



# THE LAWSUITS AGAINST TRUMP'S ORDER TO DEFUND SANCTUARY CITIES

## *Breaking Down the Legal Arguments*

On January 25, 2017 President Trump issued an Executive Order that “sanctuary cities” will not receive federal funding.<sup>1</sup> So far, two counties and three cities have filed lawsuits against this Executive Order: San Francisco County, CA, Santa Clara County, CA, Chelsea and Lawrence, MA (jointly), Richmond, CA and Seattle, WA. This brief advisory explains what is happening in the lawsuits and why these cities and counties claim Trump’s order regarding “sanctuary cities” is unconstitutional.

### Why did they sue?

Each of these local governments is concerned that the executive order threatens their ability to protect the communities they serve and to carry out their own public safety policies. They fear that the involvement of local agencies in deportations will erode immigrants’ trust in public services and police, so that they will not seek help when necessary. These jurisdictions are concerned that the executive order takes away their ability to make their own decisions about how to best build trust in the community and protect all community members. Furthermore, they protest against being coerced into holding people on ICE detainers. The expansive threats in the Executive Order would force them to either cooperate with the Executive’s immigration enforcement policies or else lose enormous amounts of federal funding that go to critical public services.<sup>2</sup>

### What makes a city a “sanctuary city”?

The Executive Order does not provide a precise definition or explanation of what makes a city a “sanctuary city,” at risk of losing federal funding. The order gives the Secretary of Homeland Security complete discretion in

designating sanctuary jurisdictions. The lawsuits claim that this is unconstitutional, and that the most plausible meanings of the Executive Order are also unconstitutional.

One possible definition of sanctuary is a jurisdiction’s failure to cooperate with “detainer” requests. Detainers are requests from Immigration and Customs Enforcement (ICE) to local law enforcement to detain someone who would otherwise be free to be released, so that ICE can take that person into their own custody.<sup>3</sup>

A second claim about the meaning of “sanctuary” is that Executive Order defines sanctuary jurisdictions as those that refuse to comply with a specific federal statute, 8 USC § 1373. This federal law says that a local government cannot prohibit its employees or agencies from communicating with the federal government about someone’s citizenship or immigration status.<sup>4</sup>

A third claim about the possible interpretation of the Executive Order recognizes that sanctuary is sometimes marked by public statements rather than specific policies. Accordingly, the lawsuits cite statements by the President, Attorney General, DHS Secretary, and others from the White House that have already labeled a particular city a “sanctuary city.” For example, the San Francisco and Seattle lawsuits reference statements by Executive officers that they are “sanctuary cities,” and Richmond’s complaint notes that because the state of California as a whole has been called out by President Trump and his cabinet members for its sanctuary policies, Richmond, CA could be included as well.

### What are their legal arguments?

The lawsuits argue that the President does not have the power to do the things the Executive Order says it will do

<sup>1</sup> Executive Order: Enhancing Public Safety in the Interior of the United States, President Donald Trump, January 25, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>2</sup> For more discussion of what the Executive Order says and the legal issues that are implicated see: <https://www.ilrc.org/faq-trump%E2%80%99s-executive-order-sanctuary-cities>

<sup>3</sup> For more explanation of immigration detainers, see: <https://www.ilrc.org/immigration-detainers-legal-update-october-2016>; <https://www.ilrc.org/legal-analysis-immigration-detainers>; <https://www.ilrc.org/faqs-immigration-authority-local-law-enforcement>.

<sup>4</sup> For more explanation of the requirements of 8 USC § 1373, see our fact sheet: <https://www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding>

in regards to “sanctuary cities.” They also argue that even Congress does not have this power. The lawsuits argue that Section 9 of the Executive Order, the main section of the order that talks about sanctuary jurisdictions, and 8 USC § 1373, as the executive order applies it, are unconstitutional. Each lawsuit also raises its own unique concerns and arguments against the Executive Order. Combined, they present a strong picture of all the order’s legal and constitutional defects.

The lawsuits generally claim that Section 9 of the Executive Order is unconstitutional because it:

1. ***Violates the Spending Clause*** and the principle of Separation of Powers in the U.S. Constitution because Congress, not the Executive, has the authority to regulate federal spending, sometimes called the “power of the purse”
2. ***Violates Spending Clause limitations*** on how Congress can put conditions on federal funding: 1) the conditions must be related to the federal policy or program being funded; 2) the conditions cannot be so coercive as to be a “gun to the head”; 3) local governments have to be given notice about conditions on funding before they apply for it; conditions cannot be added retroactively
3. ***Violates the 10<sup>th</sup> Amendment*** to the U.S. Constitution by “commandeering” local governments to do the federal government’s bidding, which intrudes on state sovereignty, and trampling on the ability of local governments to make their own decisions regarding public health and safety, what is sometimes called the “police power” of the states
4. ***Violates the Due Process Clause of the 5<sup>th</sup> Amendment*** to the U.S. Constitution as void for vagueness because key terms such as what are “sanctuary jurisdictions,” what are “willful” violations of 8 USC § 1373 and the Executive Order, and what is “hindering” the enforcement of federal law, are unconstitutionally vague and may lead to ad hoc or subjective implementation and even arbitrary or discriminatory application
5. ***Violates Procedural Due Process under the 5<sup>th</sup> Amendment*** to the U.S. Constitution because the order does not provide any way to contest a determination that a jurisdiction is a “sanctuary city,” or even notification that it has been identified as a “sanctuary city”
6. ***Violates the 4<sup>th</sup> Amendment*** to the U.S. Constitution to the extent that it requires jurisdictions to honor ICE detainer requests, which are not based on a judicial finding of probable cause

## What did they ask the court to do?

With significant amounts of funding at risk, these municipalities are now looking to the courts to invalidate parts of the Executive Order and 8 USC § 1373 so that they will not be forced to choose between federal funding they are reliant upon, and policies they have determined best serve their communities.

They generally asked for the following:

For the court to ***declare*** that:

1. The jurisdiction complies with 8 USC § 1373
2. 8 USC § 1373 and Section 9 of the Executive Order are unconstitutional
3. Some also asked that the court declare they are not “sanctuary jurisdictions” as defined in the Executive Order

For the court to ***order*** that:

1. The federal government not enforce 8 USC § 1373
2. The federal government not enforce Section 9 of the Executive Order

## What has the court decided so far?

On April 25, 2017 the U.S. District Court for the Northern District of California granted Santa Clara and San Francisco’s requests for a preliminary injunction. The injunction applies nationwide. This means that implementation of Section 9(a) of the Executive Order is on hold while the litigation proceeds, and the federal government cannot strip any funding pursuant to the Executive Order until the courts have issued a ruling finding it permissible.

In order to grant the request for a preliminary injunction, the court had to find that Santa Clara and San Francisco: 1) would suffer immediate irreparable harm unless Section 9(a) of the Executive Order is put on hold; 2) that they were likely to succeed on the merits of their claims – that is, that their legal arguments were compelling and likely to win; and 3) that the balance of equities weigh in their favor, and that an injunction would be in the public interest – in other words, that an injunction was a reasonable short term remedy. The court found that the counties met all of these criteria.

The court agreed with the counties that they are likely to win on their legal claims: that the Order violates separation of powers between the President and Congress, that it violates the Spending Clause by exceeding the powers granted to the federal government to put conditions on funds, that it violates the Tenth Amendment by seeking to

conscript localities to enforce federal laws, and that it is void for vagueness and violates Due Process.<sup>5</sup>

Santa Clara and San Francisco also had to establish standing to sue. This means they must show that they have been harmed or will imminently suffer an injury from the order. The court found that Santa Clara and San Francisco had shown this: the Executive Order violates the counties' constitutional rights to Due Process and to their Tenth Amendment right to self-governance. Further, the counties are already suffering the harm of major

budgetary uncertainty because of the extent of funding at risk. The court rejected the federal government's arguments that the Order does not change the law and that the counties have not yet been harmed.

## What happens next?

The federal government may appeal the district court's decision regarding Santa Clara and San Francisco's preliminary injunctions to the Ninth Circuit Court of Appeals.



### San Francisco

1663 Mission Street, Suite 602  
San Francisco, CA 94103  
t: 415.255.9499 f: 415.255.9792

[ilrc@ilrc.org](mailto:ilrc@ilrc.org) [www.ilrc.org](http://www.ilrc.org)

### Washington D.C.

1016 16th Street, NW, Suite 100  
Washington, DC 20036  
t: 202.777.8999 f: 202.293.2849

### About the Immigrant Legal Resource Center

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<sup>5</sup> The court has not yet reviewed the arguments about whether 8 USC § 1373 itself is constitutional.