NEVIN M. GEWERTZ
nevin.gewertz@bartlit-beck.com
ABBY M. MOLLEN
abby.mollen@bartlit-beck.com
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 West Hubbard Street, Suite 300
Chicago, IL 60654
Telephone: (312) 494-4400
Facsimile: (312) 494-4440

Attorneys for *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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.

Case No. 3:17-cv-00574-WHO

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Date: April 5, 2017
Time: 2:00 pm
Dep't: Courtroom 2
Judge: Hon. William H. Orrick

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Trial Date: Not yet set

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INTEREST OF *AMICI CURIAE*

Amici are law professors and scholars in constitutional law, including those who have taught, written, and spoken on the topics of 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 Federal Government's ability to compel State and local Governments to adopt or administer federal law.

INTRODUCTION

The Constitution prohibits the Federal Government from compelling State and local officials to enforce federal law. *Printz v. United States*, 521 U.S. 898, 925 (1997). So too does it prohibit the Federal Government from wielding its spending power to achieve the same result by coercion. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 132 S. Ct. 2566 (2012); *cf. United States v. Butler*, 297 U.S. 1, 75 (1936) (spending power cannot be used as an "instrument for total subversion of the governmental powers reserved to the individual states"). Simply put, "[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925.

That cornerstone of Our Federalism is at stake here. Given its broadest reach, the Executive Order would leave certain State and local governments at risk of losing all "Federal grants." § 9(a). The targeted jurisdictions are those that "willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions)," *id.*, with § 1373 in turn forbidding State and local governments from restricting distribution of information regarding individuals' citizenship or immigration status to the Federal Government. 8 U.S.C. § 1373(a) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."). The Executive Order may go

further still and target for defunding those jurisdictions that refuse to serve as federal detention facilities, either because the Executive Order instructs that such jurisdictions qualify as "sanctuary jurisdictions," § 9(b), or because the executive branch considers such jurisdictions to be in violation of § 1373 itself, *see* Mem. from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att'y Gen., Office of Justice Programs, Department of Justice, Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients, at p. 8 (May 31, 2016), https://oig.justice.gov/ reports/2016/1607.pdf ("Horowitz Memo") (stating that § 1373 may prohibit certain State and local policies against honoring detainer requests).

If the Executive Order conditions all federal funds on compliance with § 1373 or civil detention requests by the Federal Government, it transgresses basic limits on the power of the Federal Government. First, if applied to federal funds already promised to State and local governments, the Executive Order would impermissibly impose new, previously unstated conditions. That alone is fatal: any condition on federal funds must be unambiguous and not retroactive to be valid. Second, the Executive Order would give State and local jurisdictions the very ultimatum that would be unconstitutional if made by Congress in the first instance—submit, or opt-out and lose all federal grants, grants funded in part by the federal tax obligations of the States' own citizens. That "choice" is no choice at all. It presents the exact kind of economic coercion that risks turning States into arms of the Federal Government. If the President's Executive Order requires State and local governments to comply with federal detainer requests—at their own political and economic cost and on pain of losing all federal grants—the assault to Our Federalism is even more apparent. The Federal Government has no authority to conscript State and local police to enforce federal immigration law. It certainly cannot do so by giving States a supposed choice that they cannot refuse.

ARGUMENT

I. Our Federalism Protects States from Becoming Arms of the Federal Government.

Under our system of Federalism, the States possess their own sovereign power—and their own authority and accountability to the people—and are not mere arms of the Federal Government. That means the Federal Government lacks absolute power to rule upon and through the States. The Framers considered and rejected such a form of government, *see Printz*, 521 U.S. at 919-920, understanding that "the only proper objects of government" are "the citizens" themselves, THE FEDERALIST No. 15, p. 109 (C. Rossiter ed. 1961). The Framers' choice ensured that States are not subject to the Federal Government's command: "[T]he 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.[1]

The Constitution embodies the Framers' choice for the States to retain some political independence, or a "residuary and inviolable sovereignty," distinct from the Federal Government. THE FEDERALIST NO. 39, p. 245. Most fundamentally, as Chief Justice Marshall recognized in *McCulloch v. Maryland*, the national government (whatever its powers) is "acknowledged by all" to be limited. 17 U.S. (4 Wheat.) 316, 405 (1819). The Constitution grants the Federal Government only enumerated powers, itself a "limitation of powers because 'the enumeration presupposes something not enumerated.'"

[1] Of course, the Federal Government may "subject state governments to 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).

NFIB, 132 S. Ct. at 2577 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824); alteration omitted)). The "police power," *i.e.*, the "general power of governing," is residual and "possessed by the States, [] not by the Federal Government." *NFIB*, 132 S. Ct. at 2578. 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.[2]

Given this structure of Federalism, the Constitution prohibits the Federal Government from commandeering state legislatures or executive officers into service of federal law or the national political agenda. "[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925. That is no less true where the Constitution grants the Federal Government power to enact and enforce such programs itself. Even then, the Federal Government cannot force the States "to govern according to Congress's instructions," *New York*, 505 U.S. at 162, or, indeed, according to 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*, 132 S. Ct. at 2602. 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 may not "cross[] the line distinguishing encouragement from coercion." *New York*, 505 U.S. at 175. Rather, the States must be free to determine whether it is worth it 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.").

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

Despite these basic precepts of Our Federalism, the Federal Government has at times sought to compel the States to adopt federal law as their own. 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." *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*, 132 S. Ct. at 2605; *id.* at 2666 (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").[3]

The Federalism structure embodied in the Constitution and upheld in these cases and others 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

[3] Of course, these cases address acts of Congress (not executive action) because Congress has "[a]ll legislative powers herein granted" by the Constitution, including the authority under the spending clause to attach conditions to federal funds, U.S. Const. Art. I, § 1; *id.* § 8 cl.1., as explained in the separate amicus brief addressed to the Separation of Powers issues presented by the Executive Order. But these cases nonetheless control here, as they address the limits of the Federal Government's authority as reflected in the Tenth Amendment and the enumeration of powers delegated to the Federal Government—limits that apply no matter what branch of the Federal Government seeks to act beyond them.

(explaining that federalism is "one of the Constitution's structural protections of liberty"). The balance of power between the States and the Federal Government "secures to citizens" the freedoms that "derive from 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.

II. The Executive Order Threatens to Upset Our Federalism.

The Executive Order reflects the President's judgment that so-called sanctuary jurisdictions "have caused immeasurable harm to the American people and to the very fabric of our Republic." § 1. Depending on its reach (and the reach of § 1373, which the Order purports to enforce), it is the Executive Order that poses a threat to our Republic and the dual sovereignty that the Framers sought to enshrine in the Constitution.[4]

A. The Executive Order Threatens to Impose Retroactive Conditions on Federal Funds Already Granted to the States.

"Th[e] practice of attaching conditions to federal funds greatly increases federal power." *NFIB*, 132 S. Ct. at 2659. For that reason, the Supreme Court has set absolute limits on the practice to protect the States—and by extension individual liberties—from undue expansion of federal power. *See id.* Among other limits, any condition 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

[4] Amici offer no view of the proper interpretation of the reach of the Executive Order or 8 U.S.C. § 1373, either in terms of the funds at stake or the particular conduct required to avoid classification as a "sanctuary jurisdiction."

protect States' ability to enter federal spending programs "knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal quotation marks omitted).

Amici know of no statute that unambiguously links federal funds to compliance with § 1373.[5] Yet, the Executive 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, while the Executive Order indicates that jurisdictions that fail to honor civil detainer requests may also qualify as sanctuary jurisdictions at risk of defunding, § 9(b), Amici know of no statute that unambiguously 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, as it addresses the information-sharing obligations of State and local governments (not any detention obligations) and does not purport to condition any federal funds on compliance with those obligations.[6]

If the Executive Order does as it says—that is, if it puts *all* federal funds at risk, including those already accepted by State and local governments, whether for a jurisdiction's noncompliance with § 1373 or its unwillingness to act as a federal detention

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[5] The State Criminal Alien Assistance Program ("SCAAP") and Edward Byrne Memorial Justice Assistance Grant Program ("JAG") grants have been interpreted by the executive branch to require compliance with § 1373 based on the statutory requirement that the jurisdiction comply with "all applicable federal laws." But with neither grant did Congress itself explicitly require compliance with § 1373.

[6] Indeed, prior to the Executive Order, the Federal Government's position was that agreement to detain individuals upon the Federal Government's request was "voluntary." D.I. 1 (Santa Clara Complaint, Case No. 3:17-cv-00574) ¶ 54 (stating that ICE responded in a public exchange of letters that civil detainers are "requests"); *see also Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (holding that to require States and localities to detain prisoners pursuant to federal immigration detainer requests would run afoul of the anti-commandeering doctrine).

facility—it imposes new, after-the-fact conditions on federal funds that Congress chose not to impose in the first instance. Aside from obvious Separation of Powers problems, *see supra* at 5 n.3, that would transgress the basic rule that the spending power "does not include surprising participating States with post acceptance or 'retroactive' conditions" on funds already appropriated to them. *Pennhurst*, 451 U.S. at 25. The Federal Government cannot force new conditions down the throats of State and local governments. 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* D.I. 36-2 (Harris Decl., Case No. 3:17-cv-00574, Ex. B (Tr. of Feb. 5, 2017 interview of President Donald J. Trump)) (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 Threatens to Coerce State and Local Governments Into Enforcing Federal Immigration Law.

The Executive Order also threatens to breach the line that "distinguish[es] encouragement from coercion." *New York*, 505 U.S. at 175. If the Executive Order puts *all* federal funds at stake, it gives States no choice but to comply. The specter of such absolute defunding is a far cry from the modest threat of foregone highway funds in *South Dakota v. Dole*. 483 U.S. at 205. 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.'" *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)); *see NFIB*, 132 S. Ct. at 2604 ("It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a prerogative to reject Congress's desired policy, not merely in theory but in fact." (internal quotation marks omitted)). Indeed, if the Executive Order threatens all federal funds, then even the Medicaid Expansion piece of the Affordable Care Act at

issue in *NFIB* seems modest by comparison.[7] That threatened the States with loss of all Medicaid funds—a subset of all federal funds—unless the States took on expanded Medicaid obligations. Seven Justices agreed in *NFIB* that the Medicaid expansion law amounted to "economic dragooning that leaves the States with no real option but to acquiesce." 132 S. Ct. at 2605; *id.* at 2666 (joint op. of Scalia, Kennedy, Thomas, Alito, JJ.). A condition imposed on *all* federal funds would be economically coercive for the same reason—the offer is one that no State or local government could refuse.[8]

The pernicious consequences of such coercion are perhaps most apparent if classification as a "sanctuary jurisdiction"—and thus potential defunding—can be triggered by a State or local government's refusal to detain individuals upon the Federal Government's request. *Cf.* § 9(b) (seemingly equating a "sanctuary jurisdiction" as one that fails to honor detainer requests); Horowitz Memo at 8 (suggesting that certain policies against honoring detainer requests may operate to "restrict cooperation with ICE in all respects" and thus "be inconsistent with and prohibited by Section 1373"). 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

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[7] By comparison, 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://obama whitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/spec.pdf.

[8] The County previously participated in both the SCAAP and JAG programs. *See* D.I. 26 (Case No. 3:17-cv-00574) at 6 n.5. But after the executive branch issued guidance linking the two programs to compliance with § 1373, the County opted-out, deciding not to accept SCAAP and JAG funds to "retain its full discretion in this policy area." *Id.* Assuming the executive branch's guidance was permissible (a question Amici take no position on), the kind of choice that the County made is exactly what *Dole* requires at a minimum and what the Executive Order threatens to destroy depending on the breadth of the funds it puts at stake. *See United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 362-27 (1942) (Frankfurter, J., dissenting) ("[T]he courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other.").

immigration agents. *See* D.I. 1 (Santa Clara Compl., Case No. 3:17-cv-00574) ¶ 59, D.I. 20 (San Fran. Amd. Compl., Case No. 3:17-cv-00485) ¶ 3 (alleging that complying with voluntary detainer requests would compromise local law enforcement by undermining trust between officers and local communities). The President can no more countermand that determination and require state officers to detain individuals for the Federal Government than Congress could force state law enforcement officers to perform background checks on would-be handgun purchasers in *Printz*. There, as here, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States." 521 U.S. at 922. And there, as here, the augmentation of power to the Federal Government 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 830; *see also NFIB*, 132 S. Ct. at 2602–03. Indeed, the intrusion posed by the Executive Order is likely worse than in *Printz*: the financial burden is greater and law enforcement officers may have to detain individuals for the Federal Government, not just stand between a potential gun purchaser and immediate possession of his gun.

The Federal Government cannot foist the political and financial costs of its immigration policies onto State and local governments, whether 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 be disastrous to Our Federalism: "the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer."

NFIB, 132 S. Ct. at 2602. Indeed, one need not even agree with every aspect of *Printz* or other "New Federalism" decisions of the Supreme Court to understand that their basic meaning is to rein in the kind of incursion by the Federal Government on States' political independence that would exist if the Executive Order threatens absolute defunding of State and local governments that refuse to become agents of federal immigration enforcement.

Such coercion is alone fatal. But if the Executive Order reaches all "Federal grants," it is illegitimate for another reason too. Conditions on federal funds are legitimate only if they "relate[] to the federal interest in particular national projects or programs." *NFIB*, 132 S. Ct. at 2659; *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 federal highway funds at issue in *Dole* and the Medicaid funds at issue in *NFIB* certainly did not. The same reach that would make the Executive Order coercive would also make it overbroad in relation to the federal interest at stake. Either flaw would be fatal.

CONCLUSION

The Framers 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 autonomy and independence of State and local governments in their spheres of authority.

March 22, 2017

BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP

By: /s/ *Nevin M. Gewertz*
Nevin M. Gewertz
Abby M. Mollen

Attorneys for Amici Curiae Constitutional Law Scholars

Amici Curiae Constitutional Law Scholars

(Institutional Affiliation Listed for Identification Purposes Only)

Raquel Aldana, McGeorge School of Law, University of the Pacific

Michelle Wilde Anderson, Stanford Law School

Hadar Aviram, University of California Hastings College of the Law

W. David Ball, Santa Clara School of Law

Lenni B. Benson, New York Law School

Gabriel J. Chin, University of California, Davis School of Law

Ingrid V. Eagly, University of California Los Angeles School of Law

William H.D. Fernholz, University of California Berkeley School of Law

Katherine J. Florey, University of California Davis School of Law

Gerald E. Frug, Harvard Law School

Bill Ong Hing, University of San Francisco School of Law

Sanford V. Levinson, University of Texas School of Law

Alison L. LaCroix, University of Chicago Law School

Karl Manheim, Loyola Law School, Los Angeles

Maya Manian, University of San Francisco School of Law

Hiroshi Motomura, University of California Los Angeles School of Law

James Gray Pope, Rutgers Law School

Darien Shanske, University of California Davis School of Law

Fred Smith, Jr., University of California Berkeley School of Law

Ilya Somin, George Mason University, Antonin Scalia Law School

Elissa Steglich, University of Texas School of Law

Rose Cuison-Villazor, University of California Davis School of Law

Michael Vitiello, McGeorge School of Law, University of the Pacific

Alexander "Sasha" Volokh, Emory University School of Law

Keith Whittington, Princeton University

Michael J. Wishnie, Yale Law School

Ernest Young, Duke University School of Law