Nos. 17-17478, 17-17480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants.

CITY AND COUNTY OF SANTA CLARA,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California,
Nos. 3:17-cv-00485-WHO, 3:17-cv-00574-WHO

AMICI CURIAE BRIEF OF ADMINISTRATIVE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

Amici are leading legal scholars and professors who teach, write, and research administrative law and its effects on public administration. They have an interest in Executive Branch agencies and the courts properly interpreting executive orders ("EOs") issued by the President of the United States. *See* Appendix for List of *Amici Curiae* Administrative Law Professors.

SUMMARY OF ARGUMENT

Amici write to offer their views on the legal effect of the memorandum issued by Attorney General Sessions on May 22, 2017 (hereinafter the "Sessions Memo" or "Memo")[2] concerning Executive Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (hereinafter "EO 13,768" or "the Order") [ER187-91].

The Sessions Memo attempts to drastically minimize, to the point of rendering entirely superfluous, Section 9(a) of EO 13,768. With respect to the treatment of so-called "sanctuary jurisdictions," the Order is plainly directed at ensuring that all "executive departments and agencies (agencies)" do not provide

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Memorandum for All Department Grant-Making Components: Implementation of Executive Order 13768* (May 22, 2017) [ER184-85].

any "Federal funds" to such jurisdictions. EO 13,768 §§ 1, 2(c). In stark contrast, the Sessions Memo—supporting the government's shifting litigation position in this case—seeks to render the Order inapplicable beyond existing grants for three specific Department of Justice ("DOJ") grant programs. [ER64] As the district court correctly recognized, "[t]he federal government's construction requires a complete rewriting of the Executive Order's language and does not retain any of Section 9(a)'s legal effect." [ER20] Attorney General Sessions's attempt to modify EO 13,768, under the guise of providing guidance on the implementation of the Order, is contrary to law. Other than the courts, only the President—or Congress (if acting pursuant to relevant constitutional authority)—has the authority to modify, nullify, repeal or replace a presidential directive issued through an executive order. A subordinate member of the Executive Branch does not.

The government's brief to this Court does not even attempt to defend Section 9(a) of the Order on its merits in the form promulgated by the President and correctly interpreted by the district court. To the contrary, the government's merits based defense of the Order relies on an interpretation that would nullify a key component of the Order, namely, Section 9(a). The government's specious argument that Section 9(a) of the Order must be interpreted narrowly because of the Order's directive that it be implemented only "to the extent consistent with law," quickly falls apart when the Sessions Memo is read in tandem with the plain

language of the Order and the President's statements about the intent of the Order, which make clear that the President and the Attorney General differ in their interpretation of what is "consistent with law." EO 13,768 is a presidential action carrying significant weight and legal effect. It states in no uncertain terms that the Order is intended to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." EO 13,768 § 2(c). The President directs specific federal officers to implement the Order with regard to "Sanctuary Jurisdictions": he authorizes the Secretary of Homeland Security to designate jurisdictions as "sanctuary jurisdictions," directs the Director of the Office of Management and Budget ("OMB") to obtain and provide relevant information on "all Federal grant money" that is currently received by the sanctuary jurisdictions, and orders the Attorney General to take "appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.* at § 9. Nowhere does the President direct or provide the Attorney General with the authority to interpret *which* federal funds administered by *which* Executive Branch agencies should be withheld from "sanctuary jurisdictions." To the contrary, the President directs the Director of OMB to develop a comprehensive list of "all federal grant money." *Id.* at § 9. In public statements made since issuing the Order, the President has clearly, consistently, and repeatedly

indicated that the Order is supposed to take away all federal funding from these sanctuary cities. [ER 15-16].

The Sessions Memo cannot narrow the scope or meaning of EO 13,768. A contrary holding not only would be erroneous, but would establish a dangerous precedent concerning the scope of agency power and the interpretation of presidential directives. To begin with, the Sessions Memo is not directed at and does not purport to bind agencies other than DOJ; nor would DOJ have authority to do so. Even assuming that the Sessions Memo could bind another federal agency, it is not due any deference because it seeks to erase the unambiguous language of EO 13,768, among other reasons. Only by ignoring standard canons of construction and clear presidential intent can the government argue that the unambiguous language of the Order supports its position. Although the government avoids expressly contending that the Sessions Memo is due deference, its argument is implicitly based on the Memo's interpretation of the Order and that argument must fail under well-established administrative law doctrines.

Just as the government's argument on the merits must fail because it is based on an untenable attempt to nullify the Order, the government's cursory and undeveloped justiciability argument must also founder, Gov't Br. at 20-21. The government's attempted retreat from the clear threat posed by the Order is precisely the type of voluntary cessation that provides an insufficient basis to avoid

legal scrutiny of challenged conduct. Moreover, the Executive's ongoing actions demonstrate that the Order should be read as written and that the threat of prosecution is real—notwithstanding the Sessions Memo and the government's litigation positions. Indeed, less than three weeks ago, DOJ sent letters to over twenty alleged sanctuary jurisdictions threatening subpoenas, and on the very same day, the President's Press Secretary endorsed that action in no uncertain terms: "The White House has been very clear that we don't support sanctuary cities."[3] If the Executive Branch wants to extinguish the force of the Order, the President must rescind or modify the Order.

ARGUMENT

I. EXECUTIVE ORDERS CARRY SIGNIFICANT WEIGHT AND LEGAL EFFECT.

A. Source of Authority, Use and Definition of Executive Orders.

Presidents derive their power to issue executive orders from two sources of authority: "an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). With respect to constitutional authority, Article II of the Constitution authorizes the President to issue executive orders in (a) areas exclusive to presidential power, and (b) areas of concurrent congressional- presidential authority, if the order is not "incompatible with the

[3] White House Press Briefing by White House Press Secretary Sarah Sanders (Jan. 24, 2018), *available at* https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-012418/

expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

While neither Congress nor the Executive Branch has established a formal definition of "executive order," there is a common understanding that executive orders are presidential directives that are "generally directed to, and govern actions by, Government officials and agencies." Staff of H.R. Comm. on Gov't Operations, 85th Cong., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Comm. Print 1957) (hereinafter "1957 House Report"); *see also* Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 546–557 (2005).

Executive orders have a long history. They have been issued since President Washington assumed office over 225 years ago and issued the first order to the heads of all federal agencies directing them to give him an account of the "affairs of the United States." Cleve R. Wootson Jr., *What Trump Could Learn from George Washington's First Executive Order*, Wash. Post (Feb. 20, 2017), http://wapo.st/2kTUOAg. Presidents have used them "to suspend habeas corpus, desegregate the military, implement affirmative action requirements for government contractors, institute centralized review of proposed agency regulations, stall stem cell research, [and] create the nation's first cybersecurity initiative." Erica Newland, Note, *Executive Orders in Court*, 124 Yale L.J. 2026,

2033 (2015); *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2291 (2001).

B. Executive Orders Are Formal Actions That Carry Significant Weight and That Bind the Agencies To Which They Are Directed.

Executive orders have "the force and effect of law." Newland, *supra*, at 2030-31 (citing, *inter alia*, *Armstrong v. United States*, 80 U.S. 154, 156 (1871) (holding that a presidential order is "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect")). Accordingly, executive orders written in mandatory language are binding on executive agencies. *See Am. Fed'n of Gov't Employees, AFL-CIO (AFGE), Council 147 v. Fed. Labor Relations Auth.*, 204 F.3d 1272, 1275 (9th Cir. 2000) ("There is also no question that the Order is mandatory and that agencies failing to obey the Order are answerable to the President."); *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (explaining that a federal agency "may not simply disregard an Executive Order").

In connection with their power to bind, presidential directives (including executive orders) that have "general applicability and legal effect" for entities other than "Federal agencies or persons in their capacity as officers, agents, or employees thereof," must be published in the Federal Register. 44 U.S.C. § 1505. Other presidential actions, usually including memorandums, directives, and determinations, do not have this statutorily-mandated publication requirement.

EO 13,768, issued on January 25, 2017, was published in the Federal Register on January 30, indicating that it has "general applicability and legal effect." 44 U.S.C. § 1505. And it clearly has such effect: it directly impacts states and localities, among others. Executive orders directed solely at federal government officials can have tremendous impacts on non-federal parties, and can be intended to do so. *See* Kagan, *Presidential Administration*, *supra*, at 2291–92; Stack, *Statutory President*, *supra*, at 547 n.19; *cf. Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (holding that the agency's purportedly procedural rule is in fact substantive—even though it is not backed by legal sanction—because it affects private interests). President Trump's EO 13,768 is such an order.

C. Federal Officials Directed By the President To Act Must Do So.

Executive orders direct government officials and agencies to take action to carry out such orders. *See* 1957 House Report, *supra*. As long as those officials and agencies are "under the direction of the executive branch," they "must implement the President's policy directives to the extent permitted by law." *Sherley*, 689 F.3d at 784 (citing *Bldg. & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28, 32–33 (D.C. Cir. 2002) ("[O]fficers are duty-bound to give effect to the policies embodied in the President's direction, to the extent allowed by the law." (citing *The Federalist* No. 72, at 463 (Alexander Hamilton))). EO 13,768 directs the Secretary

of Homeland Security, the Director of OMB, and other federal agency heads to carry out specific directives, which cannot be limited or negated by the Attorney General. *See infra* Part II.

The government's attempt to narrow the obligation of federal officials to carry out this Order only to the "extent consistent with law" rests on the critical assumptions that the government will respect the constraint and that there is a uniform understanding by the President and his subordinates about what satisfies the constraint. The government relies on the D.C. Circuit's ruling in *Bldg. & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) to argue that the "extent consistent with law" language narrows the Order and therefore cabin's the Attorney General's authority. But unlike in *Allbaugh*, where there was no record to support the argument that an agency official might "make a legally suspect decision," there is ample evidence here that the President intends for his Order to take away all federal funds from sanctuary jurisdictions. This situation is not a "mere possibility" the D.C. Circuit dismissed in *Allbaugh*. *Id.* at 33. In addition, there is disagreement about what is legally permissible, making it likely that federal officials will "make a legally suspect decision" in carrying out the Order. While the Sessions Memo states that it is not legally permissible to take away all federal funding, that interpretation does not free other federal officials from their

duty to carry out the directive—specifically, making their own legal interpretations of the Order.[4]

II. THE ORDER'S DIRECTIVE TO WITHHOLD FEDERAL FUNDS CONTROLS NOTWITHSTANDING THE MEMO'S ATTEMPT TO ELIMINATE THAT DIRECTIVE.

A. The Order Applies To All Agencies, Not Just DOJ and DHS.

EO 13,768 is directed at the entire Executive Branch, not just at DOJ and the Department of Homeland Security ("DHS"). While Section 9 is the immediate focus of this appeal, the Order must be read as a whole to understand the obligations placed upon executive agencies to carry out Section 9. *See Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (applying statutory canons of construction to the interpretation of an executive order); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). The Order

[4] For example, in June 2017, Thomas Homan, the acting director of Immigration and Customs Enforcement (ICE) at the U.S. Department of Homeland Security, confirmed before the House Appropriations Subcommittee on Homeland Security that DHS is complying with the Order's directive to identify "sanctuary jurisdictions" that would "no longer be eligible for federal law enforcement grants or homeland security grants." [SER 209] Director Hoffman noted that DHS was compiling this information and that he estimated there were "well over 100" such jurisdictions. [SER 209-210]. This testimony provides a clear indication that DHS has not been constrained by the Sessions Memo in legally interpreting or carrying out the Order.

must also be read, if possible, so as not to render any of its provisions superfluous. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (applying the "canon against interpreting any statutory provision in a manner that would render another provision superfluous").

The first paragraph of the Order unambiguously states that it "declare[s] the policy of the executive branch." [ER187] And Section 1 of the Order makes clear that the Order is directed at all "executive departments and agencies (agencies)" [ER187]—not merely DOJ and DHS. Throughout, the Order maintains an inclusive reach to all "executive branch" and "agencies," as well as all "Federal funds" and "Federal grants. Section 2, for instance, states: "It is the policy of the executive branch to: . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive *Federal funds*, except as mandated by law" (emphasis added). [ER187]. Section 4 then confirms the broad scope of Section 2: "In furtherance of the policy described in section 2 of this order, I hereby direct *agencies* to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens" (emphasis added). [ER 188] Section 9—the main focus of this litigation—contains an order to OMB "to obtain and provide relevant and responsive information on *all Federal grant money* that currently is received by any sanctuary jurisdiction" (emphasis added). [ER189]

As a result of EO 13,768's broad scope and binding nature, all executive agencies are obliged to comply with it. See 2 C.F.R. § 200.210(b)(1)(ii) (2017).

B. The Sessions Memo Does Not Control the Interpretation of the Order for the Entire Executive Branch.

For the reasons explained in the subsections below, Attorney General Sessions's memo does not and cannot alter executive agencies' duty to comply with EO 13,768 as written.

1. The Sessions Memo Is an Internal DOJ Order Directed Only at DOJ.

The Sessions Memo is addressed to "All Department Grant-Making Components." By DOJ's own admission, "department" refers only to DOJ, not all departments of the federal government. *See* Press Release No. 17-555, Office of Public Affairs, Department of Justice, *Attorney General Jeff Sessions Issues Memorandum on Implementation of Executive Order 13768, "Enhancing Public Safety in the Interior of the United States"* (May 22, 2017) ("Attorney General Jeff Sessions today issued the attached memo to all *Department of Justice* grant making components" (emphasis added)). This interpretation of the word "Department" is consistent with other memoranda issued by DOJ and the Attorney General. *See, e.g.*, *Memorandum for All Component Heads and United States Attorneys: Prohibition on Settlement Payments to Third Parties* (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download; *Memorandum for*

Head of Department Components & United States Attorneys: Update on the Task Force on Crime Reduction and Public Safety (April 5, 2017), https://www.justice.gov/opa/press-release/file/955476/download. Thus, the Sessions Memo does not even purport to bind DHS or other agencies.[5] In fact, the Memo lacks the key hallmark of an Attorney General legal opinion that binds the Executive Branch: it is not written in response to a request by any senior official in the Executive Branch required to comply with Section 9, such as the Secretary of Homeland Security or the Director of OMB, asking the Attorney General how to interpret EO 13,768 consistent with the Constitution and statutory authority.

2. The Attorney General Could Not Bind All Executive Agencies in These Circumstances.

Even if the Sessions Memo had been directed at the entire Executive Branch, it could not bind all agencies, for at least two reasons. *First*, it erroneously ignores other provisions of the Order in interpreting Section 9(a) of the Order, including Sections 2 and 4. These sections "direct agencies to employ all lawful means" to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds." EO 13,768 §§ 2 & 4. [ER187, 188] Given these requirements, Plaintiffs are still at risk of irreparable harm due to the mandate directed at executive agencies other than DOJ to withhold potentially billions of

[5] There also is no indication that DHS is relying on the Sessions Memo. To the contrary, DHS is executing on the directives in the Order. *See supra* Note 4.

dollars in federal grants to Plaintiffs alone, and billions more for cities and states across the country.[6]

Second, a cursory memo from the Attorney General does not have a legally binding effect on the entire Executive Branch. *See, e.g.*, Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318–19 (2000); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 739–41 (2007). One author (now-judge) has observed that legal opinions issued by the Attorney General "will likely be valued only to the extent they are viewed by others in the Executive Branch, the courts, the Congress, and the public as *fair, neutral, and well-reasoned*." Moss, *Executive Branch Legal Interpretation*, *supra*, at 1311 (emphasis added). As discussed in the next subsection, the Sessions Memo does not have the characteristics of a fair, neutral, and well-reasoned legal opinion.

[6] *See Briefing Book: State (and Local Taxes)*, Urban-Brookings Tax Policy Center (accessed on February 12, 2018), http://www.taxpolicycenter.org/briefing-book/what-types-federal-grants-are-made-state-and-local-governments-and-how-do-they-work ("The federal government distributes around $530 billion, about 14 percent of its budget, each year to states and localities, providing about a quarter of these governments' general revenues.").

3. The Unusual Substance and Timing of the Sessions Memo Militate Against It Being Interpreted as Binding the Entire Executive Branch.

Although an OLC opinion or a considered Attorney General legal opinion can, as a matter of Executive Branch practice, be viewed as binding on the Executive Branch, *see id.* at 1320, the Sessions Memo is neither of these. A comparison to examples of DOJ documents that have been considered binding on the Executive Branch is illustrative. *Cf., e.g.*, *The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States & to Defer Removal of Others*, 2014 WL 10788677, at *1 (O.L.C. Nov. 19, 2014) (OLC opinion to DHS and White House Counsel); *Legality of Revised Phila. Plan*, 42 Op. Att'y Gen. 405, 415 (1969) (hereinafter the "Revised Philadelphia Plan Memo") (opinion by the Attorney General to the Secretary of Labor analyzing the legality of the Department of Labor's Revised Philadelphia Plan, which placed requirements on federal contractors to develop affirmative action plans and non-discrimination policies in order to comply with the equal employment opportunity requirements of Executive Order 11,246); Moss, *Executive Branch Legal Interpretation*, *supra*, at 1312–15 (arguing the Constitution mandates the Attorney General and OLC "accept only the strongest legal arguments").

Consider, for example, the difference between the Revised Philadelphia Plan Memo and the Sessions Memo. The former was an 8-page single spaced memo that

included reasoned legal analysis evaluating the requirements of EO 11,246 and considering whether the Revised Philadelphia Plan followed both the requirements of the EO and the requirements of Title VII of the Civil Right Act of 1964. Before concluding that the Revised Philadelphia Plan was not in conflict with Title VII and was a lawful implementation of the Executive Order, the Attorney General offered an interpretation of the EO, reviewed analogous caselaw, and considered both sides of the argument. The Sessions Memo, by contrast, is a 2-page memo that is a conclusory statement of the requirements in Section 9(a) of the Order and the statutory requirements of 8 USC § 1371. It fails to grapple with any of the substantive legal arguments concerning why Section 9 of the Order should be interpreted to apply only to DOJ grants or how the Attorney General has the authority to make such a determination. It cites no caselaw, includes no footnotes, and does not contain any reasoned legal argument. Accordingly, there is no support for a conclusion that the memo binds the Executive Branch, even as a matter of practice (let alone as a legal matter).

In addition, the issuance of the Memo in the midst of litigation is contrary to longstanding practice concerning legal opinions of the Attorney General and OLC, and is thus further evidence that the Sessions Memo is not a document that binds the Executive Branch. *See Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 428 (Fed. Cir. 1986) (stating "[t]he Department of Justice is not allowed

to issue a ruling on a matter already in litigation," and citing three Opinions of the Attorney General); *see also Office of Legal Counsel-Limitation on Op. Function*, 3 Op. O.L.C. 215, 216 (1979); *Memorandum for Attorneys of the Office: Best Practices for OLC Legal Advice and Written Opinions*, at 3 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf ("OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party . . . ."). Attorney General Sessions issued his memo significantly narrowing the interpretation of EO 13,768 on May 22, 2017, shortly after this Court's preliminary injunction order on April 25, 2017.

In sum, the Sessions Memo is not a controlling interpretation of EO 13,768 that binds any non-DOJ agency. Plaintiffs continue to face irreparable harm from the denial of federal funds by non-DOJ agencies.

III. THE SESSIONS MEMO IS NOT ENTITLED TO DEFERENCE

Even assuming that the Attorney General's interpretation of the Order could, in theory, bind the entire Executive Branch, it cannot in practice. Multiple doctrines make clear that the Sessions Memo's interpretation of Section 9(a) of the Order is entitled to no deference.[7]

[7] Although the government's brief implicitly seeks deference to the Sessions Memo by repeatedly invoking it, the government elsewhere acknowledged it is not

A. Deference Is Unwarranted Because the Memo Contradicts the Unambiguous Language of Executive Order 13,768.

The Sessions Memo seeks to erase the bulk of EO 13,768 by contradicting or ignoring the unambiguous language of the Order. Therefore, it may not receive deference. As discussed in Section II above, EO 13,768 unambiguously provides "that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." EO 13,768 § 2(c). The Sessions Memo is "'plainly erroneous'" and "'inconsistent with th[at] (order).'" *Kester v. Campbell*, 652 F.2d 13, 16 (9th Cir. 1981) (quoting *U.S. v. Larionoff*, 431 U.S. 864, 872 (1977)); *see also Udall v. Tallman*, 380 U.S. 1, 18 (1965) (deferring to agency interpretation of Executive Order 8,979 and agency orders issued pursuant to that order only if the agency's interpretation "is not unreasonable [and] if the language . . . bears [the agency's] construction"). Specifically, the Memo effectively rewrites the term "Federal grants" to instead read "only Federal grants administered by the Department of Justice or the Department of Homeland Security." And contrary to the Order's newly-created "authority to designate . . . a jurisdiction as a sanctuary jurisdiction," EO 13,768 § 9(a), the Memo states that the Order does not "purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect." [ER185]

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relying on a deference argument. *See* Case No. 17-574, ECF No. 117 (Reply In Supp. of Defs. Mot. for Recons., June 13, 2017) at 5, n.6.

B. Deference Is Unwarranted Because the Memo Is a Post Hoc Litigation Position.

The Supreme Court has also refused to defer to agency interpretations—as here—that are *post hoc* rationales to support a litigation position. Specifically, the Supreme Court has explained:

> [D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a "convenient litigating position," or a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack[.]"

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (alterations in original) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997), *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988), respectively); *see also Oregon v. Ashcroft*, 368 F.3d 1118, 1130 n.11 (9th Cir. 2004) ("Nor is deference due when an agency's interpretation of a regulation conflicts with the agency's intent at the time the regulation was promulgated."), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006). *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988). While these cases address agency interpretations of regulations, not executive orders, their reasoning applies equally here: an expediently contrived agency interpretation is illegitimate regardless of whether it purports to interpret a statute, regulation, or executive order.

The Sessions Memo is an obvious "*post hoc* justification adopted in response to litigation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 614 (2013). Attorney General Sessions issued his memo on May 22, 2017, about one month after this Court's preliminary injunction order. The next day, on May 23, the Government filled a motion for reconsideration that relied almost exclusively on the "AG Memorandum." *See City and County of San Francisco v. Donald J. Trump, et al.*, No. 17-cv-00485-WHO (N.D. Cal. Mar. 21, 2017), Dkt. No. 107. On June 6, the Government filed a motion to dismiss, which also drew heavily on the Memo, *see id.*, Dkt. No. 111 at 7-8, as did the Government's summary judgment briefing, *see id.* Dkt. No. 172. As the government's brief to this Court candidly admits, the Sessions Memo was intended to "mak[e] clear that the Justice Department's understanding of the Executive Order was that presented to the district court in its consideration of plaintiffs' preliminary injunction motion," Gov't Br. at 9—*i.e.*, the government's litigating position. Because the Sessions Memo is undoubtedly a "*post hoc* justification adopted in response to litigation," deference is not warranted.

C. Deference Is Unwarranted Because the Memo Implicates Questions of Major Significance.

Deference is also unwarranted because the Sessions Memo implicates a question of deep political significance. Judicial deference may not be warranted for an agency's interpretation that implicates a policy decision of "'deep economic and

political significance.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). In addition to implicating matters of significant economic magnitude, with the threatened loss of billions of dollars to Plaintiffs and billions more to other jurisdictions, EO 13,768's provisions implicate fundamental federalism concerns. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–462 (1991). The Memo also asserts interpretive authority even though the Order does not expressly delegate the interpretation of "Federal grants" to any agency, and in fact delegates the designation of "sanctuary jurisdictions" to the Secretary of DHS, not the Attorney General. *See King*, 135 S. Ct. at 2489 (demanding both express delegation and agency expertise for deference to agencies on questions of deep economic and political significance). Therefore, deference to the Sessions Memo is not warranted.

IV. THIS CASE IS JUSTICIABLE DESPITE THE GOVERNMENT'S ATTEMPT AT VOLUNTARY CESSATION.

In a cursory analysis, the government incorrectly claims that this case is not justiciable because "[t]he Executive Branch has confirmed that the Order itself *cannot* be enforced against anyone." Gov't Br. at 21. This is precisely the type of voluntary cessation of offending conduct that cannot be used to avoid review.

In assessing Article III standing or ripeness, a court "consider[s] whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Thomas v. Anchorage Equal Rights Comm'n*,

220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). At the time they brought suit, Plaintiffs-Appellees faced a realistic threat of enforcement with respect to all federal funds based on the plain terms of Section 9(a), viewed in context of the entire Order.[8] Although the Order speaks for itself, it is notable that a letter from DOJ to Congress concerning the Order [ER186]—issued by the Department prior to its first substantive brief in the district Court—did nothing to signal a restrained interpretation. To the contrary, that March 7, 2017 letter states that the Order applies to "Federal grants" without limitation. [ER186]

Then, facing preliminary injunction proceedings in the district court, the government began distancing itself from the Order's plain directive to all agencies concerning all federal funds. As described by the district court, first, in its preliminary injunction briefing, the government argued that "Section 9 simply directs the Attorney General and Secretary to ensure that grants that are already conditioned on compliance with Section 1373 are not remitted to jurisdictions that fail to meet that requirement." [ER63] Next, at the preliminary injunction hearing, as further described by the district court, "the Government went further and explicitly disclaimed the ability under the Executive Order to add conditions to

[8] The clear directive of Section 9(a) of the Order was reinforced by statements of high government officials, as the district court observed. [ER15-17]

grants authorized by Congress or to enforce the Order against any but three grant programs." [ER64] As the district court explained, the government stated "for the first time at oral argument that the Order is merely an exercise of the President's 'bully pulpit' to highlight a changed approach to immigration enforcement"—an "interpretation [that] renders the Order toothless." [ER53]

After the district court granted a preliminary injunction, the government attempted to formalize its distancing from the Order through the Sessions Memo. That Memo was issued on May 22, 2017—just in time for the government to move for reconsideration of the district court's preliminary injunction order. The Memo further detailed the limiting construction of the Order offered by the government at the preliminary injunction hearing, "essentially repeat[ing] the interpretation that the government proposed at oral argument" on the preliminary injunction motion. [ER33] The Sessions Memo, combined with the government's shifting and evolving position leading to that Memo, belies the government's recurring claim in its brief to this Court that it has provided a "consistent interpretation of the Executive Order." Gov't Br. at 20; *see id.* at 22 ("consistently construed"); *id.* ("consistent interpretation"); *id.* at 27 "consistently interpreted").

As the district court astutely observed in its summary judgment order issued in November 2017, "explicit statements" of the President and Attorney General "have been scant since I entered the preliminary injunction" [ER16], which is

understandable in light of the district court's reliance on statements of those individuals and others as supporting the Order's clear breadth. But that restraint—and the false sense of security that it may have been intended to create—has not lasted. Less than three weeks ago, DOJ sent letters to over twenty alleged sanctuary jurisdictions demanding certain information and threatening subpoenas absent that information. The same day that the rash of letters issued, the President's official spokesperson—the White House Press Secretary—could not have been more transparent: "The White House has been very clear that we don't support sanctuary cities." *See supra* n.3.

The district court viewed the government's litigation position as reflected in the Sessions Memo as an illusory promise of non-enforcement—and it is. [ER38-45] It is also voluntary cessation of the government's threats, from the highest levels, to apply the Order as written—which prompted this lawsuit in the first place. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Id.* at 189 (citations omitted). Thus, to establish non-justiciability here, the government has a "heavy burden" of persuading the Court

that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189 (citations omitted). Here, "in light of the Government's shifting interpretations of the Executive Order," it cannot be said that the current Executive Branch interpretation "even if authoritative and binding, will persist past the immediate stage of these proceedings." *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017).

The shifting sands of the government's position, combined with the Order's unambiguous commands to all agencies and the government's ongoing threats toward sanctuary cities, underscore that this case remains justiciable. Notably, the Executive Branch is not without recourse. The President can rescind or modify the Order at any time to manifest the implausibly narrow (and therefore constitutionally non-problematic) meaning it seeks to give to Section 9(a). "The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor." Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 7–9 (2014). Indeed, the Administration has previously recognized revocation and modification as an available course: faced with an implausible interpretation of an initial version of the "travel ban" executive order, the Administration informed this Court that "[r]ather than continuing this litigation, the President intends in the near future to rescind the Order and replace it with a new, substantially revised Executive Order

to eliminate what the panel erroneously thought were constitutional concerns." U.S. Supplemental Brief on *En Banc* Consideration, *Washington v. Trump*, No. 17-35105, ECF No. 154 (9th Cir. Feb. 15, 2017). In no event should this Court allow the government to escape review due to a litigation-based retreat from an Order that, properly interpreted, poses so grave a threat.

CONCLUSION

The Sessions Memo has not and cannot change the meaning of EO 13,768, or the ongoing harm created by its continuing legal effect. For the foregoing reasons, this Court should affirm the district court's judgment in favor of Plaintiffs-Appellees.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,152 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: February 12, 2018

s/*Ann O'Leary*
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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 CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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