Policy Shifts and Legal Battles: The Trump Administration's Impact on Local Government

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I. EXECUTIVE SUMMARY

This white paper analyzes the legal and policy implications of executive actions taken during President Trump's second term, focusing on their impact on local governments. Key areas include immigration enforcement, federal funding freezes, Diversity Equity and Inclusion ("DEI") programs, and legal challenges surrounding sanctuary jurisdictions. The paper outlines the constitutional limits of executive orders and provides practical guidance for municipalities navigating these changes. Leveraging its nationally recognized government relations and legal practices, Brownstein Hyatt Farber Schreck, LLP ("Brownstein") has been at the forefront of monitoring and analyzing these developments, offering timely insights through resources such as its *Tracking President Trump's Executive Orders* and *Executive Action Tracker*.

A. Background

In his second term, President Trump rapidly enacted a series of executive orders aimed at reshaping multiple facets of federal policy. These directives span a broad spectrum, including immigration reform, environmental regulation, energy policy, federal funding structures, and even the nation's approach to trade agreements. The cumulative effect is a body of executive action that touches nearly every corner of government, from how local jurisdictions interact with federal agencies to how foreign governments negotiate trade with the United States.

Notably, Trump's directives reach beyond headline-grabbing topics like immigration and DEI. As highlighted in *Trump Executive Orders and Implications for Cities and Public Agencies*, many orders require immediate compliance from state and local governments, sometimes tying access to federal funding to new policy mandates. This can create uncertainty for public agencies tasked with delivering critical services. Similarly, trade policy has been reshaped through executive orders: *President Trump Establishes Process for Implementing Trade Agreements; Implements U.S.–Japan Deal* describes how new processes for negotiating and implementing trade agreements alter both the speed and predictability of U.S. commitments to its partners, with downstream consequences for industry and local economies.

Within this larger backdrop, several categories of executive action stand out for their direct impacts on cities, states, and federally funded programs:

> (1) Impacts to Designated Sanctuary Cities: President Trump signed several executive orders and presidential proclamations targeted at immigration enforcement and "sanctuary" jurisdictions. These orders assert a firm federal stance on immigration enforcement and seek to penalize "sanctuary" jurisdictions that refuse to cooperate with federal immigration enforcement efforts by potentially revoking their access to federal funds. On February 5, newly-confirmed U.S. Attorney General, Pam Bondi, issued a

memo[1] (the "Sanctuary City AG Memo") stating that the sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice ("DOJ"), and sued Illinois, the city of Chicago, and Cook County on February 6 for allegedly thwarting federal efforts to enforce immigration laws.[2] The lawsuit was dismissed on July 25 for lack of standing.[3]

Additionally, on February 12, the U.S. Attorney General filed a lawsuit against the New York Governor, Kathy Hochul, and state Attorney General Letitia James over immigration enforcement.[4]

The Trump administration also filed a lawsuit against the city of New York, Mayor Eric Adams, and top law enforcement officials on July 24 alleging the city's sanctuary city policies are preempted by federal law.[5]

A group of cities and counties also sued the Trump administration in February to block executive actions targeting "sanctuary" jurisdictions.[6] The federal district court granted a preliminary injunction and the Trump administration filed a motion to dismiss on August 26.[7] A hearing on the motion to dismissed is scheduled for November 5.[8] Similar lawsuits were also filed in Massachusetts and Rhode Island, which are still pending.[9]

(2) Federal Funding: Several of President Trump's early executive orders sought to pause or condition substantial amounts of federal funding. This includes funding to entities that promote DEI or use the funds to promote "gender ideology,"

[1] *Sanctuary Jurisdiction Directives* (Feb. 05, 2025) available at https://www.justice.gov/ag/media/1388531/dl?inline#:~:text=So-called%20%22sanctuary%20jurisdictions%22,other%20applicable%20federal%20immigration%20laws.

[2] February 06, 2025 Complaint available at https://news.wttw.com/sites/default/files/article/file-attachments/gov.uscourts.ilnd_.473062.1.0.pdf.

[3] July 25, 2025 Order available at https://www.courthousenews.com/wp-content/uploads/2025/07/jenkins-dismissal-trump-sanctuary-lawsuit.pdf.

[4] See PBS News, WATCH: Bondi announces lawsuit against New York over immigration enforcement (Feb. 2, 2025) available at https://www.pbs.org/newshour/politics/watch-bondi-announces-lawsuit-against-new-york-over-immigration-enforcement.

[5] July 25, 2025 Complaint, available at https://www.courthousenews.com/wp-content/uploads/2025/07/us-v-nyc-sanctuary-city-eastern-district-new-york.pdf.

[6] San Francisco and Santa Clara counties in California, King County, Washington, and the cities of Portland, Oregon, and New Haven, Connecticut initially filed the federal lawsuit but amended their complaint to include additional jurisdictions.

[7] August 26, 2025 Motion to Dismiss, available at https://storage.courtlistener.com/recap/gov.uscourts.cand.444175/gov.uscourts.cand.444175.227.0.pdf.

[8] https://storage.courtlistener.com/recap/gov.uscourts.cand.444175/gov.uscourts.cand.444175.229.0.pdf.

[9] The Massachusetts cities of Chelsea and Somerville filed a motion for a preliminary injunction on June 3, 2025 and the suits in Rhode Island relate to federal funding for victims of crimes and cooperating with federal immigration enforcement, respectively. June 3, 2025 Motion, available at https://storage.courtlistener.com/recap/gov.uscourts.mad.281125/gov.uscourts.mad.281125.12.1.pdf; August 18, 2025 Complaint, available at https://storage.courtlistener.com/recap/gov.uscourts.rid.60243/gov.uscourts.rid.60243.1.0_1.pdf; June 19, 2025 Preliminary Injunction, available at https://storage.courtlistener.com/recap/gov.uscourts.rid.59601/gov.uscourts.rid.59601.57.0_1.pdf.

though there are other freezes mandated as well. Further, on January 27, the Office of Management and Budget ("OMB") issued a Memorandum temporarily pausing a substantial amount of federal spending (the "OMB Memo"). Judge Loren Alikhan issued an administrative stay on January 28 in the *National Council of Nonprofits v. Office of Management and Budget* case, ("January 28 Administrative Stay"), ordering the Trump administration[10] not to block the disbursement of federal funds under any open awards until at least 5 p.m. EST on February 3, and OMB then issued Memorandum M-25-14, which rescinded the OMB Memo. In a separate case, on January 31, a temporary restraining order (the "January 31 TRO") was issued instructing the Trump administration to not "pause, freeze, impede, block, cancel, or terminate Defendants' compliance with awards and obligations to provide federal assistance to the States."[11] The January 31 TRO also required the Trump administration to "provide written notice of this Order to all . . . agencies and their employees." The DOJ complied with this order and informed all federal agencies that they must not: "pause, freeze, impede, block, cancel, or terminate any awards of obligations on the basis of the OMB memo, or on the basis of the President's recently issued executive orders." Despite the January 28 Administrative Stay and January 31 TRO, 22 state attorney generals and Washington, D.C.'s attorney general accused the Trump administration of continuing to block access to federal funds.[12] On February 10, U.S. District Judge John McConnell ordered the Trump administration to "immediately restore frozen funding" while his order remains in effect, including to the National Institutes of Health and to fulfill the Biden-era Inflation Reduction Act and Infrastructure Improvement and Jobs Act ("February 10 Order").[13] Later that day, the Trump administration filed an appeal of the January 31 TRO, and insisted on an administrative stay of the court's orders pending the appeal. On February 11, the First Circuit denied the administration's request for an administrative stay but made clear that was the only issue it decided. An appeal of the January 31 TRO was not directly at issue. On March 6, a preliminary injunction was issued, extending the January 31 TRO. This preliminary injunction is still in place.

The parallel litigation in front of Judge Loren Alikhan in Washington, D.C. also resulted in a temporary restraining order, also enjoining the Trump administration from freezing federal funds (the "February 3 TRO").[14] A January 25 preliminary injunction extending the TRO remains in place in this case as well.

(3) DEI Programs: The DEI related orders halt federal DEI programs and restrict federal money from flowing to entities that promote DEI—even if the DEI programs in question are *not* funded with federal money. The restriction is recipient,

[10] Also referred to as the "Administration" throughout this white paper.
[11] *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025).
[12] February 07, 2025 Request for Emergency Relief to Enforce Temporary Restraining Order of January 31, 2025, Upon Evidence of Violation available at https://storage.courtlistener.com/recap/gov.uscourts.rid.58912/gov.uscourts.rid.58912.66.0.pdf.
[13] February 10, 2025 Order available at https://storage.courtlistener.com/recap/gov.uscourts.rid.58912/gov.uscourts.rid.58912.96.0_2.pdf.
[14] *National Council of Nonprofits v. Office of Management and Budget*, 1:25-cv-00239, (D.D.C. Feb 03, 2025) ECF No. 30.

not program-based, meaning that promotion of DEI would likely impact all federally-funded programs and projects, not just DEI programs. These orders, to the extent that they pause or restrict federal funding, are currently enjoined by preliminary injunctions.[15]

(4) <u>IRA and IIJA Grants and Incentives</u>: President Donald Trump issued the "Unleashing American Energy" executive order, directing federal agencies to pause disbursements from the Inflation Reduction Act ("IRA") and the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law, ("IIJA"). This pause is intended to allow agencies to review their funding processes to ensure alignment with the Administration's energy policies. Some of the funding freezes are temporarily blocked by court orders, and litigation is ongoing with respect to other portions of the pause.

B. <u>Executive Orders: Legal Limits and Considerations</u>

Executive orders are powerful tools for setting executive policy and agency direction but are not a substitute for legislative or regulatory processes. Their legal effect is limited to what is permissible under the Constitution and federal law, and orders that exceed those limits may be subject to judicial review and invalidation.

Article II of the U.S. Constitution vests the President with executive power over the government, including the obligation to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3 (the "Take Care" Clause); *see id*. at art. II, § 2, cl. 1. Executive orders are instruments through which a President can achieve that power, and may direct the policy priorities and internal operations of federal agencies under the Executive Branch. While executive orders can significantly influence the administration and enforcement of federal programs, they are not legislation and do not, by themselves, create binding legal obligations beyond the Executive Branch. Critically, executive orders generally cannot create new federal law, amend existing statutes, or override legislative requirements.

While an executive order may lawfully direct an agency to initiate a specific process, under current law it cannot itself establish new regulatory requirements or invalidate existing ones. Attempts to do so may violate the Administrative Procedure Act ("APA") and are likely subject to legal challenge. For example, directing agencies to initiate a rulemaking process would be a proper use of an executive order, whereas those declaring old rules void or purporting to create new regulatory definitions may be in violation of the APA. As such, executive orders generally cannot promulgate new regulatory definitions, repeal old regulatory definitions, or create new policy without undergoing the rulemaking process. Any substantive change to regulatory definitions or policy must typically proceed through the notice-and-comment rulemaking process under the APA.

However, there are exceptions to this general rule. For example, while most federal agency regulations require notice-and-comment rulemaking, the APA exempts certain regulations from

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[15] On February 10, 2025, AG Bondi issued a memo exclusively aimed at prohibiting DEI policies in the private sector.

this process, including on "matter(s) relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. 553 (a)(2). The APA also allows agencies to forego notice requirements for "good cause" if the notice procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Further, the United States President has the authority to declare national emergencies under the National Emergencies Act (50 U.S.C. §§ 1601–1651), which allows the President to take actions under certain laws. Regardless, the Supreme Court has recognized that under the APA, an agency must amend or repeal a rule using the same process that was used to pass the regulation initially. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). As such, executive orders cannot unilaterally change federal regulations without notice-and-comment rulemaking, if such regulations were established under that process.

Moreover, executive orders must operate within constitutional and statutory bounds. They cannot override existing laws or infringe upon constitutional protections, such as those guaranteed by the First Amendment, the Equal Protection Clause, or statutory provisions such as Titles VI and VII of the Civil Rights Act of 1964. Similarly, while executive orders may shape agency priorities for future discretionary spending, they generally are not able to unilaterally reallocate or withhold funds that have already been appropriated or obligated by Congress. Actions of that nature may raise concerns under the Appropriations Clause, the Due Process Clause, or the Contracts Clause of the U.S. Constitution.

II. EXECUTIVE ORDERS: ANALYSIS AND IMPLICATIONS

A. Implications of and Requirements for Sanctuary City Designation

1. Review of Executive Orders and Actions

In his first term, President Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (82 FR 8799), which purported to strip sanctuary jurisdictions of federal funding unless deemed necessary for law enforcement purposes.[16] The executive order defined sanctuary jurisdictions as any jurisdiction that "willfully refuses to comply with 8 U.S.C. § 1373," which provides that state and local government cannot prevent the Immigration and Naturalization Service from receiving information regarding the citizenship or immigration status of any individual. Importantly, 8 U.S.C. § 1373 governs only information sharing and does not extend to broader cooperation, such as honoring detainer requests or assisting U.S. Immigration and Customs Enforcement ("ICE") in arrests. The statute does not require states or localities to actively participate in immigration enforcement; rather, it simply prohibits policies that restrict communication with federal immigration agencies.

[16] 82 FR 8799.

That executive order was signed within the first week of President Trump's first term in office, and by the following week, several jurisdictions filed suit to prevent the U.S. government from enforcing the order.[17]

In the first case, the City of San Francisco sued on the grounds that the order violated the Tenth Amendment of the U.S. Constitution, arguing that the order unconstitutionally infringed on state sovereignty.[18] The city sought and won a nationwide preliminary injunction, effectively halting implementation of the order on April 25, 2017. The district court went on to issue a summary judgement in favor of the plaintiffs, permanently enjoining the Administration from withholding funds from sanctuary jurisdictions.[19]

Following the lawsuit, California lawmakers enacted SB 54, the "California Values Act," which restricts state and local law enforcement agencies from using their resources to assist federal immigration enforcement, except in limited circumstances. Specifically, the California Values Act prohibits the use of personnel, facilities, equipment, or funds for immigration enforcement activities. However, it provides exceptions for cooperation in serious criminal cases, including (1) individuals convicted of serious or violent felonies (e.g., murder, rape, robbery), and (2) participation in joint task forces with federal agencies for criminal investigations not primarily focused on immigration enforcement. Notably, the California Values Act does not prevent ICE from operating within the state or halting deportations.

The Trump administration sued California, arguing that SB 54 violated 8 U.S.C. § 1373[20] by restricting law enforcement from cooperating with ICE. However, in *United States v. California* (2019), the Ninth Circuit upheld SB 54, ruling that the federal government cannot force states to participate in federal immigration enforcement, reaffirming state sovereignty under the Tenth Amendment.[21] The Ninth Circuit reiterated that "California has the right, pursuant to the anticommandeering rule [derived from the Tenth Amendment], to refrain from assisting with federal efforts."[22] When the prior Trump administration asked the Supreme Court to review that decision, the Court denied the request, leaving the Ninth Circuit's decision and SB 54 in place. Similar cases have also provided localities with immunity when refusing to cooperate with federal immigration enforcement if their decision was a policy choice protected by discretionary immunity.[23]

In his second term, President Trump has issued several executive orders and proclamations aimed at immigration policies and citizenship, including: *Protecting the Meaning*

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[17] The guidelines under 82 FR 8799 were ultimately removed by former President Biden in January 2021. (See, Executive Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Federal Register 7051, January 20, 2021.)
[18] *City & County of San Francisco v. Trump* (N.D. Cal. 2017) 275 F.Supp.3d 1196.
[19] *Id*. at p. 1212 (granting summary judgement), available at https://www.cand.uscourts.gov/filelibrary/3225/Order-Granting-Motion-for-Summary-Judgment.pdf.
[20] 8 U.S.C. § 1373 is one of the original "anti-sanctuary" laws and was passed in 1996 before "sanctuary" was a common term, and states that no state or local official can prohibit any other state or local official from communicating immigration information to the federal government.
[21] *United States v. California* (9th Cir. 2019) 921 F.3d 865 available at https://oag.ca.gov/system/files/attachments/press-docs/9th_cir_ca_opinion%20SB%2054.pdf.
[22] *Id*. at p. 873.
[23] See *Steinle v. City of SF* (2019) 919 F.3d 1154.

and Value of American Citizenship (Executive Order 14160, 90 FR 8449); *National Emergency Concerning the Southern Border of the United States* (Proclamation 9844, 90 FR 8327); *Securing Our Borders* (Executive Order 14165, 90 FR 8467); *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats* (Executive Order 14161, 90 FR 8451); *Protecting the American People Against Invasion* (Executive Order 14159, 90 FR 8443); and *Protecting American Communities From Criminal Aliens* (Executive Order 14287, 90 FR 18761).

These orders and proclamations have led to an increase in immigration enforcement efforts across the country. Executive Order 14159 is of particular interest as it provides:

> "The Attorney General and Secretary of Homeland Security shall, to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that so-called **'sanctuary' jurisdictions**, **which seek to interfere with the lawful exercise of Federal law enforcement operations**, **do not receive access to Federal funds**."[24]

President Trump has said of sanctuary jurisdictions: "We're trying to end them, and a lot of the people in those communities don't want them."[25]

On February 5, U.S. Attorney General Bondi issued the Sanctuary City AG Memo stating that the sanctuary jurisdictions should not receive access to federal grants administered by the DOJ.[26] Similar to some of the executive orders, the Sanctuary City AG Memo references the Supremacy Clause, stating that the federal government trumps state and local law and enables it to invalidate any state and local law it deems as interfering with federal law.

Further, on February 6, the Trump administration sued Illinois, the city of Chicago, and Cook County for allegedly thwarting federal efforts to enforce immigration laws.[27] The lawsuit sought to invalidate state and local laws (the Way Forward Act, the TRUST Act, Chicago's Welcoming City Act, and Cook County Ordinance 11-0-73)[28], which DOJ alleged were preempted by federal immigration law and impeded the federal government's ability to carry out its immigration enforcement activities. A federal judge dismissed the lawsuit on July 25, citing a lack of standing.[29]

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[24] 90 FR 8443 (emphasis added).

[25] See discussion at https://www.nbcnews.com/politics/donald-trump/live-blog/trump-administration-executive-orders-presidential-agenda-live-updates-rcna188605.

[26] *Sanctuary Jurisdiction Directives* (Feb. 05, 2025) available at https://www.justice.gov/ag/media/1388531/dl?inline#:~:text=So-called%20%22sanctuary%20jurisdictions%22,other%20applicable%20federal%20immigration%20laws.

[27] February 06, 2025 Complaint available at https://news.wttw.com/sites/default/files/article/file-attachments/gov.uscourts.ilnd_.473062.1.0.pdf.

[28] We are currently analyzing these to determine whether there could be any overlap between these laws and any California state or local laws.

[29] July 25, 2025 Dismissal available at https://www.courthousenews.com/wp-content/uploads/2025/07/jenkins-dismissal-trump-sanctuary-lawsuit.pdf.

On July 24, the Trump administration filed a similar lawsuit against the city of New York, Mayor Eric Adams, and top law enforcement officials, arguing that the city's sanctuary laws violate the Supremacy Clause of the U.S. Constitution.[30] Reports suggest the Trump administration is targeting Illinois and New York in particular because they have some of the strongest protections for immigrants in the nation.

Additionally, San Francisco and Santa Clara counties, King County, Washington, and the cities of Portland, Oregon, and New Haven, Connecticut filed a federal lawsuit to stop the policy. On August 22, a federal district court judge issued a preliminary injunction blocking the Trump administration from withholding, freezing, or conditioning the use of federal funds from "sanctuary" jurisdictions.[31]

As of September 17, there has been no freeze in funding to sanctuary cities as a result of the Sanctuary City AG Memo that we are aware of, but this could change in the upcoming days, weeks and months.

2. Implications for Jurisdictions in California

a. Sanctuary City Designation

Although several executive orders have been issued with the stated goal of increasing enforcement actions against sanctuary cities, the criteria for identifying which jurisdictions qualify remains unclear. On August 5, the Trump administration did published a list of states, cities, and counties identified as having policies, laws, or regulations that impede enforcement of federal immigration laws.[32] However, it is uncertain whether additional jurisdictions will be added or what specific criteria trigger a jurisdiction to be designated as a "sanctuary" jurisdiction. Much of this determination appears to rest with the Attorney General and Secretary of Homeland Security.

Additionally, the lawsuit filed against Illinois, Chicago, and Cook County focuses on specific laws that limit ICE's ability to carry out immigration enforcement activities, but does not necessarily define what a "sanctuary" jurisdiction is. This suggests that, rather than adopting a uniform definition, the Trump administration may pursue a case-by-case approach aimed at invalidating particular state or local measures it views as obstructing federal immigration policy.

Further, local governments, as subdivisions of the states, retain rights that limit federal control. As made clear in *United States v. California* (9th Cir. 2019) 921 F.3d 865, the federal government cannot compel local jurisdictions to enforce federal law. This principle explains why immigration policy is set at the federal level and why Congress has never enacted immigration laws requiring localities to enforce them.

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[30] July 24, 2025 Complaint available at https://www.courthousenews.com/wp-content/uploads/2025/07/us-v-nyc-sanctuary-city-eastern-district-new-york.pdf.

[31] This order extended an April 24 preliminary injunction to include new plaintiffs that had since been added to the suit.

[32] See list at https://www.justice.gov/opa/pr/justice-department-publishes-list-sanctuary-jurisdictions.

California identifies itself as a "sanctuary state," with the California Values Act often cited as its sanctuary law. Therefore, even if a city or county in California does not formally identify as a "sanctuary" jurisdiction, it may still be affected by the state's sanctuary status. For example, a reduction in federal funding to California could result in reduced state funding available to local jurisdictions.

Further, now that the Administration is attempting to rescind federal funds from "sanctuary" jurisdictions, there will likely be several additional lawsuits challenging the move on grounds similar to the claims in *City of San Francisco v. Trump*. Those challenges, if California and/or other jurisdictions are successful, could lead to review by the Supreme Court, which would likely rule in favor of the administration given the current conservative majority. The Trump administration could try to make arguments based on 8 U.S.C. § 1373, as it did in *United States v. California*, but, as the precedent currently stands, this would likely only be successful to the extent that the state and local laws are specifically preventing the federal government from enforcing the immigration laws.

The Trump administration could also try to use 8 U.S.C. § 1324, which prohibits "any person" from affirmatively harboring or shielding aliens, or concealing an individual from immigration enforcement or detection. It also prohibits anyone from encouraging or inducing someone to illegally come to the U.S.[33] It is unclear, however, whether "any person" includes the state and local government. The statute also doesn't define "harboring" and "concealing," and therefore it is unclear whether a state or locality's actions would fall under these. Further, this is a criminal statute and courts may be unwilling to qualify the government as "any person" under a criminal statute.

b. Law Enforcement's Ability to Assist in Deportation Efforts

Under the California Values Act, local law enforcement is generally prohibited from assisting ICE in the current Administration's ICE raids, but there are limited exceptions where local law enforcement would be allowed to assist in such raids. Circumstances where local law enforcement could assist ICE include the following:

1. **Individuals with Serious or Violent Felonies**: Local law enforcement may notify ICE of an individual's release or transfer custody if the person has been convicted of a serious or violent felony (e.g., murder, rape, robbery).
2. **Joint Task Forces**: Localities may participate in federal task forces involving criminal investigations, as long as the primary focus is not immigration enforcement (e.g., drug trafficking or human trafficking cases that involve noncitizens).
3. **Judicial Warrants**: Jjails may comply with an ICE request only if ICE obtains a judicial warrant—but administrative detainers (ICE holds) alone are not enough.

Therefore, as the law currently stands, local law enforcement can only act in limited circumstances when it comes to ICE raids or other Trump administration deportation efforts. If

[33] 8 U.S.C. § 1324.

local law enforcement assists in activities prohibited by the California Values Act, the state could likely administer penalties.

B. <u>Impacts on Federal Funding</u>

1. Federal Spending Overview

Generally, federal money is first obligated (promised) to an individual, entity, or lower level of government, and then the money is disbursed (actually sent). This creates three buckets of funding: (1) non-obligated funds, (2) obligated funds, (3) disbursed funds (also known as outlays).

Prior to funds being obligated, there is no contractual obligation with the recipient to disburse the funds. That does not mean there is no *legal* obligation to disburse the funds—generally speaking, congressionally appropriated funds must be disbursed according to congressional intent. But this premise is likely to be the subject of a landmark constitutional challenge by the Trump administration and will be addressed in more detail below.

Once funds have been obligated, they must be disbursed according to the terms of the grant agreement and applicable federal regulations. For example, the Federal Fish and Wildlife Service may send a certificate of apportionment to a state wildlife agency promising a certain amount of federal funding. Once that certificate is sent, the funds are obligated and the federal government incurs a "legal liability to disburse funds immediately or at a later date."[34] Federal regulations, and often the grant agreements themselves, allow for termination of obligated funds in four instances: (1) failure to comply, (2) mutual agreement, (3) recipient request, or (4) if the award no longer meets the program goals or agency priorities.[35] In the past, these four options have been an exhaustive list. The fourth option, regarding agency priorities, has not, in the past, been interpreted to provide a universal or unilateral authority to cancel all funds. Rather, case-by-case analysis is required.

After the money is obligated and then disbursed, it becomes a federal "outlay," meaning the money has left the federal accounts and has been deposited with the recipient. Funds that are already disbursed and now considered outlays are unlikely to be rescinded—once funds have hit the accounts of their recipients, the federal government has historically been unlikely to claw back the funding.

The Congressional Budget and Impoundment Control Act of 1974 ("ICA") traditionally governs the process of a presidential freeze or termination (also called impoundment) of congressionally appropriated funds.[36] The ICA offers the president two options to halt appropriated funds: deferral or recission. Deferral allows the president to withhold funds temporarily; the funding cannot indefinitely be deferred, nor can it be allowed to expire. Recission allows the president to *propose* cancellation of funds, but Congress must act to

[34] 50 CFR 80.91.
[35] 2 CFR 200.340.
[36] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681-688).

approve this within 45 days of the request. Importantly, the ICA offers no statutory authority to defer or terminate federal funding indefinitely or unilaterally.

Senior Trump administration officials believe the ICA is an unconstitutional restriction on presidential power and contend that President Trump has the constitutional authority to freeze or terminate federal funding. Notably, this topic featured prominently during OMB nominee Russel Vought's confirmation hearing before the Senate Budget Committee. Vought and others argue that the president has the constitutional charge to "take Care that the Laws are faithfully executed," meaning that the president must have the discretionary authority to impound funds while executing the laws.[37] Conversely, others argue that the "take Care" clause means that the president has no discretionary authority in this area outside of what Congress delegates.

In the past, the Department of Justice and the U.S. Supreme Court have agreed with the latter argument: the president has no inherent authority to terminate or impound appropriated money. In *Train v. City of New York* (1975) 420 U.S. 35, the Court held that while Congress can confer upon the president the authority to withhold appropriated funds, he may not do so absent such a delegation of power.[38] Again, this topic is likely to be freshly litigated in the near future.

2. Review of Executive Actions

a. OMB's (Now Rescinded) Temporary Freeze on Federal Funds

During the 2024 presidential campaign, then-candidate Donald Trump promised to "use the president's long-recognized impoundment power to squeeze the bloated federal bureaucracy for massive savings." Both in a now-rescinded OMB Memo and in seven early executive orders, President Trump set out to do just that. On January 20, President Trump signed seven executive orders with direct impacts on the obligation and disbursement of federal funds. A week later, on January 27, OMB released the OMB Memo (later rescinded) purporting to "temporarily pause all . . . Federal financial assistance." OMB clarified that the OMB Memo did not intend to pause *all* federal funding—only funding directly implicated by the following orders:

- *Protecting the American People Against Invasion* (Executive Order 14159, 90 FR 8443);
- *Reevaluating and Realigning United States Foreign Aid* (Executive Order 14169, 90 FR 8619);
- *Putting America First in International Environmental Agreements* (Executive Order 14162, 90 FR 8455);
- *Unleashing American Energy* (Executive Order 14154, 90 FR 8353);
- *Ending Radical and Wasteful Government DEI Programs and Preferencing* (Executive Order 14151, 90 FR 8339)

[37] *See* Mark Paoletta, Daniel Shapiro, *The President's Constitutional Power of Impoundment*, Center for Renewing America (September 10, 2024), https://americarenewing.com/the-presidents-constitutional-power-of-impoundment/.
[38] *See Clinton v. City of New York* (1998) 524 U.S. 417, 468 (Scalia, J., concurring) ("President Nixon, the Mahatma Gandhi of all impounders, asserted at a press conference in 1973 that his 'constitutional right' to impound appropriated funds was 'absolutely clear' . . . Our decision two years later in *Train v. City of New York*, 420 U.S. 35 (10975), proved him wrong…").

- *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* (Executive Order 14168, 90 FR 8615); and
- *Enforcing the Hyde Amendment* (Executive Order 14182, 90 FR 8751).

These seven executive orders include their own internal freezes on federal funding, as do several others. Therefore, rescission of the OMB Memo is unlikely to reduce the risk for recipients of federal funds. While many of these Executive Orders have been challenged in court, they remain in effect and federal funding remains at risk regardless of the OMB Memo. OMB later rescinded the original OMB Memo but insisted that the funding freeze required by each of the executive orders remains in effect. Two cases—one filed by a collection of non-profits, and another filed by 22 states and the District of Columbia—challenge the original OMB Memo and the underlying freezes embedded in each of the executive orders.

On January 31, Chief Judge of the District of Rhode Island John McConnell issued a temporary restraining order instructing the Trump administration to not "pause, freeze, impede, block, cancel, or terminate Defendants' compliance with awards and obligations to provide federal assistance to the States."[39] The order also required the Trump administration to "provide written notice of this Order to all . . . agencies and their employees." The Department of Justice complied with this order and informed all federal agencies that they must not:

> "pause, freeze, impede, block, cancel, or terminate any awards of obligations **on the basis of the OMB memo**, or on the **basis of the President's recently issued executive orders**."

Importantly, this instruction applies to all agencies (even those not listed as Defendants). The instruction also clarifies that each agency may exercise their own discretion and authority to pause awards and obligations—so long as those pauses are not the result of the OMB Memo or the President's executive orders.

The night of February 10, the Trump administration filed an appeal of the January 31 TRO, and insisted on an administrative stay of the court's orders pending the appeal. The First Circuit denied this request for an administrative stay, but made no decision on the merits. On March 6, Chief Judge of the District of Rhode Island John McConnell issued a preliminary injunction extending January 31 TRO, enjoining the Trump administration from "pausing, freezing, blocking, canceling, suspending, terminating, or otherwise impeding the disbursement of appropriated federal funds to the States . . . based on the OMB Directive, including funding freezes dictated, described, or implied by Executive Orders issued by the President before rescission of the OMB Directive or any other materially similar order, memorandum, directive, policy, or practice under which the federal government imposes or applies a categorical pause or freeze of funding appropriated by Congress."[40] This preliminary injunction remains in place.

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[39] *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025).
[40] March 6, 2025 Preliminary Injunction, available at https://www.rid.uscourts.gov/sites/rid/files/16112325032NYT.pdf.

Parallel litigation in D.C. also resulted in a February 3 TRO.[41] Judge Loren Alikhan ordered that "Defendants are enjoined from implementing, giving effect to, or reinstating under a different name the directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal funds under all open awards." On February 25 Judge Loren Alikhan granted the plaintiffs' motion for a preliminary injunction.[42]

Practically speaking, Judge McConnell and Judge Alikhan have enjoined any funding freezes as the result of OMB Memo and President Trump's executive orders. These preliminary injunctions will remain in place until the respective judges reach decisions on the merits.

As a result of the ongoing litigation and the Trump administration's unclear policies following the January 31 TRO or March 6 preliminary injunction, the full extent and effect of the funding freeze remains uncertain. OMB's rescission of the original OMB Memo does not necessarily answer many questions because the executive orders themselves include freezes on billions of dollars of federal funding. This remains an ongoing and complicated legal battle.

b. Executive Orders' Federal Fund Freezes

President Trump's early executive actions (and the now rescinded OMB Memo) include pauses on federal funding for projects related to DEI, "gender ideology," and green energy projects. The DEI orders, which will be addressed in the subsequent section, pause all federal funding for DEI programs, and also prohibit federal funds from flowing to recipients of federal money that "promote DEI." With regards to "gender ideology," the order, *Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government* (Executive Order 14168, 90 FR 8615), prohibits federal funds that "promote gender ideology." All agencies are instructed to "assess grant conditions and grantee preferences" to ensure that funds do not promote "gender ideology."[43]

President Trump's energy related order, *Unleashing American Energy* (Executive Order 14154, 90 FR 8353), includes a section "[t]erminating the Green New Deal" by "immediately paus[ing] the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58)." The pause on disbursement appears to be comprehensive. Agencies were instructed to prepare a report within 90 days of the order with recommendations as to which programs should move

[41] *National Council of Nonprofits v. Office of Management and Budget*, 1:25-cv-00239, (D.D.C. Feb 03, 2025) ECF No. 30.
[42] February 25, 2025 Preliminary Injunction, available at https://www.courtlistener.com/docket/69583571/51/national-council-of-nonprofits-v-office-of-management-and-budget/.
[43] The order defines "gender ideology" as an ideology that "replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body."

forward depending on the programs' "alignment with the policy" set forth in the order. Critically, the order includes the instruction that:

> "**[n]o funds** identified in this subsection (a) **shall be disbursed** by a given agency until the Director of OMB and Assistant to the President for Economic Policy have determined that such disbursements are consistent with any review recommendations they have chosen to adopt."

As with each of the executive actions, the order speaks in broad, sweeping language that fails to specify what exactly, is targeted. Moreover, as was discussed earlier, these funding freezes are currently enjoined as the result of litigation challenging both the original OMB Memo and the funding freezes imbedded in each executive order. Other executive orders, such as the orders relating to immigration or sanctuary jurisdictions, also contain language pausing funding, and will also be the subjects of litigation.

3. Implications for Jurisdictions in California

The implications of the described orders are uncertain given (1) the recission of the funding freeze OMB Memo, (2) the lack of clarity in the executive orders themselves, (3) the impact of court ordered injunctions against the OMB Memo and the orders themselves, and (4) the Trump administration's potential failure/refusal to follow those injunctions.

To the extent that a jurisdiction engages with programs that promote "gender ideology," it should be aware that future grant awards may condition acceptance on the discontinuation of such programs. It is unclear whether a jurisdiction would need to certify that the federally funded program *itself* does not promote gender ideology, or if the jurisdiction as a *whole* would be disbarred from accepting any federal funds if it promoted gender ideology in any program.[44]

Although the OMB Memo directing a broad pause has been rescinded, some litigation is still active, and some courts have enjoined parts of the executive orders or related guidance. Agencies currently must tread cautiously: while many funds appear to be proceeding under past terms, delays or uncertainties persist. Retroactive claw backs of disbursed funds are not clearly authorized by these orders. As the litigation progresses, judgments on preliminary injunctions and related motions will more clearly define what agencies can or cannot do, and which grants may be legitimately conditioned or withheld.

C. Impacts on DEI Efforts

In his initial days in office, President Trump issued two orders related to diversity, equity, and inclusion ("DEI"). First, Executive Order 14170, *Reforming the Federal Hiring Process and Restoring Merit to Government Service* (90 FR 8621). Second, Executive Order 14151, *Ending*

[44] To put a fine point on this, if the order applies to recipients as a *whole*, that will likely mean any programs that promote "gender ideology" would prohibit a municipality from accepting any federal grants at all. Based on the drafting of the order, it appears the order is limited to programs that specifically promote "gender ideology": "Federal funds shall not be used to promote gender ideology." The order does *not* say recipients that otherwise promote gender ideology, with non-federal funds, are also barred from receiving unrelated federal money.

Radical and Wasteful Government DEI Programs and Preferencing (90 FR 8339). Together, these orders reshape federal policy and institute new requirements on recipients of federal money (federal grantees). Moving forward, entities with DEI programs will likely be ineligible for federal money.

1. Review of Executive Actions

President Trump's first DEI-related order, *Reforming the Federal Hiring Process and Restoring Merit to Government Service*, largely targets federal policies, offices, and positions designed to promote DEI, environmental justice, and other social justice related causes. While much of this order is inward facing, the order does direct agency heads to recommend steps to "align agency or department programs, activities, policies, regulations, guidance, . . . grants, consent orders, and litigating positions" with the Administration's view that DEI is both "illegal" and "immoral." This first order has no immediate impact on federal grantees (though, the eventual recommended changes likely will).

The second DEI-related order, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, appears to have an immediate impact on federal grantees.[45] To start, the order relies on existing anti-discrimination and civil rights laws to classify at least some (or potentially all) DEI programs as unlawful under federal law. The order uses vague, broad language that fails to specifically describe the types of programs the Administration views as "unlawful" under existing law.

Notwithstanding the ambiguity, the order effectively states that (1) DEI programs violate existing federal antidiscrimination laws, and (2) that federal grantees (as a condition of accepting federal money) must not violate any such laws. Practically speaking, if the order is permitted to take effect, any recipient of federal funds will be banned from operating any programs promoting DEI.[46] Currently, there are 14 active cases challenging Executive Order 14151 that have temporarily blocked enforcement of parts of the executive order.[47]

The order calls for the "streamlin[ing] of the "[f]ederal contracting process," and requires "[f]ederal contractors and subcontractors to comply with our civil-rights laws." The order requires that every future contract or grant award issued by the federal government include the following:

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[45] The order also mandates that the attorney general produce a report, by May 21, 2025, that includes plans to identify private sector "key sectors of concern," "the most egregious and discriminatory DEI practitioners in each sector," and a plan to deter these programs. The order also directs "each agency . . . [to] identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." The Department of Justice, and other regulatory agencies, should be expected to launch public investigations of various entities for alleged violation of federal anti-discrimination laws.

[46] The exact definition of DEI is elusive and will likely need to be defined by the Administration for federal fund recipients to comply.

[47] https://www.brookings.edu/articles/tracking-lawsuits-challenging-the-trump-administrations-k-12-education-agenda/.

(1) "A term requiring the contractual counterparty or grant recipient to **agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material** to the government's payment decisions for purposes of [the False Claims Act];" and

(2) "A term requiring such counterparty or recipient to **certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws**."

For future government contracts and grant awards, this language will have immediate effects. *First*, the language requires applicants for federal money to ensure that their entities "do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[48] If an entity promotes DEI within their organization (through something like a strategic committee or mentorship program), that entity would likely not be able to certify that they comply with the terms of the contract or award and would thus be ineligible for the federal money.

Second, the required terms create a heightened risk of liability under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 – 3733. The FCA, which is explicitly referenced in the order, states that "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government is liable for treble damages plus penalties. For a claim to be fraudulent under the FCA, the false certification in question must be "material" to the government's decision to pay the claim. The President's executive order requires grant and contract signors to agree that compliance with existing anti-discrimination laws is "material" is a direct attempt to satisfy an element of FCA liability.[49]

For current government contracts and already granted or obligated funds, the impact of the order is far less clear. Once spending becomes an outlay (or in other words, the money is already issued in a check, deposited into an account, or transferred electronically), it is very difficult to claw back. For money only budgeted or obligated (essentially, promised to a recipient), the administration has much more authority to pause, review, or, in some cases, terminate the funding.[50] As was discussed in Section II.B, the Administration attempted to freeze all federal spending on January 27. That freeze continues to be the subject of ongoing and evolving litigation. The freeze is currently enjoined by two federal judges in two different lawsuits.

An important caveat to the above analysis is that if DEI programs are *not* contrary to existing anti-discrimination and civil rights laws, the order lacks an enforcement hook. The order relies on the premise that DEI programs *do* violate such laws and thus upholding them can be a valid condition of federal money. The order specifically states that "unlawful" DEI programs are

[48] Again, the order does not state *which* DEI programs violate current anti-discrimination laws.
[49] It is unclear whether this preemptive designation of materiality will satisfy court review. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court held that simply "designating" any one legal requirement as an up-front condition of payment is not enough to establish materiality. 579 U.S. 176, 192 (2016).
[50] For more details regarding this authority, *see* Section II.B. Typically, these actions must be according to the terms of the contract or grant agreement, or otherwise in accordance with applicable regulations. A unilateral, overarching freeze on all federal obligations is not likely to be legal.

prohibited. If the programs are not unlawful on anti-discrimination grounds, they are not likely to be unlawful at all. But such a decision would require an unlikely sweeping Supreme Court or circuit court opinion, or an even more unlikely legislative change.

2. Implications for Jurisdictions in California

Generally speaking, if this order is permitted to take effect, entities that receive federal funds will need to certify, via their federal contract or grant award, that they do not "promote DEI." While the terms "promote" and "DEI" are not defined in the order, official actions like the establishment of a named committee or taskforce are likely to qualify. Other, unnamed actions (like the acceptance or recommendation of a project for DEI-related reasons) would also likely qualify as the "promot[ion] of "DEI."

Moreover, the order creates significant legal risk for individuals and entities who certify that that their respective entities do not "promote DEI." If the entities are found to have, in fact, promoted DEI, despite certifications to the contrary, the order insinuates that entities or individuals could incur liability under the FCA. The required term that DEI compliance is "material" confirms that the Administration plans to use the FCA to enforce the DEI prohibition.

As discussed previously, the funding freezes included in the DEI related executive orders, along with the rest of President Trump's early executive actions, are currently enjoined by the preliminary injunctions. The status of this depends on whether or not the federal administration complies with the injunctions.

III. CONCLUSIONS

More guidance and clarity from the White House and implementing agencies is expected. For now, entities can do the following:

First, **jurisdictions should be on the lookout for more guidance from implementing agencies**. Federal contractors should expect updates from the OFCCP regarding compliance with the executive orders as compliance deadlines approach.

Second, **jurisdictions should internally determine if any of its programs or policies "promote" "DEI".** This challenge is much broader and more significant. Even if the program in question is not federally funded, the fact that an entity itself funds or participates in the program may be enough to cut the entity off entirely from receiving federal grants or awards in the future. Despite this fact, many entities have refused to comply with DEI-related executive orders, including Executive Order 14151 and Executive Order 14173 for many of the reasons set forth in the legal challenges. Entities should be aware of this risk when continuing to implement and promote DEI programs.

Third, **jurisdictions should closely monitor the evolving status of the legal challenges to Executive Order 14151 and Executive Order 14173**. Many of these cases are proceeding on expedited briefing schedules, with ongoing motion practice and active court involvement. The outcomes of these cases will determine whether key provisions of the executive orders are upheld, narrowed, or invalidated.