Case Nos. 17-16886, 17-16887, 17-17478, 17-17480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Appellee, v. DONALD J. TRUMP, et al., Defendants-Appellants.	Nos. 17-16886, 17-17478 U.S. District Court for Northern California, San Francisco No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff-Appellee, v. DONALD J. TRUMP, et al., Defendants-Appellants.	Nos. 17-16887, 17-17480 U.S. District Court for Northern California, San Francisco, No. 3:17-cv-00574-WHO

BRIEF OF *AMICI CURIAE* THE STATES OF WEST VIRGINIA, LOUISIANA AND 9 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST AND IDENTITY OF *AMICI*

The States of West Virginia, Louisiana, Alabama, Arkansas, Florida, Kansas, Nevada, Ohio, Oklahoma, South Carolina, and Texas file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.[1] *Amici* States have at least two important interests in this appeal, which concerns the district court's order preliminarily enjoining Section 9(a) of President Trump's Executive Order 13768, "Enhancing Public Safety in the Interior of the United States" (the "Order"). Exec. Order No. 13768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).[2]

First, as the chief legal officers of their States, the undersigned have an important interest in complying with federal immigration law and instructing state and local law enforcement to do the same. Cities and localities that obstruct cooperation on immigration enforcement between federal and local officials—so-called "sanctuary jurisdictions"—undermine the rule of law and deprive law enforcement of the tools necessary to enforce the law effectively. Sanctuary jurisdictions can cause harm to neighboring States by making it easier for people who are not lawfully in this country and have committed civil or criminal offenses

[1] A State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a)(2).

[2] *Amici* States are aware that Appellants have also appealed the district court's order granting summary judgment (Nos. 17-17478 and 17-17480) and that there is a pending motion to consolidate the appeals. The arguments presented in this brief apply equally to those appeals.

to evade law enforcement and travel out-of-state. For instance, the City of Baltimore, which has adopted sanctuary city policies, is a significant source of illegal drugs flowing into the Eastern Panhandle of West Virginia. Sanctuary policies deprive jurisdictions of important tools that could assist with preventing such out-of-state drug trafficking.

Second, the States have a significant interest in ensuring that federal immigration policy, including the directives in the Order, is consistent with the separation of powers and federalism principles inherent in our Constitution. Those federalism principles both protect the sovereignty of the States and "secure[] to citizens the liberties that derive from the diffusion of sovereign power." *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

Amici States respectfully submit that the district court erred in issuing a preliminary injunction enjoining implementation of the Order. Plaintiffs cannot succeed on the merits of their claim that the Order is facially unconstitutional under principles of federalism and separation of powers. When analyzed under both the Spending Power and the Tenth Amendment, there are ways that the Order—which authorizes the Attorney General or Secretary of Homeland Security to place conditions on the States' voluntary receipt of federal grant funds—can be enforced with full respect for the role of the States in our constitutional structure.

SUMMARY OF ARGUMENT

Appellees have mounted a facial challenge to the constitutionality of an Executive Order concerning immigration enforcement—an area of the law where Congress and the President wield significant constitutional 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*" 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. 13768, 82 Fed. Reg. at 8,801 (emphasis added). Section 1373 (the "Act"), in turn, provides that a State "may not prohibit, or in any way restrict, any government entity 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(a).

Appellees cannot meet their heavy burden to show that the Order is unconstitutional in all its applications. The Order is not unconstitutional under the Spending Clause. The federal government may place conditions on receipt of federal grant money so long: (1) Congress legislates to promote the general welfare; (2) the States have clear notice of the relevant grant conditions; (3) the conditions relate to the purposes for which the grant issues; and (4) the inducement to accept the grant is not coercive. *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987). While *amici*

States take no position on whether any particular grant program meets these criteria, Appellees cannot demonstrate that the Order is unconstitutional in all applications. That is because *Dole* provides a well-established—and legally permissible—framework for the federal government to attach conditions on grants to the States consistent with law. Therefore, while Appellees could bring an as-applied challenge if the federal government were to exceed its power in denying particular sources of funding to the States, this facial challenge must fail because the Order could be constitutional as applied to programs that satisfy the *Dole* framework.

Appellees also cannot show that the Order is unconstitutional under the Tenth Amendment. The Tenth Amendment protects our system of dual sovereignty by prohibiting the federal government from compelling States and state and local officials to administer federal programs. But the Act does not require the States to do anything. It merely displaces state laws that directly conflict with federal immigration policy by prohibiting voluntary communication between local law enforcement officials and federal officials. To the extent that the States voluntarily accept federal grant money in exchange for compliance with federal immigration law—including the Order—the Order does not conscript the State or its officials into carrying out federal purposes. Accordingly, Appellees' facial challenge to the Order must fail.

ARGUMENT

I. The Order Can Be Constitutionally Applied Under The Spending Power.

Appellees argue that the Order is facially unconstitutional because it purportedly represents a new and invalid condition on State's receipt of federal funds. But that argument fails because Congress may place certain conditions on the States' receipt of federal funds pursuant to the "spending power" in Article I, Section 8, clause 1 of the Constitution—and here, the Order can be applied consistent with that power. Appellees have chosen the heavy burden of raising a facial challenge to the Order. Such challenges will succeed only if the government action in question is "unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). In other words, "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) (a statute is facially unconstitutional if it would be invalid "in every conceivable application") (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). Appellees cannot satisfy that demanding standard here.

As an initial matter, the text of the Order itself contains important caveats that cabin the Order's scope and ensure that officers acting pursuant to the Order exercise

their authority within the parameters of federalism and the separation of powers. *First*, the Order expressly applies only to grant programs where the Attorney General or Secretary are permitted by law to impose conditions on the States' receipt of federal grant funds. Specifically, Section 9(a) directs that "the Attorney General and the Secretary [of Homeland Security] . . . 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. The Attorney General's Memorandum interpreting the Order confirms its narrow scope. This Memorandum explains 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] Significantly, this language ensures that the Order could not be interpreted to deny federal funding to States under programs administered by other departments or agencies, such as funds for education, highways, or Medicaid—and should the federal government ever attempt to enforce it in one of these contexts, Appellees (or others) could seek as-applied relief against that unlawful interpretation.

[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) (emphasis added).

Second, the Order applies only "to the extent consistent with law." Section 9 provides that the Order's purpose is "to ensure, to the fullest extent of the law, that a State or a political subdivision of a State, shall comply with" the Act. Section 9(a) further provides that the Attorney General and the Secretary shall make eligibility determinations and determine what qualifies as a sanctuary jurisdiction only "to the extent consistent with law." Also, the Attorney General's Memorandum confirms that the Order does not contemplate grant conditions beyond those authorized by law, explaining that the Order "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation" or "purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary . . . in any respect.[4] The Order is thus expressly limited to constitutional applications only.

Further, Congress and the President have tools to apply the Order consistent with the Constitution. Article 1, Section 8 of the Constitution provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. While the clause, sometimes called the Spending Clause, speaks only of the power to tax, the Supreme Court has interpreted it to include an implicit power to appropriate funds as well. *See, e.g.*, *Sabri v. United*

[4] *See supra* n.3 at 1–2.

States, 541 U.S. 600, 605 (2004); *Dole*, 483 U.S. at 206. Since the Founding, however, there has been debate about whether, and to what extent, that provision serves as a basis for Congress to appropriate money for purposes not part of Congress's enumerated powers.[5] The modern view adopted by the Supreme Court is that "the power of Congress to authorize the 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). To the contrary, Congress may use its spending power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Dole*, 483 U.S. at 206 (internal quotation marks and citation omitted).

Nevertheless, in order to mitigate the federalism concerns associated with that view, the Supreme Court has placed four limits on Congress' ability to place conditions on federal funding to the States. *Dole*, 483 U.S. at 207–08. *First*, Congress must legislate "in pursuit of 'the general welfare.'" *Id.* (quoting U.S. Const. art. I, § 8, cl. 1. *Second*, if Congress places conditions on "the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise

[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); *United States v. Butler*, 297 U.S. 1 (1936).

their choice knowingly, cognizant of the consequences of their participation.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). *Third*, conditions must be related "to the federal interest in particular national projects or programs." *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). *Fourth*, the conditions cannot be coercive. *Id.*; *see also NFIB v. Sebelius*, 567 U.S. 519, 578–79 (2012).

The Order is not facially unconstitutional under the *Dole* framework. As explained above, the Order cannot deny States funds under grant programs unrelated to the federal government's interest in immigration enforcement because the Order applies only to programs administered by the Attorney General or the Secretary. And because the Order permits the Attorney General and Secretary to deny funds only as permitted by law, it does not—as the Attorney General's Memorandum explained—"call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation."[6] Thus, assuming that Congress complies with the *Dole* factors in a particular grant program and has authorized the Attorney General or the Secretary to administer that program, the Order can be applied consistent with the federal government's Spending Power. In such situation, States would retain the ability to "voluntarily and knowingly accept[] the terms of the contract." *NFIB*, 567 U.S. at 577.

[6] *Supra* n.3 at 1–2.

While *amici* take no position on whether any particular existing grant program meets the *Dole* factors, it is clear that Congress and the President can act in a manner that permits the Order to be constitutionally applied. Appellee's facial challenge must fail.

II. The Order And The Act Do Not Violate The Tenth Amendment.

Appellees argue that the Order violates the Tenth Amendment by requiring the Attorney General to "take appropriate action" against States that violate 8 U.S.C. § 1373. That argument also fails. Section 1373 provides that States "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." *Id.* The Tenth Amendment prohibits the federal government from commandeering States by *forcing* them to administer a federal regulatory regime or conscripting state officers to do the same. But that is not what Congress did. Rather, the Order provides States with voluntary inducements to comply with federal law. And for its part, the Act simply displaces or preempts state laws that prohibit localities or local law enforcement officials from voluntarily communicating with federal officials, with a goal to further the comprehensive federal immigration regime. Congress thus acted within its enumerated powers and under the Supremacy Clause to preempt state laws that stand as obstacles to the creation of this uniform policy.

A. The Tenth Amendment provides that "[t]he 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. The Supreme Court has interpreted this language to provide that Congress cannot "require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Congress also cannot "conscript[] the State's officers directly" to administer a federal program. *Printz v. United States*, 521 U.S. 898, 935 (1997).

In *New York* and *Printz*, the Supreme Court explained that these principles protect the operation of dual sovereignty—or in other words, the Tenth Amendment ensures that the federal government and the States each remain politically accountable to the people for their own actions. In *New York*, the Court held that the Tenth Amendment prohibits Congress from requiring States to either take possession of nuclear waste or regulate the disposal of such waste within the State. *New York*, 505 U.S. at 153–54. The Court reasoned that when the federal government conscripts States or state officers into administering a federal program, political accountability is diminished. *New York*, 505 U.S. at 168–69 ("it 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"). In part, the Court also rested its decision on the failed experience of the

Articles of Confederation under which Congress could only regulate by compelling States to act. *Id.* at 163–66.

Similarly, in *Printz*, the Supreme Court held that the federal government cannot conscript state law enforcement officials into enforcing federal law. 521 U.S. at 935. The statute at issue there required state law enforcement officials to conduct background checks in connection with handgun transfers. *Id.* at 903. The Court rejected a purported distinction between making policy and enforcing or implementing it, and concluded that Congress could require the States neither to make law nor to enforce federal law. *Id.* at 928. As in *New York*, the Court emphasized that the Tenth Amendment is designed to avoid the blurring of political lines of accountability. *Id.* at 930 (explaining that the law at issue would have allowed Congress to "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes," while putting the States "in the position of taking the blame for [the program's] burdensomeness and for its defects.").

Under these principles, the Order does not commandeer the States or transform section 1373 into a commandeering provision. The Order operates by instructing the Attorney General and the Secretary, consistent with law, to condition the receipt of federal grant funds on compliance with section 1373. As already explained, the Order can be applied consistent with the Constitution where Congress

has given the Attorney General and the Secretary the authority to condition the States' receipt of federal grant funds so long as the grant program complies with the *Dole* framework. And because the Order itself is narrow in scope, it does not grant any authority that the Attorney General and Secretary would not otherwise have. Instead, the Order instructs the Attorney General and the Secretary to exercise their discretion under congressionally created grant programs in a particular way.

The Act itself does not commandeer the States in violation of the Tenth Amendment either. As the Second Circuit has correctly held, section 1373 does not compel States to administer a federal program nor does it conscript local officials into doing so. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). Instead, the Act "prohibit[s] state and local governmental entities or officials only from directly restricting *the voluntary exchange of immigration information* with the [Immigration and Naturalization Service]." *Id.* (emphasis added). Indeed, the Supreme Court expressly reserved in *Printz* the question of whether statutes requiring "only the provision of information to the Federal Government" can constitute commandeering. *Printz*, 521 U.S. at 918.

Further, the commandeering principles from *Printz* and *New York* only apply where States are required "in their sovereign capacity to regulate their own citizens" or "assist in the enforcement of federal statutes regulating private individuals." *Reno v. Condon*, 528 U.S. 141, 151 (2000). The Act does meet that definition of

commandeering because it does not require the State to regulate its own citizens, but simply preempts state policies that interfere with implementation of a federal regulatory regime.

Indeed, the Supreme Court has rejected Tenth Amendment challenges where Congress has regulated state activities but not attempted to use the sovereign power of the States to regulate individuals. For example, the Supreme Court rejected a Tenth Amendment challenge to a federal law prohibiting States from issuing unregistered bonds in furtherance of a federal policy discouraging tax evasion. *South Carolina v. Baker*, 485 U.S. 505, 514 (1988). The Court concluded that Congress had not attempted "to use state regulatory machinery to advance federal goals" but to regulate the State as any other entity. *Id.* at 514. To take another example, the Supreme Court rejected a Tenth Amendment challenge to a law prohibiting States from selling public information obtained from motor vehicle records. *Reno*, 528 U.S. at 151. In that case, the Court explained that the federal statute "regulates the States as the owners of data bases" to further a federal regulatory scheme related to privacy. *Id.* at 151. The statute, the Court explained, did not run afoul of the Supreme Court's commandeering decisions because it did not require the State to regulate in its sovereign capacity or help enforce federal law. *Id.*

B. Finally, the Act is justified under the Supremacy Clause. When Congress acts pursuant to its enumerated powers (and within the bounds of the Tenth

Amendment), the laws it enacts become "the Supreme Law of the Land" and displace inconsistent state law. U.S. Const. art. VI, cl. 2. The federal government may exercise such power even though it may "serve[] to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'" *FERC v. Mississippi*, 456 U.S. 742, 759 (1982) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)). Nevertheless, Congress must make its intent to preempt clear, which it can do most directly by "enacting a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

It is beyond dispute that Congress has the enumerated power to enact a comprehensive immigration regime. The Constitution grants the federal government the power to "establish an uniform Rule of Naturalization," U.S. Const. art I, § 8, and the "inherent power as sovereign to control and conduct relations with foreign nations," *Arizona*, 567 U.S. at 395 (quoting *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). Accordingly, the Supreme Court has recognized that the federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Id.*

The means Congress has chosen here—displacement of state law—furthers the purpose of the comprehensive federal immigration regime by facilitating communication between state and federal officials on matters relating to citizenship

and immigration status. Indeed, this type of federal-state communication is an important part of the federal immigration system. *Arizona*, 567 U.S. at 411 ("Consultation between federal and state officials is an important feature of the immigration system.") (discussing 8 U.S.C. § 1373).[7] The Act merely prevents States from prohibiting local law enforcement for voluntarily cooperating with the federal government—and displaces state policy choices that are inconsistent with Congress's purpose to ensure enforcement of the Nation's immigration laws.

[7] Of course, States are not prohibited from enacting laws to implement Section 1373 that are consistent with the Act's purposes. Congress made clear that it intended 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). Congress has not attempted to enter the field of enforcement mechanisms for section 1373, meaning that States are free to create their own enforcement mechanisms consistent with the purpose of section 1373. *See Chamber of Commerce of U.S. 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).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on December 22, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system.

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