

United States Senate  
WASHINGTON, DC 20510

February 27, 2017

The Honorable Tom Price  
Secretary  
Department of Health and Human Services  
200 Independence Ave., SW  
Washington, D.C. 20201

Dear Secretary Price:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>2</sup> Memorandum from DHS Secretary John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

<sup>4</sup> Dave Gilson, *Unlike Trump, California Pays Its Taxes*, Mother Jones (Feb. 6, 2017), at <http://www.motherjones.com/politics/2017/02/california-federal-taxes-spending-trump>

<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President's Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> Id. § 9(a).

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<sup>12</sup> Fox News, O’Reilly Factor (Feb. 5, 2017).

<sup>13</sup> Daily Press Briefing (Jan. 25, 2017).

funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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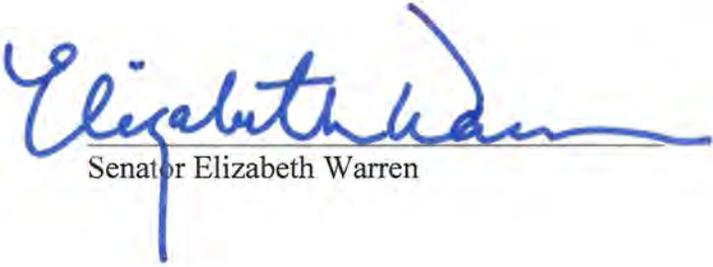
justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

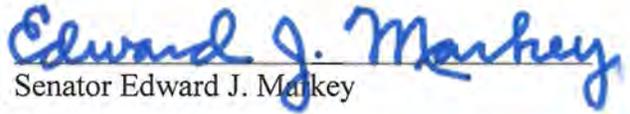
6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

United States Senate  
WASHINGTON, DC 20510

February 27, 2017

The Honorable John Kelly  
Secretary  
Department of Homeland Security  
800 K St., NW  
Washington, D.C. 20528

Dear Secretary Kelly:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, you issued a memorandum instructing your agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

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In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly

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Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

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3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
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6. If you and/or the Attorney General determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If

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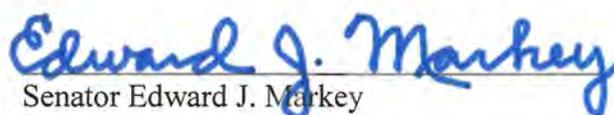
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Senator Elizabeth Warren



Senator Edward J. Markey

United States Senate  
WASHINGTON, DC 20510

February 27, 2017

The Honorable Jeff Sessions  
Attorney General  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Sessions:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>1</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>2</sup> Memorandum from DHS Secretary John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

<sup>4</sup> Dave Gilson, *Unlike Trump, California Pays Its Taxes*, Mother Jones (Feb. 6, 2017), at <http://www.motherjones.com/politics/2017/02/california-federal-taxes-spending-trump>

<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

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<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

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<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can’t Force “Sanctuary Cities” to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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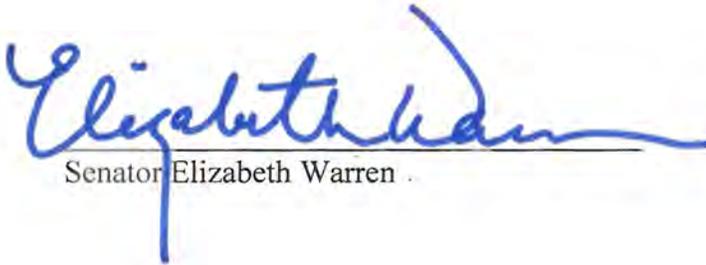
justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable Betsy DeVos  
Secretary  
Department of Education  
400 Maryland Ave., SW  
Washington, D.C. 20202

Dear Secretary DeVos:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President's Executive Order threatens that vital support.

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In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

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Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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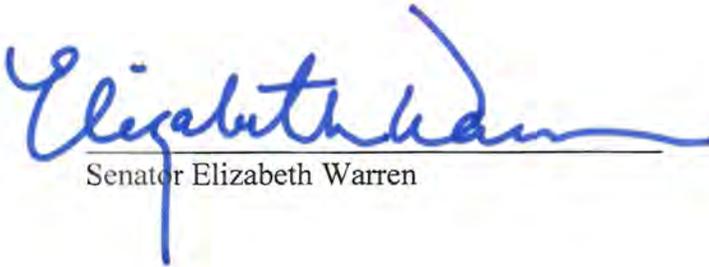
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Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

Governor Rick Perry  
Secretary-Designate, Department of Energy  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Governor Perry:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>1</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

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<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

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Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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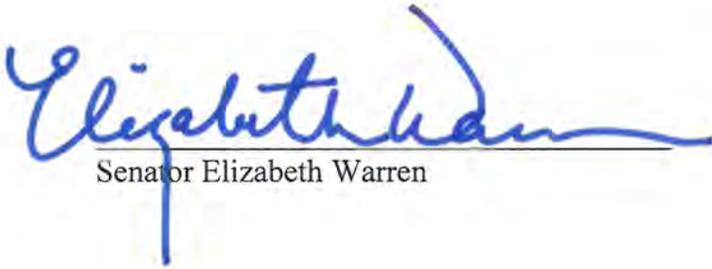
justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

Wilbur Ross  
Secretary-Designate, Department of Commerce  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Mr. Ross:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

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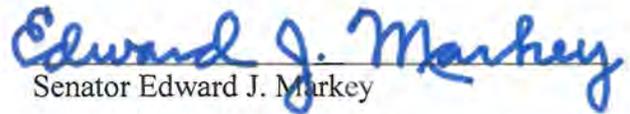
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Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable James Mattis  
Secretary  
Department of Defense  
1000 Defense Pentagon  
Washington, D.C. 20301

Dear Secretary Mattis:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>2</sup> Memorandum from DHS Secretary John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

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<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> Id. § 9(a).

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<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can't Force "Sanctuary Cities" to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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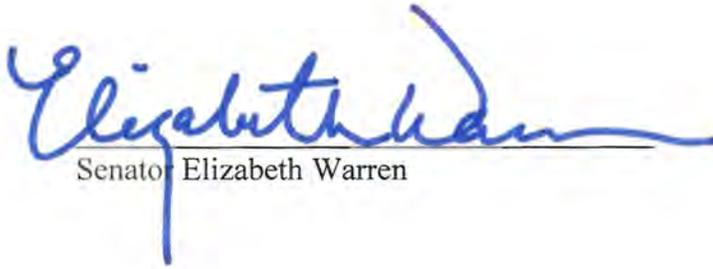
justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable Scott Pruitt  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

Dear Administrator Pruitt:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>1</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

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Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

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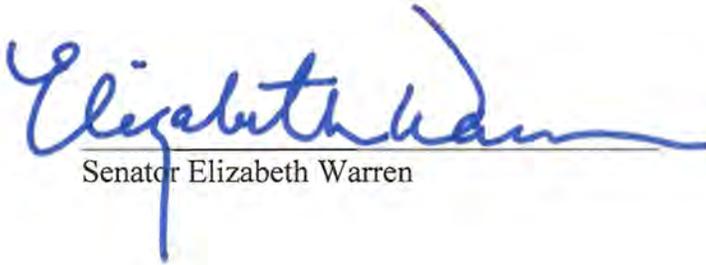
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6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Handwritten signature of Elizabeth Warren in blue ink.

Senator Elizabeth Warren



Handwritten signature of Edward J. Markey in blue ink.

Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

Governor Sonny Perdue  
Secretary-Designate, Department of Agriculture  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Governor Perdue:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

<sup>4</sup> Dave Gilson, *Unlike Trump, California Pays Its Taxes*, Mother Jones (Feb. 6, 2017), at <http://www.motherjones.com/politics/2017/02/california-federal-taxes-spending-trump>

<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> Id. § 9(a).

<sup>9</sup> Alan Gomez, *First ‘Sanctuary City’ caves to Trump demands*, USA Today (Jan. 26, 2017), at <http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/>.

<sup>10</sup> See, e.g., Meghan E. Irons & Cristela Guerra, *Walsh rails against Trump, calls immigration actions ‘direct attack’*, Boston Globe (Jan. 25, 2017), at <https://www.bostonglobe.com/metro/2017/01/25/walsh-says-boston-will-use-city-hall-itself-last-resort/UtZrLHENkQvEC1ftjgs7bP/story.html>.

<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

<sup>12</sup> Fox News, O’Reilly Factor (Feb. 5, 2017).

<sup>13</sup> Daily Press Briefing (Jan. 25, 2017).

funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can’t Force “Sanctuary Cities” to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

<sup>21</sup> See, e.g., Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605) (“The anti-commandeering issue raised by Section 1373 has not yet been directly addressed by the Supreme Court (though the law was upheld in a badly flawed lower court decision back in 1999). We cannot be certain what will happen when and if the

If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



Senator Elizabeth Warren



Senator Edward J. Markey

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable Steven Mnuchin  
Secretary  
Department of the Treasury  
1500 Pennsylvania Ave., NW  
Washington, D.C. 20220

Dear Secretary Mnuchin:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>1</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>2</sup> Memorandum from DHS Secretary John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

<sup>4</sup> Dave Gilson, *Unlike Trump, California Pays Its Taxes*, Mother Jones (Feb. 6, 2017), at <http://www.motherjones.com/politics/2017/02/california-federal-taxes-spending-trump>

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President's Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> Id. § 9(a).

<sup>9</sup> Alan Gomez, *First ‘Sanctuary City’ caves to Trump demands*, USA Today (Jan. 26, 2017), at <http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/>.

<sup>10</sup> See, e.g., Meghan E. Irons & Cristela Guerra, *Walsh rails against Trump, calls immigration actions ‘direct attack’*, Boston Globe (Jan. 25, 2017), at <https://www.bostonglobe.com/metro/2017/01/25/walsh-says-boston-will-use-city-hall-itself-last-resort/UtZrLHENkQvEC1fTjgs7bP/story.html>.

<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

<sup>12</sup> Fox News, O’Reilly Factor (Feb. 5, 2017).

<sup>13</sup> Daily Press Briefing (Jan. 25, 2017).

funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can’t Force “Sanctuary Cities” to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

<sup>21</sup> See, e.g., Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605) (“The anti-commandeering issue raised by Section 1373 has not yet been directly addressed by the Supreme Court (though the law was upheld in a badly flawed lower court decision back in 1999). We cannot be certain what will happen when and if the

If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

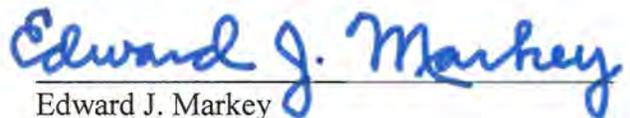
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

February 27, 2017

Alexander Acosta  
Secretary-Designate, Department of Labor  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Mr. Acosta:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>1</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>2</sup> Memorandum from DHS Secretary John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

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<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

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<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can’t Force “Sanctuary Cities” to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

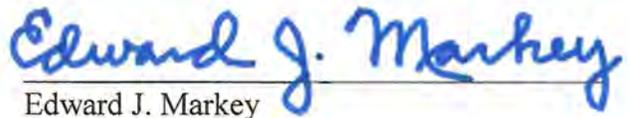
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

Congressman Ryan Zinke  
Secretary-Designate, Department of the Interior  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Congressman Zinke:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

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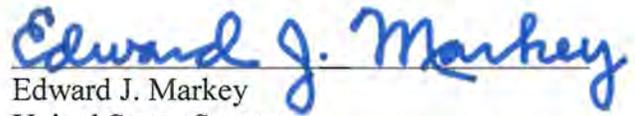
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Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

February 27, 2017

The Honorable David Shulkin  
Secretary  
Department of Veterans Affairs  
810 Vermont Ave., NW  
Washington, D.C. 20571

Dear Secretary Shulkin:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

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Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

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<sup>7</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> *Id.* § 9(a).

<sup>9</sup> Alan Gomez, *First ‘Sanctuary City’ caves to Trump demands*, USA Today (Jan. 26, 2017), at <http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/>.

<sup>10</sup> *See, e.g.*, Meghan E. Irons & Cristela Guerra, *Walsh rails against Trump, calls immigration actions ‘direct attack’*, Boston Globe (Jan. 25, 2017), at <https://www.bostonglobe.com/metro/2017/01/25/walsh-says-boston-will-use-city-hall-itself-last-resort/UtZrLHENkQvEC1fTjgs7bP/story.html>.

<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is

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<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can't Force "Sanctuary Cities" to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

<sup>21</sup> See, e.g., Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605) (“The anti-commandeering issue raised by Section 1373 has not yet been directly addressed by the Supreme Court (though the law was upheld in a badly flawed lower court decision back in 1999). We cannot be certain what will happen when and if the justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.
6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

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<sup>22</sup> 5 U.S.C. § 3331.

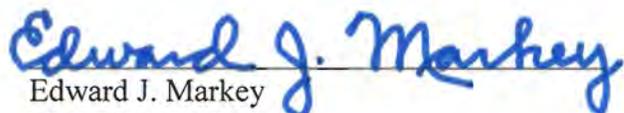
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

February 27, 2017

The Honorable Elaine Chao  
Secretary  
Department of Transportation  
1200 New Jersey Ave., SE  
Washington, D.C. 20590

Dear Secretary Chao:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>3</sup> White House Press Briefing, Feb. 23, 2017.

<sup>4</sup> Dave Gilson, *Unlike Trump, California Pays Its Taxes*, Mother Jones (Feb. 6, 2017), at <http://www.motherjones.com/politics/2017/02/california-federal-taxes-spending-trump>

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise “discretion” to “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 enforcement purposes by the Attorney General or the Secretary.”<sup>7</sup> In turn, 8 U.S.C. § 1373 states that “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 Order also gives the DHS Secretary “the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

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Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
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<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

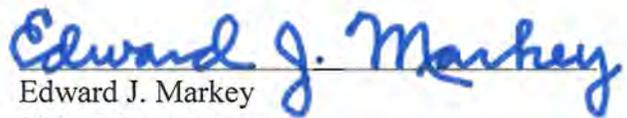
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

Ben Carson  
Secretary-Designate, Department of Housing and Urban Development  
Trump-Pence Transition Team  
1717 Pennsylvania Avenue NW  
Washington, D.C. 20006

Dear Mr. Carson:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President's Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise "discretion" to "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 enforcement purposes by the Attorney General or the Secretary."<sup>7</sup> In turn, 8 U.S.C. § 1373 states that "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 Order also gives the DHS Secretary "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction."<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a "weapon" against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order "directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams."<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

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funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

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If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

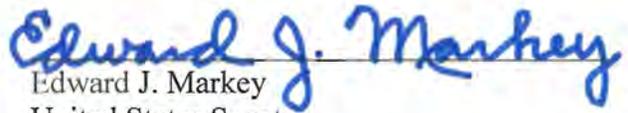
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable Linda McMahon  
Administrator  
Small Business Administration  
409 3<sup>rd</sup> St., SW  
Washington, D.C. 20416

Dear Administrator McMahon:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President’s Executive Order threatens that vital support.

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Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a “weapon” against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order “directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams.”<sup>13</sup>

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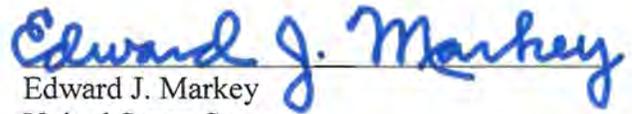
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Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator

# United States Senate

WASHINGTON, DC 20510

February 27, 2017

The Honorable Rex Tillerson  
Secretary  
Department of State  
2201 C St. NW  
Washington, D.C. 20520

Dear Secretary Tillerson:

On January 25, 2017, President Trump issued an Executive Order directing Administration officials to identify “sanctuary jurisdictions” and cut off all federal grants to those jurisdictions.<sup>1</sup> Despite lawsuits challenging the legality of the Order, the Trump Administration appears to be accelerating its efforts to put the Order into effect. Last week, Department of Homeland Security (DHS) Secretary John Kelly issued a memorandum instructing his agency on how to implement the Order,<sup>2</sup> and the White House Press Secretary said that the Administration would “do everything we can to respect taxpayers and ensure that your states follow the law.”<sup>3</sup> Because the Order is unconstitutional and the Administration is not pausing to give the courts time to weigh in, we write to better understand your views and your intentions regarding immediate enforcement against Massachusetts.

Massachusetts is a huge contributor to the federal treasury. We are among the nation’s top three states in terms of per capita federal taxes paid, and Massachusetts is also one of only eleven states whose residents actually subsidize the federal government by paying more in federal taxes than we get back.<sup>4</sup> Federal funding that actually returns to Massachusetts is vitally important. For example, federal support accounts for nearly \$11 billion of our state’s annual budget.<sup>5</sup> These funds go to support health insurance for children, affordable housing for

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<sup>5</sup> Massachusetts Budget & Policy Center, *Partnership in Peril: Federal Funding at Risk for State Programs Relied Upon by Massachusetts Residents* (Feb. 16, 2017), at [http://www.massbudget.org/report\\_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html](http://www.massbudget.org/report_window.php?loc=Partnership-in-Peril-Federal-Funding-at-Risk.html).

families, nursing care for veterans, and countless other critical programs.<sup>6</sup> By its terms, the President's Executive Order threatens that vital support.

Section 9(a) of the Order directs the Attorney General and DHS Secretary to exercise "discretion" to "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 enforcement purposes by the Attorney General or the Secretary."<sup>7</sup> In turn, 8 U.S.C. § 1373 states that "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 Order also gives the DHS Secretary "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction."<sup>8</sup> That sweeping provision gives the DHS Secretary unilateral authority to arbitrarily jeopardize federal grants to numerous jurisdictions, despite the clear unconstitutionality of such an action.

In recent days, states and localities have begun to grapple with how they will respond to this directive. Some have already begun changing their own laws to avoid risking the loss of vital funding.<sup>9</sup> Despite these threats, however, local leaders in Massachusetts have indicated that they do not intend to be browbeaten into changing their own laws to suit the whims of the President on matters over which he has no legal authority or control.<sup>10</sup> Several jurisdictions, including the Massachusetts cities of Chelsea and Lawrence,<sup>11</sup> have sued the Administration to prevent the implementation of this unconstitutional directive.

Evidently, the purpose of this Order is to punish local jurisdictions that make local law enforcement decisions that the President disagrees with. The President himself has described the Order as a "weapon" against certain cities,<sup>12</sup> while the White House Press Secretary said that the Order "directs the [DHS] secretary to look at . . . funding streams that are going to these cities . . . and figure out how we can defund those streams."<sup>13</sup>

The President has no constitutional authority to direct your agency to withhold grants on these arbitrary terms. First, as the Supreme Court reiterated in its seminal case on the Affordable Care Act in 2012, it is unconstitutional to use the threat of cutting off significant, pre-existing

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<sup>6</sup> Id.

<sup>7</sup> "Executive Order: Enhancing Public Safety in the Interior of the United States" (Jan. 25, 2017), § 9(a), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>8</sup> Id. § 9(a).

<sup>9</sup> Alan Gomez, *First 'Sanctuary City' caves to Trump demands*, USA Today (Jan. 26, 2017), at <http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/>.

<sup>10</sup> See, e.g., Meghan E. Irons & Cristela Guerra, *Walsh rails against Trump, calls immigration actions 'direct attack'*, Boston Globe (Jan. 25, 2017), at <https://www.bostonglobe.com/metro/2017/01/25/walsh-says-boston-will-use-city-hall-itself-last-resort/UtZrLHENkQvEC1fTjgs7bP/story.html>.

<sup>11</sup> *City of Chelsea & City of Lawrence v. Trump* (D. Mass. 2017), at <http://lawyerscom.org/wp-content/uploads/2017/02/Sanctuary-Cities-Complaint-FINAL-FILED.pdf>.

<sup>12</sup> Fox News, O'Reilly Factor (Feb. 5, 2017).

<sup>13</sup> Daily Press Briefing (Jan. 25, 2017).

funding to “coerce” a state into adopting a federal policy directive.<sup>14</sup> Where a President openly brags of his desire to use the loss of unrelated funding as a “weapon” against states and localities, the intent to exert such unconstitutional coercion is obvious.

Second, the Supreme Court has long established that conditions on federal grants must be related “to the federal interest in particular national projects or programs” funded by the grants.<sup>15</sup> The Order contains no such limitation, instead referring explicitly to “all Federal grant money that currently is received by any sanctuary jurisdiction.”<sup>16</sup> The Order is unconstitutional because it would condition federal grants on compliance with certain federal immigration laws even when those grants are completely unrelated to those areas.

Third, the Supreme Court has also long established that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>17</sup> Under this precedent, the Order cannot constitutionally be applied to any grant programs at your agency unless Congress – not the President – has expressly and unambiguously conditioned grants under those programs on compliance in the immigration-related areas discussed in the Order.<sup>18</sup> To the best of our knowledge, few, if any, such conditional grants exist.

Finally, the Order is unconstitutional because it ties federal funds to compliance with 8 U.S.C. § 1373 – which is itself an unconstitutional provision. The Supreme Court has ruled that the federal government cannot “commandeer” state officials by directing them to enforce federal law.<sup>19</sup> Consistent with the federalism principles that animate our system of government and our Constitution, this anti-commandeering principle aims to maintain the “[p]reservation of the States as independent and autonomous political entities.”<sup>20</sup> Section 1373 prohibits states and localities from telling their own government employees how to do their jobs – one of the most basic aspects of state and local sovereignty – and is therefore unconstitutional.<sup>21</sup>

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<sup>14</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012).

<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (internal quotations omitted).

<sup>16</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States” (Jan. 25, 2017), § 9(c), at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>17</sup> *Pennhurst State Sc. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

<sup>18</sup> See, e.g., Erwin Chemerinsky, Annie Lai, and Seth Davis, *Trump Can’t Force “Sanctuary Cities” to Enforce His Deportation Plans*, Washington Post (Dec. 22, 2016), at [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.91e9fbb7a0ca](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.91e9fbb7a0ca); Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605).

<sup>19</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>20</sup> *Id.* at 919.

<sup>21</sup> See, e.g., Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, Washington Post (Jan. 26, 2017), at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.b2d635bbe605](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.b2d635bbe605) (“The anti-commandeering issue raised by Section 1373 has not yet been directly addressed by the Supreme Court (though the law was upheld in a badly flawed lower court decision back in 1999). We cannot be certain what will happen when and if the

If the Administration continues to press ahead with this blatantly unconstitutional order, it will lose in court. In the meantime, however, chaos and confusion will reign, as funding for countless vital programs in Massachusetts and other jurisdictions that refuse to be bullied is thrown into question. Every agency head takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.”<sup>22</sup> It is your responsibility to act in accordance with that oath.

You and your counsel are no doubt familiar with each of these Constitutional precepts. It is our responsibility to do what we can to make certain that the Constitutional protections of the people in our home state are protected. Therefore, we ask that you answer the following questions:

1. Do you plan to support the President’s January 25, 2017 Executive Order?
2. Section 9(a) of the Order authorizes the Attorney General and/or the DHS Secretary to cut off any federal grants disbursed by your agency to a jurisdiction if that jurisdiction is found to be a “sanctuary jurisdiction” under the Order. Please indicate which grants administered by your agency you believe are covered by this order, and your basis for determining that Section 9(a) applies to those grants.
3. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions explicitly condition those grants on compliance with 8 U.S.C. § 1373? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction not in compliance with 8 U.S.C. § 1373.
4. Do any of the laws that direct your agency to provide federal grants to state and local jurisdictions expressly condition those grants on whether or not such jurisdictions have been designated as a “sanctuary jurisdiction” under the Order? If so, please indicate which grants and provide the relevant corroborating statutory citations. If not, please provide the constitutional rationale for denying such grants disbursed by your agency to any jurisdiction designated as a “sanctuary jurisdiction” under the Order.
5. If you plan to deny access to pre-existing grants and grant programs disbursed by your agency under the Order, please explain how such action is not unconstitutionally coercive by the standards established in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), particularly in light of the President’s explicit direction that the Order is intended to be used as a “weapon” against local jurisdictions that do not affirmatively enforce his federal policy preferences.

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justices take up this issue. But the principles underlying the Court’s anti-commandeering cases should lead it to strike down this law.”).

<sup>22</sup> 5 U.S.C. § 3331.

6. If the Attorney General and/or the DHS Secretary determine under Section 9(a) of the Executive Order that certain “sanctuary jurisdictions” are ineligible to receive federal grants, will you cut off or otherwise approve cutting off of grants to those jurisdictions? If not, please indicate what actions you intend to take to ensure that those jurisdictions still receive those grants.

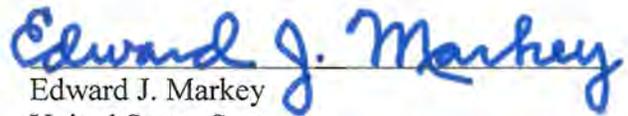
Given the importance of these issues, we respectfully request that you respond to these questions as soon as possible.

Sincerely,



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Elizabeth Warren  
United States Senator



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Edward J. Markey  
United States Senator