

IMMIGRATION ENIGMA: INTERSECTIONS BETWEEN  
IMMIGRATION STATUS AND MINIMUM MANDATORY  
SENTENCES IN HOME RULE MUNICIPALITIES

ABSTRACT

Immigration law is a complicated and constantly evolving legal landscape. When non-citizens are accused or convicted of a misdemeanor crime the two most important potential consequences are inadmissibility or deportation. This Comment will look at two major triggers for deportation and inadmissibility. First, “significant misdemeanors,” or crimes that carry a potential jail time of 365-days or higher, immediately initiate inadmissibility or deportation proceedings. Second, crimes that are classified as Crimes Involving Moral Turpitude also automatically trigger immigration consequences.

Because these immigration charges are litigated in criminal courts, to be effective counsel criminal defense lawyers need to take certain steps to inform non-citizen clients about potential immigration consequences. Non-citizens’ legal rights are complicated in some jurisdictions by the existence of home rule governance. In home rule jurisdictions, municipal ordinances can vary from state statutes, which might affect a non-citizen’s right to counsel as guaranteed by *Padilla v. Kentucky* and principles of equal protection. This Comment will argue that any criminal statute or ordinance affecting immigration status should be considered a matter of “mixed state-and-local concern” whereby municipal ordinances are preempted by state statutes. By ensuring state statutes preempt local ones, the rights of non-citizens will not change city-to-city, attorneys will be able to advise their clients more effectively, and there will be improved consistency in the practice of immigration and criminal law. This Comment goes on to argue that both Colorado and the United States have a legal and moral obligation to protect non-citizens. This Comment concludes by exploring both practical and radical solutions to this crimmigration issue. This Comment is the first to examine how home rule autonomy in Colorado subverts equal protection in immigration law.

TABLE OF CONTENTS

INTRODUCTION .....	398
I. DEFINING CRIMMIGRATION LAW .....	400
A. <i>History of Crimmigration Law</i> .....	400
B. <i>Crimmigration Law in Practice</i> .....	402
1. Terms of Art.....	403
II. THE IMPACT OF HOME RULE MUNICIPALITIES IN COLORADO.....	405
A. <i>History of Home Rule Municipalities in Colorado</i> .....	405
B. <i>Legislative History: Preemption and Home Rule Cities in</i>	

<i>Colorado</i> .....	406
<i>C. Colorado's Balancing Test</i> .....	407
<i>D. Colorado's State Statute Regarding Municipal Ordinances:</i>	
<i>Colo. Rev. Stat § 13-10-113</i> .....	410
III. ANALYSIS .....	412
<i>A. Issues with Preemption: Colo. Rev. Stat. § 13-10-113</i> .....	412
<i>B. Discrepancies in Application Across Home Rule Jurisdictions</i> ..	413
<i>C. The Right to Effective Counsel</i> .....	415
<i>D. Equal Protection</i> .....	418
IV. PROPOSED SOLUTIONS .....	418
CONCLUSION .....	420

## INTRODUCTION

This Comment examines the intersection of home rule ordinances and crimmigration law in Colorado. Separately, both topics have a long and established history.<sup>1</sup> However the effect on non-citizens when these two areas of law overlap is relatively unexplored in Colorado.<sup>2</sup>

Home rule was codified into the Colorado Constitution in 1902.<sup>3</sup> Home rule is, “a form or structure of governing defined by the municipality or county that allows for more control over matters of local significance.”<sup>4</sup> Home rule enables local governments to legislate local matters.<sup>5</sup> To ensure independence in matters of local concern, home rule ordinances will supersede state laws.<sup>6</sup> However, when home rule ordinances conflict with state laws in matters of statewide or mixed local-and-state concern, the state law supersedes the local ordinance.<sup>7</sup> Finally, in matters of statewide and mixed state-and-local-concern, local ordinances may coexist with state laws if the two are not in conflict.<sup>8</sup>

“Crimmigration” is the intersection between criminal law and immigration law.<sup>9</sup> Today, the two fields are completely entangled.<sup>10</sup> Almost all felonies trigger immigration proceedings, but this Comment will examine

1. César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 200 (2018).

2. There are no cases in Colorado courts at any level that directly address how a municipal criminal conviction affects a non-citizen’s immigration status. The novelty of this subject is likely due to the recency of misdemeanor reform. Colorado did not reform statewide misdemeanors until 2017. Furthermore, as will be explained later in this Comment, the penalty for a municipal misdemeanor conviction would need to be one-year to trigger immigration consequences. Municipal misdemeanors are often less serious crimes, therefore the crimes that could fall into these categories is limited.

3. COLO. CONST. art. XX, § 6; *id.* art. XIV, § 16.

4. APRIL BERNARD, HOME RULE GOVERNANCE IN COLORADO, LEGIS. COUNCIL STAFF ISSUE BRIEF 20-16 (May 2020), [https://leg.colorado.gov/sites/default/files/r20-540\\_issue\\_brief\\_on\\_home\\_rule\\_charters.pdf](https://leg.colorado.gov/sites/default/files/r20-540_issue_brief_on_home_rule_charters.pdf).

5. *See id.*

6. *See City of Longmont v. Colorado Oil & Gas Ass’n*, 369 P.3d 573, 579 (Colo. 2016).

7. *See id.*

8. *See id.*

9. *See Hernández, supra* note 1, at 200.

10. *See id.* at 200.

situations in which misdemeanors trigger immigration proceedings.<sup>11</sup> Two types of misdemeanors may trigger immigration proceedings; misdemeanors that carry a potential jail time of 365-days, and misdemeanors that are labeled as “Crimes Involving Moral Turpitude” (CIMTs).<sup>12</sup> This Comment will focus extensively on misdemeanors and CIMTs because many CIMTs are enforced by municipal ordinance.<sup>13</sup>

Colorado and many other states have passed legislation making the maximum sentence for misdemeanor convictions less than a year.<sup>14</sup> One goal of these bills is to prevent misdemeanor convictions from triggering immigration consequences such as inadmissibility or deportation.<sup>15</sup> However this legislation applies only to state crimes, home rule cities are still able to write their own ordinances that are protected by the constitution.

Misdemeanors and CIMTs are the nexus between home rule and crimmigration.<sup>16</sup> In Colorado, some home rule cities do not have any crimes that carry a potential jail time of 365-days, and some home rule cities have 365-days as their maximum sentence.<sup>17</sup> In some home rule cities, a conviction for disturbing the peace would classify as a CIMT, whereas it would not in another city. The Constitution protects the right to legislate local issues as a home rule city.<sup>18</sup> However, the unintended consequence of this autonomy is that a non-citizen in Denver might have a different immigration consequence than someone living in Aurora or Alamosa.

This Comment will define the essential terms of art in both home rule and crimmigration jurisprudence; analyze controlling legislation and case law for both topics; and articulate the gaps case law and legislation create in Colorado’s immigration system. Then, this Comment will analyze how lawyers can provide effective counsel to non-citizens when they work in a metro-area with different municipalities.

This Comment will argue that any criminal statute or ordinance affecting immigration status should be considered a matter of mixed state-

11. See *id.* at 202–04, 211–12.

12. See Katy Brady, *All Those Rules About Crimes Involving Moral Turpitude*, IMMIGRANT LEGAL RESOURCE CENTER PRACTICE ADVISORY, 1, 5 (2020), IMMIGRANT LEGAL RES. CTR. PRAC. ADVISORY, 1, 5 (2020).

13. See COLO. CONST. art. XX, § 6; *id.* art. XIV, § 16; COLO. REV. STAT. §§ 31-2-201 to 225; *id.* §§ 30-11-501 to 513; *id.* §§ 30-35-101 to 906.

14. See Brady, *supra* note 12, at 5 (“Partly for this reason, since January 1, 2015, California Penal Code § 18.5 has provided that for every California misdemeanor where the code section states the potential sentence is up to one year (365 days), the potential sentence actually is up to 364 days.”); Moe Clark, *Colorado Lawmakers Pass Bipartisan Bill to Restructure State’s Misdemeanor Laws for First Time Since 1985*, COLO. NEWSLINE (June 9, 2021), <https://coloradonewsline.com/2021/06/09/399colorado-lawmakers-pass-bipartisan-bill-to-restructure-states-misdemeanor-laws-for-first-time-since-1985/>.

15. See Brady, *supra* note 12, at 17.

16. See *id.*; see COLO. CONST. art. XX, § 6; *id.* art. XIV, § 16; COLO. REV. STAT. §§31-2-201, 30-11-501 (2022); COLO. REV. STAT. tit. 30, art. 35.

17. See *generally* COLO. CONST. art. XX.

18. COLO. CONST. art. XX, § 6.

and-local concern,”<sup>19</sup> whereby municipal ordinances are preempted by state statutes.<sup>20</sup> By ensuring state statutes preempt local ordinances, non-citizen rights will remain constant city to city, attorneys will be able to advise their clients more effectively under municipal law, and there will be improved consistency in the practice of immigration and criminal law. Finally, both Colorado and the United States have a legal and moral obligation to protect non-citizens. This Comment concludes by exploring both practical and radical solutions to this crimmigration issue.

## I. DEFINING CRIMMIGRATION LAW

The intersection of crimmigration law, state statutes, and home rule charters create a legal gray area that affects the lives of non-citizens. There are legal ramifications that stem from violating municipal law, but more importantly, there are shameful human consequences. To understand the issues these competing interests create, it is essential to understand the ways in which crimmigration law, state statutes, and home rule charters intersect, which requires an understanding of key terms used in the crimmigration law field.

### A. History of Crimmigration Law

Crimmigration law is the intersection between criminal and immigration law.<sup>21</sup> It is one of the most nebulous and constantly changing legal fields.<sup>22</sup> Crimmigration law is complex, even for seasoned lawyers, because “[consequences for] non-citizen criminal defendants are often scripted in the legal netherworld between the constitutional rights guaranteed by the criminal justice system and the lesser protections of administrative immigration law.”<sup>23</sup> The origins of crimmigration law reflect modern jurisprudence and contemporary identity politics:

Spread across the three decades bridging the twentieth to the twenty-first centuries, crimmigration law’s expansive legislative architecture arose from the specific fears and preoccupations of the era. First there was the anti-drug hysteria of the 1980s and 1990s, then the anti-terrorism anxiety of the 2000s. In different ways, both were tinged by racism.<sup>24</sup>

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19. *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 580 (2016) (“To determine whether a regulatory matter is one of statewide, local, or mixed state and local concern, ‘we weigh the relative interests of the state and the municipality in regulating the particular issue in the case,’ making the determination on a case-by-case basis considering the totality of the circumstances.” (quoting *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (2013)).

20. *Id.* at 582.

21. Hernández, *supra* note 1, at 210.

22. Hans Meyer, *Immigration Consequences of Criminal Convictions*, in IMMIGRATION LAW FOR THE COLORADO PRACTITIONER 1, 10 (David A. Harston, Camila S. Palmer, & Koby L. Polaski eds., 2019) (available in electronic format at <https://www.hmichaelsteinberg.com/files/federal-immigration-laws.pdf>).

23. *Id.* at 2.

24. Hernández, *supra* note 1, at 204 (citations omitted).

Criminal law, as a quasi-national policy, correlates directly with the country's prison population boom: "The federal pretrial detention system under the custody of the United States Marshals Service ("USMS") is overwhelmingly filled by people facing prosecution for the two most commonly prosecuted immigration crimes, unauthorized entry and unauthorized reentry."<sup>25</sup> Many non-citizens who face deportation or inadmissibility for misdemeanor level crimes are detained in the pretrial detention system: "On the back end, the Federal Bureau of Prisons ("BOP"), responsible for confining everyone ordered to federal prison as punishment for a crime, sometimes counts more than 20,000 people under its watch who have been convicted of nothing worse than an immigration crime."<sup>26</sup> In 2018, 29,445 non-citizens were sentenced in the federal system.<sup>27</sup> In 2022 non-citizens accounted for 31.2% of all federal offenders. In 2022, 13,618 convictions were for immigration related crimes out of the 19,894 cases brought against non-immigrants.<sup>28</sup> This means 69% of all non-citizens in federal prison are there solely because of their immigration status. These statistics demonstrate that modern enforcement of immigration is done through the criminal system, further showing the fusion of immigration and criminal law.

Modern immigration policy relies heavily on local government. For over a decade, state and federal criminal justice systems have been used to supplement civil immigration proceedings:<sup>29</sup> "between 2006 and 2012, an anti-immigrant enforcement strategy known as 'attrition through enforcement' came to dominate the immigration discourse."<sup>30</sup> Attrition through enforcement "employs the use of state and local law enforcement and criminal justice systems" to enforce federal immigration laws.<sup>31</sup> As a result of these policies, criminal law and immigration law become intertwined because many state and local law enforcement agencies operated as quasi-immigration agents.<sup>32</sup>

During this time, most deportation and inadmissibility rulings were not the result of a criminal conviction—those that did intersect with the criminal justice system most often resulted from misdemeanor convictions.<sup>33</sup> During the "first seven years of Obama's two terms, fifty-six percent of people removed from the United States had not been convicted of any crime. Throughout this time, for most non-citizens who had obtained a criminal record, the most serious offense leading to their conviction was

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25. *Id.* at 199.

26. *Id.* at 197–199.

27. UNITED STATES SENTENCING COMMISSION, QUICK FACTS: NON-U.S. CITIZEN FEDERAL OFFENDERS (2022).

28. *Id.*

29. *Id.*

30. Meyer, *supra* note 22, at 3.

31. *Id.*

32. *See id.*

33. *See* Hernández, *supra* note 1, at 215.

an immigration crime.”<sup>34</sup> Recent studies show that this trend continued during the Trump administration: “Early results from the Trump administration suggest a similar pattern with fifty-two percent of people removed in February 2017 having a criminal record.”<sup>35</sup> Non-citizens are at risk of losing their immigration status due to lower crimes.<sup>36</sup> Limiting municipalities’ ability to block a non-citizen’s path to citizenship or deport non-citizens is just removing one drop in the bucket of state and federal action against non-citizens.

In 2012, the Supreme Court’s decision in *Arizona v. United States*<sup>37</sup> limited federal reliance on local law enforcement.<sup>38</sup> However, removal proceedings for non-citizens and crimes affecting immigration status are often initiated by contact with local law enforcement.<sup>39</sup> While this Comment focuses on technical loopholes in application between municipal ordinances and state law, it is also important to see crimmigration through the lens of its human consequences and not solely as legal doctrine.

Finally, inconsistencies between municipalities create reputational damage and chilling effects.<sup>40</sup> Migrants rightfully fear pretrial detention; immigrant detention facilities are run in cooperation with local government.<sup>41</sup> Thus, many non-citizens are distrustful of local government agents such as police and courts. Early in the Trump administration, “numerous cities with large migrant populations reported substantial decreases in the number of calls to police call centers.”<sup>42</sup> In Denver, “prosecutors were forced to drop criminal prosecutions because, too afraid of ICE to appear in court, victims refused to continue cooperating.”<sup>43</sup> Police departments and local government officials have complained about ICE’s representation as a police force.<sup>44</sup>

This Comment focuses on technical loopholes between municipal ordinances and state law, and national issues created by the fusion of criminal and immigration law.

### *B. Crimmigration Law in Practice*

This Comment will look at the two types of misdemeanor convictions that trigger immigration proceedings. The first type of misdemeanor is often referred to as a “significant misdemeanor,” the second type of misdemeanor is a CIMT.<sup>45</sup>

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34. *Id.* at 215.

35. *Id.*

36. *See id.* at 210.

37. 576 U.S. 387 (2012).

38. *Id.* at 408.

39. *See Meyer, supra* note 22, at 3.

40. Hernández, *supra* note 1, at 226.

41. *See id.* at 199, 224–25.

42. *Id.*

43. *Id.*

44. *See id.*

45. *See Brady, supra* note 12, at 2.

## 1. Terms of Art

To understand how crimmigration law interacts with home rule governance it is essential to understand the numerous terms of art used in the field. This is important, even for lawyers, because even phrases commonly used in other legal fields have very different implications in crimmigration law.

First, “convictions” and “sentencing” have drastically different effects on non-citizens for immigration purposes. For immigration purposes, convictions are defined as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>46</sup>

Under Colorado law, guilty pleas and convictions at trial meet this definition.<sup>47</sup> Deferred *judgements*, even after being withdrawn, qualify as convictions because guilt was “entered by a court” and the “judge has ordered some form of punishment.”<sup>48</sup> However, deferred *prosecutions* are not considered to be convictions.<sup>49</sup> Deferred prosecutions are defined as “A contractual arrangement between a US government agency . . . and . . . an individual facing a criminal or civil investigation” pursuant to which “the agency files a charging document with the court, but simultaneously requests that the prosecution be postponed to allow the defendant to demonstrate its good conduct.”<sup>50</sup>

Sentencing, for immigration purposes, includes:

[A]ny term of *imprisonment* ordered by a court of law “regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” Thus, under Colorado law, a “sentence” includes any partially or fully suspended jail or prison sentence imposed by the court in a criminal case. Therefore, the potential mitigation effect of a suspended sentence in a criminal matter may still carry the same adverse immigration consequences as if the sentence were imposed in full. For example, a long-term lawful permanent resident

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46. Immigration and Nationality Act § 101(a)(48)(A) (codified as amended at 8 U.S.C. § 1101(a)(48)(A)) (The term “alien” here is synonymous with the term “non-citizen” which is primarily used throughout this Comment).

47. See Meyer, *supra* note 22, at 5.

48. *Id.*; 8 U.S.C. § 1101(a)(48)(A).

49. Meyer, *supra* note 22, at 5.

50. THOMSON REUTERS, DEFERRED PROSECUTION AGREEMENT (DPA), PRACTICAL LAW GLOSSARY ITEM 0-608-5045 (Westlaw 2023).

(LPR) who pleads guilty to a theft offense with a one-year suspended jail sentence may face far more draconian immigration consequences than a plea involving an actual jail sentence of 364 days.<sup>51</sup>

As the definition indicates, to trigger an immigration consequence, a non-citizen does not actually have to serve a 365-day jail sentence—they only have to receive it. Even if a non-citizen’s sentence is deferred, and they do not serve any jail time, the important element is the length of the sentence technically received.

Next, it is essential to differentiate between the terms “inadmissibility” and “deportation” to understand crimmigration law. Inadmissibility and deportation are the two most common immigration proceedings brought against non-citizens.<sup>52</sup> In short, inadmissibility will block a convicted non-citizen’s path to legal residence in the future, whereas deportation is limited to physically removing an established non-citizen from the United States.<sup>53</sup> In both instances removal is presumed unless the non-citizen is granted relief.<sup>54</sup>

If a non-citizen is documented (including those with visas), they face deportation.<sup>55</sup> Deportation may occur if the non-citizen is convicted of, or pleads guilty to, either a CIME or any crime with a maximum penalty of more than 364-days in jail.<sup>56</sup> If a non-citizen is deported they are removed from the country.<sup>57</sup> If the non-citizen is undocumented, they face inadmissibility.<sup>58</sup> If inadmissibility is applied, the consequence of being convicted or pleading guilty to a significant misdemeanor or CIME is that the non-citizen would be barred from ever obtaining citizenship.<sup>59</sup> Deportation and inadmissibility are applied in immigration courts after criminal convictions.<sup>60</sup> Because immigration law is constantly changing and not readily accessible, non-citizens are often not aware how criminal convictions affect their immigration status.<sup>61</sup> Because these charges are litigated in criminal courts, to be effective counsel, criminal defense lawyers need to take certain steps to inform non-citizen clients about immigration consequences.<sup>62</sup>

Finally, it is important to understand CIMEs. Many experts in the field see CIMEs as “the most commonplace, yet nebulous, ground in immigration law.”<sup>63</sup> CIMEs are crimes that automatically affect both

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51. Meyer, *supra* note 22, at 6.

52. *Id.*

53. *Id.*

54. *Id.* at 6–7.

55. *Id.* at 3.

56. *Id.* at 5.

57. *Id.*

58. *Id.* at 9; 8 U.S.C. § 1182(a)(7)(A).

59. See Meyer, *supra* note 22, at 17.

60. *Id.* at 6–7.

61. See Meyer, *supra* note 22, at 4.

62. *Id.* at 21.

63. *Id.* at 11.



inadmissibility and deportability.<sup>64</sup> CIMTs must have a 365-day penalty and involve a “moral turpitude” to begin inadmissibility or deportation proceedings.<sup>65</sup> In 2008, moral turpitude was defined as an offense involving “reprehensible conduct” together with some form of mens rea, whether specific intent, knowledge, or recklessness.<sup>66</sup>

Reprehensible conduct is generally found when the mens rea of the relevant crime is at least recklessness.<sup>67</sup> Additional examples include, “intent to commit fraud, commit theft with intent to permanently deprive the owner, or inflict great bodily harm, as well as some reckless or malicious offenses and some offenses with lewd intent.”<sup>68</sup> A more thorough analysis of whether an offense is defined as a CIMT begins with an analysis of the mens rea and actus reus: “The more culpable the *mens rea* and the more significant the *actus reus*, the more likely” a crime is to be considered a CIMT.<sup>69</sup> However, “the moral turpitude inquiry does not depend upon the grade or classification of an offense.”<sup>70</sup> Thereby, “a third-degree misdemeanor under Colorado law that contains a specific intent element might constitute a CIMT, while a high-level felony involving criminal negligence might not trigger moral turpitude grounds for immigration purposes.”<sup>71</sup>

Thus, whether a crime, as defined by a municipal ordinance, rises to the level of a CIMT depends on the mens rea assigned by city legislatures or city council instead of those prescribed by the state.

## II. THE IMPACT OF HOME RULE MUNICIPALITIES IN COLORADO

### A. History of Home Rule Municipalities in Colorado

Home rule cities have a long history in Colorado and are controlled by Article XX, § 6 of the Constitution of the State of Colorado (Colorado Constitution).<sup>72</sup> The Colorado legislature authorized home rule governance for cities and towns in 1902 by constitutional amendment.<sup>73</sup> A separate amendment passed in 1970 authorized home rule governance for counties.<sup>74</sup> Colorado defines home rule governance as “[a] structure of governing defined by the citizens of a municipality or county that allows for more control over matters of local significance.”<sup>75</sup> Home rule

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64. *See id.*

65. Brady, *supra* note 12, at 13, 16.

66. Matter of Silva-Trevino, 24 I&N Dec. 687, 706 n.5 (A.G. 2008), *vacated and remanded sub nom.*, Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014).

67. *See id.*

68. § N.7 CRIMES INVOLVING MORAL TURPITUDE, IMMIGRANT LEGAL RES. CTR. 112 (January 2013), [https://www.ilrc.org/sites/default/files/resources/n.7-crimes\\_involving\\_moral\\_turpitude.pdf](https://www.ilrc.org/sites/default/files/resources/n.7-crimes_involving_moral_turpitude.pdf).

69. *See Meyer, supra* note 22, at 11.

70. *Id.*

71. *Id.*

72. COLO. CONST. art. XX § 6.

73. BERNARD, *supra* note 4.

74. *Id.*

75. *Id.*

governance “empowers local governments to act and legislate on local matters.”<sup>76</sup> Without a home rule charter, local governments are strictly subject to state laws.<sup>77</sup> If the Colorado Secretary of State approves a home rule charter, the municipality has the authority to legislate matters involving “municipal officers, agencies and employments” as well as matters involving the “*imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter.*”<sup>78</sup> Finally, the Colorado Constitution dictates that state statutes “shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.”<sup>79</sup>

Case law dictates the resolution of conflicts between state law and home rule charters. In *City of Longmont v. Colorado Oil & Gas Ass’n*,<sup>80</sup> the Colorado Supreme Court ruled that, “To ensure home rule cities[’] . . . independence from state control in their internal affairs . . . in matters of local concern, a home rule ordinance supersedes a conflicting state statute.”<sup>81</sup> Whereas, “when a home rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance.”<sup>82</sup> Courts determine whether a regulatory matter is of statewide, local, or mixed state-and-local concern by “weigh[ing] the relative interests of the state and the municipality in regulating the particular issue in the case.”<sup>83</sup> These cases are often determined on a case-by-case basis.<sup>84</sup>

Home rule cities can create ordinances and determine the punishments for violating those ordinances.<sup>85</sup> In Colorado, home rule cities or counties write the elements of a crime and set jail sentences.<sup>86</sup> If a non-citizen is sentenced to a 360-day jail sentence for a particular crime in one municipality it would not trigger an immigration proceeding; but, if a non-citizen was convicted in a different municipality where the same crime had a 365-day jail sentence, immigration consequences would be triggered.<sup>87</sup> Differences in municipal ordinances create immigration consequences for non-citizens.

### *B. Legislative History: Preemption and Home Rule Cities in Colorado*

Generally, courts divide preemption issues between municipal ordinances and state statutes into three categories: matters of purely local concern, matters of purely state concern, and matters of mixed state-and-local

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76. *Id.*

77. *Id.*

78. COLO. CONST. art. XX, § 6(a), (h) (emphasis added).

79. *Id.* § 6(h).

80. 369 P.3d 573 (Colo. 2016).

81. *Id.* at 579.

82. *Id.*

83. *Id.* at 580.

84. *See id.*

85. *See* COLO. CONST. art. XX § 6.

86. *See Vela v. People*, 484 P.2d 1204 (Colo. 1971).

87. *See Brady*, *supra* note 12, at 5.

concern.<sup>88</sup> Historically, the courts have been hesitant to explicitly define the differences between the three.<sup>89</sup>

Colorado courts have ruled in a multitude of ways when municipal and state laws conflict. In *City of Greenwood Village ex rel State v. Fleming*,<sup>90</sup> the Colorado Supreme Court considered a district court decision that invalidated a municipal traffic ordinance.<sup>91</sup> The City of Greenwood Village, contrary to state law, decriminalized all minor traffic offenses within its own city limits.<sup>92</sup> The court stated, “[T]he Home Rule Amendment . . . grant[s] . . . home rule cities . . . plenary legislative authority to regulate and penalize matters of local concern, with the result that a home rule city’s ordinance will supersede a conflicting state statute on the same subject matter.”<sup>93</sup>

### C. Colorado’s Balancing Test

In Colorado courts, the test to determine whether a regulatory matter is one of statewide, local, or mixed state-and-local concern is well established.<sup>94</sup> The court “weigh[s] the relative interests of the state and the municipality in regulating the particular issue in the case.”<sup>95</sup> In the context of crimmigration law, home rule cities have an interest in regulating crime and have enumerated power under the state constitution to write their own code.<sup>96</sup> However, under the “totality of circumstances,”<sup>97</sup> the state clearly has an interest to regulate immigration within its borders.

In *City of Greenwood Village*,<sup>98</sup> the city tried to remove the criminal offense element of traffic violations.<sup>99</sup> The court ruled: “[W]hen the state has proscribed certain conduct as a criminal offense, the counterpart provision of the Home Rule Amendment prohibits a home rule city from removing such basic criminal safeguards as proof of guilt beyond a reasonable doubt.”<sup>100</sup> The court explicitly preempted home rule cities from diverging from legislative intent.<sup>101</sup> The court explained: “[T]he conduct forbidden by the ordinance is also proscribed as criminal and punishable as such under a state statute, any statutory grant of authority to municipalities

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88. See *City of Greenwood Village ex rel. State v. Fleming*, 643 P.2d 511, 515 (Colo. 1982).

89. See generally *id.*

90. 643 P.2d 511 (Colo. 1982).

91. *Id.* at 512.

92. *Id.*

93. *Id.* at 515.

94. See generally *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000).

95. *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 580 (Colo. 2016) (quoting *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (2013)).

96. COLO. CONST. art. XX, § 6 (2023).

97. *Town of Telluride*, 3 P.3d at 37.

98. See *City of Greenwood Village*, 643 P.2d at 512.

99. *Id.* at 514.

100. *Id.* at 516.

101. *Id.*

. . . would run afoul of the very protections contemplated by the counterpart provision itself.”<sup>102</sup>

Although the traffic offenses were only decriminalized for tickets issued in Greenwood Village, the court relied on its previous decision in *Canon City v. Merris*.<sup>103</sup>

In *Merris* the court clarified that “Even though an ordinance effectually covers a local and municipal matter, and it is a counterpart of a law of the state, its violation is triable and punishable as a crime where so designated by the statute.”<sup>104</sup> If the state counterpart to a municipal ordinance is punishable as a criminal violation, a violation of the ordinance should be tried as criminal if prosecuted in municipal court.<sup>105</sup> A municipality may not fully decriminalize a state criminal violation even if the act is a purely local matter; as a result, municipal prosecutions are accountable to enforce certain criminal laws.<sup>106</sup>

When ordinances and statutes are not in conflict, a person will be convicted under the municipal ordinance.<sup>107</sup> *Vela v. People*<sup>108</sup> determined whether a state statute or home rule ordinance is applied in a criminal conviction.<sup>109</sup> In *Vela*, the court reviewed a conviction for disturbing the peace based on a state statute rather than the relevant ordinance in a home rule city.<sup>110</sup> The court reiterated that, “[F]or a state statute to be superseded by an ordinance of a home rule city, two requirements must be met. The state statute and the ordinance must be in conflict, and the ordinance must pertain to a purely local matter.”<sup>111</sup>

In *Vela*, the Court determined that the only difference between disturbing the peace in the Greeley ordinance and the state law was “that the ordinance [went] further in its prohibition.”<sup>112</sup> Furthermore, it determined that “[n]either piece of legislation permits or licenses what the other forbids and prohibits.”<sup>113</sup> When an ordinance and state statute are not in direct conflict they can both exist.

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102. *Id.* at 518.

103. 323 P.2d 614 (Colo. 1958).

104. *Id.* at 620.

105. *See Greenwood Village*, 643 P.2d at 516.

106. *See Merris*, 323 P.2d at 620.

107. *Vela v. People*, 484 P.2d 1204, 1205 (Colo. 1971).

108. 484 P.2d 1204 (Colo. 1971).

109. *Id.* at 1205–06.

110. *Id.* at 1205.

111. *Id.*

112. *Id.* at 1206.

113. *Id.*

However, there is no standard balancing test to determine what constitutes a matter of purely local concern.<sup>114</sup> In *Webb v. City of Black Hawk*,<sup>115</sup> the Colorado Supreme Court held that:

Practically, it is rare that regulatory matters fit neatly within one of these three categories. Regulations that are of local, mixed, or statewide concern often imperceptibly merge or overlap. Because the categories do not reflect factually perfect descriptions of the relevant interests of the state and local governments, categorizing a particular matter constitutes a legal conclusion involving considerations of both fact and policy.<sup>116</sup>

In *City & County of Denver v. State*,<sup>117</sup> there was a home rule challenge to the constitutionality of a state statute mandating certain residency requirements for municipal employees.<sup>118</sup> The City of Denver adopted a local ordinance mandating that employees of the city become residents of the City and County of Denver to maintain their employment.<sup>119</sup> The Colorado Supreme Court noted that home rule cities have “*every power* therefore possessed by the legislature to authorize municipalities to function in local and municipal affairs.”<sup>120</sup> Furthermore, the court outlined whether a state law preempting a local ordinance is decided on a case-by-case basis.<sup>121</sup> The court stated, “We have not developed a particular test which could resolve in every case the issue of whether a particular matter is ‘local,’ ‘state,’ or ‘mixed.’”<sup>122</sup> The court affirmed the validity of the city ordinance and found that “the cities’ claim that the residency of municipal employees is a matter appropriate for local regulation finds direct textual support in Section 6(a) [of the Colorado Constitution].”<sup>123</sup>

*City & County of Denver* outlines four key factors for when home rule supersedes state statute.<sup>124</sup> The court found, “[T]he residency of municipal employees is of local concern and therefore governed by a charter provision or ordinance of a home rule city rather than a conflicting state statute,”<sup>125</sup> and that, “residency of the employees of a home rule municipality is of local concern. . . . [It] does not limit the authority of home rule municipalities to enact . . . ordinances requiring employees to reside within the corporate limits of the municipality.”<sup>126</sup> Home rule cities can

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114. See *Webb v. City of Black Hawk*, 295 P.3d 480, 486–87 (Colo. 2013).

115. 295 P.3d 480 (Colo. 2013).

116. *Id.* at 486 (citations omitted).

117. 788 P.2d 764 (Colo. 1990).

118. *Id.* at 765.

119. *Id.*

120. *Id.* at 767 (quoting *Four-County Metro. Cap. Improvement Dist. v. Bd. of Cnty. Comm’rs*, 369 P.2d 67, 72 (Colo. 1962)).

121. *Id.* at 767–68.

122. *Id.* at 767.

123. *Id.* at 770.

124. See *id.* at 768.

125. *Id.* at 771.

126. *Id.* at 772.

set residency requirements for employment because that is considered a purely local matter.<sup>127</sup>

The judicial branch sets precedent through case law that home rule cities must abide by. On the other hand, the state legislature does not have direct control over home rule cities due to constitutional protections. However, home rule cities often structure their criminal penalties after the state legislatures.<sup>128</sup> Thus, the Colorado General Assembly may try to influence home rule cities by reforming state laws. In Colorado, maximum penalties for misdemeanors do not exceed one year.<sup>129</sup> If all home rule cities followed suit, immigration consequences would be uniform across the state.<sup>130</sup> However, because safety and order is considered a local issues, as long as ordinances are not in conflict constitutional protection grants home rule cities autonomy in setting their own ordinances.<sup>131</sup>

*D. Colorado's State Statute Regarding Municipal Ordinances: Colo. Rev. Stat. § 13-10-113*

In 2017, riding a wave of punishment reduction and criminal justice reform, the Colorado State Legislature amended Colo. Rev. Stat. § 13-10-113<sup>132</sup> to make all misdemeanor crimes carry a maximum penalty of 364-days.<sup>133</sup> As of July 2021, the statute reads:

Except as provided in subsection (1)(b) of this section, any person convicted of violating a municipal ordinance in a municipal court of record may be incarcerated for a period not to exceed three hundred sixty-four days or fined an amount not to exceed two thousand six hundred fifty dollars, or both.<sup>134</sup>

One of the underlying victories for the immigration community was the effect that sentencing maximums would have on CIMTs and other convictions affecting removal proceedings.<sup>135</sup> Because of the amendment, Colorado currently has more favorable regulations for non-citizens than many other states.<sup>136</sup>

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127. *Id.*

128. *See, e.g.*, COLO. SPRINGS, COLO., CODE ch. 1, § 1.1.201; DENVER, COLO., CODE ch. 1, § 1-13(a)(b); CITY OF PUEBLO, COLO., CODE OF ORDINANCES § 1-2-1(c).

129. *See* COLO. REV. STAT. § 13-10-113 (2024).

130. *See id.*

131. COLO. CONST. art. XX, § 6.

132. H.B. 17-1268, 71st Gen. Assemb., Reg. Sess. (Colo. 2017); *Misdemeanor Sentencing Trends*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 29, 2019), <https://www.ncsl.org/civil-and-criminal-justice/misdemeanor-sentencing-trends> ("In 24 states the maximum penalty for a misdemeanor is up to one year of incarceration.").

133. COLO. REV. STAT. § 13-10-113(1)(a) (2024); *see also* Kelly Cunningham, *Colorado Limits Immigration Consequences of a Criminal Record*, COLLATERAL CONSEQUENCES RES. CTR. (July 2, 2019), <https://ccresourcecenter.org/2019/07/02/colorado-limits-immigration-consequences-of-a-criminal-record/>.

134. COLO. REV. STAT. § 13-10-113(1)(a) (2024).

135. *See id.*

136. *Misdemeanor Sentencing Trends*, *supra* note 132.

One goal behind amending Colo. Rev. Stat. § 13-10-113 was to reduce maximum jail time for misdemeanors, and in turn reduce the number of automatic immigration consequences.<sup>137</sup> But, if a municipal ordinance concerns a purely local matter and is not in conflict with state statute, the municipal ordinance will supersede the state statute.<sup>138</sup> Further, if the only difference between the state crime and the municipal ordinance is that the ordinance has stricter punishment or a more elevated mens rea than the state crime, both would be allowed to exist. Similarly, because municipalities have discretion to set mens rea requirements, the same crime can be classified as a CIMT in one city and not another. Thus, it is entirely plausible that a criminal conviction in a home rule ordinance could trigger immigration consequences even though conviction for the corresponding crime under state law would not trigger these consequences.

Colorado law and the Colorado legislature are currently more favorable to non-citizens and their status than in previous years. Home rule codes mostly match the elements and punishments in the Colorado Revised Statutes.<sup>139</sup> However, there are still noticeable departures. Although progressives control the legislature today, that does not mean that progressive and immigrant-friendly lawmakers will always control the legislature.<sup>140</sup> There should be protections to preserve legislative intent. Even if municipalities want to change their regulations, they should be preempted because a state's ability to set immigration policy, even in home rule cities, is of mixed local-and-state concern. Immigration consequences are often counterintuitive. A specific intent crime may be harder to convict; but pleading to a specific intent crime, as opposed to a general intent crime, triggers immigration consequences.<sup>141</sup> If a municipality changes its code in ways that create harsher immigration consequences, they should be seen as conflicting with state law.

The state legislature changed mandatory maximums in 2019 in part to protect immigrants and their status in Colorado.<sup>142</sup> Allowing home rule cities to run counter to legislative intent complicates equal protection by creating hyper-localized differences in immigration consequences. These consequences are then unevenly enforced by local courts—an improper challenge to state supremacy.

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137. Cunningham, *supra* note 133.

138. City and County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990).

139. Compare COLORADO SPRINGS, COLO., CODE ch. 1, § 1.1.201 (2023), with COLO. REV. STAT. § 13-10-113(1)(a) (2023).

140. See Daniel Ducassi & Jesse Paul, "A Fighting Tone": Colorado Republicans Are Heading Into the 2022 Legislative Session on the Offensive, COLO. SUN (Jan. 13, 2022, 4:00 AM), <https://coloradosun.com/2022/01/13/colorado-legislature-2022-republicans/>.

141. See generally Meyer, *supra* note 22.

142. LEGISLATIVE COUNCIL STAFF, H.B. 19-1148: FISCAL NOTE, 1st Sess., at 1 (Colo. 2019).

## III. ANALYSIS

*A. Issues with Preemption: Colo. Rev. Stat. § 13-10-113*

In Colorado, home rule municipalities have the potential to counteract the legislative intent behind maximum sentence reform, especially for misdemeanors. Currently, little to no literature addressing this issue exists.<sup>143</sup> A logical mechanism to solve this issue would be for state courts to hold that immigration consequences are not a matter of purely local concern. This would mean any local law or ordinance that triggers immigration consequences is, at minimum, a matter of mixed state-and-local concern. Thus, state law would preempt home rule to better protect both documented and undocumented immigrants.

If a non-citizen is convicted of two CIMTs immigration consequences automatically begin.<sup>144</sup> If a non-citizen is convicted of a crime carrying a maximum sentence of one year or more in jail, immigration consequences automatically begin.<sup>145</sup> Therefore, there are two ways home rule ordinances could create immigration proceedings that are inconsistent with current state law. The first is writing criminal codes to include a mens rea of recklessness, regardless of the correlating jail time. The second is to extend the maximum penalty for misdemeanors to the full 365-day penalty.

For example, from 1992 through 2018, under Colo. Rev. Stat. § 13-10-113 the maximum penalty for violating a misdemeanor level offense was “a period not to exceed one year.”<sup>146</sup> Most home rule municipalities in Colorado have followed the spirit of the statute.<sup>147</sup> In Denver, municipal ordinances carry a maximum sentence of 364-days; in Colorado Springs, municipal ordinance violations carry a maximum sentence of 189-days.<sup>148</sup> Aurora imposes a maximum sentence for municipal ordinance violations of up to 364-days.<sup>149</sup> However, the municipal code of the home rule cities Grand Junction, Los Animas, Saquache, and San Luis all allow imprisonment for municipal offenses “up to one year” or for 365-days.<sup>150</sup> The difference between a 364-day penalty and 365-day penalty is whether or not immigration proceedings are initiated.

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143. The Colorado Supreme Court has addressed conflicts between state law and local ordinance. *City of Longmont v. Colorado Oil & Gas Ass’n*, 369 P.3d 573, 579 (Colo. 2016). The court has also heard cases about the right to counsel for non-citizens. *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987). However, the court has not had any cases addressing differences in immigration consequences in different municipalities since new legislation was passed in 2017.

144. See 8 U.S.C. § 1227(a)(2)(A)(ii).

145. 8 U.S.C. § 1227(a)(2)(A)(i)(II).

146. COLO. REV. STAT. § 13-10-113(1)(a) (2018).

147. See, e.g., AURORA, COLO., CODE ch. 1, art. I, § 1-13(a) (2023).

148. DENVER, COLO., CODE ch. 1, § 1-13 to 1-14; COLORADO SPRINGS, COLO., CODE ch. 1, § 1.1.201(B) (2023).

149. See AURORA, COLO., CODE ch. 1, art. I, § 1-13(a) (2023).

150. GRAND JUNCTION, COLO., CODE title 1, ch. 1.04.090 (2023) (“Any person 18 years of age or older . . . shall be subject to a fine of up to \$1,000 and/or up to one year in jail or any combination



Furthermore, CIMTs are determined by the level of culpability of the offense.<sup>151</sup> Home rule city ordinances are not preempted when the ordinances' punishment goes beyond that of state statute,<sup>152</sup> although "state residents have an expectation of uniformity in local criminal laws."<sup>153</sup>

Colo. Rev. Stat. § 13-10-103 is the statute which applies Colo. Rev. Stat. § 13-10-113.<sup>154</sup> Colo. Rev. Stat. § 13-10-103 empowers municipal courts to create ordinances and court rules, limited to some exceptions. Colo. Rev. Stat. § 13-10-103 is protected by the Colorado Constitution.<sup>155</sup> It states:

This article 10 applies to and governs the operation of municipal courts in the cities and towns of this state. Except for the provisions relating to the method of salary payment for municipal judges, the incarceration of children . . . the appearance of the parent, guardian, or lawful custodian of any child under eighteen years of age who is charged with a municipal offense as required by section 13-10-111, the right to a trial by jury for petty offenses . . . relief from improperly entered guilty pleas . . . rules of procedure promulgated by the supreme court, and appellate procedure, this article 10 may be superseded by charter or ordinance enacted by a home rule city.<sup>156</sup>

Therefore, the provisions of article 10, including § 13-10-103, apply to municipal courts, but any of the provisions except § 13-10-111, may be superseded by charter or ordinance enacted by a home rule city.<sup>157</sup> Thus, the maximum sentence limit of 364-days applies to a home rule city unless the home rule city has superseded the maximum sentence by charter or ordinance.<sup>158</sup>

### *B. Discrepancies in Application Across Home Rule Jurisdictions*

Colo. Rev. Stat. § 13-10-113 was a win for immigration reform on the state and municipal level; however, its effectiveness in home rule cities is a house of cards which depends on the political composition of local electorates. Denver and Grand Junction are two of the largest cities in Colorado. Yet, a maximum sentence in Denver for a misdemeanor would not

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thereof unless a specific fine is expressly provided."); LOS ANIMAS, COLO., CODE ch. 1, § 1-6 (2023) ("Any person who shall be convicted . . . shall be punished by a fine . . . or by imprisonment in jail not exceeding three hundred sixty-five days."); SAGUACHE, COLO., CODE ch. 1, art. 4, § 1-4-20 (2023) ("Any person who violates or fails to comply . . . shall . . . be punished by a fine . . . or by imprisonment not exceeding one year."); SAN LUIS, COLO., CODE ch.1 § 1.09 (2023) ("Any person who violates . . . this Code . . . shall . . . be punished . . . by imprisonment not exceeding one (1) year.").

151. See Meyer, *supra* note 22, at 19.

152. See C.R.S § 13-10-103; C.R.S § 13-10-113; DENVER, COLO., CODE ch. 1.

153. City & County of Denver v. State, 788 P.2d 764, 768 (Colo. 1990).

154. "This article 10 applies to and governs the operation of municipal courts in the cities and towns of this state. Except for the provisions relating to the method of salary payment for municipal judges . . . this article 10 may be superseded by charter or ordinance enacted by a home rule city."

155. See *id.*

156. *Id.*

157. *Id.*

158. See sources cited *supra* note 150; COLO. REV. STAT. § 13-10-113(1)(a) (2024).

trigger the same consequences as a maximum sentence in Grand Junction.<sup>159</sup>

Generally, any crime with a year of jail time is considered a significant misdemeanor<sup>160</sup> for immigration purposes. One consequence of being convicted of a significant misdemeanor is its impact on relief from removal. Relief is critically important to non-citizens because “there are various statutory avenues for undocumented immigrants to obtain status as well as statutory defenses to removal for [Lawful Permanent Residents (LPR)] other non-citizens with valid immigration status.”<sup>161</sup> Some of these forms of relief “include adjustment of status to become an LPR by virtue of a qualifying family relationship, cancellation of removal, or persecution-based defenses to removal such as asylum.”<sup>162</sup> The Deferred Action for Childhood Arrivals (DACA), is one of the most recognizable programs offering relief from removal.<sup>163</sup> However, non-citizens become ineligible for relief if “convicted of a felony, a significant misdemeanor, or three or more non-significant misdemeanors.”<sup>164</sup>

Similarly, any conviction of a CIMT that has a penalty of over one year in jail immediately triggers deportation grounds.<sup>165</sup> Thus, a conviction in a home rule city like Grand Junction or Los Animas, which can punish misdemeanors with up to 365-days in jail, has different immigration consequences than other home rule cities. Once a home rule charter is certified, the municipality has the power to legislate or control, “imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.”<sup>166</sup> Thus, home municipalities have autonomy to set the elements of crimes in their cities,<sup>167</sup> leading to discrepancies between local ordinances. In writing legislation, home rule cities can create specific intent, and set the requisite mens rea to make a crime qualify as a CIMT.

For example, Denver and Aurora have different intent requirements for crimes involving obstruction of school or university operations. Denver classifies such violations as “[u]nlawful acts in or about schools, colleges or universities.”<sup>168</sup> To violate the Denver code, one must “knowingly

159. Compare DENVER, COLO., CODE ch. 1, § 1-13 to 1-14, with GRAND JUNCTION, COLO., CODE title 1, ch. 1.04.090 (2023). Due to the recency of the statute, this issue has received little attention by the courts, and the intersection between home rule ordinances, state statute, and immigration consequences remains almost entirely unresolved by Colorado case law.

160. See Meyer, *supra* note 22, at 20.

161. *Id.* at 19.

162. *Id.* (footnotes omitted) (citing 8 U.S.C. § 1255(a); 8 U.S.C. § 1229b(b); 8 U.S.C. § 1158).

163. See *id.* at 20.

164. *Id.* (footnote omitted) (citing *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA> (last visited Mar. 19, 2024)).

165. See Brady, *supra* note 12, at 6.

166. COLO. CONST. art. XX, § 6; COLO. CONST. art. XIV, § 16; see generally COLO. CODE REGS. §§ 35-30 (2022); see also COLO. REV. STAT. § 31-2-201 (2022); see also COLO. REV. STAT. § 30-11-501 (2024).

167. COLO. CONST. art. XIV, § 16; see COLO. CONST. art. XX, § 6.

168. DENVER, COLO., CODE § 38-94 (2023).

or recklessly prevent the orderly conduct of the activities, administration or classes of any school, college or university.”<sup>169</sup> However, Aurora categorizes the same behavior under the broader crime of disturbing the peace, which has no mens rea requirement.<sup>170</sup>

If Denver imprisoned misdemeanor offenses up to 365-days, an unlawful act at a school or university in Denver would trigger deportation or inadmissibility effects for a non-citizen. The same crime would not trigger immigration consequences in Aurora. Conversely, city code violations in Aurora that would be charged as disorderly conduct would trigger immigration consequences as CIMTs, but the same behavior would not trigger immigration consequences in Denver. Non-citizens should not face drastically different immigration consequences based on variations across home rule codes, and lawyers representing non-citizens should not have to drastically modify the way they represent their clients in two different cities that share a border.

However, there are legitimate interests in preserving a home rule city’s ability to set criminal punishments within their boundaries. Article XX of the Colorado Constitution unambiguously states home rule cities “have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.”<sup>171</sup> The Colorado Municipal League argues that home rule is the “embodiment of the principle that the best government is the one that is closest to the people.”<sup>172</sup> Citizens of a local municipality are more affected by local issues than national issues. Limiting the authority home rule cities have over non-citizens in their cities could have adverse immigration issues as well. Cities like Denver have created more liberal laws protecting non-citizens.<sup>173</sup> The political composition of the state legislature ebbs and flows just as regularly as home rule city councils.<sup>174</sup> Conservative cities have the power to limit legal rights for non-citizens, however, giving this power exclusively to the state legislature does not eliminate the possibility of future state legislatures creating more draconian punishments for non-citizens.

### C. *The Right to Effective Counsel*

Non-citizens’ legal rights are complicated by home rule governance. In home rule jurisdictions, municipal ordinances are allowed to vary from

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169. *Id.*

170. AURORA, COLO., CODE § 94-107 (2019).

171. COLO. CONST. art. XX, § 6.

172. Sam Mamet, *Overview of Colorado Municipal Home Rule*, COLO. MUN. LEAGUE (2018), [https://www.cml.org/docs/default-source/uploadedfiles/issues/home-rule/home-rule-forum-presentation.pdf?sfvrsn=c4a07177\\_0](https://www.cml.org/docs/default-source/uploadedfiles/issues/home-rule/home-rule-forum-presentation.pdf?sfvrsn=c4a07177_0).

173. Faith Miller, *2021 Brought Progressive Immigration Policies to Colorado*, COLO. NEWSLINE (Nov. 17, 2021, 4:55 AM), <https://coloradonewsline.com/2021/11/17/2021-progressive-immigration-policies-colorado/>.

174. See Ducassi & Paul, *supra* note 140.

state statutes<sup>175</sup> which may affect a non-citizen's right to counsel as guaranteed by *Padilla v. Kentucky*<sup>176</sup> and principles of equal protection.<sup>177</sup>

As currently constructed, home rule autonomy both subverts the right to counsel guaranteed by *Padilla* and the rights of non-citizens, and places unnecessary burdens on lawyers who try to help them. Colorado lawyers have an obligation to provide proper legal advice to their clients.<sup>178</sup> In *People v. Pozo*,<sup>179</sup> the Colorado Supreme Court found that failure to advise a non-citizen defendant of potential immigration consequences, specifically for criminal convictions, may result in ineffective assistance of counsel.<sup>180</sup> In *Padilla*, the Supreme Court held that, “[T]he Sixth Amendment requires defense counsel to provide affirmative and competent legal advice to noncitizen defendants regarding the potential immigration consequences of a guilty plea.”<sup>181</sup>

*Padilla* creates a national obligation for lawyers to provide effective counsel. *Pozo* creates a state-wide requirement for all Colorado lawyers to provide non-citizens with effective counsel for criminal cases.<sup>182</sup> Colorado lawyers have an obligation to “inform [their] client whether [their] plea carries a risk of deportation.”<sup>183</sup> *Pozo* further established that Colorado lawyers are held to “objective standards of minimally acceptable levels of professional performance prevailing at the time of the challenged conduct.”<sup>184</sup> However, whether requisite knowledge of several different municipal codes is considered a minimally acceptable level of professional performance is a question that has not been considered by the Court.

As the law currently stands, lawyers must stay informed on increasingly complicated immigration consequences to provide effective counsel.<sup>185</sup> In response, the Office of the Colorado State Public Defender (OSPD) is in the process of hiring immigration experts to help public defenders determine the potential immigration consequences that might result from their clients' charges.<sup>186</sup> Due to the high volume of criminal cases handled by OSPD, even competent public defenders might let immigration consequences fall through the cracks. In 2010, the Census of the Public Defender's Office determined that on average public defenders in

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175. BERNARD, *supra* note 4.

176. 559 U.S. 356 (2010).

177. *Id.*; COLO. REV. STAT. § 18-1-417 (2024).

178. See *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010).

179. 746 P.2d 523 (Colo. 1987).

180. *Pozo*, 746 P.2d at 529.

181. Hans Meyer, *Padilla v. Kentucky: The Duty of Defense Counsel Representing Noncitizen Clients*, 40 COLO. LAW., Mar. 2011, at 37 (citing *Padilla*, 559 U.S. at 373–74).

182. See *Pozo*, 746 P.2d at 529.

183. *Padilla*, 559 U.S. at 374.

184. *Pozo*, 746 P.2d at 527.

185. See generally MODEL RULES OF PRO. CONDUCT RULE 1.1 (AM. BAR ASS'N 1963).

186. *Immigration Specialist, State Public Defender*, NAT'L LEGAL AID & DEFENDER ASSOC'N, <https://www.nlada.org/node/53041>, (last visited Dec. 27, 2023).

Colorado have over 200 cases assigned to them each year<sup>187</sup>—the most in the country.<sup>188</sup> The sheer volume of criminal cases seen by public defenders makes it almost impossible to provide effective counsel regarding immigration consequences.<sup>189</sup>

Different municipal codes in neighboring cities should not drastically affect how lawyers, who often represent clients in different cities, need to prepare legal defenses. If Denver or Aurora changed their municipal maximum to 365-days, the sister cities may have drastically different immigration consequences. Aurora and Denver share borders and comprise much of the Denver-metropolitan area.<sup>190</sup> The two cities account for almost half of the 2,900,000 people that live in the metro-area.<sup>191</sup> Outside of Denver and Aurora, in the metro-area alone more than fifteen other cities have home rule charters.<sup>192</sup> These cities include: Arvada, Boulder, Brighton, Centennial, Cherry Hills, and Glendale.<sup>193</sup> Therefore, all of these cities, despite their proximity, could have entirely different ordinances; these ordinances could trigger different immigration consequences for municipal convictions.

Therefore, lawyers who practice in the area could reasonably expect to have clients that live in any municipality. Close to 8,000 lawyers practice in the Denver area.<sup>194</sup> According to the Colorado Office of Attorney Regulation Counsel, about half of Colorado's lawyers are either solo practitioners, or work in small to medium sized private practices.<sup>195</sup> While this data does not account for immigration and criminal lawyers specifically, hundreds of lawyers are potentially implicated.<sup>196</sup>

Home rule codes that conflict with state statutes should be a matter of mixed state-and-local concern, and should be preempted by state statute

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187. DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS., SPECIAL REP., STATE PUBLIC DEFENDER PROGRAMS, 2007, at 12 (September 2010), <https://bjs.ojp.gov/content/pub/pdf/spdp07.pdf>.

188. *Id.*

189. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?mtref=undefined&gwh=A5566C01DB1A6C12C4F04BF58F660C60&gwt=pay&assetType=PAYWALL>.

190. *Denver Metro Maps and Communities*, METRO DENVER EDC, <https://www.metrodenver.org/do-business/communities> (last visited Dec. 27, 2023).

191. *Population of the Denver-Aurora-Lakewood Metro Area in the United States from 2010 to 2021*, STATISTA, <https://www.statista.com/statistics/815282/denver-metro-area-population/> (last visited Dec. 27, 2023); *QuickFacts: Aurora city, Colorado; Denver County, Colorado*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/auroracitycolorado,denvercountycolorado/POP645222> (last visited Dec. 27, 2023).

192. *Active Colorado Municipalities*, COLO. DEP'T OF LOC. AFFAIRS, <https://dola.colorado.gov/lgis/municipalities.jsf> (last visited Dec. 27, 2023).

193. *Id.*

194. *See 2020 Annual Report*, COLO. OFF. OF ATT'Y REGUL. COUNS. 1–2, <https://coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2020%20Annual%20Report.pdf> (last visited Dec. 27, 2023).

195. *Id.* at 58.

196. *See id.*

because they cause undue burden for lawyers, courts, and non-citizens at both local and state levels.

#### D. Equal Protection

“The Equal Protection Clause of the Fourteenth Amendment provides that no state shall ‘deny to any person within its jurisdiction the equal protection of the laws[;]’ [a]lthough the Colorado Constitution does not contain an identical provision, the due process clause of the Colorado Constitution provides a similar guarantee.”<sup>197</sup> When an equal protection challenge is raised for treating two groups differently, the first question is whether those groups are similarly situated.<sup>198</sup> The two groups must be similarly situated for the analysis to continue.<sup>199</sup> Here, the two groups would be a convicted non-citizen in one home rule city versus a convicted non-citizen in another home rule city. These groups should be seen as similarly situated by the Court.

Next, the level of scrutiny depends on the type of classification used and the nature of the right affected. Non-citizens, despite their legal status, are considered a protected class.<sup>200</sup> Therefore, courts should use strict scrutiny and the compelling interest test.<sup>201</sup> Home rule legislation may further a compelling governmental interest—self-governance is a fundamental right and home rule autonomy has been protected by the Colorado Constitution for over 100 years<sup>202</sup>—however, the enumerated rights, as they are now, are not narrowly tailored to fit that interest. Home rule can still exist and not compromise non-citizens’ immigration status, home rule’s effect on immigration can simply be legislated out. The state or the courts could rely on equal protection or preemption to remove the effect of a municipal conviction on a person’s immigration statutes.

### IV. PROPOSED SOLUTIONS

Reimagining how the state and nation view the intersections of crime, immigration, and punishment is beyond the scope of this Comment. However, changing long-entrenched views toward crimmigration law is a more difficult task than writing new legislation; “reformulating law, policy, and policing . . . is the easy part . . . .”<sup>203</sup>

197. *People v. Castillo*, 510 P.3d 561, 566 (Colo. App. 2022) (quoting the Equal Protection Clause, U.S. CONST. amend. XIV).

198. *Id.*

199. *Id.*

200. *See, e.g., Preventing Discrimination*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9-central/employee-rights-and-resources/preventing-discrimination#:~:text=Employers%20cannot%20discriminate%20when%20hiring,from%20this%20type%20of%20discrimination>. (last visited Mar. 25, 2024); *Types of Discrimination*, U.S. DEP’T OF JUST.: CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/types-discrimination> (last visited Mar. 25, 2024); COLO. CONST. art. XX, § 6 and art. XIV, § 16; *see* COLO. REV. STAT. § 31-2-201, § 30-11-501.

201. *Evans v. Romer*, 854 P.2d 1270, 1283 (Colo. 1993).

202. *See id.* at 1275–76; *see* COLO. CONST. art. XX, § 6 and art. XIV.

203. *Hernández, supra* note 1, at 250.

An on-point case would give the Colorado Supreme Court the opportunity to recognize that any law that affects immigration consequences is not of purely local concern. Alternatively, a constitutional amendment would ensure all immigration consequences are definitively established by the state. Any discrepancies in home rule laws would be immediately superseded by state law. Not only would this protect non-citizens in Colorado, but it would also create more uniformity in a notoriously nuanced area of law. Finally, further protections for non-citizens convicted of misdemeanors does not limit home rule cities from increasing felony convictions. Municipalities still have the legal ability to get around the protections described in this Comment by charging non-citizens with felonies as opposed to misdemeanors.

A more attainable solution is to create state uniformity for CIMTs. The state legislature could pass new legislation that removes the mens rea element from CIMTs. The state, with assistance from immigration attorneys and civil rights activists, could create a definitive list of what offenses Colorado considers CIMTs without infringing on home rule municipalities' autonomy to set criminal punishments within their borders. An agreed upon list of CIMTs would ensure less guess work and gray area for attorneys and non-citizens. Attorneys would then be able to advise non-citizen clients about the immigration consequences of their cases without having to consider different sentencing requirements of different home rule municipalities.

More radical solutions include changing the legal ramifications of being charged with a CIMT or significant misdemeanor. Reducing charges that often lead to detention would reduce the number of non-citizens incarcerated and weaken “[an] apparatus [that] is by far the largest system of formally nonpunitive confinement in the United States.”<sup>204</sup> CIMTs and significant misdemeanors do not need to automatically initiate immigration proceedings, but instead, could initiate a less invasive form of monitoring, such as a migrant probationary period.

The increase in non-citizen confinement is staggering: “[I]n 1955 the government held just four people in immigration-related custody; by 2001, more than 200,000 people were being confined each year. And by 2011, that total had nearly doubled—more than 400,000 people were confined.”<sup>205</sup> This change could keep hundreds of thousands of people out of confinement and keep hundreds of thousands of non-citizens' dreams of citizenship alive. The use of supervision could “strike[] a balance between

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204. René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is A Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 959 (2019) (posing the question “Should we, instead, be aiming to implement a system of civil supervision, instead of detention as some have proposed?”).

205. *Id.* at 961 (citations omitted); see also Hernández, *supra* note 1, at 198.

the government's widely accepted need to execute and enforce the nation's immigration laws and the inherently punitive nature of confinement."<sup>206</sup>

Streamlining home rule and state policy is a minor fix to a larger crimmigration issue. Wholesale policy reform is an ambitious task. While crimmigration's putative policies developed quickly, non-putative developments should not be abandoned because as "cimmigration's past suggests . . . radical shifts are possible, even in relatively short periods of time."<sup>207</sup>

#### CONCLUSION

Over the last decade, Colorado has passed criminal sentencing reforms with non-citizens and their immigration status in mind. However, the autonomy given to home rule cities creates too much variation in immigration law enforcement. By preempting home rule codes that conflict with state immigration goals, Colorado can protect its non-citizens and give immigration and criminal lawyers a more even playing field to protect their clients. More importantly, recognizing immigration status as a matter of mixed state-and-local concern would protect non-citizens' right to work, live, and thrive in the communities they call home.

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206. Lima-Marín & Jefferis, *supra* note 204, at 970.

207. Hernández, *supra* note 1, at 252.

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