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The Federal Government's Authority to Impose Conditions on Grant Funds

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Summary

Commonly known as the Spending Clause, Article I, Section 8, Clause 1 of the U.S. Constitution has been widely recognized as providing the federal government with the legal authority to offer federal grant funds to states and localities that are contingent on the recipients engaging in, or refraining from, certain activities. However, the Supreme Court has articulated certain limitations on the exercise of this power. In its 1987 decision in *South Dakota v. Dole*, which arguably remains the leading case regarding the use of the federal government's conditional spending power, the Court held that legislation enacted pursuant to the Spending Clause must be in pursuit of the "general welfare." In addition, the *Dole* Court held that any conditions attached to the receipt of federal funds must: (1) be unambiguously established so that recipients can knowingly accept or reject them; (2) be germane to the federal interest in the particular national projects or programs to which the money is directed; (3) not violate other provisions of the Constitution, such as the First Amendment or the Due Process or Takings Clauses of the Fifth Amendment; and (4) not cross the line from enticement to impermissible coercion, such that states have no real choice but to accept the funding and enact or administer a federal regulatory program. The fourth of these criteria, in particular, is intended to ensure that any conditions on federal grant funds do not run afoul of the Tenth Amendment's prohibition on the federal government's "commandeering" of state or local governments or officials by requiring them to carry out federal programs.

The power of the federal government to attach conditions to federal grants has received renewed attention due to a January 2017 executive order issued by President Trump that is intended to encourage state and local cooperation with federal immigration enforcement by withholding federal grants to nonfederal entities that have adopted "sanctuary" policies. Several jurisdictions that could be affected by the executive order have filed suit against the President and his senior officials challenging the order's constitutionality and seeking an injunction that would bar its implementation. The plaintiffs argue, among other things, that the executive order: (1) does not comport with the restrictions on the spending power that were articulated by the High Court in *Dole*, and (2) violates the Tenth Amendment by compelling states and localities to enforce federal immigration law. This litigation regarding the executive order, and other legal challenges that may be filed in the future, could provide an opportunity for the federal courts to elaborate further on the federal government's power to impose conditions on the use of federal funds.

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A January 2017 executive order that could render certain state and local governments ineligible to receive federal grants¹ has generated interest in the federal government's power to condition funding on recipients taking or refraining from certain actions. This particular executive order raises the prospect of withholding federal grant money from "sanctuary jurisdictions"²—or state or local governments that have adopted laws, policies, or practices intended to limit their involvement in federal immigration enforcement activities—in an effort to encourage the jurisdictions to change their behavior. However, the question of whether specific conditions attached to federal funds is permissible has been a recurring topic of litigation³ and congressional interest⁴ over the years. Such litigation has resulted in the U.S. Supreme Court articulating several limitations on the federal government's authority to distribute funds to nonfederal entities contingent on their compliance with specific conditions. In particular, the Court has held that, for funding conditions to be permissible, they must (1) be "unambiguous[]" as to the "consequences of ... participation" in the federal spending program;⁵ (2) germane "to the federal interest in particular national projects or programs;"⁶ (3) not be barred by a separate constitutional provision;⁷ and (4) not go so far as functionally to coerce funding recipients, leaving them with no choice but to comply with a federal directive.⁸

This report provides a brief overview of the federal government's authority to impose conditions on federal grant funding. It explains the constitutional basis of the federal government's power to condition funds, as well as the limits on this power that have been recognized in a long line of U.S. Supreme Court cases.⁹ The report also briefly discusses recently filed litigation challenging the executive order targeting federal funding for "sanctuary" jurisdictions and, in particular, how this litigation could further shape the jurisprudence regarding the spending power.

Powers of the Federal Government Generally¹⁰

The U.S. Constitution confers upon the federal government only specific, enumerated powers.¹¹ As the Supreme Court has explained, "rather than granting general authority to perform all the

¹ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

² For additional information regarding "sanctuary jurisdictions," see CRS Report R44795, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, by (name redacted) ; CRS Report R44118, *Sanctuary Jurisdictions and Criminal Aliens: In Brief*, by (name redacted) ; CRS Insight IN10653, *Sanctuary Jurisdictions: Congressional Action and President Trump's Interior Enforcement Executive Order*, by (name redacted) ; and CRS Report R44789, *Sanctuary Jurisdictions and Select Federal Grant Funding Issues: In Brief*, by (name redacted)

³ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012).

⁴ See, e.g., *Role of State Legislatures in Appropriating Federal Funds to States: Hearing Before S. Comm. on Gov't Affairs, Subcomm. on Intergov't Relations*, 95th Cong., 1st Sess. (1977); *Federal Assistance Reform: Hearing Before S. Comm. on Gov't Affairs, Subcomm. on Intergov't Relations*, 97th Cong., 1st Sess. (1981); *Current Condition of American Federalism: Hearing Before H. Comm. on Gov't Operations, Subcomm. on Intergov't Relations and Human Resources*, 97th Cong., 1st Sess. (1981).

⁵ *South Dakota v. Dole*, 483 U.S. 203, 205-08 (1987) (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17).

⁶ *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 460 (1978)).

⁷ *Dole*, 483 U.S. at 207-08.

⁸ *Id.* at 211; *NFIB*, 132 S. Ct. at 2605 (opinion of Roberts, C.J.).

⁹ See *supra* note 3.

¹⁰ Portions of this section of the report have been adapted from CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by (name redacted) [hereinafter "CRS Constitutional Authority Statements report"].

¹¹ *Kansas v. Colorado*, 206 U.S. 46, 81 (1907); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); see also (continued...)

conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers."¹² These specific powers encompass a variety of activities, including the power to regulate foreign and interstate commerce,¹³ to declare war,¹⁴ and to impose taxes and spend the money collected from taxation to "provide for the ... general Welfare of the United States."¹⁵ This "spending power" is the focus of this report.

The reach of the federal government's enumerated powers is further supplemented by the final clause of Article I, Section 8, commonly known as the Necessary and Proper Clause, which provides the legislative branch with the power to adopt measures that assist in the achievement of ends contemplated by other provisions in the Constitution.¹⁶ The Necessary and Proper Clause expressly grants Congress the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers [listed in Article I, Section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹⁷ The "broad"¹⁸ scope of Congress's power under the Necessary and Proper Clause has been held to leave "Congress a large discretion as to the means that may be employed in executing a given power."¹⁹ In so holding, the Supreme Court has described the clause as providing the "broad power to enact laws that are 'convenient, or useful' or 'conducive' to" a more specific authority's "beneficial exercise."²⁰ However, the Necessary and Proper Clause is *not* itself an independent grant of legislative power to Congress; rather, the clause is "a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution....'"²¹

On the other hand, the Supreme Court has identified federalism-based constraints on the Congress's legislative power to influence state and local activity, in particular, that stem from the Tenth Amendment²²—a provision of the Bill of Rights that reserves to the states and the people those powers not expressly granted to the federal government.²³ Among the powers generally

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CRS Constitutional Authority Statements report.

¹² *NFIB*, 132 S. Ct. at 2577; *see also* *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ *Id.* art. I, § 8, cl. 11.

¹⁵ *Id.* art. I, § 8, cl. 1.

¹⁶ For example, the Court has recognized that Congress, through the Necessary and Proper Clause, has the power to enact legislation to implement U.S. treaty obligations, as such legislation may be necessary to give effect to the federal government's power to make treaties, which is found in Article II, Section 2, Clause 2 of the Constitution. *See Missouri v. Holland*, 252 U.S. 416 (1920); *Neely v. Hinkel*, 180 U.S. 109 (1901).

¹⁷ U.S. CONST. art. I, § 8, cl. 18.

¹⁸ *United States v. Kebodeaux*, 570 U.S. ___, 133 S. Ct. 2496, 2503 (2013); *United States v. Comstock*, 560 U.S. 126, 133 (2010).

¹⁹ *Lottery Case*, 188 U.S. 321, 355 (1903).

²⁰ *See Comstock*, 560 U.S. at 134 (quoting *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 405 (1819)).

²¹ *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (emphasis in original).

²² For a discussion of other limits on Congress's powers beyond the principle of federalism, including separation of powers and individual rights, *see* CRS Constitutional Authority Statements report.

²³ *See* U.S. CONST. amend. X (providing that 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."); *see also* *New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.").

seen to have been reserved to the states are traditional “police powers” concerning the promotion and regulation of safety, health, welfare, and economic activity within the state’s jurisdiction.²⁴ The Supreme Court has interpreted the Tenth Amendment to prevent the federal government from “commandeering” state governments, either by requiring them to enact laws that address particular problems²⁵ or by compelling “the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”²⁶ The “anti-commandeering doctrine” was most prominently articulated by the Supreme Court in *New York v. United States*²⁷ and *Printz v. United States*.²⁸ Both cases were premised on the view that under the federalist system, the states are sovereign entities distinct from the federal government,²⁹ and Congress cannot blur this distinction by commandeering the state political branches to perform functions on the federal government’s behalf.³⁰

While the federal government may, however, be constitutionally barred from conscripting state executive officers or state legislators into assisting in the administration of a federal program, other means may be available to influence states to adopt favored federal policies.³¹ Perhaps most

²⁴ *Western Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907) (“Decisions of this court ... recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people.”); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (“That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true.”). See also *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power....”).

²⁵ *New York v. United States*, 505 U.S. 144, 161, 173 (1992).

²⁶ *Printz v. United States*, 521 U.S. 898, 935 (1997).

²⁷ 505 U.S. 144 (1992).

²⁸ 521 U.S. 898 (1997).

²⁹ See *New York*, 505 at 155-160 (discussing the division of sovereignty in the federalist system, and stating that although “[t]he actual scope of the Federal Government’s authority with respect to the States has changed over the years ... the constitutional structure underlying and limiting that authority has not”); *Printz*, 521 U.S. at 518 (“It is incontestable that the Constitution established a system of ‘dual sovereignty.’”). The Court identified this distinction between the federal and state governments as advancing multiple goals, including better ensuring the political accountability of these governments and reducing the risk of tyranny that might result with the concentration of power in a single sovereign. *Printz*, 521 at 920-921; *New York*, 505 at 181-183.

³⁰ Not every requirement imposed by the federal government upon state or local government entities and officials necessarily violates the anti-commandeering principles identified in *Printz* and *New York*, though. A number of federal statutes provide that certain information collected by state entities must be reported to federal agencies. See, e.g., 42 U.S.C. § 5779 (providing that, when a missing child report is submitted to a state or local law enforcement agency, that agency shall report the case to the National Crime Information Center of the Department of Justice). For discussion of various federal reporting requirements applicable to states, see Robert A. Mikos, *Can States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012). The *Printz* Court expressly declined to consider whether these requirements were constitutionally impermissible. Moreover, the Court distinguished reporting requirements from the case before it in *Printz*, which the Court viewed as involving “the forced participation of the States ... in the actual administration of a federal program.” *Printz*, 521 U.S. at 918. See also *id.* at 936 (O’Connor, J., concurring) (describing the Court as having refrained “from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid”). For criticism of the distinction made by the *Printz* Court between reporting requirements and situations where the federal government directly compels states to administer federal regulatory programs, see generally Mikos, *supra*.

³¹ The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. Accordingly, states and localities may be precluded from taking actions that are “preempted” by federal law, even if such actions are otherwise valid exercises of their police powers. See *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (“[W]hen the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to (continued...)”).

notably, Congress may condition the receipt of federal funds on state compliance with federal directives, as is discussed in more detail in the following section.

The Spending Clause

While Congress would generally not be permitted to compel state legislators or executive officials to enforce or administer a federal regulatory program,³² it could provide federal grants to encourage states to participate in a federal program. Providing federal funds to nonfederal entities has been seen to constitute an exercise of one of Congress's enumerated powers, namely, its power under the Spending Clause of the Constitution (Article I, Section 8, Clause 1). The Spending Clause expressly empowers Congress "to lay and collect Taxes, ... to ... provide for the ... general Welfare of the United States."³³ When Congress uses its Spending Clause authority, it may generally prescribe the terms and conditions under which the federal funds are accepted and used by recipients.³⁴ These conditions may generally specify that the funds be used for particular purposes³⁵ or, alternatively, prohibit their use for certain purposes.³⁶

Recipients of federal financial assistance in the form of grants may also be required, as a condition of accepting the grant, to perform or refrain from certain actions.³⁷ Through the

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accomplish a similar purpose."); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers."). When Congress acts in an area in which it may preempt state activity in its entirety, it could also impose "preconditions to continued state regulation" in the otherwise preempted field. *Printz*, 521 U.S. at 926; *New York*, 505 U.S. at 173-74 ("Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

³² *Printz*, 521 U.S. at 935 ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly."); *New York*, 505 U.S. at 175-76 (similar)

³³ U.S. CONST. art. I, § 8, cl. 1. Note that the phrase "general Welfare" does not exist in isolation in this clause, which might otherwise be seen to empower Congress to enact laws that broadly promote the general welfare of the nation. *See United States v. Butler*, 297 U.S. 1, 64 (1936) ("The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted."). Instead, the phrase "general Welfare" in Article I, Section 8, Clause 1, is tied to the preceding language in the clause regarding the raising of revenue, and thus requires Congress to spend the money it collects from taxation to promote the general welfare. *See id.* at 64 (holding that "the only thing granted [by the Taxing and Spending Clause] is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare."). While this power is considerable, it is necessarily tied to spending legislation. *See id.*

³⁴ *South Dakota v. Dole*, 483 U.S. 203 (1987).

³⁵ *See Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2603 (2012) ("Congress may attach appropriate conditions to federal ... spending programs to preserve its control over the use of federal funds.").

³⁶ *See, e.g., United States v. Will*, 449 U.S. 200, 229 (1980) (concerning provisions in appropriations acts that purported to eliminate annual pay raises for federal judges); *United States v. Dickerson*, 310 U.S. 554 (1940) (examining a provision in an appropriations act that restricted the funds available for payment of previously authorized bonuses for honorably discharged servicemen who re-enlisted into the Army).

³⁷ *See NFIB*, 132 S. Ct. at 2579 ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions."). It is important to note, however, that, as a general matter, entities that receive federal grant funds do not lose their rights as organizations to use their own, private resources for certain "political" activities (e.g., lobbying for legislative programs or changes, endorsing or contributing to political candidates or parties, voter registration or get-out-the-vote campaigns) as a consequence of receiving federal funds. The Supreme Court has opined that any attempts by the federal government to restrict private, nongovernmental entities from using their own nonfederal resources for such purposes would likely implicate fundamental rights (continued...)

attachment of such conditions to federal funding, Congress may attain federal policy objectives in areas that it lacks the power to regulate directly (that is, the objectives do not fall within “the enumerated legislative fields committed to the Congress” by the Constitution).³⁸ As the Supreme Court has explained, legislation enacted pursuant to the Spending Clause is one significant way that Congress may influence state behavior without “commandeering” state officials in violation of the Tenth Amendment:

Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.³⁹

Federal Grants⁴⁰

In many (although not all) cases,⁴¹ the specific federal financial assistance to which Congress attaches conditions involves grant funds.⁴² The federal government may offer grants to nonfederal entities in furtherance of national priorities.⁴³ Federal grant programs must be authorized by legislation, which establishes the terms and conditions for individual grant programs.⁴⁴ Federal agencies award grants by executing a grant agreement with the recipient that incorporates the statutory requirements for the grant,⁴⁵ as well as any administrative requirements specified in

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protected by the First Amendment, including freedom of speech and the rights of association and petition. *See, e.g.*, *E. R.R.s President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953). For more information on this topic, see CRS Report RL34725, “Political” Activities of Private Recipients of Federal Grants or Contracts, by (name redacted)

³⁸ *United States v. Butler*, 297 U.S. 1, 65-66 (1936). *See also* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999) (“Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.”).

³⁹ *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (citing *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974); *Lau v. Nichols*, 414 U.S. 563 (1974); *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127 (1947); *Helvering v. Davis*, 301 U.S. 619 (1937); and *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

⁴⁰ For more information regarding the various types of federal grants and federal agency administration of grant programs, see CRS Report R42769, *Federal Grants-in-Aid Administration: A Primer*, by (name redacted)

⁴¹ Under the Foreign Assistance Act of 1961, the President may determine the terms and conditions under which most forms of financial aid are provided to a foreign country or international organization. *See generally* CRS Report R40213, *Foreign Aid: An Introduction to U.S. Programs and Policy*, by (name redacted) and (name redacted)

⁴² Federal law defines a grant as “money, or property provided instead of money, that is paid or provided by the United States Government under a fixed annual or total authorization, to” eligible beneficiaries that include state and local governments as well as certain private nonprofit organizations. 31 U.S.C. § 6501(4)(A) and (B).

⁴³ Grants 101, <https://www.grants.gov/web/grants/learn-grants/grants-101.html> (last visited: Mar. 13, 2017).

⁴⁴ *See Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985) (“[F]ederal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-4 (3d ed. 2006) (“[A] federal grant is a form of assistance authorized by statute in which a federal agency (the grantor) transfers something of value to a party (the grantee) for a purpose, undertaking, or activity of the grantee that the government has chosen to assist. The “thing of value” is usually money, but may, depending on the program legislation, also include property or services. The grantee, again depending on the program legislation, may be a state or local government, a nonprofit organization, or a private individual or business entity.”) (citations omitted).

⁴⁵ 31 U.S.C. § 6304 (“An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when (1) the principal (continued...)”) (continued...)

agency regulations, executive orders, or guidance issued by the Office of Management and Budget (OMB).⁴⁶

The degree of agency discretion in implementing the grant program varies depending on the type of grant program and the terms of the authorizing legislation. Federal grant funds are allocated to recipients based on a statutory formula, agency discretion, or some combination of the two. In some cases, Congress may establish a specific statutory formula for distributing federal funds to eligible grant recipients.⁴⁷ In other cases, Congress may allow federal agencies to exercise their discretion in distributing grant funds to eligible entities that affirmatively apply for them; such grants are often referred to as “competitive grants.”⁴⁸ Agency discretion over the allocation of federal grant funds may be considerable; for example, the statutory language authorizing the discretionary grant program may permit the federal agency, when evaluating and selecting grant applications, to use any criteria that the head of the agency considers to be appropriate.⁴⁹

Under current OMB guidance, federal agencies are required to review the eligibility of potential grant recipients prior to making an award.⁵⁰ This evaluation includes a review of the risks posed by the grant applicant, including, “the applicant’s ability to effectively implement statutory, regulatory, or other requirements imposed on non-federal entities.”⁵¹ However, it may not always be clear what the reference to “statutory, regulatory, or other requirements” means, and a federal awarding agency may seek to identify such requirements under its discretionary authority to administer the grant program.⁵²

If recipients fail to comply with federal grant conditions that they have voluntarily accepted and agreed to follow, they could be subject to a range of consequences. Such consequences include

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purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States ... ; and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”).

⁴⁶ Grant Policies, “How Grant Policies Are Made,” <https://www.grants.gov/web/grants/learn-grants/grant-policies.html> (last visited: Mar. 13, 2017).

⁴⁷ Grant Terminology, definition of “formula grant,” <https://www.grants.gov/web/grants/learn-grants/grant-terminology.html#F> (last visited: Mar. 13, 2017).

⁴⁸ Grant Terminology, definition of “discretionary grant,” <https://www.grants.gov/web/grants/learn-grants/grant-terminology.html#D> (last visited: Mar. 13, 2017).

⁴⁹ See, e.g., 20 U.S.C. § 10006(b) (“The Secretary shall determine which States receive grants under this section, and the amount of those grants, on the basis of information provided in State applications under section 14005 and such other criteria as the Secretary determines appropriate, which may include a State’s need for assistance to help meet the objective of paragraphs (2), (3), (4), (5) or (6) of section 14005(d).”).

⁵⁰ 2 C.F.R. § 200.205(c)(5).

⁵¹ *Id.*

⁵² For example, the Department of Justice’s Office of Justice Programs, which oversees federal grants to state and local jurisdictions under the Edward Byrne Memorial Justice Assistance Grant (JAG) program, issued a brief “guidance” document in October 2016 that clarified that grant applicants must certify their compliance with the immigration statute codified at 8 U.S.C. § 1373. U.S. Dep’t of Justice, Office of Justice Programs, *Additional Guidance Regarding Compliance with 8 U.S.C. § 1373* (Oct. 6, 2016), <https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf> (“Authorizing legislation for the Byrne/JAG grant program requires that all grant applicants certify compliance both with the provisions of that authorizing legislation and all other applicable federal laws. The Office of Justice Programs has determined that 8 U.S.C. § 1373 (Section 1373) is an applicable federal law under the Byrne/JAG authorizing legislation. Therefore, all Byrne/JAG grant applicants must certify compliance with all applicable federal laws, including Section 1373, as part of the Byrne/JAG grant application process.”).

administrative actions to terminate and recover the grant funds,⁵³ or suspension from eligibility for future grant awards.⁵⁴

Limitations on the Spending Power

Although Congress's power under the Spending Clause is expansive,⁵⁵ the Supreme Court articulated certain limitations on the use of federal grant conditions in its 1987 decision in *South Dakota v. Dole*⁵⁶—which arguably remains the leading decision regarding the use of the federal government's conditional spending power—and in subsequent cases.⁵⁷ In particular, these limitations require that any conditions attached to the receipt of federal funds must:

1. be unambiguously established so that recipients can knowingly accept or reject them;
2. be germane to the federal interest in the particular national projects or programs to which the money is directed;
3. not violate a separate constitutional provision, such as the First Amendment or the Due Process or Takings Clauses of the Fifth Amendment;⁵⁸ and
4. not cross the line from enticement to coercion, such that states have no real choice but to accept the funding and enact or administer a federal program.⁵⁹

Each of these limitations on the exercise of the spending power is discussed in more detail below.

Conditions Unambiguous and Set Forth Prior to Acceptance

Under the relevant Supreme Court precedents, federal grant conditions must be set forth unambiguously before a recipient enters into a grant agreement with the federal government. In its 1981 decision in *Pennhurst State School and Hospital v. Halderman*, the Supreme Court explained that this restriction arises because a grant is “much in the nature of a contract” between the states and federal government. Accordingly, in the Court's view, the “legitimacy of Congress' power to legislate under the spending power ... rests on whether the State knowingly and

⁵³ Federal agencies that administer grant programs may monitor recipients for compliance with grant conditions and terminate and recoup funding in the event of noncompliance. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983) (“Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I... [T]he State failed to fulfill those assurances, and it therefore became liable for the funds misused, as the grant specified.”).

⁵⁴ OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement Programs and Activities), 2 C.F.R. Part 180.

⁵⁵ The Supreme Court has indicated that “courts should defer substantially to the judgment of Congress” when determining whether a spending program advances the general welfare. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937)). The Court has even questioned whether the general welfare restriction may be enforced by the courts. *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.”).

⁵⁶ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁵⁷ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012).

⁵⁸ *See supra* note 37.

⁵⁹ *Dole*, 483 U.S. at 207, 211.

voluntarily accepts” the federally imposed conditions.⁶⁰ The Court concluded that “[t]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.”⁶¹ As a result, the Court required that a funding condition be established “unambiguously” prior to acceptance of the grant in order to allow the recipient to make an informed decision about the consequences of participating in the grant program.⁶²

The *Pennhurst* requirement was subsequently applied and clarified in the Supreme Court’s 2012 decision, *National Federation of Independent Businesses v. Sebelius*, which invalidated⁶³ provisions of the Patient Protection and Affordable Care Act of 2010 (ACA)⁶⁴ that would have required the states to expand their Medicaid programs by 2014 to cover virtually all poor Americans under the age of 65, or risk losing all Medicaid funding that they receive from the federal government.⁶⁵ In defense of these provisions, the federal government argued that “the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place.”⁶⁶ However, the Court rejected the argument that the new conditions represented permissible modifications of the existing program because it viewed the Medicaid expansion as “accomplish[ing] a shift in kind, not merely degree.”⁶⁷ Citing *Pennhurst*, the Court opined that states could not be expected to anticipate the statutory provision which granted the federal government the power “to ‘alter’ or ‘amend’ the Medicaid program included the power to transform [Medicaid] so dramatically.”⁶⁸

Relationship Between the Conditions and the Purpose of the Federal Funds

The Supreme Court has also suggested that grant conditions may be improper if they are unrelated “to the particular national projects or programs” to which the federal funds are being directed.⁶⁹ The Court has not provided further elaboration on the nature of this “relationship” requirement,⁷⁰ other than by noting that grant conditions must “bear some relationship” to the

⁶⁰ 451 U.S. 1, 17 (1981); *see also* *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 825-26 (10th Cir. 2014) (“In the federal-grant context, the State is more a partner than a subordinate of the federal government, and this relationship limits the authority of the courts to devise remedies. The State should be informed of what its burdens are before it accepts the federal funds and assumes the concomitant responsibilities.”).

⁶¹ *Pennhurst*, 451 U.S. at 25.

⁶² *Id.*

⁶³ *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2608 (2012).

⁶⁴ P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

⁶⁵ 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

⁶⁶ *NFIB*, 132 S. Ct. at 2605.

⁶⁷ *Id.* at 2605-06 (“The original [Medicaid] program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.”).

⁶⁸ *Id.* at 2606.

⁶⁹ *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). *See also* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958).

⁷⁰ *Dole*, 483 U.S. at 209 n.3 (“Our cases have not required that we define the outer bounds of the ‘germaneness’ or (continued...)”).

underlying purposes of the funds “otherwise ... the spending power could render academic the Constitution’s other grants and limits of federal authority.”⁷¹ The Court does not appear to have invalidated a federal spending condition on the basis that it fails this “relatedness” standard, nor has any lower court seemingly done so.⁷²

In its 1982 decision in *South Dakota v. Dole*, the Supreme Court engaged in what is arguably its most notable discussion of the “relatedness” standard to date. The *Dole* case concerned the National Minimum Drinking Age Amendment of 1984,⁷³ which authorized the Secretary of Transportation to withhold 5% of federal highway funds from states which permitted persons below 21 years of age to purchase alcohol. The State of South Dakota, which allowed persons as young as 19 years old to purchase alcohol, did not argue that this federal highway funding condition violated the “germaneness” principle, instead conceding that it “ha[d] never contended that the congressional action was ... unrelated to a national concern in the absence of the Twenty-first Amendment.”⁷⁴ Nevertheless, a majority of the Court opined that although the grant “condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used,”⁷⁵ conditioning a portion of a state’s federal highway funds on its adoption of a minimum drinking age of 21 years was permissible because it was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”⁷⁶ The dissenting opinion authored by Justice O’Connor, in contrast, would have found that this drinking age condition not to be sufficiently related to the expenditure of federal funds for highway construction.⁷⁷ In particular, Justice O’Connor argued that Congress:

is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.⁷⁸

(...continued)

‘relatedness’ limitation on the imposition of conditions under the spending power.... Because petitioner has not sought such a restriction ... and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.”)

⁷¹ *New York v. United States*, 505 U.S. 144, 167 (1992).

⁷² *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

⁷³ Codified in 23 U.S.C. § 158.

⁷⁴ *Dole*, 483 U.S. at 208 (citation omitted).

⁷⁵ *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2604 (2012) (describing *Dole*, 483 U.S. at 208).

⁷⁶ *Id.* (quoting *Dole*, 483 U.S. at 208) (quotations omitted).

⁷⁷ *Dole*, 483 U.S. at 218 (O’Connor, J., dissenting). (“The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.”).

⁷⁸ *Id.* at 215.

Conditions May Not Induce Recipients to Engage in Unconstitutional Activities

In addition, the Supreme Court has explained that conditions attached to grant programs “may not be used to induce the States to engage in activities that would themselves be unconstitutional.”⁷⁹ In its 1982 decision in *Dole*, previously discussed, the Court noted that, “for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.”⁸⁰ The Supreme Court’s 2013 decision in *United States Agency for International Development v. Alliance for Open Society*, further illustrated this principle.⁸¹ In this case, the Supreme Court considered whether a funding condition related to the U.S. Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Leadership Act”) violated recipients’ First Amendment rights.⁸² The Leadership Act authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight against the global spread of HIV/AIDS.⁸³ The funding condition at issue—commonly referred to as the “Policy Requirement”—prescribed that none of these funds “may be used by an organization ‘that does not have a policy explicitly opposing prostitution and sex trafficking.’”⁸⁴ In other words, unless an organization adopted a policy explicitly opposing prostitution and sex trafficking, it could not receive funds under the Leadership Act, not even if the group were to remain silent as to prostitution and sex trafficking. In holding this condition impermissible, the Court first observed that if an identical requirement were “enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.”⁸⁵ Upon consideration of the later question, the Court ultimately concluded that the Policy Requirement was impermissible because it “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment.”⁸⁶

Coercive Conditions That Intrude on a State’s Sovereignty

The fourth and final limitation that the Supreme Court has articulated as to the spending power is that any conditions imposed on the use of federal funds must comport with the basic principles of federalism as embodied in the Tenth Amendment. Specifically, the Supreme Court has suggested that, in certain situations, “the financial inducements offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion,’”⁸⁷ thereby rendering the funding

⁷⁹ *Dole*, 483 U.S. at 210-11.

⁸⁰ *Id.*; see also *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 214 (2003) (holding that the Children’s Internet Protection Act, which requires public libraries that receive federal funds to install Internet filtering software on their computers, did not induce libraries to violate the First Amendment).

⁸¹ 570 U.S. ___, 133 S. Ct. 2321 (2013).

⁸² *Id.* at 2322.

⁸³ *Id.* at 2324.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2327.

⁸⁶ *Id.* at 2332. For more on this decision, see CRS Report R43027, *Restrictions on the Speech of Recipients of Federal Funds Under the Leadership Act of 2003: United States Agency for International Development v. Alliance for Open Society*, by (name redacted).

⁸⁷ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

condition impermissible. On the other hand, the Court has been reluctant to find compulsion where the federal funds involved can be seen to represent a relatively small amount of the states' budget. Perhaps most notably, in *Dole*, the Court focused on the fact that the funds to be withheld from a state with a drinking age below 21 represented less than 5% of the state's federal highway funds.⁸⁸ Accordingly, the Supreme Court did not view the condition as impermissibly coercing states into complying with the federal program.⁸⁹ Instead, the Court described the threat of losing 5% of a state's federal highway funds as "relatively mild encouragement."⁹⁰

The first and only time that the Supreme Court appears to have invalidated a federal grant condition on the grounds that the condition had "crosse[d] the line from enticement to coercion" was its 2012 opinion *National Federation of Independent Business (NFIB) v. Sebelius*⁹¹ regarding the constitutionality of the Patient Protection and Affordable Care Act (ACA).⁹² The ACA, among other things, required states to expand Medicaid eligibility to cover virtually all poor Americans under the age of 65.⁹³ However, in the controlling opinion⁹⁴ in this case, authored by Chief Justice Roberts, the Court held that the enforcement mechanism for this expansion of Medicaid violated the Tenth Amendment insofar as it involved the withdrawal of all existing Medicaid funds.⁹⁵ In particular, Chief Justice Roberts's opinion held that, when funding for an existing program is conditioned on the adoption of a "new" program, the total amount of federal funds at issue cannot represent a significant portion of a state's budget, or withdrawal of the funding will be held to be unconstitutionally coercive.⁹⁶

Notably, Chief Justice Roberts's opinion in *NFIB* did not identify a specific standard for use in determining what amount of withholding would be coercive. Nor did it prescribe what specific factors or types of factors are necessary in such analysis. Chief Justice Roberts also declined to "fix the outermost line" where a federal financial inducement's "persuasion gives way to coercion."⁹⁷ However, he did conclude that the threatened loss of federal program funds in the case at hand, which made up 10% of an average state's budget, represented a "gun to the head"

⁸⁸ *Id.* at 211. The *NFIB* Court also noted that, in the *Dole* case, "the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time." *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2604 (2012).

⁸⁹ *Dole*, 483 U.S. at 211 ("When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.").

⁹⁰ *Id.*

⁹¹ 567 U.S. 519, 132 S. Ct. 2566 (2012).

⁹² P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

⁹³ *NFIB*, 132 S. Ct. at 2601.

⁹⁴ In *NFIB*, seven Justices held that the requirement that states either comply with the requirements of the Medicaid expansion under the ACA or lose all Medicaid funds violated the Tenth Amendment. *Id.* at 2608. However, these seven Justices either all wrote or joined one of two separate opinions on this issue, and did not join in either the reasoning or judgment of the other opinion. The opinion of Chief Justice Roberts, which was joined by Justices Breyer and Kagan, appears to be significantly narrower than the dissenting opinion authored by Justices Scalia, Kennedy, Thomas, and Alito, and is thus would generally thus be seen as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'") (citation omitted).

⁹⁵ *Id.* at 2604-05. The Court went on to hold, however, that the remedy was to sever that enforcement mechanism, effectively making state participation in the Medicaid expansion voluntary. *Id.* at 2607.

⁹⁶ *Id.* at 2605-06.

⁹⁷ *Id.* at 2606 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937)).

and was a form of “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”⁹⁸

Executive Order 13768

The issuance of President Trump’s January 25, 2017, executive order that could render “sanctuary jurisdictions” ineligible for federal grants has prompted renewed interest in the federal government’s legal authority to impose conditions on federal funds. Lawsuits that have already been filed against the executive order (or similar legal challenges that may be brought in the future) could address some of the questions about the spending power that have been left unanswered by the Supreme Court. For example, the *Dole* Court expressly declined to “define the outer bounds of the ‘germaneness’ or ‘relatedness’ limitation on the imposition of conditions under the spending power.”⁹⁹ Similarly, neither the controlling opinion in *NFIB* nor the majority opinion in *Dole* identified precisely when a financial inducement offered to states by Congress crosses the line between “mild encouragement,” which is permissible, and “impermissibl[e] coercion.”¹⁰⁰

The remaining sections of this report briefly describe (1) the particular provisions of the executive order that relate to sanctuary jurisdictions and (2) the arguments advanced by the plaintiffs in the lawsuits filed to date challenging the order that could help to clarify Spending Clause jurisprudence.

Terms of the Executive Order

Among other things, Executive Order 13768 (EO)¹⁰¹ raises the prospect of withholding federal grant money to state or local government entities that have adopted so-called “sanctuary” laws, policies, or practices that limit their cooperation with federal immigration authorities in identifying and apprehending “unauthorized aliens” within the state or locality’s jurisdiction.¹⁰² Entitled “Enhancing Public Safety in the Interior of the United States,” the EO declares that “[i]t is a 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.”¹⁰³ This federal immigration

⁹⁸ *Id.* at 2604-05.

⁹⁹ *South Dakota v. Dole*, 483 U.S. 203, 209 n.3 (1987).

¹⁰⁰ *NFIB*, 132 S. Ct. at 2604, 2606 (“The Court in *Steward Machine* did not attempt to ‘fix the outermost line’ where persuasion gives way to coercion. 301 U.S., at 591. The Court found it ‘[e]nough for present purposes that wherever the line may be, this statute is within it.’ *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.”); *Dole*, 483 U.S. at 211 (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’ *Steward Machine Co. v. Davis*, *supra*, at 590. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds.... When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.”).

¹⁰¹ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

¹⁰² As used here, the term “unauthorized alien” refers to any alien who entered or remained in the United States in violation of federal immigration law and whose continued presence in the country has not been sanctioned by federal immigration officials.

¹⁰³ 82 Fed. Reg. at 8,801.

statute, enacted in 1996, bars state and local governments and officials from adopting any restriction on the sharing of information regarding “immigration or citizenship status.”¹⁰⁴

Section 9(a) of the EO directs the Secretary of Homeland Security (Secretary) to designate, “in his discretion and to the extent consistent with law,” jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 as “sanctuary jurisdictions.” This section further provides that the U.S. Attorney General and the Secretary must “ensure,” “in their discretion and to the extent consistent with law,” that these “sanctuary” jurisdictions are ineligible to receive federal grants funds, with the exception of grants that are deemed “necessary for law enforcement purposes.” The Attorney General is also ordered 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.” Finally, Section 9(c) of the EO instructs the Director of OMB “to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.”

Pending Litigation Over the Executive Order

Because the language of the EO is open to some interpretation, and repeatedly refers to the EO being implemented “to the extent consistent with law,” questions have arisen about what constitutes a sanctuary jurisdiction for purposes of the order; what federal funds may be denied to such jurisdictions; and how the executive branch may implement the order.¹⁰⁵ Some of these questions may be considered by the federal courts, as several jurisdictions have already filed lawsuits against the President and his senior officials, challenging the EO’s constitutionality and seeking an injunction barring its implementation. These jurisdictions include the City of San Francisco, CA;¹⁰⁶ the County of Santa Clara, CA;¹⁰⁷ and the Massachusetts cities of Chelsea and Lawrence.¹⁰⁸ Collectively, these lawsuits argue, among other things, that the EO violates: (1) the Spending Clause of the U.S. Constitution by imposing funding conditions that are unduly coercive or that are not related to the federal interest furthered by the funds; and (2) the Tenth Amendment prohibition against the federal government “commandeering” state and local governments by compelling them to enforce federal immigration law. For example, the City of San Francisco argues that the EO violates the Spending Clause because it “imposes funding conditions that are not germane to the purpose of the funds insofar as it reaches funds that are

¹⁰⁴ The statute also provides that no person or agency may prohibit a federal, state, or local government entity from (1) sending information regarding immigration status to, or requesting information from, federal immigration authorities; (2) maintaining information regarding immigration status; or (3) exchanging such information with any other federal, state, or local government entity. 8 U.S.C. § 1373.

¹⁰⁵ For an examination of some of these issues, see CRS Report R44795, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement*, by (name redacted) ; CRS Legal Sidebar WSLG1741, *Plan to Restrict Federal Grants to “Sanctuary Jurisdictions” Raises Legal Questions*, by (name redacted) and (name redacted); CRS Insight IN10653, *Sanctuary Jurisdictions: Congressional Action and President Trump’s Interior Enforcement Executive Order*, by (name redacted) ; and CRS Report R44789, *Sanctuary Jurisdictions and Select Federal Grant Funding Issues: In Brief*, by (name redacted)

¹⁰⁶ Amended Compl., *City & Cty. of San Francisco v. Trump* (N.D. Cal. Feb. 27, 2017) (No. 3:17-cv-00485), <https://www.sfcityattorney.org/wp-content/uploads/2017/01/SF-v-Trump-Amended-Complaint-1.pdf> (last visited: Mar. 21, 2017).

¹⁰⁷ Compl., *Cty. of Santa Clara v. Trump* (N.D. Cal. Feb. 3, 2017) (No. 5:17-cv-00574), <https://www.sccgov.org/sites/opa/nr/Documents/Complaint%20-%20Filed.pdf> (last visited: Mar. 21, 2017).

¹⁰⁸ *City of Chelsea, City of Lawrence v. Trump* (D. Mass. Feb. 8, 2017) (No. 1:17-cv-10214), <https://assets.documentcloud.org/documents/3456943/Chelsea-Lawrence-Complaint-Sanctuary-Cities.pdf> (last visited: Mar. 21, 2017).

unrelated to law enforcement or immigration.”¹⁰⁹ In addition, San Francisco claims that the EO is impermissibly coercive, in violation of the *NFIB* opinion:

[The withholding of federal funds pursuant to the EO] threatens a substantial percentage of San Francisco’s overall budget—approximately 13% of its total annual operating budget, even without considering federal multi-year grants. Threatened funds include the entire funding stream for programs, such as Medicaid, that are critical to the lives of San Francisco’s residents. Threats of this magnitude, and to such critical programs, constitute “economic dragooning that leaves the States with no real option but to acquiesce” to federal dictates.¹¹⁰

Similarly, as to the Tenth Amendment, the Massachusetts cities assert that:

[t]he Tenth Amendment, and the federalist system under which state and federal governments coexist, protect state and local governments from federal intrusion on powers reserved to the states, and prohibit the federal government from forcing state and local governments to implement legislation according to federal directives or to regulate in a particular field or a particular way. The Executive Order purports to grant federal officers and agencies unfettered discretion to determine whether a governmental entity has in effect statutes, policies, or practices that “prevent[] or hinder[] the enforcement of Federal law,” and grants the Federal Executive power to “take appropriate enforcement action” against such entities. On its face, this provision of the Executive Order is an unconstitutional attempt to force state and local governments to fall in line with—or regulate under the directive of—the federal government.¹¹¹

In a court filing opposing Santa Clara’s request for a nationwide preliminary injunction against implementation of the executive order, the Department of Justice (DOJ) has argued that Santa Clara’s claims are premature and therefore nonjusticiable,¹¹² given that the Trump Administration has not attempted to withhold federal grant funds from any jurisdiction over a “sanctuary” policies, nor has the DOJ, DHS, or OMB issued any formal guidance to the public describing how federal agencies will implement the executive order.¹¹³ At the time of the publication of this report, the litigation is in its preliminary stages.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov.

¹⁰⁹ Amended Compl., *City & Cty. of San Francisco v. Trump* (N.D. Cal. Feb. 27, 2017) (No. 3:17-cv-00485), at 4, 22-23.

¹¹⁰ *Id.* at 23 (quoting *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2605 (2012)).

¹¹¹ *Id.* at 34-35 (internal citations and quotation marks omitted).

¹¹² Under the ripeness doctrine, claims are not justiciable until they are “ripe for adjudication.” *See, e.g., Texas v. United States*, 523 U.S. 296, 300 (1998); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 488 (5th Cir. 2016). In other words, there is no Article III “case or controversy” for a court to decide if the asserted claim “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas*, 523 U.S. at 300; *see also Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017).

¹¹³ Opp’n to Pl.’s Mot. for Prelim. Inj. at 17, No. 3:17-cv-00574-WHO (copy on file with the author).

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