Explainer: Florida Immigration Enforcement Legislation (SB 1808/HB 1355)

I. Overview

Republicans in the Florida Legislature have recently voted to advance legislation aimed at expanding state laws barring so-called sanctuary jurisdictions, among other priorities. The companion bills, SB 1808 in the Florida Senate and HB 1355 in the Florida House of Representatives, would also require certain law enforcement agencies to enter the 287(g) program, and penalizes contractors who transport unauthorized immigrants into the state.

The bills' immigration enforcement priorities are consistent with the stated policy goals of Gov. Ron DeSantis (R-Florida). In December of 2021, Gov. DeSantis voiced a plan to strengthen anti-sanctuary city laws, prevent shelters that house unaccompanied migrant children from receiving state licenses, expand E-Verify enforcement, and transport undocumented immigrants out of the state. Gov. DeSantis has regularly criticized the Biden administration's handling of immigration policy and stated, "We need all entities in Florida helping to fight back against the federal government's ineptitude and inaction" as a justification for his immigration policies.

SB 1808 and HB 1355 have been met with fierce opposition from most Florida Democrats, with only a handful of Democrats in the Florida legislature crossing over to support the bills. SB 1808 and HB 1355 have also faced criticism from religious organizations, faith leaders and immigration advocacy groups, among others. Critics have asserted that the bills would lead to racial profiling and discriminatory implementation, while harming children and potentially hurting local businesses and tourism.

Below is a summary and brief analysis of each section of the bills.

II. SB 1808 and HB 1355

1. Expansion of Sanctuary Jurisdiction Ban

The bills would expand the state's ban on so-called sanctuary jurisdictions, under a previously-enacted state law, SB 168. SB 168 defined "sanctuary policy" as "a law, policy, practice, procedure, or custom adopted or allowed by a state entity or local government entity which prohibits or impedes a law enforcement agency from complying with 8 U.S.C. § 1373 or which prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency so as to limit such law enforcement agency in, or prohibit the agency from: (a) comply with an immigration detainer; (b) complying with a request from a federal immigration agency to notify the agency before the release of an inmate or detainee in the custody of the law enforcement agency; (c) providing a federal immigration agency access to an inmate for interview; (d) participating in any program or agreement authorize under section 287 of the INA, 8 U.S.C. § 1357; or (e) providing a federal immigration agency with an inmate's incarceration status or release date." SB 168 attempted to completely ban sanctuary policies throughout Florida.

A federal court found SB 168 to be unconstitutional in 2019, holding that it would violate the 14th Amendment's Equal Protection Clause, by having a disparate impact on immigrant

communities. The court decision, which is being appealed by Florida, also found that the law would afford too much discretion to law enforcement in requiring them to use their "best efforts" in carrying out federal immigration enforcement policies, likely leading to racial profiling. There is no uniform definition of "sanctuary jurisdiction," but the term generally refers to polices that restrict state and local cooperation with the federal government in carrying out immigration enforcement. These types of policies include restrictions on when law enforcement personnel can inquire into an individual's immigration status or on when local law enforcement agencies can hold individuals in custody in the absence of a criminal warrant or court order. These policies both promote community trust and prevent localities from committing constitutional violations that may lead to legal liability. In most instances, these types of policies do not violate federal law.

Under SB 1808 and HB 1355, the term "sanctuary policy" would incorporate the exact same definition as SB 168, but expand it further to also prohibit policies that prevent "(f) providing information to a state entity on the immigration status of an inmate or detainee in the custody of the law enforcement agency." This additional section would require law enforcement to provide information about the immigration statutes of someone in law enforcement's custody to state entities.

Critics of SB 1808 and HB 1355 note that the less-expansive SB 168 was already found to be unconstitutional, and the new legislation would not remedy those legal deficiencies. Like SB 168, the current legislation is likely to face similar legal challenges including having a disparate impact on immigrant communities while leading racial profiling.

In addition, critics of the bills cite other downsides of the legislation – that it would undermine trust between law enforcement and immigrant communities, that it would direct limited resources of local law enforcement agencies into carrying out immigration enforcement functions that traditionally have been the responsibility of the federal government, and that it undermines local control. Local authorities, they argue, should be able to decide what trust policies are best and safest for their immediate communities.

2. *Mandatory § 287(g) Obligations*

SB 1808 and HB 1355 would obligate each law enforcement agency in Florida that operates a county detention facility to enter into a § 287(g) agreement with federal immigration authorities, as well as report specified information concerning the agreement on a quarterly basis to the Florida Department of Law Enforcement.

Agreements under § 287(g) permit "designated officers to perform limited immigration law enforcement functions." Under § 287(g), a local jurisdiction enters into a written agreement with the U.S. Department of Homeland Security (DHS) and then deputizes select officers to investigate, arrest, and/or detain noncitizens for violations of immigration law. Participating jurisdictions must periodically send officers deputized under the program to specific federally-sponsored training sessions, compensating those state or local officers for their time during training, which can take weeks. The training is necessary because state or local law enforcement officers taking part in the program perform certain federal immigration functions that are typically the purview of federal authorities.

Under federal law, these agreements are voluntary and the overwhelming majority of state and local law enforcement agencies opt not to take part in the program. Deputized officers taking

part in § 287(g) perform immigration tasks such as ascertaining immigration status, transfering immigrants to ICE custody, and issuing Notices to Appear (the charging document that initiates removal proceedings), among other immigration-related functions.

The § 287(g) provisions of SB 1808 and HB 1355 flip the federal framework on its head, making the agreements mandatory for all law enforcement agencies running detention facilities, like county jails. Under the proposed legislation, all such law enforcement agencies would be required to enter into written agreements with DHS by January 1, 2023. Covered law enforcement agencies must absorb the cost of participation in § 287(g) agreements, including significant investments in time personnel and detention costs, which can be very expensive.

3. *Prohibition on Transportation of Immigrants*

SB 1808 and HB 1355 also would prohibit the Florida state government or local governmental entity from executing, amending, or renewing a contract with private businesses and entities that provide transportation to unauthorized aliens. These bills encompass an expansive scope of what could be defined as "common carriers" covered under the bill. The bill defines "common carrier" as, "a person, firm, or corporation that undertakes for hire, as a regular business, to transport persons or commodities from place to place offering their services to all such as may choose to employ [it] and pay their charges." This could include airplanes, buses, taxis, trains, and other types of transport. Specifically, however, the provision is aimed at barring contracts with charter air carriers who, consistent with federal law, have entered into contracts with the federal government to transport unaccompanied children and migrants to shelters and detention facilities in the state.

While Florida and local government entities do not currently contract with any of the air carriers that are the primary focus of these provisions, the legislation is intended to send a message against what the bill's proponents have referred to as "secret" or "clandestine" flights of migrants arranged by the Biden administration. Yet, as critics have noted, the existence of such flights predate the Biden administration and are a routine practice in the transportation of migrants. Critics have also expressed concern that the legislation unreasonably burdens transportation companies and unfairly targets migrants by placing a barrier on transportation and family reunification. This approach is problematic for a number of reasons. First, it targets air carriers who lawfully and reasonably have contracted with the federal government. Second, to the extent the law impacts other modes of transit, it unreasonably burdens those carriers to assess for immigration status of passengers and subsequently attest to the fact that they are not unauthorized.[1] Transit operators do not have in-depth knowledge of immigration laws, yet would face legal liability for improperly transporting an "unauthorized alien." Requiring these non-expert transit operators to determine the immigration status of passengers is likely to lead to racial profiling and unnecessary intrusions against passengers who have done nothing wrong.

These provisions may even lead some carriers to cease operating in Florida to avoid potential liability, impacting Florida residents and tourists. In addition, churches, community organizations, charities and other entities who transport migrants while providing services to them are concerned that they could face potential liability.

[1] Given the complexity of immigration law, this is not always straightforward. For example, an immigrant who has a Notice to Appear and a copy of their asylum application stamped by the immigration court, most likely could prove they have a pending asylum case and therefore are lawfully in the United States while they await the adjudication of their case, regardless of whether or not they have a work permit.

III. Conclusion

By undermining community trust policies, mandating costly participation in the § 287(g) and punishing transport companies who have lawfully contracted with federal authorities, SB 1808 and HB 1355 manage to simultaneously undermine local control and federal policymaking on immigration. Rooted in a harmful and misleading narrative of immigrants as dangerous, they threaten to undermine police/community relations, while potentially harming Florida businesses, as well as churches, community organizations, and charities that serve migrants. These raise serious concerns on both legal and policy grounds and, accordingly, have faced significant opposition.