

# SANCTUARY: K-12 SCHOOL DISTRICTS IN AGRICULTURAL COMMUNITIES

## I. INTRODUCTION

Executive Order 13768, Enhancing Public Safety in the Interior of the United States (hereinafter “Executive Order”) was issued in January of 2017.<sup>1</sup> It charged non-compliant sanctuary jurisdictions with shielding illegal immigrants from removal from the United States, and declared them ineligible to receive federal funding.<sup>2</sup> Primary and secondary (hereinafter “K-12”) schools in agricultural communities have a particular interest in both adopting sanctuary resolutions and implementing policies that run counter to mandates like that of the Executive Order for one main reason: they have a federal duty to not hinder access to education for any child, regardless of the child’s immigration status, or that of the child’s parents.<sup>3</sup>

Populations in agricultural communities are comprised of high numbers of immigrant farmworkers, only half of whom are estimated to be authorized to work in the United States.<sup>4</sup> Of these workers, many are parents of school-aged children.<sup>5</sup> Given the federal duty to not impede access to education for any child, the Executive Order put K-12 schools in a difficult situation; complying with its mandates would have caused them to potentially violate the constitutional rights of their students, while not complying with the mandates might have subjected them to the loss of federal funding.<sup>6</sup>

This comment was initiated some eight months after the Executive Order was issued and well after the Executive Order’s enforcement had been

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<sup>1</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the Executive Order has been permanently enjoined, and that ruling has been appealed. Discussed in further detail in Section III).

<sup>2</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8799, 8801.

<sup>3</sup> See Plyler v. Doe, 457 U.S. 202, 226 (1982).

<sup>4</sup> Bureau of Labor Statistics, *Occupational Employment and Wages, May 2017, Occupational Employment Statistics*, U.S. DEPT OF LABOR (May 2017), <https://www.bls.gov/oes/current/oes452099.htm>; Trish Hernandez et al., *Findings From the National Agricultural Workers Survey (NAWS) 2013-2014: A Demographic and Employment Profile of United States Farmworkers*, U.S. DEPT OF LABOR EMPLOYMENT AND TRAINING ADMIN., i, 4 (Dec. 2016), [https://www.doleta.gov/naaws/pages/research/docs/NAWS\\_Research\\_Report\\_12.pdf](https://www.doleta.gov/naaws/pages/research/docs/NAWS_Research_Report_12.pdf).

<sup>5</sup> Hernandez, *supra* note 4, at i, 7, 8.

<sup>6</sup> See Plyler, 457 U.S. at 226; Exec. Order No. 13768, 82 Fed. Reg. at 8801.

challenged by multiple lawsuits on constitutional grounds.<sup>7</sup> A federal judge eventually ruled that the Executive Order was unconstitutional and permanently blocked its enforcement.<sup>8</sup> Despite this ruling, the Executive Order still casts an ominous shadow on sanctuary jurisdictions, which may – or may not – include K-12 school districts with sanctuary policies.<sup>9</sup> This comment will discuss K-12 education in agricultural communities, in light of the Executive Order’s threat to defund any jurisdiction that was deemed a sanctuary.<sup>10</sup> The goal of this comment is to examine the nature, purpose, and utility of K-12 sanctuary policies in connection with the mandates of the Executive Order and the President’s broader immigration goal, which includes dismantling sanctuary jurisdictions.<sup>11</sup>

Part II of this comment will discuss K-12 school districts’ federal obligation to undocumented immigrant students and citizen children of undocumented parents.<sup>12</sup> It will also include a discussion of how K-12 schools and the wider educational community were, and continue to be, affected by the Executive Order and the President’s general immigration rhetoric.<sup>13</sup> Part III will discuss the contents of the Executive Order, focusing on the various legal challenges

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<sup>7</sup> See generally, Civil Rights Litigation Clearinghouse, *Special Collection: Civil Rights Challenges to Trump Immigration Enforcement Orders*, UNIVERSITY OF MICH. LAW SCHOOL, <https://www.clearinghouse.net/results.php?searchSpecialCollection=46> (last visited Feb. 13, 2018) (a collection of most court documents related to the Executive Order) [hereinafter Litigation Clearinghouse].

<sup>8</sup> Order Granting Motion for Summary Judgment at 4, *County of Santa Clara v. Jefferson B. Sessions, III, et al.*, No. 17-cv-000574-WHO (N.D. Cal. filed Dec. 18, 2017).

<sup>9</sup> See *id.* at 5 (stating that “sanctuary” is not defined) (throughout this comment, “schools,” “districts,” “institutions,” and “school districts” will be used interchangeably).

<sup>10</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>11</sup> See generally Politico Staff, *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016 10:54 pm), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> (President lays out his immigration goals which include blocking funding to sanctuary cities).

<sup>12</sup> See *Plyler*, 457 U.S. at 226; Jessica Hanson et al., *Practice Advisory: The Legal Authority for “Sanctuary” School Policies*, NAT’L IMMIGRATION LAW CENTER 3 (Jun. 2017), <https://www.nilc.org/wp-content/uploads/2017/06/sanctuary-schools-practice-advisory-2017-06.pdf>.

<sup>13</sup> See *Safe Havens Initiative*, CAL. DEP’T. OF EDUC., <https://www.cde.ca.gov/eo/in/safehavens.asp> (last visited Feb. 3, 2018); See Letter from Tom Torlakson, State Superintendent of Pub. Instruction to Cty. and Dist. Superintendents, Charter Sch. Adm’r., and Principals (Dec. 21, 2016) (*available at* <https://www.cde.ca.gov/nr/el/le/yr16ltr1221.asp>) [hereinafter Letter from Tom Torlakson].

it has faced.<sup>14</sup> It will address the federal ruling that permanently blocked enforcement of the Executive Order as well as the Executive Branch's appeal of that ruling.<sup>15</sup> Part IV will discuss the ambiguity surrounding the meaning of "sanctuary," and how this ambiguity factors into whether or not K-12 schools should adopt sanctuary policies. It will also point out what is generally at the core of a K-12 sanctuary school policy.<sup>16</sup> Part V will recommend that, if K-12 districts choose to designate their campuses as sanctuaries, they be cognizant of the potential political ramifications associated with the term "sanctuary."<sup>17</sup> Additionally it will recommend the farming community contemplate a farmer-sponsored option that may allow loyal, hard-working undocumented farmworkers the ability to reside, legally, in the United States, should they desire it.

## II. K-12 SCHOOLS AND CONCERN WITH IMMIGRATION

It is estimated that up to one in thirty students in California public schools is undocumented.<sup>18</sup> According to the California Department of Education, there are 300,000 undocumented K-12 students attending primary and secondary schools and approximately one million K-12 students with at least one undocumented parent.<sup>19</sup> California tends to have higher percentages of K-12 students with at least one undocumented parent, at 12.3% of the state's total.<sup>20</sup>

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<sup>14</sup> Exec. Order No. 13768, 82 Fed. Reg.; *See* Litigation Clearinghouse, *supra* note 7.

<sup>15</sup> *See* Litigation Clearinghouse, *supra* note 7.

<sup>16</sup> *See generally* Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU Law Review 1, 133 (2008) (discussing the meaning of sanctuary in the context of contemporary immigration issues); *See* Nancy Jodaitis, *Understanding the Sanctuary School & Safety Zone Movement: A Quick Guide for Educators*, EDUCATORS FOR FAIR CONSIDERATION, 3, 4, [http://www.e4fc.org/images/E4FC\\_SanctuarySchoolandSafeZoneMov.pdf](http://www.e4fc.org/images/E4FC_SanctuarySchoolandSafeZoneMov.pdf) (last visited Feb. 8, 2018).

<sup>17</sup> Villazor, *supra* note 16, at 134; *See* Ruben Vives, et al., *Fresno Mayor Vows His Town Won't Become 'Sanctuary City,' Bucking California Trend*, LOS ANGELES TIMES (Jan. 25, 2017), <http://www.latimes.com/local/lanow/la-me-sanctuary-city-california-20170125-story.html> (Fresno Mayor decline to designate Fresno as a sanctuary to avoid potential loss of federal funding); *See* Matt Boone, *Not a Sanctuary City, But Arvin Plans to Fight Deportations*, BAKERSFIELDNOW.COM (Jan. 10, 2017), <http://bakersfieldnow.com/news/local/not-a-sanctuary-city-but-arvin-plans-to-fight-deportations> (Arvin city leaders decline to designate Arvin as a sanctuary to avoid potential loss of federal funding).

<sup>18</sup> [Proposed] Brief of *Amici Curiae* Public Schools, School Districts, and Ass'ns of Educators at 3, *County of Santa Clara v. Trump*, No. 3:17-cv-00574-WHO (N.D. Cal. filed Mar. 22, 2017) [hereinafter Brief of *Amici Curiae* Public Schools].

<sup>19</sup> *Safe Havens Initiative*, *supra* note 13.

<sup>20</sup> Jeffrey S. Passel & D'Vera Cohn, *Children of Unauthorized Immigrants Represent Rising Share of K-12 Students*, PEW RESEARCH CENTER (Nov. 17, 2016),

This is largely due to the fact that California is the leader among all states in agriculturally produced income, but even more so because agriculture is a labor-intensive industry that is *extremely* dependent on immigrant farm workers.<sup>21</sup> Statistics from 2014 indicate that over seventy percent of agriculture's labor force is foreign-born and nearly half of those workers are estimated to be unauthorized to work in the United States.<sup>22</sup> More than half of farmworkers are married and those who are parents have an average of two children under the age of eighteen in their households.<sup>23</sup> It is therefore understandable why schools in California have a higher number of children of immigrants than other states.<sup>24</sup>

### A. Undocumented Children Have a Right to Access Education

All children in the United States have a federally protected right of access to a free public primary and secondary education, regardless of their, or their parents' perceived immigration or citizenship status.<sup>25</sup> This right was afforded to children after the 1982 Supreme Court decision in *Plyler v. Doe*, 457 U.S. 202 (1982), where the Texas legislature refused to enroll immigrant children in public schools because they were not legally admitted into the United States.<sup>26</sup> The Court determined that Texas legislators failed to show that denying an education to unauthorized foreign-born children somehow substantially furthered the interests of the state, and so denying those children access to a free public education was a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>27</sup> The Court further stated that a "special constitutional sensitivity" was presented in *Plyler* and that "so long as [the children] are present in this country through no fault of their own," Texas did not benefit themselves or the nation as a whole by denying the children an

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<http://www.pewresearch.org/fact-tank/2016/11/17/children-of-unauthorized-immigrants-represent-rising-share-of-k-12-students/>.

<sup>21</sup> California Agricultural Statistics Review, 2016-2017, CALIFORNIA DEP'T OF FOOD AND AGRICULTURE, 1, <https://www.cdfa.ca.gov/Statistics/PDFs/2016-17AgReport.pdf>; Valerie Hamilton, *California's Undocumented Workers Help the Economy Grow—But May Pay the Cost, Bus., Econ., and Jobs*, PRI'S THE WORLD (Mar. 6, 2017), <https://www.pri.org/stories/2017-03-06/californias-undocumented-workers-help-grow-economy-theres-cost>.

<sup>22</sup> Hernandez, *supra* note 4, at i, 4.

<sup>23</sup> Hernandez, *supra* note 4, at 7, 8.

<sup>24</sup> See generally Passel, *supra* note 20 (detailing the number of children of immigrants); see generally *Plyler*, 457 U.S. at 226 (holding that all undocumented children have a right to access free public education).

<sup>25</sup> See *Plyler*, 457 U.S. at 226.

<sup>26</sup> *Id.* at 205.

<sup>27</sup> See *id.* at 212, 215, 230.

education, especially in light of the fact that some of them might one day be granted citizenship.<sup>28</sup>

*Plyler* is cited as the primary authority in many sanctuary resolutions that have been adopted by K-12 districts, and is the legal platform used to encourage districts that have not designated themselves as sanctuaries to do so.<sup>29</sup> Given that the immigration status of children has no bearing on the availability of their education, K-12 school districts are charged with an affirmative duty to protect all children's access to education.<sup>30</sup>

It should be noted that the number of undocumented students has declined since 2009, but this has no effect on the obligations of K-12 schools or their concern for immigration policies that threaten the removal of undocumented immigrants.<sup>31</sup> Reports have shown that when an immigration raid occurs, school attendance drops, and it is not just the undocumented children who are absent – U.S. born children of immigrants have high rates of absenteeism following immigration raids and arrests as well.<sup>32</sup> To K-12 schools, it is irrelevant whether or not their students are documented citizens of the United States, as all of their students are entitled to unhindered access to a free public education.<sup>33</sup> What does matter, though, is that immigration enforcement activity affects children negatively by causing them to be absent from school, or causing them to be present but fearful and anxious while at school.<sup>34</sup> In light of agriculture's reliance on immigrant farm workers, and the fact that over half of those workers have school-aged children with a federally protected right to access an education, it follows that K-12 school districts in agricultural communities should be uniquely concerned with any immigration policies that may affect their students – especially when those policies potentially threaten the federal funding a district receives.<sup>35</sup>

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<sup>28</sup> *Id.* at 226.

<sup>29</sup> Hanson, *supra* note 12, at 3-5; *Safe Havens Initiative*, *supra* note 13; Letter from Tom Torlakson, *supra* note 13.

<sup>30</sup> *See Plyler*, 457 U.S. at 226.

<sup>31</sup> *Id.*

<sup>32</sup> Brief of *Amici Curiae* Public Schools, *supra* note 18, at 4; Catherine E. Shoichet, *ICE Raided a Meatpacking Plant. More Than 500 Kids Missed School the Next Day*, CNN (Apr. 12, 2018), <https://www.cnn.com/2018/04/12/us/tennessee-immigration-raid-schools-impact/index.html>.

<sup>33</sup> *See Plyler*, 457 U.S. at 226.

<sup>34</sup> Shoichet, *supra* note 32; Zaidee Stavely, *Pre-Inauguration, California Districts Declare Sanctuary Schools*, KQED NEWS (Jan. 5, 2017), <https://ww2.kqed.org/news/2017/01/05/pre-inauguration-california-districts-declare-sanctuary-schools>.

<sup>35</sup> Hamilton, *supra* note 21; Hernandez, *supra* note 4, at 7; *Safe Havens Initiative*, *supra* note 13; *see generally* Exec. Order No. 13768, 82 Fed. Reg. at 8801 (warning that non-compliant jurisdictions will be ineligible for federal grants) (it was never certain whether K-12 schools would have lost federal funding, but the drop in daily

### *B. K-12 Districts' Adoption of Sanctuary Resolutions and Policies*

Prior to the issuance of the Executive Order and shortly after the inauguration of President Trump, some K-12 school districts publicly asserted or reasserted their desire to provide places of safety and sanctuary for all students.<sup>36</sup> This was largely in response to the President's vow to deport three million undocumented immigrants and the subsequent anxiety, uncertainty, and increased reports of bullying, harassment, and intimidation it created for K-12 students.<sup>37</sup> Tom Torlakson, California Superintendent of Public Instruction, sent out a letter to all school superintendents, administrators, and principals in the state urging them to adopt policies declaring their schools safe spaces, or sanctuaries, for students with irregular immigration statuses.<sup>38</sup> This push to adopt sanctuary resolutions and policies was a preemptive and largely a symbolic reaction to the immigration crackdown endorsed by the President.<sup>39</sup> The intent behind their adoption points toward multiple goals: to reiterate the right of all school-aged children in the United States to access free public primary and secondary education; to state each school district's duty to protect their students' personal information; to provide a safe and fear-free learning environment for children; and to foster community trust between schools and immigrant children and their families.<sup>40</sup>

The preemptive adoption of sanctuary resolutions was well-founded as, shortly after the issuance of the Executive Order, there were news reports of immigration raids by U.S. Immigration and Customs Enforcement (hereinafter "ICE") agents and arrests near schools, which served to justify the general fear of deportation in communities with high immigrant populations.<sup>41</sup> Nationwide

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attendance causes districts to lose state funds that are contingent on the number of children in school).

<sup>36</sup> Letter from Tom Torlakson, *supra* note 13; Stavely, *supra* note 34; Mark Keierleber, *Claiming Sanctuary: Inside the Schools Now Actively Resisting President Trump's Immigration Crackdown*, THE 74 (Mar. 19, 2017), <https://www.the74million.org/article/claiming-sanctuary-inside-the-schools-now-actively-resisting-president-trumps-immigration-crackdown>.

<sup>37</sup> Katie Reilly, *Donald Trump Plans to Deport Up to 3 Million Immigrants*, TIME (Nov. 13, 2017), <http://time.com/4569034/donald-trump-undocumented-immigrant-deportation>; Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, THE ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

<sup>38</sup> Letter from Tom Torlakson, *supra* note 13.

<sup>39</sup> Keierleber, *supra* note 36.

<sup>40</sup> *Safe Havens Initiative*, *supra* note 13.

<sup>41</sup> Lisa Rein, et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, THE WASH. POST (Feb. 11, 2017), <https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6->

raids resulted in the arrests of hundreds of undocumented immigrants, and even though the purported intent of those raids was to locate and apprehend known criminals, non-criminal immigrants were rounded up as well.<sup>42</sup> In one instance, a high school student was arrested on his way to class and held in federal custody for six months before being released on a \$30,000 bond.<sup>43</sup> In yet another instance, a father was arrested shortly after dropping his daughter off at school, only two blocks from the campus, and in front of his wife and a second daughter.<sup>44</sup> This heightened enforcement has made some parents fearful of taking their children to school.<sup>45</sup> It is this type of anxiety and fear that K-12 districts in communities with high immigrant populations have responded to and which they desire to alleviate through the adoption of sanctuary resolutions.<sup>46</sup> To date, some of the top ten ag-producing counties in California, for example Fresno, Kern, Merced, Monterey, and Ventura, have approximately thirty K-12 school districts that have passed sanctuary resolutions.<sup>47</sup>

The Executive Order mandates compliance with Chapter 8 of the United States Code, Section 1373 (hereinafter “Section 1373”), which is concerned with the sending, requesting, receiving, maintaining, and exchanging of individuals’ immigration information to and from federal immigration agencies.<sup>48</sup> Regarding such information, K-12 schools do not require students or their parents to provide immigration information, as that would be a violation of *Plyler*.<sup>49</sup> Indeed, a major feature of many school sanctuary resolutions is a refusal to collect or turn over information on students’

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b4ff-ac2cf509efe5\_story.html?utm\_term=.2d76eb06f315; Brief of *Amici Curiae* Public School, *supra* note 18 at 5; Keierleber, *supra* note 36.

<sup>42</sup> Rein, *supra* note 41.

<sup>43</sup> Mark Price, *After six months in custody, bond set for immigrant CMS student*, THE CHARLOTTE OBSERVER (Jun. 28, 2016), <http://www.charlotteobserver.com/news/local/article86450677.html>.

<sup>44</sup> Andrea Castillo, *Immigrant Arrested By ICE After Dropping Daughter Off at School, Sending Shockwaves Through neighborhood*, L.A. TIMES (Mar. 3, 2017), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>; Keierleber, *supra* note 36.

<sup>45</sup> Mark Keierleber, *‘Sanctuary Schools’ Across America Defy Trump’s Immigration Crackdown*, THE GUARDIAN (Aug. 21, 2017), <https://www.theguardian.com/us-news/2017/aug/21/american-schools-defy-trump-immigration-crackdown>.

<sup>46</sup> Letter from Tom Torlakson, *supra* note 13.

<sup>47</sup> California Agricultural Statistics Review, 2016-2017, *supra* note 21, at 18; California Safe Haven School Districts List, CA. DEP’T. OF EDUC., <https://www.cde.ca.gov/eo/in/casafhavendistrictslist.asp> (last visited Feb. 3, 2018).

<sup>48</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8801; 8 U.S.C. §1373 (1996).

<sup>49</sup> Hanson, *supra* note 12, at 6.

immigration or citizenship statuses.<sup>50</sup> Facially then, if it was the case that K-12 districts were sanctuary jurisdictions, the Executive Order's mandate to comply with Section 1373 would have implicated them in being potentially non-compliant with the dictates of the Executive Order.<sup>51</sup> So, although initially a symbolic gesture of support for immigrant students and their families, upon the issuance of the Executive Order, K-12 districts with sanctuary policies and resolutions suddenly became potentially afoul of an Executive mandate.<sup>52</sup> However, a number of legal impediments challenging the Executive Order slowed any potential legal problems that K-12 districts might have faced as a result of the Executive Order, most notably, the lack of legal standard for what constitutes a sanctuary and the Executive Order's failure to provide an adequate legal starting point in order to understand it.<sup>53</sup>

### III. EXECUTIVE ORDER 13768

On January 25, 2017, President Donald J. Trump issued Executive Order 13768, Enhancing Public Safety in the Interior of the United States.<sup>54</sup> Its purpose was to ensure public safety and national security in the United States.<sup>55</sup> In order to carry out that purpose, the Executive Order demanded compliance with Section 1373.<sup>56</sup> Section 1373, entitled "Communications between government agencies and the Immigration and Naturalization Service," was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and also as part of the Omnibus Consolidated Appropriations Act of 1997.<sup>57</sup> Section 1373 forbids any federal, state, or local government entity or official from prohibiting or restricting the sending to or receiving from the Immigration and Naturalization Service information regarding an individual's citizenship or immigration status, be it lawful or not.<sup>58</sup> To ensure compliance with Section 1373, Section 9(a) of the Executive Order specifically targeted sanctuary jurisdictions as willful violators of federal law; those jurisdictions would have therefore been ineligible to receive federal grants, except, according to the discretion of the Attorney General or

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<sup>50</sup> *FAQ For Educators on Immigrant Students in Public Schools*, ACLU, <https://www.aclu.org/other/faq-educators-immigrant-students-public-schools> (last visited Apr. 19, 2018); Hanson, *supra* note 12, at 17.

<sup>51</sup> See Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>52</sup> Keierleber, *supra* note 36; See Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>53</sup> See Litigation Clearinghouse, *supra* note 7.

<sup>54</sup> Exec. Order No. 13768, 82 Fed. Reg.

<sup>55</sup> *Id.* at 8799.

<sup>56</sup> *Id.* at 8801.

<sup>57</sup> 8 U.S.C. §1373.

<sup>58</sup> *Id.*



the Secretary of Homeland Security, those necessitated by law enforcement purposes.<sup>59</sup>

### A. Legal Challenges to the Executive Order

The Executive Order was immediately met with legal challenges.<sup>60</sup> Just six days after it was issued, the City and County of San Francisco (hereinafter “San Francisco”) filed a complaint in the Northern District of California against the President, the Secretary of the Department of Homeland Security, and the (acting) Attorney General.<sup>61</sup> The complaint alleged, *inter alia*, that the Executive Order was unconstitutional on its face because it violated the Tenth Amendment by encroaching on state sovereignty.<sup>62</sup> Only three days after San Francisco filed suit, the County of Santa Clara also brought suit with allegations of the same Tenth Amendment violation.<sup>63</sup> In addition to claiming that the Executive Order violated the Separation of Powers Doctrine by Executive overreach into Congressional spending power, the complaint alleged that the Executive Order violated the Fifth Amendment’s Due Process Clause because it was unconstitutionally vague, and did not allow the opportunity for review, challenge, or to obtain notice of loss of federal funds.<sup>64</sup> Three more lawsuits were filed in February and March of 2017 by the cities of Chelsea and Lawrence in Massachusetts, the City of Richmond in California, and the City of Seattle in Washington State.<sup>65</sup> The allegations contained in them largely overlapped with those of San Francisco and Santa Clara.<sup>66</sup> The Richmond complaint added that the Executive Order would compel compliant jurisdictions to violate the Fourth Amendment by detaining individuals who

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<sup>59</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>60</sup> See Litigation Clearinghouse, *supra* note 7.

<sup>61</sup> Complaint for Declaratory and Injunctive Relief, City and County of San Francisco v. Trump, No. 3:17-cv-00485 (N.D. Cal. filed Jan. 31, 2017) [hereinafter San Francisco Complaint].

<sup>62</sup> *Id.* at 20-21.

<sup>63</sup> Complaint for Declaratory and Injunctive Relief at 21, County of Santa Clara v. Trump, No. 3:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017) [hereinafter Santa Clara Complaint].

<sup>64</sup> *Id.* at 31-39.

<sup>65</sup> Complaint for Declaratory and Injunctive Relief, City of Chelsea v. Trump, No. 1:17-cv-10214-GAO (Dist. Mass. filed Feb. 8, 2017); Complaint for Declaratory and Injunctive Relief Concerning Fed. Exec. Order 13768, City of Richmond v. Trump, No. 3:17-cv-01535 (N.D. Cal. filed Mar. 21, 2017); Complaint for Declaratory Relief, City of Seattle v. Trump, No. 2:17-cv-00497-BAT (W. Wash. filed. Mar. 9, 2017).

<sup>66</sup> See Litigation Clearinghouse, *supra* note 7.

would otherwise be released.<sup>67</sup> In the end, only the San Francisco and Santa Clara lawsuits moved jointly forward; they sought to block enforcement of Section 9(a) of the Executive Order on the grounds that it was facially unconstitutional.<sup>68</sup>

In April of 2017, a federal judge ruled that Section 9(a) was likely unconstitutional and ordered a nationwide preliminary injunction which temporarily blocked its enforcement.<sup>69</sup> Seven months later, after the inception of this comment, the presiding federal judge granted summary judgment for San Francisco and Santa Clara, ruling that on its face the Executive Order violated the Separation of Powers Doctrine, as well as the Fifth and Tenth Amendments.<sup>70</sup> Enforcement of Section 9(a) has now been permanently blocked.<sup>71</sup>

### *B. The Executive Order has been Blocked, but “Sanctuaries” are Still Being Targeted*

The Executive Order is currently blocked from enforcement, but the President and his administration are still very much dedicated to their immigration policy goals targeting so-called sanctuary jurisdictions.<sup>72</sup> In December of 2017 the Executive Branch appealed the permanent injunction ruling.<sup>73</sup> The President and his administrators have also moved to withhold a federal law enforcement grant from sanctuary jurisdictions, which prompted

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<sup>67</sup> Complaint for Declaratory and Injunctive Relief Concerning Fed. Exec. Order 13768 at 20, *City of Richmond v. Trump*, No. 3:17-cv-01535 (N.D. Cal. filed Mar. 21, 2017).

<sup>68</sup> Related Case Order, *City and County of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. filed Feb. 2, 2017); Order Granting the County of Santa Clara’s and City and County of San Francisco’s Motion to Enjoin Section 9(a) of Exec. Order 13768 at 1, *County of Santa Clara v. Trump, et al.*, No. 3:17-cv-00574-WHO (N.D. Cal. filed Apr. 25, 2017).

<sup>69</sup> Order Granting the County of Santa Clara’s and City and County of San Francisco’s Motion to Enjoin Section 9(a) of Exec. Order 13768 at 48, *County of Santa Clara v. Trump, et al.*, No. 3:17-cv-00574-WHO (N.D. Cal. filed Apr. 25, 2017).

<sup>70</sup> Order Granting Motion for Summary Judgment at 4, *County of Santa Clara v. Jefferson B. Sessions, III, et al.*, No. 17-cv-000574-WHO (N.D. Cal. filed Dec. 18, 2017).

<sup>71</sup> *Id.*

<sup>72</sup> See Jon Herskovitz, *U.S. Judge in California Blocks Trump’s Order on Sanctuary Cities*, RUTERS, U.S. LEGAL NEWS (Nov. 21, 2017), <https://www.reuters.com/article/usa-immigration-sanctuary/u-s-judge-in-california-blocks-trumps-order-on-sanctuary-cities-idUSKBN1DL0A6> (spokesmen for President Trump states that motion to enjoin will be challenged).

<sup>73</sup> Brief For Appellants at 2, *City and County of San Francisco v. Trump*, Nos. 17-16886, 17-16887 (N.D. Cal. filed Feb. 2, 2017).

yet another lawsuit from San Francisco, as well as one from the State of California.<sup>74</sup> Those cases are still pending.<sup>75</sup> Out of court statements further demonstrate the President's commitment: following the April 2017 preliminary injunction ruling, the President expressed that any outcome not in favor of the Executive Order would be challenged, as denoted by his tweet, "see you in the Supreme Court!"<sup>76</sup> Further, after the summary judgment and permanent halt on the enforcement of Section 9(a), a spokesman for the Department of Justice, Devin O'Malley, stated that the district court overreached its authority and vowed that this limit on the President's immigration enforcement authority would be vindicated.<sup>77</sup> These statements show the President's disagreement with the Court regarding his ability to advance his immigration policies, as well as his commitment to take this fight to the Supreme Court, if necessary.<sup>78</sup>

Despite the major set-back concerning the enforcement of the Executive Order, the President's commitment to the furtherance of his immigration policies has not diminished, and nor has the concern of K-12 districts in response to those policies.<sup>79</sup> Reports of ICE arrests of parents near schools have increased since the Executive Order was issued, and nearly five months after the permanent injunction ruling on the Executive Order, federal agents raided a meat packing plant in eastern Tennessee, detaining nearly 100 people accused of being in the United States illegally.<sup>80</sup> The following day, Hamblen County Schools, a K-12 district in a neighboring county, experienced over 500

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<sup>74</sup> Ryan Levi & Alex Emslie, *S.F. and California Attorney General Announce Lawsuit Challenging Latest Trump 'Sanctuary City' Policies*, *The California Report*, KQED NEWS (Aug. 14, 2017), <https://ww2.kqed.org/news/2017/08/14/s-f-and-california-attorney-general-announce-lawsuit-challenging-latest-trump-sanctuary-city-policies/>; Helen Christophi, *Judge Oks Lawsuit Against Trump's Sanctuary City Defunding Plan*, *COURTHOUSE NEWS SERVICE* (Feb. 28, 2018), <https://www.courthousenews.com/judge-oks-lawsuits-against-trumps-sanctuary-city-defunding-plan/>; See *Litigation Clearinghouse*, *supra* note 7.

<sup>75</sup> See *Litigation Clearinghouse*, *supra* note 7.

<sup>76</sup> Donald Trump (@realDonaldTrump), TWITTER (Dec. 9, 2017, 3:20 AM), (April 26, 2017, 3:20 am), <https://twitter.com/realdonaldtrump/status/857177434210304001?lang=en>.

<sup>77</sup> Herskovitz, *supra* note 72; Sudhin Thanawala, *Federal Judge Permanently Blocks Trump's Executive Order to Cut Funding to Sanctuary Cities*, *THE CHICAGO TRIBUNE* (Nov. 20, 2017), <http://www.chicagotribune.com/news/immigration/ct-trump-sanctuary-cities-funding-ruling-20171120-story.html>.

<sup>78</sup> See Trump, *supra* note 76.

<sup>79</sup> See generally Donald Trump, President Donald J. Trump's Weekly Address (Dec. 9, 2017), transcript available at <https://www.whitehouse.gov/the-press-office/2017/12/09/president-donald-j-trumps-weekly-address> (President speaks against sanctuary cities and need to remove illegal immigrants).

<sup>80</sup> Castillo, *supra* note 44; Shoichet, *supra* note 32.

absences – more than 6.5 times the number of absences on a typical day.<sup>81</sup> This increased enforcement has again spiked the anxiety of students and their parents to the extent that some children are fearful to attend school and some parents have kept their children home from school altogether.<sup>82</sup> It is this continued anxiety and fear that has precipitated their adoptions of sanctuary resolutions.<sup>83</sup>

#### IV. WHAT EXACTLY IS A SANCTUARY JURISDICTION?

The Executive Order targets jurisdictions that hinder communication between state and local jurisdictions and the Department of Homeland Security regarding an individual's immigration status.<sup>84</sup> Section 9(a) of the Executive Order is entitled "Sanctuary Jurisdictions" and yet offers no legally significant insight into which jurisdictions may be designated as such.<sup>85</sup> Section 3 of the Executive Order, entitled "definitions," is one sentence long in its entirety and states that "terms of this order, where applicable, shall have the meaning provided by Section 1101 of Title 8, United States Code."<sup>86</sup> Nowhere in Section 1101 of Title 8 of the United States Code is the word "sanctuary" mentioned, let alone "sanctuary jurisdictions," which were the target of the Executive Order.<sup>87</sup> In May of 2017, Attorney General Sessions issued a memo in an attempt to clarify what was meant by "sanctuary jurisdiction," but his words simply mirrored the language in the Executive Order and made the understanding of the term no clearer.<sup>88</sup> His memo states, "the term 'sanctuary jurisdiction' will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'"<sup>89</sup> Neither the Executive Order nor the Attorney General

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<sup>81</sup> Shoichet, *supra* note 32.

<sup>82</sup> Keierleber, *supra* note 45.

<sup>83</sup> Letter from Tom Torlakson, *supra* note 13.

<sup>84</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8799.

<sup>85</sup> *Id.* at 8801.

<sup>86</sup> *Id.* at 8800.

<sup>87</sup> *See* Definitions, 8 U.S.C. §1101 (1996); Order Granting Motion for Summary Judgment at 5, County of Santa Clara v. Jefferson B. Sessions, III, et al., No. 17-cv-000574-WHO (N.D. Cal. filed Dec. 18, 2017); Complaint for Declaratory and Injunctive Relief at 18, County of Santa Clara v. Trump, No. 3:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017).

<sup>88</sup> Memorandum from Attorney Gen., Jeff Sessions on Implementation of Exec. Order 13768 to All Dep't Grant-Making Components (May 22, 2017) [hereinafter "Memorandum"]; Order Granting Motion for Summary Judgment at 25, County of Santa Clara v. Jefferson B. Sessions, III, et al., No. 17-cv-000574-WHO (N.D. Cal. filed Dec. 18, 2017).

<sup>89</sup> Memorandum, *supra* note 88.

specified what “willfully refuse” or “comply” entail.<sup>90</sup> With regard to the Executive Order, “sanctuary” was (and remains) a legally ambiguous term such that various entities, including educational institutions, were unsure as to whether they fell within the purview of the Executive Order.<sup>91</sup>

*A. Divergent Associations of Sanctuary: Willful Violators or Willful Protectors?*

There is no legal definition for sanctuary, and yet both education advocates and the President utilize the term in seemingly meaningful yet divergent ways.<sup>92</sup> Thus, multiple understandings of sanctuary result, two of which are relevant to this particular discussion.<sup>93</sup> The first is associated with actions of the Los Angeles Police Department (hereinafter “LAPD”) and San Francisco within the past four decades.<sup>94</sup> In 1979, the Los Angeles chief of police issued Special Order No. 40 (hereinafter “Special Order”) which states that a person’s immigration status is not a police matter, and that the LAPD is obliged to enforce the law equally, as per the Equal Protection Clause.<sup>95</sup> Essentially, the Special Order states that the LAPD will not do the job of the federal government in ascertaining the immigration status of any person, nor in arresting or booking anyone merely for being in the country illegally.<sup>96</sup> Similarly, San Francisco passed what is known as the “Sanctuary Ordinance,” in 1989 (updated in 2016), which states that San Francisco will not cooperate with ICE agents in the “investigation, detention, or arrest relating to alleged violations of the civil provisions of federal immigration law.”<sup>97</sup> These policies are motivated by public safety considerations: undocumented residents are more likely to report crimes as either victims or witnesses if they do not fear deportation, and they are also more likely to cooperate with police and fire departments in the event of public safety situations.<sup>98</sup> The aim of such policies

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<sup>90</sup> Order Granting Motion for Summary Judgment at 5, *County of Santa Clara v. Jefferson B. Sessions, III, et al.*, No. 17-cv-000574-WHO (N.D. Cal. filed Dec. 18, 2017).

<sup>91</sup> Jeffrey Hess, *Is Fresno A Sanctuary City? It Depends On Who You Ask*. VALLEY PUBLIC RADIO (Jan. 31, 2017), <http://kvpr.org/post/fresno-sanctuary-city-it-depends-who-you-ask>.

<sup>92</sup> Hanson, *supra* note 12, at 17; *See generally* Trump, *supra* note 79; Memorandum, *supra* note 88.

<sup>93</sup> *See* Villazor, *supra* note 16, at 133.

<sup>94</sup> *See* Los Angeles Police Dep’t. [LAPD], Special Order No. 40 (1979); *See* S.F., CAL., SANCTUARY ORDINANCE, S.F. ADMIN. CODE ch. 12H, 12I, (2016) [hereinafter Sanctuary Ordinance].

<sup>95</sup> Special Order No. 40.

<sup>96</sup> *Id.*

<sup>97</sup> Sanctuary Ordinance.

<sup>98</sup> Sanctuary Ordinance; Special Order No. 40.

is therefore to protect the community and individual residents, regardless of an individual's immigration or citizenship status.<sup>99</sup>

Sanctuary, as understood by San Francisco and LAPD, must be distinguished from a second understanding as exhibited by the so-called Central American Sanctuary Movement (hereinafter "CAS Movement").<sup>100</sup> CAS is a faith-based organization of loosely affiliated congregations and churches that began in Arizona and California.<sup>101</sup> It came into being in the 1980s when Central Americans came illegally into the United States fleeing the life-threatening civil unrest and brutality in their home countries.<sup>102</sup> Some of those refugees died due to the harsh desert conditions of Arizona and California.<sup>103</sup> Upon discovering the intention of the Immigration and Naturalization Service (hereinafter "INS") to deport surviving refugees immediately back to the deadly civil unrest of their home countries, CAS affiliates illegally harbored the refugees and hid them from the INS to avoid their deportation.<sup>104</sup> In March of 1982, six congregations declared themselves "sanctuaries" in order to house those seeking asylum, which was a violation of federal law.<sup>105</sup> Sixteen participants in the CAS Movement, including members of the clergy, were indicted on charges of conspiracy, and in 1985 eleven were convicted.<sup>106</sup> Like the policies of the LAPD and San Francisco, the goal of the CAS movement was to protect individuals, but in direct deviance of federal law.<sup>107</sup>

### *B. Tensions Created by Dual Understandings of Sanctuary*

The distinction between the policies of the LAPD and San Francisco and the actions of members of the CAS Movement is an important one because while being situated together under the term "sanctuary," the roots of their proximity are vitally different.<sup>108</sup> Both utilize "sanctuary" as a meaningful term to denote the creation of an environment aimed at the protection of individuals, with the major difference being that one aimed to do so from within the bounds of the law (i.e. San Francisco and LAPD), while the other deigned to do so in

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<sup>99</sup> *Id.*

<sup>100</sup> Villazor, *supra* note 16, at 140-142.

<sup>101</sup> Villazor, *supra* note 16, at 140; Judith McDaniel, *The Sanctuary Movement, Then and Now*, RELIGION & POL. (Feb. 21, 2017), <http://religionandpolitics.org/2017/02/21/the-sanctuary-movement-then-and-now>.

<sup>102</sup> McDaniel, *supra* note 101.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Sanctuary Ordinance; Special Order No. 40; Villazor, *supra* note 16, at 144. See McDaniel, *supra* note 101.

<sup>108</sup> Villazor, *supra* note 16, at 137-138.

defiance of the law (i.e. CAS Movement).<sup>109</sup> On the one hand, the LAPD's Special Order and San Francisco's Sanctuary Ordinance are essentially non-enforcement policies that concede that immigration is a federal matter and they will not enforce, nor expend funds, toward implementing federal immigration law.<sup>110</sup> On the other hand, the CAS Movement, although motivated by religious ethics and morality, involved a conscious and deliberate disregard of federal law in order to shield the removal of refugees illegally in the country from the United States.<sup>111</sup>

Vital here is the discernment between a pragmatic understanding of sanctuary that motivated policies like those of San Francisco and the LAPD (which are more in line with the motivations underlying K-12 sanctuary policies), and the more pejorative undercurrent of sanctuary as exhibited by the CAS Movement, and which underlies the President's view of sanctuary.<sup>112</sup> The sanctuary policies advocated for by education fall in line with the pragmatic non-enforcement policies, while the language of the Executive Order denotes an understanding of sanctuary that is more in line with the pejorative character of the CAS Movement.<sup>113</sup> These two exemplifications of sanctuary demonstrate a dichotomous understanding that is conceptually useful here in making sense of the simultaneous disdain the President has for sanctuaries which he believes calls for their eradication and the advocacy of sanctuaries that motivate educators to call for the creation of sanctuaries.<sup>114</sup>

The Executive Order states that "sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."<sup>115</sup> This language speaks directly to the illegal actions like those demonstrated in the CAS Movement, and yet have been directed at those jurisdictions adopting non-enforcement policies aimed, not at defying federal law, but at ensuring the constitutional rights and safety of all individuals residing in that jurisdiction through policies of non-compliance.<sup>116</sup>

Despite the lack of legal definition of sanctuary jurisdictions, the President and his administration have seemingly adopted a pejorative view of sanctuary in line with the CAS Movement.<sup>117</sup> The President views entities with sanctuary policies as defying federal law and shielding criminal aliens from federal

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<sup>109</sup> Sanctuary Ordinance; Special Order No. 40; McDaniel, *supra* note 94.

<sup>110</sup> Villazor, *supra* note 16, at 137.

<sup>111</sup> McDaniel, *supra* note 94; Villazor, *supra* note 12, at 140-141.

<sup>112</sup> See Villazor, *supra* note 16, at 138.

<sup>113</sup> See Letter from Tom Torlakson, *supra* note 13; see Hanson, *supra* note 12, at 2, 8; see Jodaitis, *supra* note 16; see Exec. Order No. 13768, 82 Fed. Reg. at 8799.

<sup>114</sup> See Trump, *supra* note 79; see Hanson, *supra* note 12, at 2.

<sup>115</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8799.

<sup>116</sup> See Sanctuary Ordinance; see Special Order.

<sup>117</sup> *Id.*

detection.<sup>118</sup> After the federal ruling blocking the enforcement of the Executive Order was handed down, in a December 2017 weekly address the President claimed that sanctuary cities are “no good,” and that they continue to be harmful to American citizens because they resist federal authority and obstruct immigration enforcement.<sup>119</sup> In February 2018, the President called the “sanctuary city situation” a disgrace.<sup>120</sup> This rhetoric on the part of the President and his administration has led to a political distancing from utilizing the word “sanctuary” in order to avoid any negative repercussions.<sup>121</sup> This is the case even when the policies are pragmatically “sanctuary-like” in substance.<sup>122</sup> For example, Fresno Mayor Lee Brand, vowed that Fresno would not become a sanctuary city, citing that he does not want Fresno to be “caught in the crosshairs” and risk losing federal funds.<sup>123</sup> However, he also admits that even though Fresno is not a sanctuary city (and will not become one, as far as he is concerned), Fresno has a policy that mirrors many of the policies of sanctuary cities in California.<sup>124</sup> Similarly, Arvin, located in Kern County east of Bakersfield, has chosen not to adopt the label “sanctuary,” in an effort to avoid any potential legal risks.<sup>125</sup> However, the city has plans to implement a policy restricting its officers from enforcing federal immigration laws, which falls in line with sanctuary policies of San Francisco and Los Angeles.<sup>126</sup> For both Fresno and Arvin, avoiding the label “sanctuary” is a politically practical decision of which advocates of sanctuary school policies are cognizant.<sup>127</sup>

The consequence of these two understandings of sanctuary has created a paradoxical situation for various entities who desire to maintain constitutional policies that maximize public safety while simultaneously seeking to avoid the negative association of sanctuary that may be politically damaging, as in the case of Fresno and Arvin.<sup>128</sup> Being aware of these two views of sanctuary in no way puts us any closer to a legally cognizable definition of what a sanctuary jurisdiction is, but it does help to orient the overall understanding of the word

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<sup>118</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8799; *See Trump*

<sup>119</sup> Donald Trump, *supra* note 120.

<sup>120</sup> Remarks by President Trump in Meeting with Local and State Officials on School Safety, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-local-state-officials-school-safety/> (last visited Jan. 31, 2018).

<sup>121</sup> *See Vives, supra* note 17; *see Boone, supra* note 17.

<sup>122</sup> *Vives, supra* note 16.

<sup>123</sup> *Id.*

<sup>124</sup> Jeffrey Hess, *Is Fresno A Sanctuary City? It Depends On Who You Ask*. VALLEY PUBLIC RADIO (Jan. 31, 2017), <http://kvpr.org/post/fresno-sanctuary-city-it-depends-who-you-ask>.

<sup>125</sup> *Boone, supra* note 16.

<sup>126</sup> *Id.*

<sup>127</sup> *Hess, supra* note 127; *Vives, supra* note 16; *Boone, supra* note 16.

<sup>128</sup> *See generally Villazor, supra* note 16, at 134.



“sanctuary” as it pertains to K-12 school districts.<sup>129</sup> Despite the lack of legal definition of sanctuary jurisdiction, and the ambiguity that continues to surround the term, there is still a general sense of what sanctuary means for K-12 schools.<sup>130</sup>

### C. The K-12 Meaning of Sanctuary

As mentioned previously, all K-12 school districts in California have been urged to adopt sanctuary policies and/or resolutions.<sup>131</sup> This urging comes independently from various entities like the California Department of Education, the American Federation of Teachers, and the American Civil Liberties Union, whom all suggest the inclusion of virtually the same underlying tenets regarding K-12 sanctuary.<sup>132</sup> Advocates for a movement called the “Sanctuary School and Safe Zone Movement” describe the movement as:

A movement made up of schools, school districts and higher education institutions that call for protections to be put into place that will ensure a safe environment for ALL students, reaffirm the constitutional right of access to education and protect the rights of undocumented immigrants and other vulnerable populations.<sup>133</sup>

This statement encapsulates the essential core at the heart of various suggested sanctuary resolutions and policies to protect students.<sup>134</sup> Important in this movement is the cognizance of the ambiguity surrounding the word “sanctuary,” as well as the consequent dismissal of that ambiguity.<sup>135</sup> Model policies and resolutions have been suggested with no preferred uniform presentation since the focus is not on a district’s “status” as a sanctuary jurisdiction, nor on the particular label applied to any protection policies they adopt.<sup>136</sup> Labels that may be applied to such policies are varied: Sanctuary school,<sup>137</sup> safe haven,<sup>138</sup> safe zone,<sup>139</sup> and safe school.<sup>140</sup> Common features of model sanctuary policies include:

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<sup>129</sup> See Villazor, *supra* note 16, at 148.

<sup>130</sup> Letter from Tom Torlakson, *supra* note 13; *Safe Havens Initiative*, *supra* note 13.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Jodaitis, *supra* note 16 at 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Keierleber, *supra* note 45.

<sup>138</sup> Letter from Tom Torlakson, *supra* note 13.

<sup>139</sup> Jodaitis, *supra* note 16, at 4.

<sup>140</sup> *Id.*

- Citing the federal precedent established by *Plyler* which requires that schools allow the enrollment of all children, regardless of their immigration or citizenship status.<sup>141</sup>
- Citing federal and state laws that prohibit schools from disclosing student information with immigration agents without parental consent, court order, a lawful subpoena, or in case of a health emergency.<sup>142</sup>
- Taking caution when collecting student information to avoid collecting information concerning immigration status.<sup>143</sup>
- Restricting immigration agents from accessing campuses.<sup>144</sup>
- Providing resources and information for immigrant students and their families.<sup>145</sup>

Although there is no suggested uniformity in the presentation and labeling of sanctuary policies, it has been noted that specifically using the word “sanctuary” carries additional weight, as it places an entity within the “growing national movement” aimed at ensuring a safe environment for all students.<sup>146</sup> Indeed, being so situated in the “growing national movement” may indicate that the variety of available labels for policies with essentially the same core is symptomatic of the dichotomous understandings of sanctuary discussed above.<sup>147</sup> Any hesitance in labeling a policy a “sanctuary” is justified, in light of the negative view taken by the President and his administration.<sup>148</sup>

The language of the Executive Order demonstrates a pejorative understanding of sanctuary as protecting undocumented immigrants from deportation (akin to the CAS Movement), whereas advocates of sanctuary policies like those suggested for K-12 districts, demonstrate a pragmatic necessity (akin to the San Francisco and LAPD policies).<sup>149</sup> These two very different understandings of sanctuaries are at the root of the concern, anxiety and uncertainty that K-12 districts experienced upon the issuance of the Executive Order.<sup>150</sup>

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<sup>141</sup> *Safe Havens Initiative*, *supra* note 13.

<sup>142</sup> Family Educational Rights and Privacy Act, U.S. DEP’T OF ED. <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited Feb. 3, 2018); *Safe Havens Initiative*, *supra* note 13.

<sup>143</sup> *Safe Havens Initiative*, *supra* note 13.

<sup>144</sup> Jodaitis, *supra* note 16, at 3.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See* Villazor, *supra* note 16, at 134; Trump, *supra* note 76.

<sup>149</sup> *See* Villazor, *supra* note 46; McDaniel, *supra* note 107; Special Order No. 40.

<sup>150</sup> *See* Villazor, *supra* note 16.

K-12 institutions are in a unique position with regard to adopting sanctuary policies because they are charged with the education of minors.<sup>151</sup> They, therefore, can exercise more control of the physical location of students such that they can forbid ICE from accessing the campus without rigorous protocols.<sup>152</sup> They also have federal obligations that make their base-line policies with regard to students look very much like sanctuary policies.<sup>153</sup> In fact, fulfilling the obligations required of K-12 entities appear to make the adoption of sanctuary policies legally superfluous.<sup>154</sup>

#### *D. K-12 Sanctuary Policies are Essentially Mandated*

Although enforcement of the Executive Order has been blocked, the President and his administrators are still firmly committed to their attack on sanctuary jurisdictions and those entities with sanctuary policies in place.<sup>155</sup> K-12 school districts are legal entities of the state with specific governmental functions, which technically make them political subdivisions within the purview of the Executive Order.<sup>156</sup> It follows that the Executive Order, should the Administration's appeal be successful, could be enforced against K-12 districts who fail to comply with Section 1373.<sup>157</sup> Therefore, it is incumbent upon K-12 school districts to acknowledge their rights and obligations as governmental entities, and how this affects their obligations to students.<sup>158</sup> Moreover, it is important for them to be cognizant of the importance of having in place broad policies that not only address these rights and obligations, but to create a safe and inclusive educational environment for all students.<sup>159</sup> Having this awareness will ameliorate some of the uncertainty and anxiety experienced in the face of the Executive Order and other immigration enforcement policies.<sup>160</sup>

First, the federal precedent established by the Supreme Court in *Plyler* renders the immigration statuses of school-aged children completely

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<sup>151</sup> See Sanctuary Ordinance; see Special Order; McDaniel, *supra* note 107; Hanson, *supra* note 12, at 17.

<sup>152</sup> Hanson, *supra* note 12, at 17.

<sup>153</sup> See *Plyler*, 457 U.S. at 226; Family Educational Rights and Privacy Act, *supra* note 143.

<sup>154</sup> Villazor, *supra* note 46, at 150.

<sup>155</sup> Trump, *supra* note, 27.

<sup>156</sup> *How To Determine An Entity's Legal Status*, SOCIAL SECURITY ADMINISTRATION, [https://www.ssa.gov/section218training/advanced\\_course\\_9.htm](https://www.ssa.gov/section218training/advanced_course_9.htm) (last visited Dec. 18, 2017); see Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>157</sup> See Exec. Order No. 13768, 82 Fed. Reg. at 8801.

<sup>158</sup> *The Lawsuits Against Trump's Order to Defund Sanctuary Cities: Breaking Down the Legal Arguments*, *supra* note 67.

<sup>159</sup> Hanson, *supra* note 12, at 2.

<sup>160</sup> *Id.*

irrelevant.<sup>161</sup> K-12 schools are therefore justified in not even collecting information with regard to a child's immigration status since it has no bearing on whether the child will be allowed to enroll in school.<sup>162</sup>

Second, the Family Educational Rights and Privacy Act (hereinafter "FERPA") is a federal law that applies to any school that receives funds by way of applicable programs of the United State Department of Education.<sup>163</sup> FERPA ensures the privacy of students' educational records by disallowing the educational institution to disclose them without parental consent.<sup>164</sup> The only information that FERPA does not protect is directory information like a student's name, address, phone number, date of birth, place of birth, etc.<sup>165</sup> Because this information is not protected by FERPA, ICE agents may obtain it.<sup>166</sup> It has therefore been suggested by education advocates that schools pay close attention to the information they collect about students and avoid collecting any personal information that could make a child vulnerable to ICE agents.<sup>167</sup>

Lastly, and possibly most importantly, California has passed into law two bills, Senate Bill 54 and Assembly Bill 699, largely in response to the President's current immigration policy.<sup>168</sup> Senate Bill No. 54 applies to all public state and local law enforcement agencies, including school police, and prohibits school districts from using their funds or personnel to assist in immigration enforcement.<sup>169</sup> As consistent with state and federal laws, it also requires that public schools, public libraries, and state health facilities implement lawful policies that limits assisting immigration enforcement to the fullest extent possible.<sup>170</sup> Assembly Bill 699 amends the education code of California to forbid any school officials or employees from collecting information or documents regarding the citizenship of students or students' families.<sup>171</sup> All requests for immigration information or ICE agent access to a school site must be reported to the governing board or local educational agency such that it preserves the confidentiality and privacy of students' information.<sup>172</sup> Both of these laws essentially mandate K-12 schools to

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<sup>161</sup> See *Plyler*, 457 U.S. at 226.

<sup>162</sup> See *Plyler*, 457 U.S. at 226; Hanson, *supra* note 12, at 5.

<sup>163</sup> See Family Educational Rights and Privacy Act, *supra* note 143.

<sup>164</sup> See Family Educational Rights and Privacy Act, *supra* note 143; see Hanson, *supra* note 12, at 5.

<sup>165</sup> Hanson, *supra* note 12, at 6.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> 2017 Cal. Legis. Serv. Ch. 495 (S.B. 54) (WEST); 2017 Cal. Legis. Serv. Ch. 493 (A.B. 699) (WEST).

<sup>169</sup> 2017 Cal. Legis. Serv. Ch. 495 (S.B. 54) (WEST).

<sup>170</sup> *Id.*

<sup>171</sup> 2017 Cal. Legis. Serv. Ch. 493 (A.B. 699) (WEST).

<sup>172</sup> *Id.*

implement the very sanctuary policies that have been advocated for and that were initially adopted by school districts as symbolic gestures of support for their students.<sup>173</sup>

## V. RECOMMENDATIONS

### A. K-12 Should Continue to Publicize Their Policies, Regardless of What Those Policies are Called

Practically speaking, every K-12 school is a sanctuary for all children, documented or not.<sup>174</sup> Based on the precedents set in *Plyler*, FERPA, and the recently enacted California Sanctuary Bills, California public schools are essentially mandated to have policies that, collectively, are “sanctuary-like” in their essence, whether or not they are labeled as such.<sup>175</sup> It might follow that there is little point in adopting sanctuary policies, but to accept such a view would be an error. Immigration enforcement, whether near schools or at a workplace, has a destabilizing effect on the educational environment of K-12 institutions: if children do not feel safe, their ability to learn is negatively impacted.<sup>176</sup> The goal of K-12 institutions is to educate children, so it follows that they should do everything possible to ensure a safe and stable learning environment in furtherance of that goal.<sup>177</sup>

In light of the politicized nature of the sanctuary label, it is recommended that K-12 school districts be cognizant of the pros and cons that accompany whatever label, if any, they choose to apply to their policies.<sup>178</sup> It has been suggested that attaching the sanctuary label to K-12 policies is particularly important and powerful because in addition to allowing marginalized students to immediately recognize the school as accepting of them, it situates the school district within the growing national movement of sanctuary schools.<sup>179</sup> On the other hand, opponents of the term sanctuary may associate any school district with sanctuaries as complicit in hiding or shielding undocumented immigrants.<sup>180</sup> Whatever route a K-12 district takes, be it adopting a sanctuary

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<sup>173</sup> 2017 Cal. Legis. Serv. Ch. 495 (S.B. 54) (WEST); 2017 Cal. Legis. Serv. Ch. 493 (A.B. 699).

<sup>174</sup> See *Plyler*, 457 U.S. at 226; see Family Educational Rights and Privacy Act, *supra* note 143.

<sup>175</sup> See *Plyler*, 457 U.S. at 226; see Family Educational Rights and Privacy Act, *supra* note 143; 2017 Cal. Legis. Serv. Ch. 495 (S.B. 54) (WEST); 2017 Cal. Legis. Serv. Ch. 493 (A.B. 699).

<sup>176</sup> Hanson, *supra* note 12, at 17.

<sup>177</sup> Stavely, *supra* note 34.

<sup>178</sup> See Villazor, *supra* note 46, at 134; see Vives, *supra* note 16; see Boone, *supra* note 16.

<sup>179</sup> Jodaitis, *supra* note 16, at 3.

<sup>180</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8799.

resolution and designating its campus a sanctuary, or opting not to, K-12 school districts should rest confidently knowing that there are layers of federal and state protections that act as a buffer to mandates like that of the Executive Order.<sup>181</sup>

### *B. Inroad to Legal Farm Labor*

This comment links the immigration concerns of K-12 school districts with agriculture by way of the school-aged children of immigrant farmworkers. Immigration mandates, like the one exhibited by the Executive Order, as well as enforcement activity that results in the deportation of undocumented immigrants, has destabilizing effects for both education and agriculture.<sup>182</sup> ICE activity near schools has created fear and anxiety that makes students reluctant to attend school, and family members reluctant to engage with school staff, which sometimes results in foregoing taking their children to school altogether.<sup>183</sup> Conversely, ICE raids at work places or at home are equally disruptive to education as students may not attend school for fear of being arrested or fear of returning home to find that their parents have been arrested.<sup>184</sup> Given the interconnectivity between immigration policy, agriculture, and its symbiotic effect on K-12 education, it is recommended that a grower-sponsored process to legalize valuable farmworkers be considered.

California agriculture is a \$46 billion dollar industry comprised of over 77,000 farms and ranches.<sup>185</sup> It is well acknowledged that immigrant labor, both documented and not, is the life force of agriculture in California.<sup>186</sup> A stable work force is critical for the continued viability of farms, and as 85% of farmworkers are employed directly by farmers, labor shortages wreak havoc

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<sup>181</sup> See *Plyler*, 457 U.S. at 226; see Family Educational Rights and Privacy Act, *supra* note 143.

<sup>182</sup> Brief of *Amici Curiae* Public Schools, *supra* note 18, at 4; Shoichet, *supra* note 32.

<sup>183</sup> Brief of *Amici Curiae* Public Schools, *supra* note 20, at 2.

<sup>184</sup> *Fact sheet: U.S. Citizen Children Impacted by Immigration Enforcement*, AMERICAN IMMIGRATION COUNCIL (Mar. 28, 2017), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

<sup>185</sup> California Agricultural Statistics Review, *supra* note 23.

<sup>186</sup> Natalie Kitroeff and Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don't Want the Job*, L.A. TIMES (Mar. 17, 2017), <http://www.latimes.com/projects/la-fi-farms-immigration/>; David Garcias, *California Can't Afford to Lose Immigrant Workers. These Two Bills Protect Them*, THE SAN DIEGO UNION-TRIBUNE (March 30, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-immigrant-workforce-california-20170330-story.html>.

on the ability of growers to harvest their crops and remain profitable.<sup>187</sup> Since the Executive Order was issued in January of 2017, over 226,000 undocumented individuals have been deported, some with no criminal history.<sup>188</sup> ICE no longer exempts any categories or classes of undocumented immigrants, so it is essentially open season for the arrest and deportation of any and all undocumented immigrants.<sup>189</sup> For a number of California growers, the heightened immigration enforcement has created a labor shortage that has left fresh produce rotting in fields and cost farmers millions.<sup>190</sup> Recently, Bee Sweet Citrus located in Fowler, California experienced the dramatic effects of immigration enforcement as forty of their 500 employees quit after the company was notified of an impending immigration inspection.<sup>191</sup> Another fifty employees failed to show up to work, which resulted in the company losing twenty percent of its labor force immediately and without warning.<sup>192</sup> Labor shortage issues are nothing new for farmers, but given the President's well-documented determination to decrease the numbers of undocumented individuals in the United States, the threat to their work force is likely to continue.<sup>193</sup>

While there are no easy solutions for the labor issues that agriculture faces, it appears that current available solutions benefit the growers more so than they benefit undocumented farm workers and their families.<sup>194</sup> In the 2013-2014 National Agricultural Workers Survey, a majority of undocumented workers had been in the United States for at least five years, but the average worker arrived eighteen years before being surveyed.<sup>195</sup> Undocumented farmworkers play an essential role in agriculture, and growers who utilize undocumented farmworkers, especially those who have been long-term, stable, and crime-free, chance nothing in sponsoring workers with whom they have good rapport to be fast-tracked as citizens. A large number of farm workers have spent

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<sup>187</sup> Zippy Duvall, *Worker Shortage Threatens U.S. Ag Sustainability*, AMERICAN FARM BUREAU FED'N. (Oct. 16, 2018), <https://www.fb.org/viewpoints/worker-shortage-threatens-u.s.-ag-sustainability>.

<sup>188</sup> See Removal Report, *supra* note 178.

<sup>189</sup> *Id.*

<sup>190</sup> Duval, *supra* note 185.

<sup>191</sup> Kerry, Klein, *Valley Citrus Grower Loses 90 Workers Ahead of ICE Inspection*, VALLEY PUBLIC RADIO (Feb. 6, 2018), <http://kvpr.org/post/valley-citrus-grower-loses-90-workers-ahead-ice-inspection>; Robert Rodriguez, 'People Are Not Wanting to Go to Work,' *ICE Checks at Central Valley Firms Spread Fear*, THE FRESNO BEE (Feb. 5, 2018), <https://www.fresnobee.com/news/business/agriculture/article198662084.html>.

<sup>192</sup> *Id.*

<sup>193</sup> Kitroeff, *supra* note 184.

<sup>194</sup> See Trump, *supra* note 79.

<sup>195</sup> See Duvall, *supra* note 186.

<sup>196</sup> See Hernandez, *supra* note 4, at 3.

numerous years laboring in the fields, have children, ties to the community, and contribute immensely to the national economy.<sup>196</sup>

A low-maintenance, government-approved program whereby farmers sponsor their undocumented, long-term employees who wish to remain legally in the United States, would go a long way in stabilizing agricultural labor. Workers in good standing with their employers, who have committed no major criminal offenses, and who have a registered tax identification number should be invited by their employers to take part in any such program.<sup>197</sup> This would incentivize participation for both growers and farmworkers, as the program would stabilize their workforce from season to season while offering undocumented farmworkers the ability to have a legal presence in this country, should they desire to do so.<sup>198</sup>

## VI. CONCLUSION

The Executive Order has been declared unconstitutional on its face.<sup>199</sup> Even had it not been, K-12 schools have federal and state obligations that essentially render them *de facto* sanctuaries.<sup>200</sup> As such, the significance of adopting sanctuary policies and resolutions is truly symbolic. They are useful and very meaningful, however, in attempting maintain safe and welcoming learning environments for undocumented students and the students of immigrants in the face of recent immigration enforcement.<sup>201</sup> The root of the issue here is that California's economy is dependent on agriculture, and the farmers who sustain the agricultural economy are in turn dependent on immigrant labor.<sup>202</sup> Given the number of children that K-12 schools are obligated educate, it is imperative that immigration legislation take full stock of the importance of recognizing the worth and worthiness of immigrants, which includes a commitment to allowing access to both K-12 education for immigrant children, and an expedited path to legalization for undocumented

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<sup>196</sup> See Hernandez, *supra* note 4, at i.

<sup>197</sup> See generally Trump, *supra* note 37 (President's stated goal is to remove illegal immigrants with criminal records and those who pose a threat to the United States. Undocumented workers who have good report with their employers and no major history of crime would be ideal to both sustain the agricultural workforce while working toward the President's ideal of a safer America).

<sup>198</sup> *Id.*

<sup>199</sup> See Order Granting Motion to Enjoin, County of Santa Clara v. Trump, No. 17-cv-000574-WHO.

<sup>200</sup> See Plyler, 457 U.S. at 226; See Family Educational Rights and Privacy Act, *supra* note 143; 2017 Cal. Legis. Serv. Ch. 495 (S.B. 54) (WEST); 2017 Cal. Legis. Serv. Ch. 493 (A.B. 699) (WEST).

<sup>201</sup> See e.g., Castillo, *supra* note 44.

<sup>202</sup> See Hernandez, *supra* note 4, at 3.



workers who sustain agriculture and choose to call the United States their home.

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