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Nearly 300 Law Professors Agree that President Trump's Executive Order on "Sanctuary" Cities is Unconstitutional

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On 3/13/17, nearly 300 law professors sent a letter to President Trump demanding that he rescind section 9(a) of Executive Order 13768, Enhancing Public Safety in the Interior of the United States, due to its likely violations of the spending clause and Tenth Amendment of the U.S. Constitution.

March 13, 2017

The Honorable Donald J. Trump
The White House
1600 Pennsylvania Ave., NW,
Washington, D.C. 20502

RE: PROPOSED TERMINATION OF FUNDING TO “SANCTUARY” JURISDICTIONS UNDER EO 13768 IS UNCONSTITUTIONAL

Dear Mr. President:

The undersigned 292 constitutional, immigration, administrative law, and international law professors and scholars¹ write to share our legal conclusion that section 9(a) of Executive Order 13768 (“EO 13768”), which directs the federal government to withhold federal funding from states, counties, and cities with “sanctuary” policies, is unconstitutional. Consequently, we strongly urge your Administration to rescind section 9(a) of EO 13768.

There is no single legal definition of “sanctuary cities” or “sanctuary” jurisdictions. The term has been used to tarnish or celebrate (depending on the speaker) laws, ordinances, or policies that states, cities, and counties have opted to disentangle them from federal immigration enforcement. On January 25, 2017, you signed EO 13768, which directs the Attorney General and Secretary of the U.S. Department of Homeland Security (DHS) to designate jurisdictions who willfully do not comply with 8 U.S.C. § 1373 as “sanctuary jurisdictions,” identify the federal grants administered to those jurisdictions, and withhold funds to punish jurisdictions that do not rescind their policies.² **Based on our legal analysis of EO 13768, 8 U.S.C. § 1373, the U.S. Constitution, and relevant Supreme Court precedent, we conclude that terminating federal funding from these jurisdictions in order to coerce them to rescind their “sanctuary” policies violates the Tenth Amendment, exceeds the federal government’s powers under the Spending Clause, and exceeds the president’s powers under Article II.**

I. JURISDICTIONS HAVE INHERENT CONSTITUTIONAL AUTHORITY TO PROMULGATE “SANCTUARY” POLICIES

When states, cities, and counties promulgate “sanctuary” policies, they are exercising their reserved constitutional authority under the Tenth Amendment to promote the health, safety, and welfare of their residents.³ At their core, “sanctuary” policies are decisions by state and

¹ All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter.

² EXEC. ORDER NO. 13,768, 82 C.F.R. 8799 § 9 (2016), available at <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

³ U.S. CONST. amend. X; *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power”).

local governments about state and local priorities, particularly law enforcement priorities. Many of these policies offer the protections of equal treatment, privacy and confidentiality to community members. Some limit affirmatively sharing an individual’s immigration status, release date, or other immigration information except as required by law; others direct local law enforcement to refrain from asking victims and witnesses about immigration status; still others prohibit local authorities from investigating, arresting, or detaining individuals on immigration-related grounds. Importantly, “sanctuary” policies do not prevent federal immigration authorities from entering local jurisdictions and detaining, arresting, or deporting immigrants using federal resources and officers. More than 600 counties limit the use of their resources for the purposes of immigration enforcement and could conceivably be considered as having “sanctuary” policies.⁴

II. “SANCTUARY” POLICIES DO NOT VIOLATE 8 U.S.C. § 1373

As an initial matter, we believe that 8 U.S.C. § 1373 is unconstitutional as commandeering under the Tenth Amendment,⁵ a contention at the center of the legal challenge brought by the city of San Francisco.⁶ However, even if 8 U.S.C. § 1373 is constitutional, “sanctuary” policies do not violate 8 U.S.C. § 1373.⁷ The plain text of 8 U.S.C. § 1373 covers only information about citizenship or immigration status—not other information—and does not require state and local actors to collect *any* information regarding immigration status. 8 U.S.C. § 1373 only prohibits restrictions on the sharing of information that is collected.⁸ Under 8 U.S.C. § 1373, state and local jurisdictions “may not prohibit, or in any way restrict, any government entity or official from sending to” the federal government “information regarding the citizenship or immigration

⁴ Lena Graber, Nikki Marquez, *Searching for Sanctuary: An Analysis of America’s Counties & Their Voluntary Assistance With Deportations* 12, IMMIGRANT LEGAL RESOURCE CENTER, Dec. 2016, <https://www.ilrc.org/searching-sanctuary>.

⁵ See Ilya Somin, *Why Trump’s executive order on sanctuary cities is unconstitutional*, WASHINGTON POST, Jan. 26, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/> (“As Scalia put it in the same opinion, federal law violates the Tenth Amendment if it ‘requires [state employees] to provide information that belongs to the State and is available to them only in their official capacity.’ The same is true if, as in the case of Section 1373, the federal government tries to prevent states from controlling their employees’ use of information that ‘is available to them only in their official capacity.’”).

⁶ Compl. ¶ 75, *San Francisco v. Trump* (N.D. Cal. 2017) (“Section 1373(a) unconstitutionally regulates ‘States in their sovereign capacity.’ (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000)).”).

⁷ Unfortunately, the Executive Order has already unconstitutionally coerced at least one jurisdiction. The Mayor and county commission of Miami-Dade recently ordered jails to comply with federal immigration detainers in response to EO 13768. See Alan Gomez, *Miami-Dade Commission votes to end county’s ‘sanctuary’ status*, Feb. 17, 2017, USA TODAY <http://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976/>. Not only does the mayor and commission’s order direct local jails to violate the Fourth Amendment by complying with warrantless detainer requests, but such directive is unnecessary because the Miami-Dade ordinance, like sanctuary policies in general, does not violate 8 U.S.C. § 1373. Moreover, the mayor and county’s decision instead open Miami-Dade to legal liability in light of extensive federal court decisions that warrantless detainers are unconstitutional.

⁸ *Harbison v. Bell*, 556 U.S. 180 (2009) (looking first to plain text of statute to discern congressional intent).

status . . . of an individual” or restrict the “[m]aintaining [of] such information.”⁹ Further, nothing in 8 U.S.C. § 1373 requires jurisdictions to prolong the detention of individuals otherwise entitled to release to comply with an immigration detainer.¹⁰ Thus, “sanctuary” policies that direct local law enforcement agencies to refrain from collecting immigration information or to decline detainers requesting prolonged detention requests do not violate 8 U.S.C. § 1373.

Moreover, to the extent your administration purports to impose additional requirements beyond 8 U.S.C. § 1373 by promulgating EO 13768, such action exceeds the authority granted to the Executive under Article II to “take care that the laws be faithfully executed.”¹¹ Importantly, 8 U.S.C. § 1373 cannot, in any event, be the basis for the executive branch to create new conditions on federal grants.

III. THE EXECUTIVE’S ATTEMPTED IMPOSITION OF NEW CONDITIONS ON GRANTS EXCEEDS THE FEDERAL GOVERNMENT’S SPENDING CLAUSE AUTHORITY

Longstanding Supreme Court precedent interpreting Congress’s Spending Clause power mandates that the federal government may not impose conditions on grants to states and localities unless the conditions are “unambiguously” stated “so that the States can knowingly decide whether or not to accept those funds.”¹² Few if any federal grants to “sanctuary” cities are explicitly conditioned on compliance with 8 U.S.C. § 1373. Any such conditions must be approved by Congress and can only be applied prospectively on new grants, not retroactively to grants that have already been disbursed. The executive cannot simply make up new conditions on its own and impose them on state and local governments.

Moreover, any spending conditions must be germane to the “federal interest in [the] particular [] project or program[.]”¹³ EO 13768’s attempt to reach funding streams unrelated to immigration enforcement would violate that requirement. Finally, the federal government may not use its Spending Clause power to induce state and local government action that is itself unconstitutional.¹⁴ Any attempt to induce states and localities to violate constitutional rights—for example, by unlawfully holding individuals on immigration detainers—would be an “illegitimate exercise of the [Spending Clause] . . . power.”¹⁵

These limits on the federal government’s spending clause powers are not mere technicalities. If the President could make up new conditions on federal grants without specific, advance

⁹ 8 U.S.C. § 1373 (West 2016).

¹⁰ *See id.*

¹¹ U.S. CONST. art. II. (“he shall take Care that the Laws be faithfully executed”).

¹² *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17, 24 (1981); *South Dakota v. Dole*, 483 U.S. 203 (1986).

¹³ *South Dakota* 483 U.S. at 207-08 (1987) (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

¹⁴ *Id.* at 210.

¹⁵ *Id.* at 210-11.

congressional authorization, impose them on funding streams wholly unrelated to immigration enforcement, and induce local actors to engage in actions that are themselves unconstitutional, it would create chaos in our constitutional system. Such an executive power-grab would also usurp Congress’s legislative powers. It is Congress, not the president, which has the constitutional authority to attach conditions to federal grants.¹⁶

IV. WITHHOLDING FEDERAL FUNDING TO “SANCTUARY” JURISDICTIONS IS UNCONSTITUTIONAL UNDER TENTH AMENDMENT

Nor can the executive branch use the threat of withholding federal funding to coerce states and localities to rescind “sanctuary” policies. EO 13768 directs the Office of Management and Budget to catalogue “all Federal grant money that is currently received by any “sanctuary” jurisdiction.” Among others, the federal government administers a variety of law-enforcement grants to state and local jurisdictions under U.S. Department of Justice (DOJ) programs, including through Edward Byrne Memorial Justice Assistance Grants, State Criminal Alien Assistance Program, and Office of Community Oriented Policing Services.¹⁷ These grants are critical in the funding of public safety, crime victim and witness initiatives, and drug treatment and enforcement. The executive branch cannot, consistent with the Tenth Amendment, threaten to cut off these law-enforcement grants, much less the myriad other federal grants that states and cities receive, in order to coerce “sanctuary” jurisdictions to comply with EO 13768’s directives.

Critically, the Tenth Amendment prohibits the federal government from “commandeering” state and local government by simply forcing them to enforce federal law.¹⁸ In a case involving federal commands to state and local law enforcement, the Supreme Court held in *Printz v. United States* that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁹ The federal government can no more command a “sanctuary” jurisdiction to implement the executive’s deportation policy than it can command a state legislature to enact a statute or a state executive official to conduct background checks on gun purchasers.²⁰ Forcing counties and cities to allocate local resources, including police officers, technology, and personnel, to enforce federal immigration law by detaining immigrants, to collect and share immigration information, or otherwise participate in immigration enforcement runs afoul of the Supreme Court’s clear prohibition on commandeering. Consequently, neither Congress nor your Administration can force “sanctuary” jurisdictions to

¹⁶ U.S. CONST. art. II. (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

¹⁷ Memorandum from Matthew J. Piers, et. al, Hughes Socol Piers Resnick, & Dym, Ltd. on Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses, to Tom Cochran, The U.S. Conference of Mayors, Jan. 13, 2017, <https://www.nilc.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Resp.pdf>.

¹⁸ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁹ *Id.* at 898-900.

²⁰ *New York v. United States*, 505 U.S. 144, 166 (1992).

enforce federal immigration law by directing them to rescind their “sanctuary” policies.

Importantly, there is no exception to the Tenth Amendment that allows federal statutes and regulations to mandate the disclosure of private information about residents gathered by sanctuary jurisdictions in their sovereign capacity.²¹ In *Reno v. Condon* the Supreme Court found that requiring information sharing is permissible under the Tenth Amendment only when it “does not require [states] to enact any laws or regulations, and it *does not require state officials to assist in the enforcement of federal statutes regulating private individuals.*”²² Here, the stated goal of EO 13768 is to “employ all lawful means to *enforce* the immigration laws of the United States”²³ and obtaining the immigration status of individuals is an obvious effort to enforce federal immigration law.

The federal government may, of course, “induce” state and local actors to cooperate with federal policymakers²⁴ by “offer[ing] funds to the States, and . . . condition[ing] those offers on compliance with specified conditions.”²⁵ The use of federal funds to “induce” jurisdictions, however, is not absolute. In 2012, the Supreme Court held that when the federal government “threatens to terminate other significant independent grants as a means of pressuring the States to accept” a federal policy, that threat can become coercive, and therefore, unconstitutional.²⁶ In *NFIB*, the Court concluded that directing a cabinet Secretary, in that case the Secretary of Health and Human Services, to penalize States that did not participate in the Medicaid expansion by stripping their existing Medicaid funding, “threatened loss of over 10 percent” of the State’s budget and constituted “economic dragooning.”²⁷ States had, in the words of the Court, “no real option but to acquiesce in the Medicaid expansion.”²⁸ Moreover, the new federal policy accomplished a “shift in kind, not merely degree,” in the terms of the grant, one that states “could hardly anticipate.”²⁹

Here, the federal government provides a variety of grants and funding streams, virtually none of which, as previously stated, require jurisdictions to engage in enforcement of federal immigration law. Directing DOJ to withhold this funding unconstitutionally alters the bargain

²¹ See generally Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, (2012).

²² *Reno v. Condon*, 528 U.S. 141, 151 (2000) (emphasis added).

²³ EXEC. ORDER NO. 13,768, 82 C.F.R. 8799 § 1 (2016), available at <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

²⁴ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions.”).

²⁵ *Id.* at 2566.

²⁶ *Id.* at 2566-67.

²⁷ *Id.* at 2574.

²⁸ *Id.*

²⁹ *Id.*

the states and cities agreed to by imposing additional, burdensome—and previously unannounced—requirements that amount to coercion.

Moreover, the scope of the grants and their intersection in a variety of different state and local programs leave jurisdictions “with no real option but to acquiesce.”³⁰ Santa Clara (CA),³¹ San Francisco (CA), Chicago (IL), Providence (RI), Denver (CO), New York City (NY) would all lose approximately 10% or more of their budgets if federal funds were withheld, similar to the amount judged to be an unconstitutional coercion in *NFIB*.³² Certain jurisdictions would lose even more, with Washington, D.C. losing upwards of 25% of its budget, substantially more than the 10% loss contemplated in *NFIB*.³³

For all of the reasons above, we strongly urge your Administration to rescind section 9(a) of EO 13768. Thank you for considering the above legal analysis. If you have any questions regarding this letter, please do not hesitate to contact Jose Magaña-Salgado of the Immigrant Legal Resource Center at 202-777-8999 or jmagana@ilrc.org.

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³⁰ *Id.*

³¹ Compl. ¶ 108, *Santa Clara v. Trump*, (N.D. Cal. 2017) (“As set forth above, [Santa Clara] County receives approximately \$1 billion in federal funding per year, which amounts to more than 15% of its total budget.”).

³² Sara Rathod, *Here Are the Sanctuary Cities Ready to Resist Trump Deportation Threats*, MOTHER JONES, Dec. 2, 2016, <http://www.motherjones.com/politics/2016/11/sanctuary-city-immigration-federal-deportation-trump-threats-budget>.

³³ *Id.* (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

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