NEVADA AS AN EXAMPLE: STATE IMMIGRATION REFORM IN A SWING STATE

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** It is an honor to have served my community in the Nevada State Assembly since 2019 and as chair of the Nevada Hispanic Legislative Caucus during the 81st legislative session. As a nation of immigrants we should not have to pass legislation to protect immigrants in our community. However, I am grateful for the opportunity to partner with immigrant voices and allies to support legislation that makes a better Nevada for all. Thank you Coco and Professor Kagan for including me in this project.

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INTRODUCTION

Nevada has the largest undocumented immigrant population of any state in proportion to its overall population. In 2016, the Pew Research Center documented that approximately 210,000 undocumented immigrants resided in Nevada. That amounts to 7.1% of the Nevada population. Beyond undocumented immigrants, Nevada was home to 587,686 immigrants in 2019, meaning that one in five Nevada residents were immigrants. The 385,184 immigrants represented 25% of the State’s labor force in 2018. Given Nevada’s large immigrant population, the question of who should be deported, and how they should be identified and processed is of immense importance.

The most common way for immigrants to find themselves in Immigration and Customs Enforcement (ICE) custody, and subsequently deported, is through the integration of local police into the federal deportation pipeline. The most important part of that integration is a detainer program. Under the detainer program, an ICE agent may request for a state or local enforcement agency to hold detainees past their scheduled release time so that ICE has enough time to interrogate and pick-up the detainee. In some local jails, the detainer program is enhanced through the 287(g) Program, which comes from Section 287(g) of the Immigration and Nationality Act. Through the 287(g) Program, the Department of Homeland Security (DHS) enters into formal written agreements, also known as Memoranda of Agreement (MOAs), with state and local enforcement agencies to train state and local officers to perform limited functions similar to that of a federal immigration agent. While limited, these ad-hoc state immigration enforcement officers can still perform a variety

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2 Id.
3 Id.
5 Id. at 2.
9 Id.
of functions, such as: interview detainees about their immigration status, check the DHS database for information on individuals, issue immigration detainers, and transfer noncitizens to ICE custody, to name a few.10

Several states have enacted legislation, sometimes known as the Trust Act, to limit state and local enforcement agencies from complying with detainer holds for immigration purposes.11 Through these laws, some states have acted to cut themselves out of the deportation pipeline that targets many of their residents.12 But thus far, all such states have been dark “blue” in terms of political partisanship.13 That is, in all of them the Democratic candidates for president and other statewide federal offices have won by comfortable margins in recent election cycles.14 Nevada stands out among states with very large immigrant populations in that it has been led mostly by Democrats, but without either party having a complete monopoly on power. Since 2016, Democrats have won six of seven races in Nevada for President, Governor and U.S. Senate.15 While the Democrats have won often, they have won statewide elections only by narrow margins and they lost the 2022 race for governor.16 Only once, in the 2018 Senate race, did the Democrats margin touch 5%.17 In the 2016 presidential and senate races, and again in the 2020 presidential contest, the Democrats won by

10 Id.
just 2.4 percent.\textsuperscript{18} Nevada is thus not like Texas, where there is a large immigrant population but the state government is under the control of Republicans who often take openly hostile positions toward immigrant rights.\textsuperscript{19} But Nevada is also not like California, where Democrats routinely win elections without having to worry about the popularity of their positions with large populations of swing voters.\textsuperscript{20} In Nevada, Democrats win relatively consistently. However, there are still concerns that supporting an unpopular immigration policy could change the outcome of elections.

The purpose of this paper is to look at how state lawmakers can constrain the incorporation of local policing into the federal deportation system in a swing state. The premise of the paper is that some of the strategies that have been used in more solidly blue states are more challenging politically in a state like Nevada. This Paper will set out to show that this does not mean that nothing can be done.

This Paper will focus on the 287(g) Program in Nevada, with a particular focus on the Las Vegas Metropolitan Police Department (LVMPD). The Paper will identify the controversies associated with the 287(g) Program and then discuss the legislative efforts to eradicate the Program from our State. This Paper will conclude with lessons learned from the legislative fight in 2021 in the 81st Legislative Session through Assembly Bill 376, sponsored by Assemblywoman Selena Torres. The intent of this Paper is to give insight to policymakers across the country on how to fight for state immigration reform.

I. HISTORICAL DEVELOPMENT OF THE 287(G) PROGRAM IN NEVADA

In Nevada, and particularly Las Vegas, the LVMPD entered into an MOA with ICE and DHS as early as September 2008.\textsuperscript{21} LVMPD was the first de-
partment in Nevada to participate in the program and was one of sixty-three in the country to participate.22 The immigration functions authorized LVMPD to deputize state officers under the MOA as follows:

- The power and authority to interrogate any person believed to be an alien as to his right to be or remain in the United States . . . ;
- The power and authority to serve warrants of arrest for immigration violations pursuant to 8 C.F.R. § 287.5(e)(3);
- The power and authority to administer oaths and to take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2)), to complete required criminal alien processing . . . ;
- The power and authority to prepare charging documents . . . ;
- The power and authority to issue immigration detainers (8 C.F.R. § 287.7) and I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors; and
- The power and authority to detain and transport (8 C.F.R. § 287.5(c)(6)) arrested aliens to ICE-approved detention facilities.23

Commencing in October 2008, the Program consisted of ten LVMPD deputized officers that had access to the Federal Immigration Database.24 The officers questioned detainees about their immigration status, and if a question arose about their legal status, the case was then referred to ICE.25 Individuals who had been merely arrested and charged with a crime, and later determined to be not guilty, were still subject to the Program based on the mere fact that police officers “had probable cause to believe that the individual committed a crime.”26

The Program changed in 2014 and evolved into the commonly recognized 48-hour detainer program in 2016, detailed below. Prior to the 2014 policy changes, LVMPD held detainees for as long as it took for ICE to come pick them up.27 As Chuck Calloway, the LVMPD representative to the Nevada Legislature, put it, “If it took a week, they held them a week.”28 In 2014, following a federal court ruling out of Oregon that declared holding a detainee without probable cause to violate the Fourth Amendment, the LVMPD declared that it would not honor ICE requests unless presented with a judicial determination of

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23 Memorandum of Agreement, supra note 21, at 2.
24 Finnegan, supra note 22.
25 Id.
26 Id.
28 Id.
probable cause or a warrant for a judicial officer.\textsuperscript{29} ICE returned in January of 2016 with a “special form with written probable cause” which enabled LVMPD to shift its policy, again, but this time only agreeing to hold detainees for 48 hours beyond their scheduled release time.\textsuperscript{30} LVMPD abided by this policy until 2019, when it decided to withdraw from the program and to stop honoring detainers.\textsuperscript{31} On October 23, 2019, LVMPD announced that it was no longer honoring the 287(g) Program because of a federal district court ruling based out of California that deemed components of the Program unconstitutional.\textsuperscript{32}

II. Nevada Legislative Efforts to Limit the 287(g) Program

A. The Trust Acts in 2017

The fight to limit the 287(g) Program commenced in 2017 at the 79th Nevada State Legislative Session.\textsuperscript{33} Former State Senator, Yvanna Cancela, introduced Senate Bill 223 which, if enacted into law, would have prevented state and local enforcement agencies from using state resources to perform immigration enforcement activities, “including detaining individuals, transferring them to the custody of federal immigration officials … without a warrant from either an immigration judge or a district court judge.”\textsuperscript{34} Senator Cancela’s proposed bill was a moderate approach to limiting the detainer program, as states like California severely limit who may issue a judicial warrant.\textsuperscript{35} Assemblyman Chris Brooks also introduced Assembly Bill 357, with parallel language to Senate Bill 223, but chose not to move forward with the legislation after the unsuccessful outcome of Senate Bill 223.\textsuperscript{36}

Upon its introduction, Senate Bill 223, and its sister bill Assembly Bill 357, were immediately dubbed a “sanctuary city” bill, and then-Senate Minority Leader Michael Roberson, said that the bill would “provide sanctuary to criminal aliens and threaten the safety of our families and the well-being of our communities.”\textsuperscript{37} Polling at this time generally found “sanctuary” policies to be unpopular, and the Trump-era Department of Justice was threatening to with-

\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{32} Id.
\textsuperscript{33} See Messerly, supra note 27.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
hold funds from so-called “sanctuary” jurisdictions.\textsuperscript{38} Having lost traction, Senator Cنبالa proposed an amendment to scrap the language introduced in Senate Bill 223 and add a singular provision that would prohibit state and local law enforcement from asking about an individual’s immigration status at the point of contact.\textsuperscript{39} Despite having collaborated with both law enforcement officers and immigration activists, there was no clear middle ground, and the bill died without having received a hearing.\textsuperscript{40}

B. Efforts During the 2019 80th Legislative Session

The 2019 legislative effort presented similar obstacles as those in 2017. Assemblyman Edgar Flores introduced Assembly Bill 281 and the bill was immediately labeled as the sanctuary city bill of the session.\textsuperscript{41} In the same vein, Assemblywoman Selena Torres introduced Assembly Bill 376 seeking to obtain transfer information and statistics from LVMPD.\textsuperscript{42} The success of these bills were limited but were steps in the right direction.

1. Assembly Bill 281

Assemblyman Edgar Flores introduced Assembly Bill 281 in March 2019 and the bill was referred to the Assembly Judiciary Committee.\textsuperscript{43} The Committee gave the bill a hearing on March 29, 2019 and voted to pass the bill out of the committee on April 11, 2019.\textsuperscript{44} The bill prohibited state or local enforcement agencies, school police units or campus police departments from detain-


\textsuperscript{41} Jon Ralston, Dems Open the Door on “Sanctuary State” Non-issue, but Republicans Should Know What is on the Other Side, NEV. INDEP. (Apr. 22, 2019, 1:51 PM) https://thenevadaindependent.com/article/dems-open-the-door-on-sanctuary-state-non-issue-but-republicans-should-know-what-is-on-the-other-side [https://perma.cc/4FYJ-WN9R].


\textsuperscript{43} AB281 ‘Overview,’ NEV. ELEC. LEGISLATIVE INFO. SYS., https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6508/Overview [https://perma.cc/F3D4-C3S3].

\textsuperscript{44} Id.
ing a person on the basis of a hold request, unless there was an independent finding of probable cause.⁴⁵ An independent finding of probable cause means (1) a warrant issued by a federal judge, federal magistrate judge, or a neutral and independent adjudicator; or a (2) determination by an neutral and independent adjudicator that authorizes federal immigration authority to take into custody a person who is subject to the warrant.⁴⁶ The bill ultimately died on the Assembly Floor because it was not voted on by the body to move forward to the Senate.⁴⁷

The intent of Assembly Bill 281 was similar to the 2017 Trust Act, but this iteration was not well received on both aisles of the political spectrum. The bill was criticized as “not going far enough” by immigration activists because the bill did not prohibit state and local enforcement agencies from entering into the 287(g) Program with ICE.⁴⁸ The bill was also criticized because, depending on how it would be interpreted, it might merely codify into law what LVMPD already did, which explains why LVMPD testified in support of this bill.⁴⁹ On the other end, the fact that this bill intended to limit law enforcement’s ability to detain immigrant detainees was enough for anti-immigrant advocates to dub this a sanctuary state bill.⁵⁰

2. Assembly Bill 376

In the same session, Assemblywoman Selena Torres introduced Assembly Bill 376 which was a data-driven bill seeking to obtain information about transfers to ICE custody.⁵¹ If enacted at its last reprint, the bill would have required that local enforcement agencies submit an annual report detailing the total number of persons transferred to ICE custody, and in particular, those transferred or held who had misdemeanors other than a crime of violence.⁵² LVMPD and other enforcement agencies supported the bill as introduced, which only required a general report of transfers to ICE custody, but vehemently opposed the last amended reprint, claiming that it would paint the enforcement agencies in a negative light.⁵³ The bill passed into law, but it was undoubtedly amended to the point where it lost its original intent. The only

⁴⁶ Id.
⁴⁷ AB281 Overview, supra note 43.
⁴⁹ Id.
⁵⁰ Id.
provision that survived and made it into law was that the person seeking to question prisoners about their immigration status must inform the prisoner of the purpose of the questions.54 The purpose of this provision was to safeguard immigrants while in detention.

III. LESSONS TO BE LEARNED AFTER THE 81ST NEVADA LEGISLATIVE SESSION

A. The Language of the Bill as Introduced

Entering the 81st Legislative Session, it was Assemblywoman Selena Torres’ turn to carry the “sanctuary city” bill of the session. And she realized she needed a new approach to state immigration reform if she wanted to pass meaningful legislation. Assemblywoman Torres modeled the bill after the Keep Washington Working Act, which had passed into law in 2019.55 The Washington bill, while limiting the state’s detainer program, also placed a heavy emphasis on creating economic opportunity for immigrants and accepting the fact that immigrants play a huge role in a state’s economy.56 Assemblywoman Torres hoped that the conversation would be centered around economic opportunity for Nevada immigrants, and not about sanctuary cities. And the bill did just that.

The Keep Nevada Working Act, coincidentally also assigned as AB 376, was referred to the Assembly Committee on Government Affairs on March 22, 2021.57 The committee heard the bill on April 7, 2021 and the focus of the hearing was on the Keep Nevada Working Task Force—a group created within the Office of Lieutenant Governor to bolster economic and career opportunities for Nevada immigrant workers and businesses.58 Upon the termination of the hearing, the committee moved to vote the bill out of the committee and back to the Assembly Floor.59 And it passed. From the Assembly Floor, the bill was then referred to the Assembly Committee on Ways and Means and it got stuck there.60 After meeting with stakeholders, it became apparent to Assemblywoman Torres that the conflicting concerns would prevent the Keep Nevada Working Act from moving forward. The chances of this bill passing, at this point, were as good as none.

54 NEV. REV. STAT. § 211.007 (2021).
56 Id.
59 AB 376 Overview, supra note 57.
60 Id.
B. Advocating for Change During the COVID-19 Pandemic

The 81st Legislative Session in 2021 was remarkably one of the hardest sessions in Nevada history. In the prior year, feeling the economic impacts of the COVID-19 pandemic on our state, the Governor called for a special session in summer of 2020, the first time since 2016. The State’s 31st Special Legislative session was called to address a $1.2 billion deficit in the state budget, ultimately resulting in budget cuts to state-wide agencies. To say that the State was strapped for money was an understatement, and Democratic leadership was in a position to make tough decisions against prospective bills with hefty fiscal notes.

But Democratic lawmakers were also faced with the pressures for state immigration reform. While Democrats realized the importance of their immigrant constituents and keeping them safe, the Party itself struggled to find a common ground. But one thing was clear – there could not be three consecutive legislative sessions without any signs of meaningful reform of the way local police assist in deportations in Nevada. And that is how the Keep Nevada Working Act came to be revived.

Assemblywoman Torres credits the revival of the bill to Assembly Majority Leader Teresa Benitez-Thompson, commonly referred to as TBT. After the bill spent time in limbo for almost a month, TBT picked it up and advocated for its passage. But why? Assemblywoman Torres believes it was an act of good faith. The 81st Session was TBT’s last session as an Assembly member, she was the Majority Leader, and had experience on the Ways and Means Committee (where the bill was currently stuck). Under the guise of TBT’s leadership and experience, the Keep Nevada Working Act was amended one last time, and the intent of the bill changed.

The final version of the Keep Nevada Working Act allocated $500,000 to the Immigration Clinic at the William S. Boyd School of Law of the University of Nevada, Las Vegas. The final version effectively removed the provision of the bill which sought to limit the detainer program, and instead allocated the funds to the Immigration Clinic to provide pro bono legal services relating to immigration law. The intent of the bill transformed from limiting the detainer program to deportation defense, where these funds may allow for immigrants in

64 Id.
deportation proceedings to be represented by counsel.65 While not the original intent of the bill, these funds are still useful to immigrants in deportation proceedings, because unlike in criminal cases in the United States, immigrants are not afforded public defenders in their proceedings.66 The amendment was well-received and the bill passed the legislature and was signed into law by Governor Steve Sisolak on June 11, 2021.67 And the funding did not stop at the Legislature. The Clark County Commission matched the funding, totaling $1 million to be appropriated to the Immigration Clinic over the span of two years.68

In addition to funding deportation defense, the bill as enacted did not entirely ignore the way local police are co-opted into the deportation system. Rather than ban the practice, the new law tasked the state Attorney General to publish model policies to govern the relationship between local police and ICE.69 Those model policies are to “limit, to the fullest extent practicable and consistent with any applicable law, the engagement of state or local law enforcement agencies with federal immigration authorities for the purpose of immigration enforcement.”70 Although the model policies will not be binding, local police departments will be required to either adopt them or declare what their policies vis-à-vis immigration enforcement will be.71

Let that sink in. During one of the hardest legislative sessions in Nevada history, immigration advocates were able to allocate $1 million to state immigration reform and deportation defense. How could this bill have gotten this type of funding during such unprecedented fiscal crisis? It may seem like a political mystery, where most important decisions are made behind closed doors, but it all boils down to one thing. The immigrant workforce is valuable to the entire state of Nevada, and state leadership realized the importance of protecting the state’s immigrant population.

CONCLUSION

Nevada’s experience with legislation regulating police cooperation with ICE illustrates that measures that have been enacted in bluer states are far more politically difficult in swing states. This is especially true with measures that would strike at the heart of the deportation pipeline by prohibiting detainers and

65 Martha E. Menendez, We Must End Immigration Detention, NEV. INDEP. (June 9, 2021, 2:05 AM) https://thenevadaindependent.com/article/we-must-end-immigration-detention [https://perma.cc/RL8R-HYQL].
67 AB376 Overview, supra note 57.
68 Torres-Cortez, supra note 66.
69 Assemb. B. 376, 2021 Leg., 81st Sess., Sec. 20.6 (Nev. 2021).
70 Id.
71 Id.
the 287(g) Program categorically. Yet, Nevada shows that even where the political hill is steeper to climb, progress has been possible. First, Nevada has been able to begin enacting legislation that addresses concerns about the deportation pipeline. It has supported deportation defense and has also required police disclose more information to detainees about contacts with immigration. While Nevada’s legislation is modest compared to California’s, among others, it is important to note that in 2019 its largest police department actually suspended its 287(g) Program and its reliance on detainers, at least officially. This happened even without legislation passing that would have required it, but after a period of sustained legislative scrutiny and threats of litigation from private advocacy organizations.

This experience suggests several lessons. First, relentlessness matters. Even when it is difficult to bring legislation over the finish line, keeping issues on the agenda can bear dividends. When law enforcement agencies know their conduct is under a legislative microscope its conduct may be constrained informally. Also, with each legislative session, we can see similar legislation make gradually more progress. In 2017, it did not even get a hearing. In 2019, it passed one house of the legislature. In 2021, legislative leaders felt compelled enough to address deportation issues to allocate funding for deportation defense, making Nevada the first swing state to do that at the state level.

The Nevada experience also illustrates the importance for immigrant advocates to be both relentless and pragmatic in their advocacy. While the ultimate goal—a full separation of local policing from deportation—may be difficult to achieve at first, incremental successes are possible and may yet lead to the bigger prize. It is thus important for advocates to both stay focused on what needs to be accomplished long term, while also having in mind interim steps that could make meaningful progress in the meantime.