious consequences for obstructing the execution of federal immigration law. So-called "sanctuary" jurisdictions that forbid compliance with federal immigration law and cooperation with the officials who enforce it are, therefore, breaking the law. Moreover, sanctuary jurisdictions are strictly prohibited from requiring their employees to violate federal immigration law.

We have identified your jurisdiction as a sanctuary jurisdiction that is violating federal law.[3] Such lawlessness subjects you and your subordinates to significant risk of criminal and civil liability. Accordingly, we are sending this letter to put you on notice of this risk and insist that you comply with our nation's laws.

The importance of this issue is not just abstract or hypothetical. According to U.S. Immigration and Customs Enforcement (ICE), as of September 25, 2024, there were

[1] 8 U.S.C. § 1324.
[2] 18 U.S.C. § 372.
[3] *Detainer Acceptance Tracker - Limited and Non-Cooperative Institutions*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT, (June 21, 2024), https://perma.cc/5QZ2-8D64.

425,431 convicted criminals in the United States who were illegal aliens with final orders of removal entered against them and who were not currently being detained.[4] Additionally, there were 222,141 non-detained illegal aliens in the United States with final orders of removal who had criminal charges pending against them. This adds up to 647,572 illegal aliens. According to Acting ICE Director Patrick J. Lechleitner, one of the reasons for this high number of criminal aliens who are free from detention is that "'sanctuary' policies can end up shielding dangerous criminals, who often victimize those same [immigrant] communities."[5]

Moreover, your sanctuary policies have had a real impact on your local residents. For example, in November 2024, a Venezuelan citizen was arrested illegally crossing the border from Canada into Derby Line, Vermont, carrying a handgun, a suppressor, 80 rounds of ammunition, and multiple knives. And in 2018 an illegal alien from the Ivory Coast with an outstanding felony warrant for molestation of a child was arrested by Border Patrol agents near Alburgh, Vermont.[6]

I. The Federal Government has authority over immigration and aliens.

As the Supreme Court has explained, "[t]he federal power to determine immigration policy is well settled."[7] "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[8] The U.S. Constitution empowers Congress to "establish an uniform Rule of Naturalization."[9] Furthermore, the federal government's power over immigration comes from its "inherent power as sovereign to control and conduct relations with foreign nations."[10] Conversely, "[u]nder the Constitution the states are granted *no such powers*; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."[11]

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[4] Adam Shaw, *Tens of thousands of illegal immigrants with sexual assault, murder convictions in US: ICE data*, FOX NEWS, (Sept. 27, 2024), https://perma.cc/F4FM-6966.
[5] Letter from Patrick J. Lechleitner, Senior Official Performing the Duties of the ICE Director, to Hon. Tony Gonzales, U.S. House of Representatives (Sep. 25, 2024), https://perma.cc/A5BV-UUL5.
[6] Newport Dispatch, *Venezuelan man charged after heavily armed illegal border crossing in Derby Line*, VERMONT DAILY CHRONICLE, (Nov. 12, 2024), https://perma.cc/TP6Y-BD7D; *Border Patrol Agents in Vermont Arrest Illegal Alien Wanted for Child Molestation*, U.S. CUSTOMS AND BORDER PROTECTION, (Apr. 26, 2018), https://perma.cc/DAV2-JLUK.
[7] *Arizona v. United States*, 567 U.S. 387, 395 (2012).
[8] *Id*. at 394 (citation omitted).
[9] U.S CONST. Art. I, § 8, cl. 4.
[10] *Arizona*, 567 U.S. at 394 (citation omitted).
[11] *DeCanas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis added)).

Under the Immigration and Nationality Act (INA), Congress specifically permits state and local law enforcement officers to assist federal officials in enforcing immigration law.[12] No federal law, however, allows state or local officials to *subvert* or *ignore* the requirements of the INA. In fact, federal law imposes significant criminal and civil penalties on those who do so.

II. Federal law preempts any State or local law prohibiting or restricting a State or local official from communicating with DHS about an individual's immigration status.

The INA specifically preempts State and local restrictions on local officials' communications with DHS. It states that *"[n]otwithstanding 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, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[13]

The Supreme Court has clearly explained: "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."[14] Congress did exactly that in Section 1373 of the INA. Therefore, sanctuary policies forbidding State or local officials from communicating with DHS are unlawful.[15]

III. Concealing, harboring, or shielding aliens is a federal crime.

By complying with your jurisdiction's sanctuary laws or policies, you and your subordinates appear to be engaging in facially criminal actions and potentially subjecting anyone implementing those policies to punishment. This is because anyone who "conceals, harbors, or shields from detection" "an alien [who] has come to, entered, or

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[12] *See, e.g.*, 8 U.S.C. § 1324(c) (arrests for criminal violation of the INA's prohibitions against smuggling, transporting, or harboring aliens may be made not only by federal immigration officers, but also by "all other officers whose duty it is to enforce criminal laws"); *id.* § 1252c (authorizing state and local law enforcement to arrest unlawfully present aliens who have been previously removed and convicted of a felony); *id.* § 1103(a)(10) (empowering DHS to authorize state and local law enforcement officers, when an "actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response," to perform functions of federal immigration officers); and *id.* § 1357(g) (allowing DHS to enter into written agreements with State or local governments to assist in "investigation, apprehension, or detention of aliens in the United States" and also specifically allowing such cooperation even without written agreements).

[13] 8 U.S.C. § 1373(a) (emphasis added).

[14] *Arizona*, 567 U.S. 399.

[15] U.S. CONST. art. VI, cl. 2.

remains in the United States in violation of law," or who attempts to do so, is committing a federal crime if that person knew or acted "in reckless disregard of the" alien's unlawful presence or entrance in the United States.[16] Similarly, it is a crime if an individual "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."[17] It is also a crime to aid and abet the above violations or to engage in conspiracy to commit them.[18] The penalty for any of the above crimes is five years' imprisonment *per alien* involved.[19]

Furthermore, because the language "come to, entered, or remains" is phrased in disjunctive form, federal appellate courts have held that the above provisions apply to conduct regardless of whether an alien may be considered lawfully present at the time of the conduct, so long as the alien had initially "come to" or "entered" the United States unlawfully.[20] Accordingly, if an alien initially enters the United States illegally and later receives parole status or some other temporary quasi-lawful status, that later lawful status fails to insulate you or others implementing your jurisdiction's sanctuary laws or policies from criminal exposure and long prison sentences.

IV. Your jurisdiction's sanctuary policies could expose you and your subordinates to criminal liability for conspiracy to commit a federal offense and conspiracy to impede a federal officer.

Because your jurisdiction's sanctuary laws or policies usually require multiple officials to coordinate their activities, all such officials could be criminally liable under multiple federal criminal conspiracy statutes.

For example, "[i]f two or more persons conspire either to commit any offense against the United States ... in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy," then every person involved in the conspiracy faces a penalty of up to five years' imprisonment.[21] Thus, because 8 U.S.C. § 1324 makes it a crime to conceal, harbor, or shield aliens, every employee in your agency who is involved in implementing sanctuary policies—even if they do not

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[16] 8 U.S.C. § 1324(a)(1)(A)(iii).
[17] 8 U.S.C. § 1324(a)(1)(A)(iv).
[18] 8 U.S.C. § 1324(a)(1)(A)(v).
[19] 8 U.S.C. § 1324(a)(1)(B)(ii) ("for each alien in respect to whom such a violation occurs").
[20] *United States v. Esparza*, 882 F.2d 143, 145–46 (5th Cir. 1989); *accord United States v. Francisco*, 30 F. App'x 48, 49 (4th Cir. 2002); *see also United States v. Hernandez-Garcia*, 284 F.3d 1135, 1138 (9th Cir. 2002) (holding that the disjunctive nature of the list means that not all three elements must be proved for the statute to apply and that Section 1324 therefore applies "[s]o long as an alien has come to the United States unlawfully and the transporter knows this").
[21] 18 U.S.C. § 371.

directly conceal, harbor, or shield an alien—would potentially face five years in prison.

Similarly, it is a crime for "two or more persons ... [to] conspire to prevent ... any person from ... discharging any duties" of "any office, trust, or place of confidence under the United States."[22] This crime carries a penalty of up to six years' imprisonment. Thus, employees in your jurisdiction involved in implementing sanctuary policies that prevent federal immigration officers from carrying out their duties would potentially face six years in prison.

Additionally, it is a crime carrying a penalty of up to 20 years' imprisonment for anyone who "knowingly ... engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... be absent from an official proceeding to which such person has been summoned by legal process" or to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of ... parole[] or release pending judicial proceedings."[23] This means that you and your subordinates could potentially face up to 20 years in prison for any misleading actions that help an alien to avoid removal proceedings. You and your subordinates would also potentially face the same risk for taking actions that prevent federal authorities from getting information about aliens' immigration violations or their failure to abide by conditions for release pending immigration proceedings.

V. Your jurisdiction's sanctuary policies could expose you and the other individual officials and employees involved to potential personal financial liability to private plaintiffs.

Concealing, harboring, or shielding aliens could also trigger liability under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) statute.[24] Civil RICO remedies are available to "[a]ny person injured in his business or property by reason of a violation" and "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). Public officials who have committed RICO violations may be sued in their individual capacities.[25] Thus, any individual who has been harmed by your jurisdiction's sanctuary

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[22] 18 U.S.C. § 372.

[23] 18 U.S.C. § 1512(b)(2)(D) and (b)(3).

[24] *See* 18 U.S.C. 1961(1) (listing 8 U.S.C. § 1324 as a predicate RICO offense).

[25] *Genty v. Resol. Tr. Corp.*, 937 F.2d 899, 913 (3d Cir. 1991) (holding that plaintiffs could not sue municipality for triple damages under the RICO statute but that they could bring "a RICO action against the municipal officers themselves"); *Pelfresne v. Vill. of Rosemont*, 22 F. Supp. 2d 756, 761 (N.D. Ill. 1998) (individual municipal officials sued in their individual capacities were "proper RICO persons" who could be sued for triple damages).

policies, such as victims of crimes committed by aliens you have harbored, may sue you and any other officials involved in harboring that alien for triple damages. Also, you and the other public officials and employees who enforce or follow your jurisdiction's sanctuary policies could face liability under the substantive due process state-created danger doctrine.[26]

VI. Conclusion

As President Theodore Roosevelt said, "[n]o man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."[27] The American people have spoken through their representatives. Your jurisdiction's sanctuary laws or policies therefore make a mockery of American democracy and demonstrate a shocking disrespect for the rule of law. For these reasons alone, you should abandon them. But no matter your views on our Union, the fact of the matter is that you and the other officials who support or enforce sanctuary laws, policies, and regulations have a very personal stake in the matter – you each could face criminal prosecution and civil liability for your illegal acts. We urge you to do the right thing, protect your citizens, and comply with federal law.

Best regards,

/s/ James Rogers
James Rogers
Senior Counsel
America First Legal Foundation

[26] *See, e.g., Polanco v. Diaz,* 76 F. 4th 918 (9th Cir. 2024); *Irish v. Fowler,* 979 F.3d 65 (1st Cir. 2020); *L.R. v. School District of Philadelphia*, 836 F.3d 235 (3d Cir. 2016); *Pena v. DePrisco*, 432 F. 3d 38 (2d Cir. 2005).

[27] Theodore Roosevelt, *Third Annual Message to the Senate and House of Representatives*, Dec. 7. 1903, available at https://perma.cc/E7BD-ZQBS.