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Activism on Immigration by U.S. States Is Back, with New Tactics and Different Targets

JUNE 28, 2023 POLICY BEAT | By Muzaffar Chishti and Julia Gelatt



Florida Governor Ron DeSantis at a conference in Tampa. (Photo: Gage Skidmore)

State governments across the United States are energetically reviving a nearly two-decade-old trend of activism on immigration, displaying diverging approaches towards unauthorized immigration. While sharing some touchstones with the previous era, best defined by Arizona's Senate Bill (SB) 1070 "show me your papers" law of 2010, this recent resurgence in state actions is notably different in key ways. For example, for the first time, states have bused and flown migrants encountered at the U.S.-Mexico border to cities in the U.S. interior to make political points. And heeding the call of the Texas governor, states across the country have dispatched National Guard units to the border. Some states

have adopted restrictive legislation and an active litigation strategy as part of their response to federal immigration policies and record migrant encounters at the U.S.-Mexico border.

At the vanguard of this activism are Florida and Texas, which this year enacted laws intended to discourage the presence or entry of unauthorized immigrants. Florida's new law is particularly far-reaching, enacting penalties for unauthorized immigrant workers, their employers, and people transporting unauthorized immigrants into the state, as well as new mandates requiring hospitals that accept Medicaid to ask patients about their legal status.

These new restrictions are only one side of the coin. In contrast, Minnesota, Utah, and other states have provided various rights and protections to unauthorized immigrants and recipients of quasi-legal statuses under the Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) programs, which offer work authorization and protection from deportation. These state expansions include access to driver's licenses, public benefits, professional certifications, and college tuition assistance.

As states continue to diverge in their approaches towards immigration—and increasingly to challenge each other over their actions—the nationwide landscape of policies and actions becomes ever more fractured.

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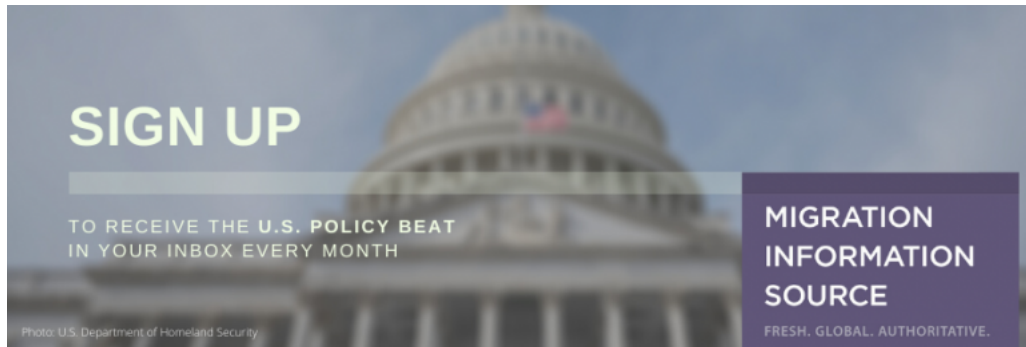
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The Florida and Texas laws follow several years of quiet amid backlash to the earlier era of restrictive policies and extensive litigation, which began in the late 2000s. After SB 1070 spawned copycat laws in states such as Alabama and Georgia, courts blocked key legislative measures, business groups revolted as segments of their workforce disappeared, and strong pushback brought political and economic consequences.

In an increasingly polarized country, it is unclear whether the backlash will be as strong this time around. Many new moves seem motivated by governors' national political ambitions. And with a change in the composition of the Supreme Court and other courts, it is less certain whether the litigation outcomes will track with past court decisions. This article reviews the growing activism and deepening divide in state approaches to immigration policy.



Sweeping New Restrictions in Florida

Two weeks before announcing his presidential campaign in May, Florida Governor Ron DeSantis (R) signed a far-reaching law restricting the rights and mobility of unauthorized immigrants and amplifying the state's role in immigration enforcement. The law's provisions include:

- Making it a felony to transport into Florida migrants who entered the country without authorization and were not inspected by federal authorities.
- Requiring hospitals that accept Medicaid to ask patients about their citizenship and immigration status. Hospitals must submit quarterly reports to state authorities on the number of patients served in each citizenship and status category, without providing identifying information.
- Making hiring unauthorized immigrants unlawful under state law, mirroring a federal prohibition.
- Imposing fines and possible jail time on unauthorized immigrants using false documents to obtain employment.
- Requiring employers with at least 25 employees to use the federal government's electronic work authorization verification system, E-Verify, to screen all new hires starting July 1. Previously, the state mandated E-Verify only for the government and its contractors.
- Allocating \$12 million to transfer migrants to other parts of the country, including from states other than Florida. DeSantis came under fire from some critics in 2022 when the state paid to pick up 48 migrants in Texas and fly them to Martha's Vineyard, MA.
- Authorizing state law enforcement agencies to audit businesses to investigate employment practices, impose fines, and revoke licenses of those not in compliance with the law.
- Prohibiting localities from funding the creation of identification cards for unauthorized immigrants and deeming invalid unauthorized immigrants' driver's licenses from other states. This provision also makes unauthorized immigrants (and DACA holders) ineligible to practice law in the state by 2028.

This law comes as Florida receives a disproportionate share of migrants entering through the U.S.-Mexico border or via new parole programs. Many newly arriving Cubans, Haitians, Nicaraguans, Venezuelans, and other South Americans have flocked to Florida, where a wide range of Caribbean and Latin American diaspora communities are established. Florida was the top state for asylum filings in immigration court in fiscal year (FY) 2022 and the first two months of FY 2023.

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The law also comes as DeSantis focuses on his presidential campaign. Some see the actions in Florida, where the GOP holds a supermajority in the Legislature, as a winning Republican campaign strategy to hold President Joe Biden and other Democrats responsible for record high numbers of Southwest border encounters.

Florida's prior efforts to strengthen immigration enforcement were more limited in scope. In 2019, the state enacted a law requiring local authorities to cooperate with federal immigration enforcement efforts, barring so-called sanctuary policies. The Eleventh U.S. Circuit Court of Appeals in April overturned a lower court's block of that law, allowing it to take force. A 2022 law requires local jails and other detention facilities to sign 287(g) agreements with U.S. Immigration and Customs Enforcement (ICE), deputizing local law enforcement to identify removable noncitizens and issue detainers and notices to appear (NTA) in immigration court.

The latest law has met sizable criticism. The civil rights group League of United Latin American Citizens (LULAC) issued its second ever advisory recommending against travel to the state. Business leaders have warned the law could impact agriculture, construction, and hospitality industries that often rely on unauthorized immigrant workers. Advocates organized a "Day without Immigrants" general work stoppage on June 1. It remains unclear what impact the new law will have on Florida's workforce or employers.

Texas Amps Up its Crackdown on Unauthorized Immigration

Following a special legislative session called by Governor Greg Abbott (R), Texas this month enacted six laws focused on immigration and border security. Among other aspects, these laws:

- Deputize U.S. Border Patrol agents who complete relevant training to search and arrest people suspected of violating state law.
- Authorize the governor to create a compact with other states to share border security intelligence and resources.
- Allow the Texas National Guard to use drones for monitoring the border and other purposes.
- Create a training program for local law enforcement agents on identifying and preventing transitional criminal authorities.
- Designate Mexican drug cartels and gangs as foreign terrorist organizations.
- Allocate funding to compensate farmers for property damage from border smuggling or trafficking.

The Texas Legislature originally had more ambitious plans. Lawmakers advanced bills this year to create a state border police force, make crossing the Mexico-Texas border without authorization a state crime, and raise penalties for people convicted of smuggling migrants. However, differences in bills between the two chambers were not reconciled in time to be sent to the governor to sign, including during a special session. It is unclear whether they will be resolved in a future special session.

The measures signed into laws build on Operation Lone Star, a \$4 billion border security initiative launched in 2021 through which Texas National Guard members and Department of Public Safety staff have been deployed to the border to arrest trespassers on private property and aid arrests related to drug and human smuggling, among other measures. The initiative has also resulted in more than 384,000 migrant apprehensions and 29,000 arrests as of this month, according to the governor's office, although critics charge these tallies include unrelated enforcement actions and those that would have occurred without the operation.

Texas made an earlier foray into state-led immigration enforcement in 2017 with SB 4, which blocks local sanctuary policies and allows local police to question the immigration status of noncitizens who are arrested or detained. Cities and counties sued to block the law, but in 2018 the Fifth U.S. Circuit Court of Appeals allowed most of its provisions to stand while the case continues at the lower court. This April San Antonio paid \$300,000 and agreed to revise its policing to settle allegations it violated SB 4.

States Extending Protections to Immigrants

Recent months have also seen new laws expanding the rights and benefits of unauthorized immigrants and those in quasi-legal statuses. As part of a major push following Democratic takeover of its Legislature this year, Minnesota created new college tuition support for all students in low-income families, regardless of immigration status. Lawmakers also made all residents eligible for driver's licenses regardless of status, reversing a 2003 law to do so. Rhode Island and Massachusetts enacted similar policies last year. Nineteen states and Washington, DC now offer such licenses, up from just three in 2012.

The move towards expanding rights is not simply a Democratic one. Utah, a Republican-controlled state, this year committed to offering in-state college tuition to immigrants who hold or have applied for asylum, humanitarian parole, refugee status, a special immigrant visa (SIV), or TPS. This builds on a 2002 law offering in-state tuition to students graduating from a Utah high school and meeting other conditions, regardless of status. Voters in Arizona last year approved a similar proposition offering in-state tuition at public colleges and universities to high school graduates regardless of status, reflecting a major shift in the state's immigration politics. As of this writing, at least 23 states and the District of Columbia offer in-state tuition to students regardless of immigration status.

Elsewhere, Maryland decided this year to offer health-care occupational licenses to qualified unauthorized immigrants, and last year Tennessee began allowing thousands of immigrants in quasi-legal status to obtain professional licenses. The moves are part of a broader trend; about a dozen states have made professional licenses available to people without permanent status but who hold work authorization, including asylum seekers, DACA and TPS holders, and parolees.

New Mexico also passed a law this year increasing the age at which migrant children who have experienced parental abuse, abandonment, or neglect can apply for Special Immigrant Juvenile status, from age 18 to 21. And California is in the process of expanding state-funded public health insurance to all immigrants ineligible for federal public insurance. Since 2020, eight states and Washington, DC have opened their state Earned Income Tax Credits to tax filers who do not have Social Security numbers.

A Creative Turn to Multiple Strategies

States have diversified their strategies to advance their immigration aims, using not just legislation but a host of tactics to advance policy, particularly for immigration enforcement. Texas was an early leader in suing the federal government over immigration, leading a group of 26 states against the Obama administration over an expansion of DACA and a new program offering deferred action to parents of U.S. citizens and legal immigrants (Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA) in 2014. Democrat-led states were very active in challenging the Trump administration, filing 17 multistate lawsuits focused on immigration issues. Since 2020, Texas has led lawsuits to maintain the Migrant Protection Protocols (MPP, otherwise known as Remain in Mexico) and undermine the Biden administration's attempt to narrow immigration enforcement priorities (a case the Supreme Court tossed out last week) and erect parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans, among other efforts. Florida has joined many of these lawsuits. It also sued to block federal authorities from releasing migrants from government custody with parole or NTAs.

At least 15 Republican-led states have dispatched their state National Guard to the border, as Texas has done since 2021 under Operation Lone Star. In March, Abbott requested other states assist; governors of Arkansas, Florida, Idaho, Iowa, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia have heeded the call. Florida is sending the largest number: 1,100 National Guard members and law enforcement officers as of this month. These troops join at least 4,000 troops who were deployed by Biden, including 1,500 active-duty military personnel dispatched ahead of the May end of the pandemic-era Title 42 expulsions policy and 2,500 National Guard members in place since last summer.

Texas and Arizona have constructed border barriers. Abbott's efforts to build a wall along the border have been slowed by the need to secure commitments from private landowners, but deals and construction are continuing. This month, Abbott also announced plans to install 1,000 feet of floating barriers in the Rio Grande to prevent

unauthorized crossings. Arizona's former Governor Doug Ducey (R) used shipping containers stacked two-high and connected end-to-end to fill more than 3,800 feet of gaps in the federal border fencing in his state. Federal authorities warned the barriers were trespassing on and damaging federal land, leading to mutual lawsuits and an agreement under which the state is dismantling the wall while the federal government reiterated plans to fill the fencing gaps.

In the newest tactic, state authorities last year began busing and flying migrants from the Southwest border to cities perceived as sanctuaries for immigrants, including Chicago, Denver, Los Angeles, New York City, Philadelphia, and Washington, DC, where some dropoffs occurred in front of Vice President Kamala Harris's Naval Observatory home. More than 22,000 migrants have been sent by Texas on these journeys since April 2022.

DeSantis's efforts in this regard have been smaller but nonetheless equally notable. Florida-funded flights have taken several dozen migrants from Texas to Martha's Vineyard, a Massachusetts island frequented by former President Barack Obama and other prominent Democrats, and to Sacramento, California's capital, sparking a strong reaction from Governor Gavin Newsom (D), himself a potential future presidential candidate. This month, DeSantis spearheaded the formation of a coalition of more than 90 sheriffs from multiple states to focus on border enforcement issues.

Additionally, approximately 3,000 migrants were sent from Arizona to Washington, DC in 2022, although Ducey's efforts appeared less designed to garner media attention, and the trips were coordinated with local Washington service providers. Ducey's Democratic successor, Katie Hobbs, has continued the practice. With minimal political theater, borderland service providers and the city of El Paso have also funded migrants' cross-country trips to their selected destination. Colorado briefly bused migrants to Chicago and New York, and New York City itself has bought bus and plane tickets for asylum seekers and other migrants to travel elsewhere in the state, other states, and, in a few cases, internationally.

SB 1070 Redux?

Current state activity mirrors a trend that previously peaked in the early 2010s. Colorado and Georgia in 2006 were first to pass state-level omnibus immigration enforcement bills requiring proof of legal status to access public benefits, demanding law enforcement check or report on the immigration status of people arrested for other violations, and mandating the state and its contractors use E-Verify. Colorado also banned local sanctuary policies, while Georgia encouraged police to strike immigration enforcement agreements with the federal government.

In 2007, Arizona became the first state to mandate E-Verify for all employers. Arizona also allowed the state to suspend or revoke business licenses of employers who knowingly hired unauthorized workers. The U.S. Supreme Court in 2011 upheld Arizona's law, paving the way for more states to follow. Alabama, Georgia, Mississippi, North Carolina, and South Carolina, Tennessee, and Utah passed state E-Verify mandates for private businesses between 2008 and 2011, but no others joined this group until this year.

Arizona's SB 1070 was the highest-profile law of this era. It required state and local law enforcement to question the immigration status of anyone stopped for a state law violation if they had a reasonable suspicion the person was in the country without authorization. The law allowed police to arrest and detain people who could not prove their legal status, required noncitizens to carry proof of their legal status, authorized Arizona residents to sue localities that limited or restricted enforcement of immigration law, and made it a crime to transport or harbor an unauthorized immigrant if the person knows or should know they lacked legal status, with a limited exception for child welfare workers and emergency medical care providers.

SB 1070 inspired copycat laws in Alabama, Georgia, Indiana, South Carolina, and Utah, but the Justice Department claimed it was preempted by federal law. In 2012, the Supreme Court ruled 5-3 against three of the law's provisions—state misdemeanors for failing to carry valid immigration documentation or seeking work when in unauthorized status, and the ability of local law enforcement to arrest without warrant people suspected

to be removable. However, justices upheld the provision requiring police to verify the status of people otherwise lawfully stopped whom they believe to lack legal status. In 2016, the state government entered a settlement related to that provision clarifying that officers could not prolong a stop or detention solely to verify immigration status, and prohibiting stops and arrests based on race or national origin, except when seeking a suspect matching a particular description. Two other key provisions of SB 1070 remain law: the prohibition on local sanctuary policies and allowing state residents to sue jurisdictions that limit immigration enforcement.

It remains to be seen how courts respond to the new state laws. Notably, three of the Supreme Court justices who sided against the SB 1070 provisions—Justices Stephen Breyer, Anthony Kennedy, and Ruth Bader Ginsburg—are no longer on the high court. Prior decisions on some issues raised by the new laws could potentially be overruled.

Did Laws Targeted at Unauthorized Immigration Serve State Goals?

Research on the impact of state E-Verify mandates found that more employers signed up for E-Verify in states with mandates than those without, but enrollment rates remained around 50 percent even in mandate states and were lower in industries where unauthorized immigrant workers are concentrated, such as agriculture and food service. Nevertheless, evidence from states with early and broad E-Verify mandates suggests they may have reduced the number of unauthorized immigrants in these states, with a substantial fall in Alabama, Arizona, Mississippi, and Utah. The law also seemed to push some unauthorized immigrant workers out of formal jobs and into self-employment.

However, states with omnibus immigration enforcement laws also faced sizable backlash. Civil rights groups called for boycotts of Arizona following the passage of SB 1070, driving away conventions, top performers, and others, leading to estimated losses of millions of tourism dollars. There were also political consequences: SB 1070 author and state Senator Russell Pearce (R) was recalled in 2011. Business communities began to oppose state action on immigration enforcement after these kinds of laws brought sizable losses. For example, after passage of Georgia's crackdown on unauthorized immigration in 2011, the agricultural sector experienced a labor shortage, leaving farm owners with fields of rotting crops and many millions of dollars in damages. In some cases, apparent state overreach made the laws appear silly. In Alabama, for example, a Mercedes-Benz executive visiting from Germany was arrested for driving his rental car without proper U.S. identification, creating an international stir.

Ultimately, major provisions of several of these state laws were blocked by the courts or walked back. State action on immigration enforcement came to a halt in 2012 and was dormant until Texas revived the cause in 2017 and again this year.

Paradigm Shift or Another Turn around the Circle?

The recent state actions on immigration enforcement and the concurrent spread of policies expanding access to public benefits and services are leading to a growing patchwork of immigration policies across the United States.

State activism in both directions is unsurprising given many states are increasingly experiencing the impacts of irregular migration, with millions of migrants allowed into the country over recent years to pursue protection claims in immigration court, and as the Biden administration admits growing numbers of migrants through humanitarian parole programs. Transportation to the interior, whether quietly or via high-profile charter flights, has helped disperse migrants nationwide. New York City, for example, has received about 80,000 migrants in its shelters over the past year. These patterns, combined with decades of congressional inaction on immigration, limited federal support to localities, and the politicization of immigration in national politics, seems to be invigorating state capitals to legislate on immigration and immigrant matters. The national political aspirations of governors in states particularly affected by immigration are further fueling this trend.

What comes next is unclear. These newer laws may be followed by the backlash, adverse court rulings, and harsh economic realities that after 2011 tamped down the earlier wave of activism aimed at unauthorized migration. On the other hand, as the 2024 election season heats up and as border arrivals remain high, states may embrace

immigration policymaking for at least another legislative cycle. Outcomes in the courts are equally uncertain. Many recent measures have survived legal challenges in other states, although some were struck down. But past precedents do not always hold. States may be betting this time is different.

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