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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs, v. DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, JOHN F. KELLY, Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States, Defendants.	Civil Case No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff, v. DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50, Defendants.	Civil Case No. 3:17-cv-00574-WHO ***AMICI CURIAE* BRIEF OF ADMINISTRATIVE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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.

INTRODUCTION AND BACKGROUND

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")[1] on Executive Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (hereinafter "EO 13,768" or "the Order").

Attorney General Sessions's attempt to modify EO 13,768, under the guise of providing guidance on the implementation of the EO, is contrary to law. Outside 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. *See* Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, *Executive Orders: Issuance, Modification, and Revocation* 7–9 (2014).

EO 13,768 is a presidential action carrying significant weight and legal effect. It states in no uncertain terms that one of the policies underlying the Order is 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 Executive 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

[1] *Memorandum for All Department Grant-Making Components: Implementation of Executive Order 13768* (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download.

"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 the Executive Branch 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.

As a result, the memorandum issued by Attorney General Sessions on May 22, 2017 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 itself contradicts the Government's argument that it should be read to bind the entire Executive Branch. The Memo is not directed at and does not purport to bind agencies other than the Department of Justice ("DOJ"); nor would DOJ have authority to do so. Even assuming *arguendo* 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. While the government has not expressly argued that the Sessions Memo is due deference, such an argument would fail because the Memo was issued in the context of litigation. Likewise, its interpretation of EO 13,768 is entitled to little to no deference under well-established administrative law doctrines. Summary judgment should be granted for Plaintiffs.

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. The first source, 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 expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The second source of authority is congressional delegations of power through statute. While Congress and the Executive Branch have not established a set definition for executive orders, 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.

The Ninth Circuit and many commentators agree that executive orders written in mandatory language—and drawing on legitimate sources of authority—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, 1274–75 (9th Cir. 2000); *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012). 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. Thus, contrary to the Government's claims, whether EO 13,768 is an "internal" Executive Branch directive is irrelevant. Even 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.

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II. PLAINTIFFS STILL FACE IRREPARABLE HARM BECAUSE EXECUTIVE ORDER 13,768'S DIRECTIVE TO WITHHOLD FEDERAL FUNDS CONTROLS NOTWITHSTANDING THE SESSIONS MEMO

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"). The plain text of the Order underscores its sweeping scope. While Section 9 is the primary focus of this litigation, the Order must be read as a whole to understand the obligations placed upon executive agencies to carry out Section 9. To begin with, the Order's preamble "declare[s] the policy of the executive branch." Section 1 of the Order, its "Purpose," states that sanctuary jurisdictions have caused "immeasurable harm to the American people and to the very fabric of our Republic." In light of this "immeasurable harm," "[t]he purpose of this order is to direct executive departments and agencies," EO 13,768 § 1, not merely DOJ and DHS.

The remaining sections of EO 13,768 repeat this inclusive emphasis on the "*executive branch*" and "*agencies*," without any limiting language to only DOJ and DHS, or other indicia of a narrower intent. 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." 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." And Section 9—the main focus of this litigation—starts with the statement that "[i]t is the policy of the *executive* branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373" (emphasis added). That Section ends with an order to OMB "to obtain and provide relevant and responsive information on *all Federal grant money* [emphasis added] that currently is received by any sanctuary jurisdiction."

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 and Thus Plaintiffs Still Face Irreparable Harm.

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

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. 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 serve as the legal authority for the views of all agencies, for at least two reasons. *First*, it purports only to interpret Section 9(a) of the Order, and thereby could have no effect on the

Order's other sections, which are addressed to all agencies. As a result, other sections of the Order such as Sections 2 and 4 go unaltered. These sections have significant operative effect, including but not limited to "direct[ing] agencies to employ all lawful means" in furtherance of "[e]nsur[ing] that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds." EO 13,768 §§ 2 & 4. Given these requirements, Plaintiffs are still at risk of irreparable harm due to the requirements placed on executive agencies outside DOJ to withhold potentially billions of dollars in federal grants to Plaintiffs alone, and billions more for cities and states across the country.[2]

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.

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 that have been considered binding on the Executive Branch is illustrative. *Cf., e.g.*, *The Dep't of Homeland*

[2] *See Briefing Book: State (and Local Taxes)*, Urban-Brookings Tax Policy Center (accessed on June 26, 2017), 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.").

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

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 any 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." Sessions Memo at 2.

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

The Supreme Court has made clear that deference should not be given 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 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.*, 133 S. Ct. 1326, 1337 (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. The post-litigation timing of the Sessions Memo, coupled with the Government's rapid-fire motions based on its issuance, demonstrate its role as a "*post hoc* justification adopted in response to litigation." Consequently, deference is not warranted.

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

An additional reason deference is unwarranted is because the Sessions Memo implicates a question of deep political significance. Judicial deference may not be warranted for an agency's interpretation of its authority if the interpretation 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 by the Court to the Sessions Memo is not warranted.

CONCLUSION

The Sessions Memo has not and cannot change the meaning of EO 13,768, or the irreparable harm that it threatens. This Court should grant Plaintiffs summary judgment.

Dated: October 4, 2017

Respectfully submitted,

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APPENDIX

LIST OF *AMICI CURIAE* ADMINISTRATIVE LAW PROFESSORS

(Affiliations provided for identification purposes only)

1. Anne Joseph O'Connell is the George Johnson Professor of Law at the University of California, Berkeley.
2. David Freeman Engstrom is a Professor of Law and the Bernard D. Bergreen Faculty Scholar at Stanford University Law School.
3. Daniel Farber is the Shao Sato Professor of Law at the University of California, Berkeley.
4. Peter M. Shane is the Jacob E. Davis and Jacob E. Davis II Chair of Law at the Ohio State University Moritz College of Law.
5. Peter L. Strauss is the Betts Professor of Law Emeritus at Columbia University Law School.