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UNITED STATES DISTRICT COURT

DISTRICT OF NORTHERN CALIFORNIA

City and County of San Francisco, Plaintiff, v. Donald J. Trump, et al. Defendants. County of Santa Clara, Plaintiff, v. Donald J. Trump, et al., Defendants.	))))))))))))	Case No. 3:17-cv-00485-WHO Case No. 3:17-cv-00574-WHO Case No. 3:17-cv-01535-WHO **PROPOSED BRIEF OF *AMICI* CURIAE STATES OF WEST VIRGINIA, LOUISIANA, ALABAMA, ARKANSAS, MICHIGAN, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS** Hon. William H. Orrick

City of Richmond,)
Plaintiff.)
v.)
)
Donald J. Trump, et al.,)
Defendants.)
_____)

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INTEREST OF *AMICI CURIAE*

The States of West Virginia, Louisiana, and eight other States[1] respectfully submit this brief of *amici curiae* in support of the United States' motions to dismiss the Plaintiffs' complaints challenging the constitutionality of Section 9(a) of the President's Executive Order 13,768, "Enhancing Public Safety in the Interior of the United States" (the "Order"). Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

Amici States have two important interests in the outcome of this litigation. *First*, as the chief legal officers of their States, the undersigned Attorneys General have an important interest in complying with federal immigration law and instructing state and local law enforcement to do the same. Sanctuary jurisdictions—cities and localities that prohibit or otherwise obstruct cooperation between federal and local officials on immigration enforcement—undermine the rule of law and deprive law enforcement of the tools necessary for effective civil and criminal enforcement. Indeed, sanctuary jurisdictions can cause harm to neighboring States—even States that have no sanctuary jurisdictions—by making it easier for people who are not lawfully in this country, and who have committed civil or criminal offenses, to evade capture by law enforcement and to travel out-of-state. For example, the City of Baltimore, which has adopted sanctuary city policies, is a significant source of illegal drugs for the Eastern Panhandle of West Virginia. Sanctuary policies deprive law enforcement in Baltimore and similar jurisdictions of important tools that could assist with preventing out-of-state drug trafficking. *Second*, the States have an important interest in ensuring that all federal immigration policy—including the directives in the Order—respect the principles of separation of powers and federalism inherent in our constitutional

[1] *Amici* are the States of West Virginia, Louisiana, Alabama, Arkansas, Michigan, Nevada, Ohio, Oklahoma, South Carolina, and Texas.

structure.

As further set forth below, *amici* States respectfully submit that Plaintiffs' facial challenge to the Order must fail because there are ways in which Congress and the President can enforce the Order while respecting the role of the States in our constitutional structure.

INTRODUCTION

In this case, Plaintiffs have mounted a pre-enforcement, facial challenge to an Executive Order concerning immigration enforcement—an area where Congress and the President have considerable power. The Order directs the Attorney General and Secretary of the Department of Homeland Security ("Secretary"), "in their discretion and *to the extent consistent with law*" (emphasis added), to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants. . . ." Exec. Order No. 13,768, 82 Fed. Reg. at 8,801. The statute cited in the Order, 8 U.S.C. § 1373 (the "Act"), prevents States from prohibiting local law enforcement from cooperating with federal officials. Plaintiffs bear the heavy burden of showing that the Order has caused them present injury and is unconstitutional in all its applications.

Plaintiffs cannot meet this burden. As an initial matter, the United States has not yet applied this Order to deny Plaintiffs any specific grant award, and the United States could not terminate or suspend an award without providing Plaintiffs with notice, an opportunity to object, and the right to appeal, as required by federal regulations. *See, e.g.*, 2 C.F.R. § 200.341. Therefore, Plaintiffs cannot show that they will be harmed by some future, speculative application of the Order.

Nor can Plaintiffs show that the Order, which applies "only to the extent consistent with law," would be unconstitutional in all its applications. To the contrary, as both Plaintiffs and the United States acknowledge, the federal government may validly place conditions on the States'

receipt of federal grant money as long as it complies with the conditions set forth by the United States Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987). *See, e.g.*, United States Mem. Supp. Mot. to Dismiss 16–20, ECF No. 111; 2d Am. Compl. ¶¶ 122–32, ECF No. 105.[2] That is, Congress must (1) legislate to promote the general welfare, (2) ensure that the States have clear notice of the relevant grant conditions, (3) ensure that the conditions relate to the purposes for which the grant issues, and (4) ensure that the inducement to accept the grant is non-coercive. While *amici* States take no position on whether any existing grant program satisfies these criteria, the *Dole* factors provide a well-established path for the federal government to attach conditions to grants to the States that would be "consistent with law." Plaintiffs therefore cannot show that the Order would be unconstitutional in all its applications, and if the federal government were to exceed its power in denying States particular sources of funding, Plaintiffs would have an opportunity to mount an as-applied challenge at that time.

Plaintiffs also argue that the Order violates the Tenth Amendment by instructing the Attorney General to "take appropriate action" against States that violate the Act—8 U.S.C. § 1373. *See, e.g.*, 2d Am. Compl. ¶¶ 149–53, ECF No. 105. This challenge is also premature, as the United States has taken no action against Plaintiffs, and if it did, Plaintiffs would have the opportunity to bring an as-applied challenge. In any event, neither the Order nor the Act present Tenth Amendment problems.

The Tenth Amendment prohibits the federal government from conscripting States into administering federal programs. But to the extent that the States voluntarily accept federal grant money in exchange for compliance with federal immigration law, no such conscription has occurred. In addition, the Act itself does not require state law enforcement officers to do anything.

[2] All ECF citations are to the docket for case number 3:17-cv-00485-WHO.

Rather, it merely displaces state laws that directly conflict by *prohibiting* voluntary communications between such officers and federal officials, while leaving ample room for the States to take other actions to support and promote federal immigration policies.

For all these reasons, the United States' motions to dismiss should be granted.

ARGUMENT

I. The Text Of The Order Ensures That It May Only Be Applied Consistent With All Applicable Constitutional Limitations

As an initial matter, the text of the Order itself acknowledges important caveats that legally cabin the President's authority and ensure executive officers can only act in a manner consistent with the constitutional requirements of separation of powers and federalism.

First, Section 9(a) of the Order only refers to the Attorney General and Secretary, and therefore, can only apply to grant programs administered by those two cabinet officers. Specifically, the Order directs that "*the Attorney General and the Secretary* . . . shall ensure that jurisdictions that willfully refuse to comply with [the Act] are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by *the Attorney General or the Secretary*." 82 Fed. Reg. at 8,801 (Emphases added.) Therefore, the Order could not be interpreted, for example, to deny States federal dollars disbursed under unrelated federal programs, administered by other federal departments or agencies, such as funds for education, highways, or Medicaid.

The Attorney General's Memorandum interpreting the scope of the Order confirms this narrow scope. In that document, the Attorney General states that the Order "will be applied solely to federal grants administered by the Department of Justice or the Department of Homeland

Security, and not to other sources of federal funding."[3] The Attorney General's plausible interpretation should carry significant weight in the context of a facial challenge, where Plaintiffs cannot show actual injury from some more farfetched application. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (hypothetical future harm that was not certainly impending insufficient to confer standing); *United States v. Richardson*, 418 U.S. 166, 172 (1974). Should the United States ever apply the Order in some other context, Plaintiffs could seek injunctive relief when they challenge the Order as applied.

Second, the Order repeatedly makes clear that the Attorney General and Secretary can only deny eligibility to grant recipients as permitted by law. Section 9 of the Order first sets forth the "policy of the executive branch to ensure, *to the fullest extent of the law*, that a State, or a political subdivision of a State, shall comply with" the Act. (Emphasis added.) Section 9(a) further states that the Attorney General and Secretary can only make eligibility determinations "to the extent consistent with law." Similarly, in determining what qualifies as a sanctuary jurisdiction, the cabinet officers must act only "to the extent consistent with law." Further, because the Order only applies "to the extent consistent with law," the Attorney General noted in his Memorandum that it "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation."[4] Nor does the Order "purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary . . . in any respect." *Id.* at 2. Finally, the Memorandum provides that the Order will not apply except in circumstances

[3] The Attorney General, Memorandum for all Department Grant-Making Components, *Implementation of Executive Order 13768, Enhancing Public Safety in the Interior of the United States* 1 (May 22, 2017).
[4] *See supra* n.3 at 1–2.

where States have "notice of their obligation[s]" under the law. *Id.*

Therefore, both the Order's text and the Memorandum expressly limit the Order's reach to constitutional applications. And, as noted above, any party adversely affected by a particular application of the Order has an opportunity for notice, hearing, and a right to appeal under federal law. *See, e.g.*, 2 C.F.R. § 200.341. As explained below, Congress and the President have tools available to apply the Order consistently with the U.S. Constitution.

II. The Order Can Be Applied Consistent With Law Where Congress Has Validly Authorized The Attorney General Or Secretary To Place Conditions On The States' Receipt Of Federal Funds Under The Spending Power

Plaintiffs claim that the Order is unconstitutional because the President has purported to place a new condition on the States' receipt of federal funds—compliance with the Act—that the federal government has not validly authorized. *See, e.g.*, 2d Am. Compl. ¶ 152–53, ECF No. 105. But as Plaintiffs themselves acknowledge (*see id.*), Congress may place conditions on the States' receipt of federal funds, "consistent with law," pursuant to the "spending power" located in Article I, Section 8, clause 1 of the U.S. Constitution.

In order to mount a successful facial challenge to the Act, Plaintiffs must show that "the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). "[O]utside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (statute is facially unconstitutional if it would be invalid "in every conceivable application"). Here, Plaintiffs cannot meet the high hurdle of showing that the Order, which must be administered "consistent with law," would be unconstitutional in "every conceivable

application" (*Foti*, 146 F.3d at 635) or in every "set of circumstances" (*Salerno*, 481 U.S. at 745). To the contrary, there is a well-established path for the federal government to impose valid grant conditions on the States.

Supreme Court jurisprudence has interpreted the Taxing Clause of Article I, Section 8 of the Constitution, sometimes referred to as the Spending Clause, as the source of an implicit power for Congress to appropriate funds. *See, e.g., Dole*, 483 U.S. at 206; *Sabri v. United States*, 541 U.S. 600, 605 (2004). The text of this provision, however, refers only to the power to tax, not the power to spend. *See* U.S. Const. Art. I, § 8, cl. 1 ("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. . . ."). Therefore, since the Founding, there has been debate over whether, and to what extent, this provision could serve as a basis for Congress to appropriate money to accomplish objects that it could not pursue under other enumerated powers.[5]

Under the modern view adopted by the Supreme Court, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler*, 297 U.S. 1, 66 (1936). But because affording this implied power to Congress raises significant federalism concerns, the Supreme Court has placed important limitations on this power—sometimes referred to as the *Dole* factors. For example, Congress must in fact legislate in pursuit of the "general welfare," the grant conditions must be related to the federal interest in the particular national projects, and the financial inducement offered by Congress cannot be coercive. *See Dole*, 483 U.S. at 207–11. And, because "legislation enacted pursuant to the spending power is much in the nature of a contract, . . . [t]he

[5] *See* Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause I of the United States Constitution*, 33 J. Marshall L. Rev. 81, 103–06 (Fall 1999).

legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Dole*, 483 U.S. at 211. "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. Whenever Congress acts pursuant to its implied spending power, it must adhere to these criteria.

While *amici* take no position on whether any existing grant program meets these criteria, the *Dole* framework provides a constitutional mechanism for Congress to validly authorize the Attorney General or Secretary to administer a grant program that conditions receipt of federal dollars on compliance with certain provisions of federal immigration law. Because Congress and the President are thus able to act in a manner that would permit the Order to be applied "consistent with law," Plaintiffs' pre-enforcement, facial challenge to the constitutionality of the Order must fail.

III. The Order and the Act Do Not Violate The Tenth Amendment

Plaintiffs also argue that the Order violates the Tenth Amendment by instructing the Attorney General to "take appropriate action" against States that violate 8 U.S.C. § 1373. *See, e.g.*, 2d Am. Compl. ¶¶ 149–52, ECF No. 105. This too is incorrect. While the Tenth Amendment prohibits the federal government from *compelling* state and local officials to enact or enforce federal programs, the Order at most suggests that States will be offered the opportunity to voluntarily accept certain federal grant money in exchange for compliance with the Act. The Order was issued in the context of state and local officials adopting policies that *prohibit* cooperation with immigration officials, in violation of the Act, which neither the current nor the prior Administrations deemed permissible. Providing States with voluntary inducements to comply

with federal law does not raise problems of unlawful commandeering.

Nor does the Act itself violate the Tenth Amendment. Instead, the Act merely displaces or preempts state laws that prohibit localities or local law enforcement officials from voluntarily communicating with federal officials. The Act does this to further the goals of a comprehensive federal immigration scheme—the Immigration and Nationality Act—that falls within Congress's power to create a uniform rule of naturalization. The Act is therefore consistent with both the Supremacy Clause and the Tenth Amendment.

A. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Under that amendment, "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 935 (1997). In addition, "Congress cannot circumvent that prohibition by conscripting the State[s'] officers directly." *Id.*

These principles protect the Constitution's system of dual sovereignty, in which the federal government and the States each remain politically accountable to the people for their own actions. For example, in *New York v. United States*, Congress directed the States either to take possession of nuclear waste or to regulate the waste according to Congress's specific instructions. *New York v. United States*, 505 U.S. 144, 153–54 (1992). The Court invalidated this regime because by forcing the States to regulate according to Congress's demands, lines of political accountability become unclear: "[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

Similarly, the statute in *Printz* required state law enforcement to conduct background

checks in connection with the transfer of handguns. 521 U.S. at 903. By conscripting state law enforcement officials into federal service, the law invalidated in *Printz* enabled members of Congress to "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes," while putting States "in the position of taking the blame for [the program's] burdensomeness and for its defects." *Id.* at 930. This blurring of political lines is precisely what the Tenth Amendment was designed to avoid.

B. If Congress acts within these constitutional boundaries, it may enact legislation pursuant to its enumerated grants of power that become "the Supreme Law of the Land" and displace inconsistent state law. U.S. Const. Art. VI, Cl. 2. To displace state law, Congress must make its intent to preempt clear, which it can do most directly by "enact[ing] a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

"Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Thus, the Supreme Court has rejected Tenth Amendment challenges where Congress has merely chosen to "regulate[] state activities" by, for instance, prohibiting States from issuing unregistered bonds in furtherance of a federal regime discouraging tax evasion. *South Carolina v. Baker*, 485 U.S. 505, 514 (1988). Similarly, the Court upheld a law prohibiting States from selling information obtained from motor vehicle records in furtherance of a federal regulatory scheme intended to protect the privacy of drivers. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

C. Applying these principles here, the Act plainly does not constitute unlawful commandeering under the Tenth Amendment.

The Act provides, in relevant part, that a State "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373. This is a valid exercise of Congress's power to regulate immigration. *See, e.g., City of New York v. United States*, 179 F.3d 29, 34–35 (2d Cir. 1999) (rejecting a claim that 8 U.S.C. § 1373 constituted unconstitutional commandeering). The Supreme Court has recognized that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. This power rests on Congress's power to "establish an uniform Rule of Naturalization," and its "inherent power as sovereign to control and conduct relations with foreign nations," *Id.* (quoting *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). Further, the means selected by Congress—displacement of state law—furthers the purposes of the comprehensive federal regime by facilitating communication between state and local officials on matters relating to citizenship and immigration status.[6] *See, e.g., id.* at 2508 ("Consultation between federal and state officials is an important feature of the immigration system.") (discussing 8 U.S.C. § 1373); *City of New York*, 179 F.3d at 35 ("[S]tates do not retain under the Tenth Amendment an untrammeled right to forbid all

[6] Of course, States are not prohibited from creating their own laws to implement section 1373 that are consistent with the aims of section 1373. The language in the federal immigration-information sharing provisions reflect "a congressional intention to displace *inconsistent* law." Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information, 23 Op. O.L.C. Supp., at 7 (May 18, 1999), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1999-05-18-census-confidentiality.pdf (emphasis added). And Congress has not even attempted to enter the field of appropriate enforcement mechanisms for section 1373, meaning state law penalties could not possibly be preempted. Thus, States are free to create their own enforcement mechanisms to promote compliance with section 1373. *See, e.g., Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 606–07 (2011) (holding that a state could tailor specific sanctions for the violation of federal immigration laws in the absence of congressional prohibition on those sanctions).

voluntary cooperation by state or local officials with particular federal programs.").

Unlike in *Printz*, for example, where local law enforcement were required to conduct background checks, the Act "does not require the States in their sovereign capacity to regulate their own citizens," and "does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151. Rather, the Act merely prevents States from prohibiting local law enforcement from cooperating voluntarily with the federal government. Under the Supremacy Clause, the Act displaces any state policy choice that would be inconsistent with this comprehensive federal regime within Congress's enumerated powers—namely, the choice to ensure the enforcement of this Nation's immigration laws.

CONCLUSION

For the foregoing reasons, the United States' motions to dismiss should be granted.

Dated: June 16, 2017

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