Case Nos. 17-17478, 17-17480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, et al., Plaintiffs/Appellees, v. DONALD J. TRUMP, President of the United States; et al., Defendants/Appellants.	No. 17-17478 U.S. District Court, Northern District Case No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff/Appellee, v. DONALD J. TRUMP, President of the United States; et al. Defendants/Appellants.	No. 17-17480 U.S. District Court, Northern District Case No. 3:17-cv-00574-WHO

AMICUS BRIEF OF LAW SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

On Appeal from the United States District Court
for the Northern District of California

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici are law professors, including scholars in constitutional law who have taught, written, and spoken on the topics of the Separation of Powers, Federalism, the Federal Government's spending power, and the Tenth Amendment. Amici's interest in this litigation is to offer their views regarding the principles that inform whether Executive Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order" or the "Order") complies with constitutional limits on the President's power, and the Federal Government's ability to compel state and local governments to adopt or administer federal law. A complete list of Amici is set forth in the Addendum at the conclusion of this brief.[1]

INTRODUCTION

The Constitution divides power both among the branches of the Federal Government and across the federal and state governments to guard against tyranny. These Separation of Powers and Federalism principles work as structural safeguards of individual liberty. As

[1] Amici hereby certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amici and their counsel contributed money intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

interpreted by the district court, the Executive Order offends both.[2] Through the Order, the Executive Branch seeks not only to wield Congress's power of the purse but also to coerce the States into enforcement of federal immigration policy. The Constitution permits neither.

Although Appellants challenge the district court's interpretation of the Order, they offer no defense of the Order's constitutionality if the district court's interpretation stands. Amici submit this brief to explain why the Order as construed is constitutionally indefensible.

ARGUMENT

I. The Executive Order Breaches the Separation of Powers.

The Constitution allocates separate and distinct powers to the executive, legislative, and judicial branches so as "to 'diffuse power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring)); *Bond v. United States*, 564 U.S. 211, 223 (2011) ("[I]ndividuals . . . are protected by the operations of separation

[2] For purposes of the constitutional analysis in this brief, Amici assume the district court correctly construed the Executive Order and this brief is premised on that interpretation of the Order.

of powers and checks and balances."); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

With the Executive Order, the President has exceeded the limits of his power at the risk of individual liberty itself. The President has no constitutional authority to create retroactive, unilateral conditions on the receipt of federal funds in order to promote favored policies or political agendas. The creation of conditions on the receipt of federal funds is an exercise of the "spending power" the Constitution assigns to Congress, not the President. And even if Congress could delegate some aspect of that power to the Executive, Congress did not do so here.

Article I of the Constitution assigns the power of the purse to Congress alone. The Appropriations Clause provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7.[3] Further, only "*Congress* shall have power to lay and collect Taxes, Duties, Imposts and excises, to

[3] The Anti-Deficiency Act, 31 U.S.C. § 1341, imposes criminal penalties on executive officers who violate this Rule.

pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1 (emphasis added). "Incident to this power, *Congress* may attach conditions on the receipt of federal funds" and, in doing so, "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (emphasis added).

The President has no power to add or subtract from what Congress has duly legislated. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The President, of course, may veto legislation exercising Congress's spending power before it becomes law. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35, 40 (1975). Or, the President may veto legislation *lacking* spending conditions that he wishes to see imposed. But "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes" that exercise Congress's spending power. *Clinton*, 524 U.S. at 438.

Nor does the President have the unilateral power to cancel appropriations enacted into law, even if Congress accedes to such action. In *Clinton v. City of New York*, the Supreme Court struck down

the Line Item Veto Act—in which Congress authorized the President to cancel direct spending items contained in duly enacted statutes—as contrary to the "'finely wrought'" procedure the Constitution mandates to enact or repeal a statute. 524 U.S. at 439-40 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. at 919, 951 (1983)). The Court explained:

> [T]he power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." . . . What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

Clinton, 524 U.S. at 439–40 (quoting *Chadha*, 462 U.S. at 951).

As the D.C. Circuit more recently emphasized, "even the President does not have unilateral authority to refuse to spend" appropriated funds to advance his favored policy. *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013); *see also* Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that

existence of such a broad power is supported by neither reason nor precedent."), *reprinted in* EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS: HEARINGS BEFORE THE SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 92d Cong. 279, 282 (1971). And Congress has affirmatively denied the President such authority through Title X of the Congressional Budget and Impoundment Control Act. *See* 2 U.S.C. §§ 681-688 (requiring any withdrawal of budget authority by the President to be affirmatively approved by both Houses of Congress).

The Framers' decision to assign the spending power to Congress—and not the President—was deliberate. While the President holds "the sword of the community," only Congress "commands the purse." THE FEDERALIST NO. 78, at 227. As a result, the President necessarily will be restrained by Congress's exercise (or failure to exercise) its spending power. After all, "[a] president cannot do much very long without funds." Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY, 134 (14th ed. 1978). It is for that reason that the Congress's power of the purse is thought to be "the most important single curb in the Constitution on Presidential power." *Id.*; *see also* THE FEDERALIST, No. 58 (James Madison) ("The power of the purse may [be] the most

complete and effectual weapon with which any constitution can arm the immediate representatives of the people.").

The Executive Order tramples these basic principles. As interpreted by the district court, Section 9(a) of the Order usurps Congress's spending power. The Order purports to exercise freewheeling discretion over whether state and local governments receive federal grants—without regard to Congress's express direction. The Order's threatened defunding of so-called "sanctuary jurisdictions" is rooted neither in 8 U.S.C. § 1373, which the Order references, nor any law by which Congress appropriated the threatened federal funds. Nor has Congress delegated to the executive branch the authority to condition all federal grant money on compliance with Section 1373 or federal detainer requests, even assuming such a delegation would be constitutional. Indeed, to the extent Congress has spoken at all, it has considered and *rejected* proposed legislation that would defund jurisdictions classified as "sanctuary cities."[4] *Cf. Youngstown Sheet &*

[4] *See, e.g.*, Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2015); Sanctuary City All Funding Elimination Act of

Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .").

Executive action might be more efficient or politically expedient than resort to deliberation by the people's representatives. But the "burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . . were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Chadha*, 462 U.S. at 959. The spending power is Congress's to exercise, in the "step-by-step, deliberate and deliberative process" the Constitution requires. *Id.* at 959. The President may not wield that power through executive fiat.

2015, H.R. 3073, 114th Cong. (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. (2015); Improving Cooperation with States and Local Governments and Preventing the Catch and Release of Criminal Aliens Act of 2015, S. 1812, 114th Cong. (2015); Protecting American Citizens Together Act, S. 1764, 114th Cong. (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015); A Bill to Prohibit Appropriated Funds from Being Used in Contravention of Section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, S. 80, 114th Cong. (2015).

II. The Executive Order Upsets Our Federalism.

The Executive Order also purports to exercise power that even Congress lacks. Under our system of Federalism, the States "are not mere political subdivisions of the United States." *New York v. United States*, 505 U.S. 144, 188 (1992). Their legislatures and executives are directly accountable to the people; they are not, and cannot be made, mere appendages of the Federal Government.

The Framers considered and rejected a form of government in which the national sovereign might control the several states' basic representative bodies. *See Printz v. United States*, 521 U.S. 898, 919-20 (1997). Instead, under our Federalism, "local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." THE FEDERALIST No. 39, at 245. Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928; *see also New York*, 505 U.S. at 188.[5]

[5] Of course, the Federal Government may "subject state governments to

The Constitution embodies the Framers' choice for the States and their constituent subunits to retain some political independence, or a "residuary and inviolable sovereignty," distinct from the Federal Government.[6] THE FEDERALIST NO. 39, p. 245. The Constitution grants the Federal Government only enumerated powers—itself a "limitation of powers because 'the enumeration presupposes something not enumerated.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824); alteration omitted)). And the Tenth Amendment makes this explicit: "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.

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generally applicable laws," meaning "the same legislation applicable to private parties." *New York v. United States*, 505 U.S. 144, 160 (1992); *see also, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). But it may not "require the States in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

[6] Local governments are treated like State Governments for purposes of the Federalism principles guaranteed by the Tenth Amendment. *See Printz*, 521 U.S. at 931 n.15.

Given the States' measure of independence, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925; *see New York*, 505 U.S. at 161. In other words, the Federal Government lacks power to force the States "to govern according to Congress's instructions," *id.* at 162—let alone the President's edict—lest "the two-government system established by the Framers . . . give way to a system that vests power in one central government," *NFIB*, 567 U.S. at 577. This is so without regard to whether the Constitution grants the Federal Government power to enact and enforce such programs itself. *See New York*, 505 U.S. at 166 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Printz*, 521 U.S. at 924.

Nor can the Federal Government achieve the same result by economic coercion. Although it may induce the States to accept federal policy by conditioning the receipt of federal funds on such cooperation, the Federal Government cannot "cross[] the line distinguishing

encouragement from coercion." *New York*, 505 U.S. at 175. Rather, the States must be free to determine whether to accept federal policy—and the fiscal and political costs that may come with it—in exchange for federal funds. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

Despite these basic precepts of Our Federalism, the Federal Government has at times sought to compel the States to implement federal law. The Supreme Court has struck those efforts down. For instance, in *Printz v. United States*, the issue was federal legislation that compelled state law enforcement officers to perform federally mandated background checks on handgun purchasers. 521 U.S. at 902. Even if the law served "very important purposes" and imposed only a "minimal and only temporary burden upon state officers," the Court struck it down as offending the "very *principle* of separate state sovereignty" without any balancing of federal and state interests. *Id.* at 931-33. And in *National Federation of Independent Business v. Sebelius*, seven Justices agreed that the Medicaid Expansion portion of

the Affordable Care Act was unconstitutionally coercive because the threatened loss of funding gave the States "no real option but to acquiesce" to increased state Medicaid obligations. *NFIB*, 567 U.S. at 582; *id.* at 688-689 (joint op. of Scalia, Kennedy, Thomas, Alito, JJ.) (concluding that the Medicaid Expansion exceeds Congress's spending power because "the offer of the Medicaid Expansion was one that Congress understood no State could refuse").[7]

Our Federalism is no mere formalism. The Supreme Court has repeatedly described it as crucial protection against "the accumulation of excessive power" in the national government, helping to maintain "a healthy balance of power between the States and the Federal Government" that, in turn, "will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also Printz*, 521 U.S. at 921 ("[Federalism is] one of the Constitution's structural protections of liberty"). The existence of dual, and potentially dueling, sovereigns "secures to citizens" the freedoms that "derive from

[7] Of course, these cases address acts of Congress (not executive action). They nonetheless control here, as these limits on the Federal Government's authority apply no matter what branch of the Federal Government seeks to act beyond them.

the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992); *Bond v. United States*, 564 U.S. 211, 220–21 (2011) ("'Freedom is enhanced by the creation of two governments, not one.'" (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 564 U.S. at 222.

A. The Executive Order Imposes Retroactive Conditions on Federal Funds Granted to the States.

"Th[e] practice of attaching conditions to federal funds greatly increases federal power." *NFIB*, 567 U.S. at 675. For that reason, the Supreme Court has repeatedly enforced clear and certain limits on the practice to protect the States—and by extension their individual citizens' liberties—from inordinate federal influence. *See id.* All conditions on federal funding must (i) be unambiguous and (ii) apply only prospectively and not retroactively. *See, e.g.*, *Pennhurst*, 451 U.S. at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *id.* at 25 ("Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or

'retroactive' conditions."). These limits protect States' ability to enter federal spending programs "knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (internal quotation marks omitted).

Amici know of no statute that unambiguously links any federal grant to compliance with § 1373.[8] Yet, the Order requires the Attorney General and the Secretary of Homeland Security to "ensure" that so-called sanctuary jurisdictions that violate § 1373 are ineligible to "receive Federal grants":

> The Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.

§ 9(a). Likewise, the Executive Order indicates that jurisdictions that fail to honor civil detainer requests are also at risk of defunding. § 9(b). Again, Amici know of no statutory language that unambiguously

[8] The Executive Branch has interpreted Edward Byrne Memorial Justice Assistance Grant Program ("JAG") grants to require compliance with § 1373 based on the statutory language requiring applicants to comply with "all applicable federal laws." But even there, Congress did not explicitly require compliance with § 1373.

requires State and local governments to comply with such requests in exchange for federal funds. Section 1373 itself certainly does not establish any such condition; it merely addresses the information-sharing obligations of State and local governments (not any detention obligations) and does not purport to condition any funds on compliance with those obligations.

And this is not the Order's sole offense to our Federalism. If it does as it says, and as the district court held—that is, if the Order puts *all* federal grants at risk, including those already accepted by a State or local government, whether for a jurisdiction's alleged noncompliance with § 1373 or its unwillingness to act as a federal detention facility—it would thereby create and impose new, *after-the-fact* conditions on federal funds quite distinct from those Congress chose not to impose in the first instance. The Federal Government has no power to spring "participating States with post acceptance or 'retroactive' conditions" on funds already appropriated to them. *Pennhurst*, 451 U.S. at 25. And it certainly cannot do so in an effort to brandish a new and more intimidating "weapon" for pressuring State and local governments to assist in the enforcement of federal immigration law. *See* Fed. News.

Serv., "President Donald J. Trump Interviewed on Fox" (Feb. 5, 2017) [SER 258] (characterizing defunding as a "weapon" that can be wielded to deprive sanctuary jurisdictions of "the money they need to properly operate as a city or a state").

B. The Executive Order Coerces State and Local Governments to Enforce Federal Immigration Law.

The Executive Order also crosses the line that "distinguish[es] encouragement from coercion." *New York*, 505 U.S. at 175. By placing all of a state or municipality's federal grants at stake, the Order leaves States no choice but submission to the federal executive's unilateral whim. The specter of such defunding is a far cry from the modest threat of foregone highway funds in *South Dakota v. Dole*. There, the Supreme Court held that Congress's conditioning of less than one percent of a State's budget on its adoption of the federal minimum drinking age amounted at most to "mild encouragement" for the State to adopt federal policy as its own and was not "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)); *see NFIB*, 567 U.S. at 580-81. By contrast, the Executive Order threatens all federal grants—money that State and local governments "need to

properly operate as a city or a state," according to the President.[9] Fed. News Serv., "President Donald Trump Interviewed on Fox" (Feb. 5, 2017) [SER 258]. The Affordable Care Act provisions at issue in *NFIB* threatened States with loss of all Medicaid funds, unless the States took on expanded Medicaid obligations. Seven Justices agreed that the Medicaid expansion law amounted to "economic dragooning that leaves the States with no real option but to acquiesce." 567 U.S. at 581-82; *id.* at 687-89 (joint op. of Scalia, Kennedy, Thomas, Alito, JJ.). A fortiori, a condition imposed on *all* federal grants—especially retroactively, and without congressional sanction—would be economically coercive for the same reason. The offer is one that no State or local government could refuse.

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[9] Different economic analyses estimate that 25 percent to 31.3 percent of all state and local spending comes from federal grants. *See, e.g.*, Congressional Budget Office, Federal Grants to State and Local Governments, p. 1 (Mar. 2013), *available at*, https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf; Office of Management and Budget, Analytical Perspectives, Budget of the U.S. Government Fiscal Year 2017, p. 270, *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/spec.pdf.

The pernicious consequences of such coercion are placed in sharpest contrast by the risk that defunding can be triggered by a State or local government's refusal to detain individuals upon the Federal Government's request. Jurisdictions like the County of Santa Clara and the City of San Francisco have determined that they cannot perform their own governmental functions—such as protecting public safety and welfare—and also permit their law enforcement officers to serve as *de facto* federal immigration agents. The President can no more countermand that determination and require state officers to detain individuals for the Federal Government outside the criminal process than Congress could force state law enforcement officers to perform background checks on would-be handgun purchasers in *Printz*. To allow this would augment "[t]he power of the Federal Government ... immeasurably" by allowing it "to impress into its service—and at no cost to itself—the police officers of the 50 States." *Printz*, 521 U.S. at 922. And there, as here, the inflation of Federal Government power not only upsets the balance between federal and state governments, but also threatens to blur the very lines between the two, undermining the accountability of both. As Justice Scalia explained in *Printz*:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Id. at 930; *see also NFIB*, 567 U.S. at 577-580.

Were these flaws not enough, the Executive Order is unlawful for still another reason. Conditions on federal funds are constitutional only if they "relate[] to the federal interest in particular national projects or programs." *NFIB*, 567 U.S. at 676; *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting) ("We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program."). Not all "Federal grants" that State and local governments accept from the Federal Government relate to federal immigration policy, much less the information-sharing requirements regarding individuals' citizenship or immigration status of § 1373. The same reach that would make the Executive Order coercive would also make it overbroad in relation to the federal interest at stake.

The Federal Government cannot foist the social, political, and financial costs of its policies onto State and local governments either by direct commandeering or by economic coercion. Here, the Executive Order threatens to coerce subnational governments into service as federal immigration agencies, as the apparent costs of any other option are too catastrophic to say no. The potential result would disastrously compromise "the two-government system established by the Framers," which "would give way to a system that vests power in one central government, and individual liberty would suffer." *NFIB*, 567 U.S. at 577.

CONCLUSION

The Framers chose to disperse the powers of the Federal Government across the branches "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). They likewise chose to diffuse sovereign authority across federal and state governments "precisely so that we may resist the temptation to concentrate power in one location as an expedient

solution to the crisis of the day." *New York*, 505 U.S. at 187. Illegal immigration may, in the President's view, be today's crisis. But any political solution to that problem cannot violate the separation of powers or the autonomy and independence of state and local governments.

February 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Ninth Circuit Rule 32-1, and the requirements of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5) and 32(a)(6), because it is proportionately spaced serif font, has a typeface of 14 point, and contains 4322 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

Dated: February 12, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF System.

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