

July 19, 2018



Bryan K. Fair  
Thomas E. Skinner  
Professor of Law

The Honorable Randall Woodfin  
Mayor, City of Birmingham  
701 20th Street North, 3rd Floor  
Birmingham, AL 35203

*Re: Legal Analysis of Proposed Mayoral Executive Order Limiting the City of Birmingham's Participation in Federal Immigration Enforcement*

Mayor Woodfin,

I am a constitutional law professor at The University of Alabama School of Law, teaching and writing primarily about inequality and discrimination in the United States.<sup>1</sup> I also examine and teach federalism principles in light of leading U.S. Supreme Court decisions. I am writing you, in my individual capacity, to provide you with my legal analysis of the proposed Executive Order entitled "Fostering Trust and Promoting Public Safety and Civil Rights for All City Residents" (the "Trust Policy"), that you have been asked to enact by a coalition of community organizations committed to social justice and equality for all persons residing in the City of Birmingham. I endorse the coalition's efforts and the proposed policy. Given the recent horrific national debacle, causing the separation of thousands of immigrant children from their parents, it is more urgent than ever that you clarify what is the proper role of local law enforcement in Birmingham regarding enforcement of federal immigration policies. I urge you to adopt the Trust Policy. It would help ameliorate the fear and hardship experienced by so many residents and to build trust among community organizations, law enforcement, and your administration.

As explained below, it is my opinion that **enacting the Trust Policy will not violate federal law or justify the denial or revocation of federal funding to the City of Birmingham.** Nor will the policy violate any state law regarding local involvement in immigration enforcement. As Mayor, you have the authority and duty to protect the residents of

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<sup>1</sup> I have attached my CV for your reference

Birmingham and to advance the health, safety, and welfare of its residents. In fact, the proposed policy will help reduce Birmingham's risk of costly litigation and potential damages liability by ensuring that residents' constitutional rights are respected. Moreover, I encourage you to consider the broad-based consensus among legal scholars, civil rights advocates, and law enforcement and community policing experts that policies like this one are an essential part of a community-oriented approach to policing that increases public safety for all residents.

### **I. The Proposed Birmingham Trust Policy**

The proposed Birmingham Trust Policy would, within the limitations of applicable state and federal law, ensure that Birmingham's limited resources are not expended on enforcing federal immigration law by, *inter alia*:

- Detaining individuals in city custody without a judicial warrant at the request of U.S. Immigration and Customs Enforcement (ICE);
- Contracting with the federal government to detain immigrant men, women or children in city facilities;
- Deputizing Birmingham police officers to act as immigration agents;
- Giving ICE agents access to non-public areas of city courthouses, public health facilities, jails, or other city facilities to carry out immigration enforcement activities;
- Participating in an unlawful federal Muslim registry or surveillance program; or
- Inquiring into individuals' immigration status or other sensitive categories of information during interactions with city personnel (except when required by law).

The proposed Trust Policy also includes commitments to establish a task force to study the creation of a municipal identification card, and to defend the policy against unlawful challenges. The policy includes an express savings clause that ensures Birmingham's continued compliance with 8 U.S.C. §§ 1373 and 1644, federal statutes related to the sharing of immigration status information with the federal government.<sup>2</sup>

Enacting the Trust Policy will not require any significant expenditure of city funds. To the contrary, it has the potential to save revenue and reduce the city's legal exposure.<sup>3</sup> Although your administration may be expected to dedicate a modest amount of time and resources to ensuring proper implementation by training city personnel and informing the public on the policy's contents, it will not require major changes in the way the city carries out its business. Indeed, most of the proposed measures in the Trust Policy would be preventive as opposed to corrective, given that, to date, Birmingham's entanglement with federal immigration enforcement has been more limited than many other jurisdictions in Alabama.<sup>4</sup> Nonetheless,

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<sup>2</sup> See *infra* Section IV for a full discussion of Section 1373 as it relates to the proposed Trust Policy

<sup>3</sup> See *infra* Section III

<sup>4</sup> It appears that Birmingham Police Department *has* engaged in a practice of detaining individuals in its custody on the basis of ICE detainer requests in all of the years (2011-2017) for which data is publicly available, see Transactional Records Access Clearinghouse, Syracuse University, "Latest Data: Immigration and Customs Enforcement Detainers," <http://trac.syr.edu/phptools/immigration/detain/> (showing 39 individuals subject to ICE detainer requests in Birmingham Hold Room for that time period). This practice is confirmed by data that was provided to community

preventive measures are valuable law enforcement tools in their own right, as even the perception of collusion between local authorities and ICE can make community members less likely to report crimes and cooperate with law enforcement, thus undermining public safety for all.<sup>5</sup>

## II. Birmingham Cannot be Compelled to Enforce Federal Civil Immigration Law

Enforcement of the federal civil immigration laws is the exclusive province of the federal government.<sup>6</sup> States and localities lack the authority to regulate who can and cannot enter into and remain in the United States, to reach independent determinations of an individual's immigration status, or to interrogate, detain or deport individuals on the basis of suspected civil immigration violations.<sup>7</sup>

On the other hand, Birmingham and other cities play an indispensable role within our nation's federalist system in providing for the health, safety, and basic welfare of all residents and visitors within the city's limits.<sup>8</sup> Even the most conservative justices on the U.S. Supreme Court have argued that robust protections for federalism and state and local autonomy are enshrined in the Tenth Amendment of the U.S. Constitution, which prohibits the federal government from forcing localities like Birmingham to carry out its prerogatives through direct mandates or coercive funding policies—a concept known as intergovernmental immunity and the anti-commandeering principle.<sup>9</sup>

In particular, the federal government cannot require local law enforcement agencies to detain individuals in a local jail at the request of ICE (a process commonly referred to as an "ICE hold" or "ICE detainer request").<sup>10</sup> Although the federal government has a long track record of misleading local jurisdictions about the legal force of ICE detainer requests and similar administrative paperwork, the law is clear on this point. As the Department of

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groups by prior Birmingham Police Chief A.C. Roper for the years 2013-2015 (showing 11 individuals subject to ICE detainer requests in Birmingham custody for that time period). The data provided by Chief Roper can be made available upon request.

<sup>5</sup> See *infra* Section VI

<sup>6</sup> See *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); see also *United States v. Alabama*, 691 F.3d 1269, 1294 (11th Cir. 2012) (citing *DeCanas*)

<sup>7</sup> See *id.*

<sup>8</sup> See *United States v. Morrison*, 529 U.S. 598 (2000) ("we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims")

<sup>9</sup> See *infra* Section IV.G

<sup>10</sup> The detainer form has undergone multiple revisions in recent years, largely in response to litigation, public criticism, and changes in administrative policy. The current version of the form, DHS Form I-247A (revised March 2017), is available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>. Although the form contains a checkbox to indicate that "DHS has determined that probable cause exists that the subject is a removable alien," it is not the legal equivalent of a criminal detainer or warrant, and is not reviewed or signed by a neutral decision-maker, but rather an immigration agent. As discussed *infra*, the form does not provide the probable cause for arrest and prolonged detention required by the Fourth Amendment. In addition to the I-247, ICE may also use other forms, including the I-200 (administrative warrant), I-205 (warrant of removal/deportation), as the basis for a request to local law enforcement to assist in the detention and transfer of an individual in their custody. These are civil, administrative documents that likewise do not provide an adequate constitutional basis for detention.

Homeland Security (DHS) itself has publicly recognized<sup>11</sup> and conceded in federal and state litigation,<sup>12</sup> ICE detainer requests are **voluntary**.<sup>13</sup> Local jurisdictions retain complete discretion to decide whether or not to comply with the request by continuing to jail individuals after local authority to detain them has expired—usually because they have posted bond, the charges against them have been dismissed, or their criminal case has been resolved.

State and local autonomy from federal encroachment is at its peak with respect to traditional “police powers”—for example, in enforcing criminal laws and making difficult decisions about the allocation of limited law enforcement resources in order to promote public safety.<sup>14</sup> Thus, while Birmingham lacks the legal authority to regulate the nation’s immigration policies, it has clear constitutional authority to implement policies to promote public safety and welfare for the benefit of its residents, both immigrants and non-immigrants alike.

### **III. The City of Birmingham and its Personnel Could Be Held Liable for Damages if the City Continues its Practice of Warrantless Detentions at the Request of Immigration Authorities**

The proposed Trust Policy would help reduce Birmingham’s risk of costly legal liability for violating the Fourth Amendment rights of individuals held in city custody without a warrant at the request of immigration authorities. Detention on the basis of an ICE hold or ICE administrative warrant clearly constitutes a new arrest, triggering the Fourth Amendment’s requirement that the arrest be justified by a finding of probable cause by a neutral magistrate—not an immigration agent who signs off on the paperwork.<sup>15</sup> Indeed, city officials who detain an individual solely on the basis of an ICE detainer request or ICE administrative warrant without a judicial finding of probable cause **may be held liable for significant money damages** for violating individual detainees’ constitutional rights.

Even though detention in local custody on the basis of an ICE detainer request is

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<sup>11</sup> Letter from Daniel H. Ragsdale, Acting Director of ICE, to Rep. Adam Smith, February 25, 2014, <http://bit.ly/1kkWdKY> (immigration detainers “are not mandatory as a matter of law”).

<sup>12</sup> See *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016); *Mercado v. Dallas County, Texas*, 229 F. Supp. 3d 501, 511 (N.D. Tex. 2017); *Lunn v. Commonwealth*, 477 Mass. 517, 527 (2017).

<sup>13</sup> See *Galarza v. Szalczyk*, 745 F.3d 634, 642 (3d Cir. Mar. 4, 2014) (“detainers are not mandatory”)

<sup>14</sup> See *Morrison*, *supra* n.8

<sup>15</sup> See *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I.), *aff’d on appeal*, 2015 WL4385945 (1st Cir. 2015) (plaintiff stated Fourth Amendment claim where she was held for 24 hours on ICE detainer issued without probable cause); *Galarza v. Szalczyk*, No. 10-6815, 2012 WL 1080020, at \*10, \*13 (E.D. Pa. Mar. 30, 2012) (unpub.) (plaintiff held for 3 days after posting bail based on an ICE detainer stated Fourth Amendment claim against both federal and local defendants; clearly established that “detainer caused a seizure” that must be supported by probable cause), *rev’d on other grounds*, 745 F.3d 634 (3d Cir. 2014) (County operating the jail may also be liable for violating the Fourth Amendment); *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at \*10 (D. Or. Apr. 11, 2014) (plaintiff’s detention on an ICE detainer after she would otherwise have been released “constituted a new arrest, and must be analyzed under the Fourth Amendment”); *Roy v. County of Los Angeles*, No. 2:12-cv-09012-AB, 2018 WL 914773, at \*23 (C.D. Cal., Feb. 7, 2018) (Los Angeles Sheriff’s Department’s continued detention of inmates “beyond their release dates on the basis of immigration detainers . . . constitutes a new arrest under the Fourth Amendment”); *Orellana v. Nobles County*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1250 (E.D. Wash. 2017); *Mendoza v. Osterberg*, No. 13-65, 2014 WL 3784141, at \*6 (D. Neb. July 31, 2014); *Villars v. Kubiatuski*, 45 F.Supp.3d 791 (N.D. Ill. 2014); *Uroza v. Salt Lake Cnty.*, No. 11- 713, 2013 WL 653968, at \*5-6 (D. Ut. Feb. 21, 2013).

typically brief, monetary liability for localities that engage in a practice of honoring detainers can be significant. Just last week, a federal district court reaffirmed its class action ruling that the Los Angeles Sheriff's Department violated the constitutional rights of thousands of individuals by holding them past their release dates on the basis of ICE detainer requests, and that these class members are entitled to money damages.<sup>16</sup> In *Miranda-Olivares*, the court's determination that plaintiff's detention on the basis of an ICE detainer request violated the Fourth Amendment led to a settlement of \$30,100.<sup>17</sup> In another example, a federal court in Utah reaching a similar conclusion led to a settlement of \$75,000 as to the local defendants.<sup>18</sup> Although the number of ICE detainer requests received by Birmingham is relatively low,<sup>19</sup> these cases make clear that even a single warrantless detention at ICE's request can give rise to significant liability for the city. Unsurprisingly, this has led over twenty-four percent of local jurisdictions nationwide to adopt policies limiting ICE detainer compliance.<sup>20</sup> This includes Southern cities and counties such as Fulton County (Atlanta), Georgia and New Orleans, Louisiana.<sup>21</sup>

#### **IV. Enacting the Proposed Trust Policy Will Not Place Birmingham Within the Trump Administration's Definition of a "Sanctuary Jurisdiction" or Justify the Denial of Federal Grant Funds**

##### **A. President Trump's Executive Order on "Sanctuary Jurisdictions"**

On January 25, 2017, President Trump issued Executive Order No. 13768, "Enhancing Public Safety in the Interior of the United States" ("EO 13768" or "EO").<sup>22</sup> The EO includes the following provision:

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law. . . .

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<sup>16</sup> See *Roy*, No. 2:12-cv-09012-AB, Doc. 378, Order Denying Defs' Mot. for Reconsideration

<sup>17</sup> *Miranda-Olivares*, 2014 WL 1414305 at \*10

<sup>18</sup> *Uroza*, 2013 WL 653968, at \*5-6

<sup>19</sup> See *supra* n.4

<sup>20</sup> See Immigrant Legal Resource Center, *The Rise of Sanctuary* (2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf)

<sup>21</sup> See ILRC, National Map of Local Entanglement with ICE, <https://www.ilrc.org/local-enforcement-map>

<sup>22</sup> <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>

The EO did not provide any guidance on what is considered “willful[] refus[al] to comply with 8 U.S.C. 1373” or “prevent[ing] or hinder[ing] the enforcement of Federal law,” or otherwise define the term “sanctuary jurisdictions”; nor is that term defined anywhere else in federal law. The EO did not include any information on the process the federal government will employ to designate a jurisdiction as a “sanctuary,” or the process, if any, for notifying designated jurisdictions or giving them an opportunity to contest that designation.

### **B. 8 U.S.C. § 1373**

Section 1373 of Title 8 of the U.S. Code prohibits states and localities from restricting the sharing of “information regarding the citizenship or immigration status, lawful or unlawful, of any individual” with the federal government.<sup>23</sup> Notably, the plain language of Section 1373 does **not** prohibit states and localities from enacting policies that restrict the *collection* of immigration status information, nor does it require states and localities to share *other types of information*—such as home and work addresses, jail release dates, or criminal case information—with the federal government.<sup>24</sup> On its face, Section 1373 only applies to the sharing of *immigration status information*. Finally, the statute clearly does not extend to situations of even more active local participation in immigration enforcement, such as detaining individuals in local custody on the basis of an ICE detainer request, entering into ICE detention contracts or 287(g) agreements, or engaging in joint operations with ICE agents.

### **C. The Sessions Memo and DOJ’s Attempts to Impose New Grant Conditions**

On May 22, 2017, after a federal district court in California entered a nationwide injunction blocking the implementation of EO 13768 Section 9(a),<sup>25</sup> Attorney General Jeff Sessions issued a memorandum (the “Sessions Memo”) purporting to clarify and limit the scope

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<sup>23</sup> The full text of the statute reads as follows:

(a) IN GENERAL Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1373.

<sup>24</sup> This reading of § 1373 is supported by recent federal court decisions interpreting the statute. *See infra* Section IV.F&G.

<sup>25</sup> *See infra* Section VI.F.1 (summarizing *Santa Clara* and *San Francisco* litigation)

of the EO.<sup>26</sup> The memo limits the definition of a “sanctuary jurisdiction” to those jurisdictions that “willfully refuse to comply with 8 U.S.C. 1373.”<sup>27</sup> The memo also states that the EO will be applied *solely* to grants administered by the Department of Justice (DOJ) and DHS—“no other sources of funding” from other federal departments will be affected.<sup>28</sup> According to the memo, the Trump Administration will require jurisdictions applying for certain DOJ grants to certify their compliance with Section 1373: “The certification requirement will apply to any existing grant administered by the Office of Justice Programs [OJP] and the Office of Community Oriented Policing Services [COPS] that expressly contain this certification and to future grants for which the Department [of Justice] is statutorily authorized to impose such a condition.”<sup>29</sup> Finally, the memo claims that DOJ may impose additional conditions on grantees “[s]eparate and apart from the Executive Order” if authorized to do so by Congress.<sup>30</sup>

On July 25, 2017, DOJ announced that it would seek to impose new conditions on jurisdictions submitting applications for the fiscal year 2017 (FY17) solicitation for the Edward Byrne Memorial Justice Assistant Grant (Byrne JAG) Program.<sup>31</sup> The conditions were added in order to “encourage” (or coerce) localities’ participation in federal immigration enforcement by requiring them to:

- (1) certify compliance Section 1373,
- (2) allow ICE access to jails and detention facilities, and
- (3) notify ICE within 48 hours of an individual’s release.<sup>32</sup>

DOJ sought to impose these conditions despite the fact that nothing in the Byrne JAG program or authorizing statute mentions immigration enforcement; rather, JAG funding is used to support local initiatives in areas such as reducing gun violence, drug enforcement, and officer safety and wellness.<sup>33</sup>

#### **D. Federal Grants Awarded to Birmingham**

The City of Birmingham has received Byrne JAG funding in past fiscal years. In fiscal year 2016, the city received approximately \$350,000 in Byrne JAG funding to improve law

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<sup>26</sup> Memorandum from the Attorney General re “Implementation of Executive Order 13768,” May 22, 2017, <https://www.justice.gov/opa/press-release/file/968146/download>

<sup>27</sup> Sessions Memo at 2 (emphasis added); *see also id.* (“A jurisdiction that does not willfully refuse to comply with section 1373 is not a ‘sanctuary jurisdiction’ as that term is used in section 9(a)”)

<sup>28</sup> *Id.* at 1

<sup>29</sup> *Id.* at 2

<sup>30</sup> *Id.*

<sup>31</sup> Press Release: Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Program, July 25, 2017, Dep’t of Justice, <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> (the release quotes Attorney General Sessions as stating “[s]o-called ‘sanctuary’ policies make all of us less safe because they intentionally undermine our laws and protect illegal aliens who have committed crimes”)

<sup>32</sup> *Id.* The compliance condition was first put forth under the Obama Administration; the notice and access conditions had not previously been included in DOJ grant solicitations.

<sup>33</sup> *See* 34 U.S.C. § 10152 (formerly 42 U.S.C. § 3751) (Byrne JAG authorizing statute; listing program purposes)

enforcement technology.<sup>34</sup> Birmingham was recently awarded a similar amount for fiscal year 2017,<sup>35</sup> and has presumably certified the city's compliance with Section 1373 as a condition to receipt of JAG funds. The city also received DOJ funding in FY17 for the Project Safe Neighborhood Program (\$298,517) and the Smart Policing Initiative (\$700,000).<sup>36</sup> It does not appear that Birmingham has received COPS or State Criminal Alien Assistance Program (SCAAP) funding from DOJ in recent years. Birmingham has received additional DOJ support in recent years through the National Public Safety Partnership and the Building Community Trust and Justice Initiative.<sup>37</sup> It is not clear from publicly available information whether these sources of funding included any conditions relating to federal immigration enforcement.

Grants awarded to Birmingham through other federal programs—such as Community Development Block Grants and transportation and education funding—are not at stake in the Trump Administration's threats to defund so-called "sanctuary jurisdictions."

#### **E. The Proposed Trust Policy Fully Complies with Section 1373**

The proposed Trust Policy fully complies with Section 1373 because it does not restrict the sharing of immigration status information with the federal government. It does include other limitations on the expenditure of city resources—for example, on detaining individuals without a warrant at the request of immigration authorities (Section 1), or participating in an illegal Muslim registry or surveillance program (Section 2)—that lie outside the ambit of Section 1373. The confidentiality provision (Section 3) of the policy only restricts the *collection* of immigration status information and other sensitive personal information by city personnel, and expressly permits inquiries "required by state or federal law," which of course includes 8 U.S.C. § 1373. The proposed policy even includes a provision (Section 6) that affirmatively mandates compliance with Section 1373. Therefore, enacting the proposed Trust Policy will not cause Birmingham to be considered a "sanctuary jurisdiction" under EO 13768 or the Sessions Memo. **Birmingham can enact the Trust Policy and continue to certify its compliance with Section 1373 without risking being subjected to penalties or losing federal funding.**

#### **F. President Trump's "Sanctuary Jurisdictions" Executive Order and the New DOJ Grant Conditions are Likely Unconstitutional, as Every Federal Court to Address the Issue Has Ruled**

Every federal district and appellate court to consider the question has determined that EO 13768 Section 9 (the "sanctuary jurisdictions" policy) and the Trump Administration's attempts to impose new conditions on federal grants without Congressional approval violate the U.S. Constitution and federal law.

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<sup>34</sup> For a full list of federal grants awarded to the City of Birmingham by DOJ Office of Justice Programs, see <https://external.ojp.usdoj.gov/selector/awardeeDetail?awardee=City%20of%20Birmingham&po=All>

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Press Release: Attorney General Sessions Announces Creation of National Public Safety Partnership to Combat Violent Crime, June 23, 2017, Dep't of Justice, <https://www.justice.gov/usao-ndal/pr/attorney-general-sessions-announces-creation>; Carol Robinson, "Birmingham 1 of 6 pilot sites in federal effort to restore police, community relations," *AL.com*, March 12, 2015, [https://www.al.com/news/birmingham/index.ssf/2015/03/birmingham\\_1\\_of\\_6\\_pilot\\_sites.html](https://www.al.com/news/birmingham/index.ssf/2015/03/birmingham_1_of_6_pilot_sites.html)



### 1. County of Santa Clara v. Trump and City and County of San Francisco v. Trump

On November 20, 2017, a federal district court in California entered a nationwide permanent injunction against EO Section 9, holding that it violates the separation of powers and deprives localities of Due Process and Tenth Amendment rights.<sup>38</sup> The court also found that the language in the Sessions Memo purporting to limit and clarify the scope of Section 9 is non-binding and “nothing more than an illusory promise”<sup>39</sup> produced in the wake of litigation. As the court explained in its prior order granting Santa Clara’s motion for a preliminary injunction, the EO is not susceptible to the narrower interpretation put forth by DOJ in litigation and in the memo; on the other hand, a broader interpretation of the EO that extends beyond “willful[] refus[als] to comply” with Section 1373 would violate the Constitution: “Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.”<sup>40</sup> The Ninth Circuit Court of Appeals recently heard oral arguments on the Administration’s appeal of the injunction order.<sup>41</sup>

### 2. Chicago v. Sessions

On April 19, 2018, the Seventh Circuit Court of Appeals upheld a nationwide injunction entered by a federal district judge in Chicago<sup>42</sup> blocking implementation of the Byrne JAG conditions requiring jail access and notification of release to ICE, which the court determined were irreconcilable with Chicago’s Welcoming City Ordinance.<sup>43</sup> The Seventh Circuit agreed with the district court that DOJ had exceeded its statutory authority in attempting to impose these new conditions: “The Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement. But the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds.”<sup>44</sup> The Seventh Circuit recently granted a temporary stay of the nationwide injunction outside of Chicago pending the resolution of DOJ’s petition for rehearing *en banc*.

### 3. Philadelphia v. Sessions

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<sup>38</sup> *Santa Clara v. Trump*, No. 3:17-cv-00574, Doc. 182, Order Granting Motion for Summary Judgment (N.D. Cal. Nov. 20, 2017)

<sup>39</sup> *Id.* at 7

<sup>40</sup> *Id.* at 4

<sup>41</sup> Judge Orrick declined to issue a preliminary injunction in a related case brought by the state of California to challenge the FY17 Byrne JAG conditions, *California v. Sessions*, 3:17-cv-04701 (N.D. Cal. Aug. 14, 2017), based on the fact that the grant payment was merely delayed, not denied, and the amount of money to be disbursed was small compared to the state’s budget. *See id.*, Doc. 89, Order Denying Am. Mot. for Prelim. Injunction at \*2 (March 5, 2018). The court also denied DOJ’s motion to dismiss, holding that California stated legally sufficient claims with respect to the notice and access conditions, following reasoning in *Philadelphia* and *Chicago*. *Id.*, Doc. 88, Order Denying Motion to Dismiss (March 5, 2018).

<sup>42</sup> *City of Chicago v. Sessions*, No. 1:17-cv-05720, Doc. 78, Memorandum Opinion and Order (N.D. Ill. Aug. 15, 2017)

<sup>43</sup> *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. Apr. 19, 2018)

<sup>44</sup> *Id.* at 3

After a bench trial on the City of Philadelphia’s challenge to the FY17 Byrne JAG conditions, the federal district judge ruled on June 6, 2018 that the notice and access conditions violated the Administrative Procedure Act (*i.e.*, that the Trump Administration lacked statutory authority to impose the conditions) and that Philadelphia’s local policy substantially complied with the Section 1373 certification requirement.<sup>45</sup> The court had previously determined in its order granting a preliminary injunction that the new conditions have no relation to local law enforcement, and that succumbing to the conditions would undermine overall public safety and security and be counterproductive to public health.<sup>46</sup>

#### 4. U.S. v. California

Meanwhile, The Trump Administration’s attempt to go on the offensive in its campaign to force localities to facilitate federal immigration enforcement was recently met with a major defeat in the courts. In March, DOJ sued the state of California, seeking to block provisions of the California Values Act (commonly referred to SB 54 or California’s “sanctuary state” law) and other pro-immigrant state legislation.<sup>47</sup> On July 5, 2018, the federal district court denied the Trump Administration’s request to enjoin the challenged provisions of SB 54 and upheld the law in its entirety.<sup>48</sup> The court rejected the Administration’s argument that the SB 54 provisions prohibiting local and state law enforcement agencies in California from sharing non-publicly available information like detained individuals’ release dates and home or work addresses with the federal government, and from transferring individuals to immigration custody without a judicial finding of probable cause, conflict with Section 1373.<sup>49</sup>

In upholding California’s authority not to assist in the federal government’s immigration enforcement activities, the court explained that “[s]tanding aside does not equate to standing in the way.”<sup>50</sup> The state’s historic police powers and its legitimate interest in avoiding even the *perception* of local law enforcement participation in immigration enforcement gave California the authority under the Tenth Amendment to enact SB 54, the court held.<sup>51</sup> The court reasoned that when a state or locality “assists federal immigration enforcement in finding and taking custody of immigrants, it risks being blamed for a federal agency’s mistakes, errors, and discretionary decisions . . . Under such a regime, federal priorities dictate state action, which affects the [locality’s] relationship with its constituency and that constituency’s perception of its . . . government and . . . the community’s relationship with local law enforcement.”<sup>52</sup>

#### 5. *Summary: Current Status of Federal Litigation*

The federal courts have unanimously rejected the Trump Administration’s attempts to use the threat of denying federal funds to coerce states and localities into expending their local

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<sup>45</sup> *City of Philadelphia v. Sessions*, No. 2:17-cv-03894, Doc. 224, Memorandum (E.D. Pa. June 6, 2018)

<sup>46</sup> *Id.*, Doc. 74 & 75, Memorandum & Order granting Pls.’ Mot. for Prelim. Injunction & Order (Nov. 15, 2017)

<sup>47</sup> *U.S. v. California*, No. 2:18-cv-00490 (E.D. Cal. Mar. 6, 2018)

<sup>48</sup> *Id.*, Doc. 193, Order re: The United States of America’s Motion for Preliminary Injunction (July 5, 2018)

<sup>49</sup> *Id.* at 35

<sup>50</sup> *Id.* at 43

<sup>51</sup> *Id.* at 51-52

<sup>52</sup> *Id.* at 50

resources to assist in federal immigration enforcement.<sup>53</sup> The Trump EO threatening to defund so-called “sanctuary jurisdictions” has been blocked by a nationwide permanent injunction. The “notice” and “access” conditions in the new DOJ grant solicitation have been found to exceed statutory authority, rendering them invalid. The courts have also determined that the “certification” condition is satisfied as long as a local policy does not restrict the sharing of immigration status information with the federal government, even if the policy prohibits the collection of such information by local officials or the sharing of other types of information, or places other limitations on local participation in immigration enforcement.

**G. The Recent Court Decisions Unanimously Rejecting the Trump Administration’s Attempts to Force Localities to Participate in Federal Immigration Enforcement Align with Supreme Court Precedent and Bedrock Constitutional Principles**

In a line of decisions grounded in the constitutional doctrine of separation of powers, the Supreme Court has recognized that the executive branch cannot impose conditions on the grant of federal funds without clear, prior authorization from Congress. The Court has held that, in order to legitimately exercise its spending power,<sup>54</sup> Congress must “speak with a clear voice” when it desires to place conditions on the states’ receipt of federal funds, thus allowing the states (or localities) the ability to knowingly and voluntarily decide whether or not to accept the funds.<sup>55</sup> The conditions must be stated “unambiguously” in the statutory text passed by Congress. As the federal courts recently asked to weigh in on the question have concluded, no such Congressional authorization exists here for the new conditions the Trump Administration seeks to impose.<sup>56</sup>

Moreover, even when Congress speaks clearly, its spending power is not unlimited. It must be exercised “in pursuit of ‘the general welfare’”; the conditions imposed on a grant of federal funds must be germane to the federal interest in the particular federal program at issue; and Congress cannot require states or localities to engage in unconstitutional action as a condition to the receipt of federal funds.<sup>57</sup> Thus, **even if Congress were to pass a new law requiring states and localities to participate in federal immigration enforcement in order to receive federal grants, such a law would be subject to legal challenges and likely would not pass constitutional muster.**

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<sup>53</sup> Today, a coalition of six states led by the New York State Attorney General’s Office filed suit in the Southern District of New York against DOJ to challenge the immigration-related conditions on Byrne JAG funding, advancing similar arguments to those that have met with success in the *Santa Clara & San Francisco*, *Philadelphia*, and *Chicago* litigation summarized above. See [https://ag.ny.gov/sites/default/files/byrne\\_jag\\_complaint\\_0.pdf](https://ag.ny.gov/sites/default/files/byrne_jag_complaint_0.pdf)

<sup>54</sup> See U.S. Const., Art. I, § 8, cl. 1: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States” (the Spending Clause)

<sup>55</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987)

<sup>56</sup> See *Chicago*, No. 1:17-cv-05720, Doc. 78 at \*19 (“The notice and access conditions therefore exceed statutory authority, and, consequently, the efforts to impose them violate the separation of powers doctrine and are *ultra vires*.” *aff’d*, No. 17-2991; *Santa Clara*, No. 3:17-cv-00574, Doc. 182 at \*4 (“The Constitution vests the spending powers in Congress, not the President, so the [Executive] Order cannot constitutionally place new conditions on federal funds”); see also 34 U.S.C. § 10152 (formerly 42 U.S.C. § 3751) (JAG authorizing statute).

<sup>57</sup> *Dole*, 483 U.S. at 207-08 (citing authorities)

The Tenth Amendment places additional limitations on the federal government’s ability to induce states and localities to carry out federal objectives. The underlying purpose of the Tenth Amendment is to trace limits around the power of the federal government and reserve a sphere of state and local autonomy in areas—such as local law enforcement and public safety—where decisions are best left up to local decision-makers. In *New York v. United States*<sup>58</sup> and *Printz v. United States*,<sup>59</sup> the Supreme Court ruled that Congressional attempts to compel states to carry out federal duties or participate in a federal program are invalid because they unlawfully “commandeer” the local legislative process. Subsequently, the Court held that requiring information sharing is permissible under the Tenth Amendment only when it “does not require [states or localities] to enact any laws or regulations, and it *does not require state officials to assist in the enforcement of federal statutes regulating private individuals.*”<sup>60</sup>

Although Congress may permissibly offer federal funds to states or localities contingent on compliance with certain lawful, reasonable conditions, when the “financial inducement” becomes “so coercive as to pass the point at which pressure turns to compulsion,” it violates the Tenth Amendment’s anti-commandeering principle<sup>61</sup> For example, as the Supreme Court recently explained in *NFIB*, when the federal government “threat[en]s to terminate other significant independent grants . . . as a means of pressuring the States to accept” a federal policy, such “economic dragooning” is considered unconstitutionally coercive.<sup>62</sup> Thus, under *New York*, *Printz*, and *NFIB*, any Congressional attempt to directly compel local jurisdictions to actively participate in federal immigration enforcement, or to induce them to do so through a coercive funding scheme, would likely violate the Tenth Amendment.<sup>63</sup> Likewise, as multiple federal courts have found in response to recent litigation, an expansive reading of Section 1373 that would compel local officials to carry out the duties of the federal immigration enforcement regime would also likely violate the Tenth Amendment.

## V. The Proposed Trust Policy Does Not Violate HB 56 Sections 5 & 6

Sections 5 and 6<sup>64</sup> of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act of 2011 (commonly referred to as HB 56) provide some narrow limitations on what local jurisdictions in Alabama can do (or decline to do) with respect to federal immigration enforcement. Namely, Sections 5 and 6 provide for certain state-imposed sanctions and a citizen complaint process against local agencies and officials that limit communications with federal immigration officials regarding immigration status information.<sup>65</sup> This prohibition is quite

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<sup>58</sup> 505 U.S. 144 (1992)

<sup>59</sup> 521 U.S. 898 (1997)

<sup>60</sup> *Reno v. Condon* 528 U.S. 141, 151 (2000) (emphasis added)

<sup>61</sup> *Santa Clara*, No. 3:17-cv-00574, Doc. 182 at \*22 (quoting *Dole*, 483 U.S. at 211 (internal quotation marks omitted))

<sup>62</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580-82 (2012)

<sup>63</sup> See Letter from Prof. Annie Lai, *et al.*, to Pres. Trump re: “Proposed Termination of Funding to ‘Sanctuary’ Jurisdictions under EO 13768 is Unconstitutional,” March 13, 2017, [https://www.ilrc.org/sites/default/files/resources/2017-03-13\\_law\\_professor\\_letter\\_re\\_eo\\_13768\\_sanctuary\\_jurisdictions\\_finalv2.pdf](https://www.ilrc.org/sites/default/files/resources/2017-03-13_law_professor_letter_re_eo_13768_sanctuary_jurisdictions_finalv2.pdf) (letter from nearly 300 law professors and scholars)

<sup>64</sup> Ala. Code §§ 31-13-5 & 6

<sup>65</sup> *Id.*

similar to 8 U.S.C. § 1373. As with Section 1373, HB 56 Section 5 and 6 do not prohibit limitations on the sharing of other types of information; nor do they require or authorize local law enforcement agencies to detain individuals in their custody on the basis of an ICE detainer request, arrest individuals based on suspected immigration violations, or take other affirmative steps or expend local resources in order to participate in federal immigration enforcement.

## **VI. Experts Concur that “Trust” Policies Increase Public Safety for All Residents and are an Essential Part of Community-Oriented Policing**

There is a broad-based consensus among legal scholars, civil rights advocates, and law enforcement and community policing experts that policies limiting local law enforcement participation in federal immigration enforcement are not just lawful, but good public policy. “Trust” policies have been widely recognized as an essential part of a community-oriented approach to policing because they help build trust between police and immigrant communities, thus increasing public safety for all residents.

The U.S. Conference of Mayors, of which you are a member, adopted a policy at its 2017 Annual Meeting strongly opposing “punitive [federal] policies that limit local control and discretion” by “commandeer[ing] local law enforcement or requir[ing] local authorities to violate, or be placed at risk of violating, a person's Fourth Amendment rights; expend limited resources to act as immigration agents; or otherwise assist federal immigration authorities beyond what is determined by local policy.”<sup>66</sup> The Conference has also submitted amicus briefs in the litigation over the Trump Administrations’ attacks on “sanctuary jurisdictions,” asserting the damaging effect these federal policies can have on local police-community relations.<sup>67</sup>

Likewise, the Presidential Task Force on 21st Century Policing recommends “decouple[ing]” routine local policing from immigration enforcement in order to promote better police-community relations.<sup>68</sup> The Task Force was convened under the Obama Administration in the wake of high-profile incidents leading to major rifts in trust between police and African-American and Latino communities; the task force heard testimony from local enforcement experts around the country in order to reach its recommendations.<sup>69</sup>

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<sup>66</sup> Letter from Mitchel J. Landrieu, President, U.S. Conference of Mayors, to Congressional Representative, June 6, 2017, [www.usmayors.org/wp-content/uploads/2017/06/USCM-Letter-Opposing-HR3003.pdf](http://www.usmayors.org/wp-content/uploads/2017/06/USCM-Letter-Opposing-HR3003.pdf) ; see also Statement of USCM CEO & Executive Director Tom Cochran on Today’s Remarks by Attorney General Jeff Sessions,” March 27, 2017, <https://www.usmayors.org/2017/03/27/statement-by-uscm-ceo-executive-director-tom-cochran-on-todays-remarks-by-attorney-general-jeff-sessions/> (characterizing Sessions’s statement “accus[ing] some states and cities of adopting ‘policies designed to frustrate the enforcement of our immigration laws’” as “incorrect, unfortunate, and ignor[ing] both the Constitution and policing practices that have made our cities safer,” and “promot[ing] the false narrative that immigrants are criminals when studies have shown that the incidence of criminality is less among immigrants than among the native-born population, and recent research has shown that communities with so-called ‘sanctuary’ policies are safer than those without them.”)

<sup>67</sup> See, e.g., Brief of Amici Curiae City of New York, 20 Additional Cities and Counties, and the United States Conference of Mayors, *City of Philadelphia v. Sessions*, No. 2:17-cv-03894, Doc. 223 (June 5, 2018)

<sup>68</sup> See *Final Report of the President’s Task Force on 21st Century Policing* (May 2015) at 18, <http://bit.ly/2uu6SvG>

<sup>69</sup> See International Association of Chiefs of Police, “21st Century Policing Task Force,” <http://www.theiacp.org/TaskForceReport>

Independent researchers have documented the detrimental effects on trust and public safety in immigrant communities when police are involved—or even perceived as being involved—in enforcing immigration law.<sup>70</sup> These dynamics, which threaten to make all of us less safe, have likely been exacerbated under the current administration, given President Trump’s extremely harsh rhetoric and policy pronouncements with respect to immigration. For example, last year the Los Angeles Police Department reported that “sexual assaults reported by Latinos in Los Angeles have dropped 25 percent, and domestic violence reports by Latinos have decreased by 10 percent compared to the same period” in the previous year.<sup>71</sup> Houston and Denver reported similarly dramatic decreases in reporting of rapes and domestic violence by Latino residents.<sup>72</sup>

## VII. Conclusion

You have been asked by a group of local immigrant residents, with the support of a large coalition of civil rights groups, to sign an executive order limiting the City of Birmingham’s participation in federal immigration enforcement. I hope I have presented you with some helpful resources explaining why other local elected leaders and community policing experts around the country have given their support to similar polices because they are in the best interests of their constituents and communities. I encourage you to join the other cities across the country in protecting the constitutional rights of all residents of Birmingham.

If you choose to enact the proposed Birmingham Trust Policy, the City of Birmingham can continue to comply with 8 U.S.C. § 1373 and HB 56 Section 5 and 6. Enacting the Trust Policy will not justify the denial or revocation of much-needed federal grant funds for the city. Indeed, enacting the policy will reduce the city’s risk of legal liability for constitutional rights violations, and will advance your administration’s central goal of improving public safety through pursuing community-oriented policing and building trust between law enforcement and vulnerable communities in Birmingham.

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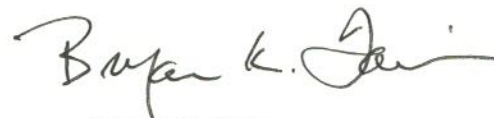
<sup>70</sup> See Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), University of Illinois at Chicago, <http://bit.ly/XAVcEt>; Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247, 253 (2012) (describing “chilling effect in immigrant communities” when local police are entangled in immigration enforcement; “Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families. Because many families with undocumented family members also include legal immigrant members, this would drive a potential wedge between police and huge portions of the legal immigrant community as well.” (quoting Gene Voegtlin, Int’l Ass’n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 5 (2004), <http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf>)).

<sup>71</sup> Michael Balsamo, Associated Press, “LAPD: Latinos report fewer sex crimes amid immigration fears,” Mar. 22, 2017, <https://apnews.com/b1fb6bf0d0264463a81f65faa50c59fb>

<sup>72</sup> Brooke A. Lewis, “HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year,” *Houston Chronicle*, April 6, 2017, <http://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php>; Mark Joseph Stern, “Bad for Undocumented Immigrants, a Gift to Domestic Abusers,” *Slate*, Mar. 8, 2017, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/03/denver\\_city\\_attorney\\_kristin\\_bronson\\_on\\_the\\_trump\\_immigration\\_crackdown.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/denver_city_attorney_kristin_bronson_on_the_trump_immigration_crackdown.html).

Thank you for your consideration and for your leadership and service. I would be glad to meet with you, City Attorney King and other members of the City Law Department to further discuss this matter.

Sincerely,

A handwritten signature in black ink that reads "Bryan K. Fair". The signature is written in a cursive style with a large, sweeping initial "B".

Bryan K. Fair

cc: Nicole King, Esq., City Attorney

**Curriculum Vitae**  
**of**  
**BRYAN K. FAIR**

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**EMPLOYMENT**

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*TEACHING:*

THOMAS E. SKINNER PROFESSOR OF LAW, THE UNIVERSITY OF ALABAMA SCHOOL OF LAW (August 2000 to present) — Professor (1997-2000) — Associate Professor (1994-1997; tenured 1996) — Assistant Professor (1991-1994).

**Courses Taught:**

- Constitutional Law
- Race, Racism and American Law
- Gender, Sexism and American Law
- First Amendment Survey
- Advanced Equal Protection Survey
- Constitutional Law Seminars
- First Amendment Seminars.

(Professor Fair has also taught law courses at Seattle University Law School (Summer 1995), the University of Fribourg, Switzerland (Fall 1999), and The Australian National University (Fall 2006, Summer 2004, 2011).

**Honors and Awards:**

- The University of Alabama National Alumni Association's Outstanding Commitment to Teaching Award (2004)
- Dean's Scholar (2004-2005, 1997-1998)
- Commencement Hooding Team (2002-2011, 1999-2000, 1994) (selected by students)
- Outstanding Faculty Member (2004, 1993) (selected by students).

**Service:**

- Director of the UA/University of Fribourg, Switzerland Cooperative Education Program (1999 to 2010)
- Co-Director of the Public Interest Institute (2005-2006)
- Co-Director of Fribourg Program (1996-1998)
- Summer Academic Support Administrator and Teacher (1991 to 2011)
- Academic Excellence Workshops for First-Year BLSA members
- Member of the following law school faculty committees:
  - Promotion and Tenure (2008- 2011)
  - Student Diversity and Academic Support (Chair, 2006 to 2009; 1991-2006)
  - Ad-hoc Committee on Professorship Policies
  - Ad-hoc Committee on Chair Appointments
  - International Programs (1996 to present)
  - Curriculum (2012-present, Chair, 2005-2006; 2002-2005; 1992-1993)



- Ad-hoc Committee on Faculty Excellence (Co-chair, 2005-2006)
- Faculty Development (Chair, 2001-2005)
- Legal Writing Lecturers Search (2002-2004)
- Readmissions (Chair, 2001-2002; 1992-1997)
- Clinical Program Director Search (Chair, 2000-2001)
- Dean's Leadership Evaluation (1999)
- Admissions (1997-1999)
- Self-Study (Chair, 1997-1998)
- Faculty Appointments (2012 to present, 2008-2010, 1993-97)
- Ad-hoc Committee on Academic Excellence
- Ad-hoc Faculty Support Committee
- Dean's Search (1993-1994).

LECTURER IN LAW, UCLA SCHOOL OF LAW (1987-1991).

- Co-Director of Academic Support Program
- Legal Research and Writing Instructor
- Admissions Consultant.

*ADMINISTRATION:*

DIRECTOR OF INTERNATIONAL PROGRAMS,(2010-2012, 2014, 2015-16).

ASSOCIATE DEAN FOR SPECIAL PROGRAMS, THE UNIVERSITY OF ALABAMA SCHOOL OF LAW (2008 - 2010) — Worked with Dean on various Law School projects, especially international initiatives and diversity programs. Supervised faculty support staff and program assistants. Served as liaison for Dean on most Law School committees.

DIRECTOR OF INTERNATIONAL AND DIVERSITY PROGRAMS, THE UNIVERSITY OF ALABAMA SCHOOL OF LAW (2007- 2008) — Supervised the primary international and diversity programs, including the Swiss Exchange Program with The University of Fribourg, the Australian Exchange Program with the Australian National University, the International LL.M. programs, as well as working with student groups to promote diversity programs and a healthy environment for all students.

ASSISTANT VICE PRESIDENT FOR UNDERGRADUATE STUDIES, OFFICE FOR ACADEMIC AFFAIRS, THE UNIVERSITY OF ALABAMA (1994-1997) — Worked as assistant to the Provost/Vice President for Academic Affairs on campus-wide academic policy matters. (Two years with Dr. James G. Taaffe and one year with Dr. Nancy S. Barrett.)

**Service:**

- Member of the following university committees and task forces:
  - Program Review Committee, Department of History (Chair, 2003-2004)
  - Housing Diversity Task Force (2001)
  - Intercollegiate Athletics Committee (1995-1998)
  - Residency Reclassification Appeals Committee (Chair, 1994-1997)
  - Council of Assistant and Associate Deans (Chair, 1994-1997)
  - Affirmative Action Hiring Procedures Task Force (Chair, 1996-1997)
  - Undergraduate Advising Task Force (Chair, 1996-1997)
  - Teaching and Learning Committee (1995-1997)
  - Women's Studies (1993-1996)
  - Minority Initiatives Task Force (Co-Chair, 1996)
  - Faculty Handbook Revision Committee (1994-1995)

- Admissions and Retention (Chair, 1993-1994; 1992-1994)
- Drug and Alcohol Task Force (1993-1994).
- Member of the following University search committees:
  - Provost Search Committee (2013)
  - Associate Provost for Global Outreach and International Education (2012)
  - Dean, School of Social Work (1999)
  - Director, McNair Program in Center for Teaching and Learning (1999)
  - Vice President for Institutional Advancement (1996)
  - Athletic Director (1996)
  - Director, University Museums (1996)
  - Dean, College of Communication (1995).

*LAW PRACTICE:*

ASSOCIATE, BRYAN, CAVE, McPHEETERS & McROBERTS, LOS ANGELES, CALIFORNIA (1985-1987).

**EDUCATION**

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UNIVERSITY OF CALIFORNIA, LOS ANGELES SCHOOL OF LAW, J.D., 1985. Admitted to practice in California (inactive status).

DUKE UNIVERSITY, B.A., 1982.

**PUBLICATIONS**

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**Book:**

Notes of a Racial Caste Baby: Color Blindness and the End of Affirmative Action (NYU Press, 1997).

**Honors:**

Received an Honorable Mention from The Gustavus Myers Center for the Study of Bigotry and Human Rights in North America for Books Published in 1997. (Paperback edition published in 1998.)

**Casebook:**

Weaver et al., *Constitutional Law*, 4<sup>th</sup> ed. (Aspen Wolters-Kluwer 2017) (co-author).  
 Weaver et al., *Constitutional Law*, 3<sup>rd</sup> ed. (Aspen Wolters-Kluwer 2013) (co-author).  
 Weaver et al., *Constitutional Law*, 2<sup>nd</sup> ed. (Aspen Wolters-Kluwer 2011) (co-author).

**Book Chapters:**

Bryan K. Fair, Knowing the Suffering of Others: A Commentary on Suk's "Laws of Trauma" (forthcoming 2014).

Bryan K. Fair, Freedom of Speech, Equal Citizenship, and the Anticaste Principle: A Commentary on Brettschneider's Regulating Hate Speech, *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* 115-122 (Austin Sarat ed., 2012).

Bryan K. Fair, Why Dissent Isn't Free: A Commentary on Pildes's "The Legal Academy and the Temptations of Power," *Dissenting Voices in American Society: The Role of Judges, Lawyers, and Citizens* 182-191 (Austin Sarat ed., 2011).

Bryan K. Fair, After Katrina: Laying Bare the Anatomy of American Caste in Levitt, Jeremy I. and Whitaker, *Hurricane Katrina: America's Unnatural Disaster* 35-46 (Matthew C. ed., 2009).

### Articles:

Fair, Still Standing in the Schoolhouse Door: Deconstructing *Brown's* Bias and Reconstructing Its Remedy, *Indiana Journal of Law and Social Equality* (accepted Fall 2013).

Fair, Change Agents: Beating Back the Dark Caste of the Law, (A Tribute to Fred Gray), 3 *Faulkner L. Rev.* 215 (2011-2012).

Fair, Intersectionality Theory, the Anticaste Principle, and the Future of *Brown*, (A Tribute to Martha Morgan), 60 *Ala.L.Rev.* IIII (2009).

Fair, "The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow's Third Cousin," *University of Miami Law Review* (2008).

Fair, "The Lengthening Shadow of Androcentrism," 11 *Cardozo Women's L.J.* 559 (2005).

Fair, "Re(caste)ing Equality Theory: Will *Grutter* Survive Itself By 2028?" in University of Pennsylvania Symposium, "Race Jurisprudence and the Supreme Court: Where Do We Go from Here?" 7 *U. Pa. J. Const. L.* 721 (2005).

Fair, "The Darker Face of *Brown*: The Promise and Reality of the Decision's Anticaste Moorings Remain Unreconciled," 88 *Judicature* 80 (Sept.-Oct. 2004).

Fair, "Taking Educational Caste Seriously: Why *Grutter* Will Help Very Little," 78 *Tul. L. Rev.* 1843 (2004).

Clemon & Fair, "Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons From Two American Heroes," 54 *Ala. L. Rev.* 961 (2003) (with The Honorable U.W. Clemon).

Fair, "Equality for All: The Case for a New Declaration of Rights Article of the Alabama Constitution," 33(2) *Cumb. L. Rev.* 339 (2003).

Clemon & Fair, "Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980," 52(4) *Ala. L. Rev.* 1121 (2001) (with The Honorable U.W. Clemon).

Fair, "The Anatomy of American Caste," 18(2) *St. Louis U. Public L. Rev.* 381 (1999) (published in late 2000).

Fair, "Been in the Storm Too Long, Without Redemption: What We Must Do Next," 25 *Southern U. L. Rev.* 121 (1997) (published in late 1998).

Fair, "Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb," 45 *Ala. L. Rev.* 403 (1994).

Fair, "Foreword: Rethinking the Colorblindness Model," 13 National Black L.J. Nos. 1 & 2 (1993) (lead article followed by a collection of edited papers written by UA Law seminar students).

**Book Review Essays:**

Bryan K. Fair, *The Excessive Entanglement of Politics, Law and Religion*, 26 J.L. & Religion. 371 (2010-2011).

Fair, The Washington Post, at C04 (Jan. 5, 2005) (reviewing Mark S. Weiner, Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste (2004)).

Fair, "Part II. America's Equality Promise: Where Do We Go From Here?," 19(1) J. of American Ethnic History (Fall 1999) (reviewing Stephan and Abigail Thernstrom, America in Black and White: One Nation, Indivisible (1997)).

Fair, "Part I. America's Equality Promise: Can You Tell Me Where It's Gone?," 18(4) J. of American Ethnic History 167-175 (Summer 1999) (reviewing Civil Rights and Social Wrongs: Black-White Relations Since World War II (John Higham ed., 1997)).

Fair, "A Constitutional Law Casebook for the 21st Century: A Critical Essay on Cohen and Varat," 21 Seattle U. L. Rev. 859 (1998) (reviewing William Cohen and Jonathan D. Varat, Constitutional Law: Cases and Materials (10th ed. 1997)).

Fair, "The Acontextual Illusion of a Color-Blind Constitution," 28 U. San Francisco L. Rev. 343 (1994) (reviewing Andrew Kull, The Color-Blind Constitution (1992)).

Fair, "How Far We Have to Go," 10 National Black L.J. 318 (1988) (reviewing Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987)).

**On-Line Essay:**

Fair, "Teaching Tolerance and Seeking Justice in a World of Disadvantage," published at <http://www.demosproject.net/2172-2/>.

Fair, "Preparing for a Career in Law in the 21st Century," manuscript for minority law school candidates, published at [www.law.ua.edu/bfair](http://www.law.ua.edu/bfair).

**In progress:**

Fair, *The New Antifederalists* (forthcoming 2017).

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## **PROFESSIONAL SERVICE**

- Chair, ABA/AALS Site Evaluation Team, Barry University School of Law
- Chair, ABA/AALS Site Evaluation Team, The University of Wyoming School of Law (2013)
- Chair, AALS Committee on Recruitment and Retention of Minority Law Teachers and Students (2014-16)
- Reporter, ABA/AALS Site Evaluation Team, Seattle University (2013)
- Reporter, ABA/AALS Site Evaluation Team, Belmont University (2012)

- Reporter, ABA/AALS Site Evaluation Team, Baylor University (2011)
- Contributor, Talking Justice Blog, NPR and the Annenberg Public Policy Center, University of Pennsylvania, <http://communities.justicetalking.org/> (2007)
- Reporter, ABA/AALS Site Evaluation Team, University of Wisconsin Law School (2006)
- Summarians, ABA/AALS Site Evaluation Team, University of Washington School of Law (2005)
- Summarians, ABA/AALS Site Evaluation Team, The University of Florida, Fredric G. Levin College of Law (2004)
- Law School Admissions Council, Minority Affairs Committee (2003-2005)
- AALS Membership Review Committee (1999-2001)
- Manuscript Evaluator, NYU Press, Duke University Press, Penn State Press
- Promotion and Tenure External Evaluations, Baylor University (2013), Florida Agricultural and Mechanical University (2013), Louisiana State University School of Law (2008), University of Pittsburgh School of Law (2006), Northern Illinois College of Law (2004), Cleveland State University, Marshall-Wythe School of Law (1999), University of Houston School of Law (1999), Mississippi College of Law (1999), University of Kentucky College of Law (1999), California Western School of Law (1998).

## **SPEECHES/LECTURES/CONTINUING EDUCATION PROGRAMS**

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- February 2016: Teaching Tolerance and Seeking Justice in a World of Disadvantage, Annual Distinguished Lecture, Alabama State University, Montgomery, AL.
- September 2015: Fighting Hate, Teaching Tolerance, and Seeking Justice in a World of Disadvantage, Annual Distinguished Lecture, Wooster College, Wooster, OH.
- February 2014: The Legacy of Brown at 60, Diversity Lecture Series, California Western School of Law, San Diego, CA.
- January 2013: Speaker, “Still Standing in the Schoolhouse Door, Deconstructing *Brown’s* Bias, AALS Annual Meeting, New Orleans, LA.
- September 2012: Speaker, “Interpreting Our Constitution: Celebrating 225 Years,” Constitution Day, Jacksonville State University, Jacksonville, AL.
- March 2012: Speaker, “Across Generations: A Conversation among Faculty of Color,” Transformative Advocacy, Scholarship, and Praxis: Taking Our Pulse, Cumberland School of Law, Birmingham, AL.

March 2012: Speaker, "Knowing the Suffering of Others," University of Alabama School of Law, Tuscaloosa AL.

February 2012: Speaker, "The Dark Side of the Law," Fred Gray Civil Rights Symposium, Montgomery, AL.

## **ACTIVITIES**

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- Board of Directors, Southern Poverty Law Center (2013 to present)
- Faculty Advisor, Jessup International Moot Court Team (2006 to 2010)
- Faculty Advisor, Law Democrats (2006 to present)
- Member, American Law Institute (2005 to present)
- Faculty Advisor, Outlaw (2005 to 2014)
- Board of Directors, Alabama Appleseed Center for Law & Justice, Inc. (2003 to 2010)
- Board of Directors, Equal Justice Initiative (1995 to 2013)
- Faculty Advisor, Black Law Students Association (1991 to present)
- Board of Directors, Hospice of West Alabama (2003-2004)
- Member, Challenge 21 Community Politics Team (2002-2004)
- Board of Directors, Child Abuse Prevention Services of Tuscaloosa (2000-2003)
- Board of Directors, 100 Men, 100 Boys (1993-1996)
- Board of Directors, Turning Point (1993-1996)
- Faculty Advisor, Alabama Public Interest Law Association (1992-1994).

## **REFERENCES**

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