



Feb. 6, 2017

Governor Phil Scott
109 State Street, Pavilion
Montpelier, VT 05609

Dear Governor Scott:

The American Civil Liberties Union of Vermont writes to thank you for opposing President Trump's Executive Orders concerning immigration and for your commitment to defend the rights of Vermont's immigrant and refugee communities. You are right to recognize that the discriminatory policies advanced by the Trump administration in its first weeks in office have no place in our democracy or our state.

We also write to communicate the ACLU of Vermont's position on what the state can and should do to ensure the civil rights and civil liberties of all Vermont residents are respected without regard to immigration status.¹ For the reasons outlined below, Vermont should take immediate action to enact the following policies for *all* state law enforcement agencies:

- 1) Require agencies to adopt the Vermont Criminal Justice Training Council's Fair and Impartial Policing Policy *in full*;
- 2) Prohibit agencies from participating in 287(g) programs and any similar programs that would direct limited state resources to federal immigration enforcement;
- 3) Prohibit agencies from responding to ICE or CBP detainer requests and "requests for notification" unsupported by probable cause; and
- 4) Prevent agencies from divulging immigrants' private information to federal agencies absent a judicial warrant or subpoena.

¹ The American Civil Liberties Union (ACLU) of Vermont is a nonpartisan, nonprofit membership organization that defends the individual rights and liberties guaranteed by the Bill of Rights and the United States and Vermont Constitutions. With more than one million members nationwide, the ACLU works to advance the civil rights and civil liberties of all people through litigation, advocacy, and public education. Founded in 1967, the ACLU of Vermont is the statewide affiliate of the national ACLU.

The President's threats notwithstanding, as a matter of law there is nothing preventing Vermont from undertaking these lawful, commonsense steps to safeguard the rights of its residents. Vermont should immediately join the growing number of jurisdictions across the country that are adopting similar measures.

In recent months, a number of public officials have contacted the ACLU seeking information about what steps they can take to make their communities safe for and welcoming to all residents. While we fully support these local efforts, it is apparent that significant confusion persists about what localities can do. A comprehensive, statewide policy would provide clarity on these points and better ensure that the rights enjoyed by Vermont residents are not dependent on the jurisdiction in which they reside.

First, we would emphasize to all public officials considering local "sanctuary" policies that the term has no fixed definition whatsoever. Generally, the term "sanctuary" has described local policies that provide for delivery of city services irrespective of immigration status or English-language ability; protect the confidential records of immigrants; and prohibit local officials from questioning anyone regarding immigration status, detaining someone on the basis of immigration status alone, or entering into immigration enforcement agreements (such as 287(g) agreements) with the federal government.

Whether they are labeled "sanctuary" or not, such policies are lawful. Many simply restate established constitutional requirements that limit police involvement in immigration enforcement, consistent with the Fourth and Fourteenth Amendments of the Constitution.²

To be clear, President Trump cannot lawfully defund states or localities that enact such laws. It is true that certain federal regulations impose constraints on what states can do to limit immigration enforcement. Specifically, 8 U.S.C. § 1373 prohibits policies that limit all communication with DHS about "information regarding the immigration or citizenship status" of individuals. Significantly, however, the law does not impose affirmative obligations to share information, does not specify any required action, and does not include any financial penalties.

Congress has never authorized the President to defund states and localities that stay clear of the deportation business, and any legislation to that effect would be susceptible to legal challenges. From the day the Executive Order was signed, the ACLU has said that any attempt by the federal government to commandeer state and local governments into carrying out federal policies would violate the 10th

² See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

Amendment.³ Attempts to coerce local entities into action by withholding funds would also violate the Spending Clause of the U.S. Constitution. Vermont should recognize that the law is on its side.⁴

As such, the state can and should pursue a comprehensive policy solution to protect the civil rights of Vermont's immigrant and refugee communities. The good news is that we don't have to start from scratch—the policy already exists. Vermont's Fair and Impartial Policing (FIP) policy was promulgated in June 2016, pursuant to 20 V.S.A. § 2366.⁵

One of the central goals of the FIP policy is to preserve public safety and community trust in law enforcement by prohibiting discriminatory policing and ensuring that local police do not undertake federal immigration enforcement activities for which they lack legal authority. Hundreds of other cities and counties around the country have enacted similar policies.⁶

Though some Vermont law enforcement agencies have adopted partial versions of the FIP policy, it is critical to underscore that *many of those policies do not contain the immigrant-protective provisions included in the full FIP policy*. Without legislation, many local agencies are unlikely to adopt the FIP policy in full, and the rights of immigrants in this state will remain vulnerable and largely contingent on the town or county in which they happen to reside. Given your commitment to defend the civil rights of all Vermont's residents, and in light of the Trump administration's recent actions, that result would be unacceptable.

A growing number of public officials around the country have recognized the importance of disentangling local law enforcement from immigration enforcement⁷—to save limited resources, preserve community trust and public

³ See *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

⁴ See generally Christopher Lasch, *Despite calls to defund sanctuary cities, a steady drumbeat of judicial decisions defends them*, THE HILL, Jan. 26, 2017, available at <http://bit.ly/2lfxPMx>.

⁵ The FIP policy was drafted by the Vermont Criminal Justice Training Council, in consultation with the office of the Attorney General, Vermont Police Chiefs' Association, the Vermont League of Cities and Towns, and civil rights organizations including the ACLU of Vermont, Migrant Justice, the Human Rights Commission, Justice for All, and the Peace and Justice Center.

⁶ Jasmine C. Lee et al., *What Are Sanctuary Cities?*, NY TIMES, Jan 25, 2017, available at <http://nyti.ms/2k7CWBy>.

⁷ See, e.g., Press Release, U.S. Mayors, Police Chiefs Concerned with Sanctuary Cities Executive Order, Jan. 25, 2017, available at <http://bit.ly/2kyUhB1>; National Immigration Law Center, Law Enforcement Leaders Oppose Federal Mandate to Engage in Immigration Enforcement, July 2013, available at <http://bit.ly/2jU4Yw2>.

safety, and avoid liability⁸ resulting from unconstitutional policing.

For the foregoing reasons, we urge you to work with the legislature to see that Vermont's FIP policy is enacted and implemented *in full*, statewide, as soon as is practicable. In addition, we strongly encourage the state to draw upon the example of other states and cities that have adopted similar policies, and consider additional measures not currently contained in the FIP policy, including a prohibition on localities entering into 287(g) agreements; ensuring that immigrants' private information is not shared by state agencies, including DMV; and directing state agencies, including the Department of Corrections, not to respond to ICE detainees or "requests for notification" not supported by probable cause.

It is critical that we in Vermont do all that we can to reject the anti-immigrant agenda embodied in President Trump's Executive Orders, and take action to ensure our state is inclusive, fair, and welcoming to all. Going forward, the ACLU of Vermont will be working with Attorney General Donovan's immigration task force to advise on all steps Vermont can take to uphold the rights of its residents, and will continue to stand in solidarity with Vermont's immigrant and refugee communities. Please let us know if we can be of any additional assistance.

Sincerely,



James Lyall
Executive Director
ACLU of Vermont

⁸ See, e.g., *Cortes v. Lakosky*, No. 14-02132 (D. Ariz., filed Sept. 25, 2014) (ACLU lawsuit filed on behalf of a woman with a pending U-Visa who was "cited and released" for a traffic violation and then driven to Border Patrol custody); *Vargas Ramirez v. United States*, No. 13-02325 (W.D. Wash., filed Dec. 27, 2013) (lawsuit filed by individual detained by local police following routine traffic stop at the direction of Border Patrol, despite Border Patrol's inability to find any immigration history); *Rios-Diaz v. Montana Highway Patrol*, No. 13-77 (D. Mont., filed Oct. 7, 2013) (lawsuit involving Montana Highway Patrol policy and practice of seizing Latino drivers or passengers for the sole purpose of contacting immigration officials to take custody); *Martinez-Castro v. Village of Wakeman*, No. 12-2364 (N.D. Ohio; filed Nov. 26, 2012) (lawsuit filed by two married couples detained for transfer to Border Patrol custody); *Ramirez-Rangel v. Kitsap County*, No. 12-2-09594-4 (Wash. Super. Ct., filed Jan. 31, 2012) (lawsuit on behalf of three individuals whose stop was extended for immigration questioning and referral to Border Patrol); *Muniz-Muniz v. United States Border Patrol*, No. 09-02865 (N.D. Ohio, filed Dec. 10, 2009) (challenging systematic racial profiling of Hispanic residents in three Ohio towns by Border Patrol and three local law enforcement agencies.).

Cc:
David Zuckerman, Lt. Governor;
T.J. Donovan, Attorney General;
Sen. Tim Ashe, Senate President Pro Tempore;
Rep. Mitzi Johnson, Speaker of the House