January 23, 2025

The Honorable James R. McHenry III
Acting Attorney General
Department of Justice
Washington, DC 20530

Via email

Re: Trump Administration's Legally Baseless Threats Against State and Local Officials

Dear Acting Attorney General McHenry,

The American Civil Liberties Union is deeply alarmed by newly issued Department of Justice guidance suggesting that state and local officials may face federal prosecution for limiting the amount of assistance they provide to federal agencies carrying out federal immigration enforcement.

As described in the attached memo, the Trump administration's assertions are legally unjustifiable and amount to a direct attack on the constitutional prerogative of every state and locality to opt out of federal immigration enforcement.

Whatever Trump administration officials may wish, the law is clear: Our state and local government leaders are free to focus their local resources on local needs—not carrying out the Trump administration's agenda.

We understand that checks and balances, including the authority of states to direct the use of their resources, may be frustrating to the president. Nevertheless, the Department and this administration are bound by the Constitution.

We strongly encourage you to meet with state and local officials against whom your agency has made these threats – the law enforcement agencies charged with serving and protecting our communities, the educators seeking to care for children and ensure they can learn and grow without fear, the social services providers who help families put food on the table and access healthcare. These state and local officials should not have to live in fear of federal prosecution, simply for doing their jobs. The ACLU can facilitate such a meeting at a time and place of your choosing.

Sincerely,

Deirdre Schifeling
ACLU Chief Political & Advocacy Officer

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From: American Civil Liberties Union

Date: January 23, 2025

Re: **The Trump administration's legally baseless threats against local officials**

On January 21, 2025, just one day into the new administration, the Department of Justice (DOJ) issued internal guidance suggesting that DOJ might try to prosecute state and local officials for "failing to comply with lawful immigration-related commands and requests" from the federal government.[1] This threat appears to be directed at States and localities that limit the amount of assistance they will provide to Immigration and Customs Enforcement (ICE). DOJ's assertions are legally baseless and a direct assault on the constitutional prerogative of every state and locality to opt out of immigration enforcement.

These prosecutions would violate the Constitution, which does not let the federal government force States to help with immigration enforcement. Whatever Trump administration officials like Stephen Miller may wish, the law is clear: Under the Tenth Amendment, local officials are free to use local resources for local needs, rather than for rounding up and deporting their own residents. The Trump administration is promising an unprecedented wave of mass deportations, which will separate families, leave children behind, devastate local economies, and tear at the very fabric of our communities. Local officials should not be intimidated into joining these efforts.

I. States Have No Obligation to Help with Mass Deportations.

DOJ's internal guidance is premised on a number of serious legal errors. This memorandum addresses them in turn.

Error #1: "The Supremacy Clause and other authorities require state and local actors to comply with the Executive Branch's immigration enforcement initiatives." (page 3)

False. The Tenth Amendment prohibits the federal government from commandeering the States, or their cities, counties, and law enforcement. The Supreme Court has specifically held that "[t]he federal government . . . may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 926 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). Yet that is precisely what DOJ's guidance says the federal government *can* do.

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[1] Acting Deputy Att'y Gen., Memorandum, Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement (Jan. 21, 2025), https://www.washingtonpost.com/documents/2f9af176-72c5-458a-adc4-91327aa80d11.pdf?itid=lk_inline_manual_4. The guidance also discusses a number of other issues that this memorandum does not address.

In fact, the previous Trump administration already advanced this same argument in court—and it completely failed. The administration sued California in 2018, arguing that California's laws limiting collaboration with immigration enforcement were illegal. The Ninth Circuit rejected those claims and explained that States have "the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts." *See United States v. California*, 921 F.3d 865, 888-91 (9th Cir. 2019). The Trump administration went to the Supreme Court, but the Court refused to take the case. *See United States v. California*, No. 19-532 (U.S. June 15, 2020).[2]

Since then, courts across the country (including at least three judges appointed by President Trump himself) have held the same thing—that States are free to safeguard their own resources and stay out of the deportation business. *See McHenry County v. Kwame Raoul*, 44 F.4th 581, 587-592 & n.4 (7th Cir. 2022); *Ocean County Bd. of Commissioners v. Att'y Gen. of NJ*, 8 F.4th 176, 181-82 (3d Cir. 2021); *City of Los Angeles v. Sessions*, CV 18-7347-R, 2019 WL 1957966, at *5 (C.D. Cal. Feb. 15, 2019) ("[A]n interpretation of Section 1324(a) that would apply to States and local governments and subject them to criminal punishment would be a violation of the Tenth Amendment.").

These decisions flow from clear Tenth Amendment principles the Supreme Court has articulated across multiple cases. In *Murphy v. NCAA*, the Court explained that the federal government has no power to "issue direct orders to the governments of the States." 584 U.S. 453, 471 (2018); *id.* at 463 (unconstitutional to "compel[] state officers to enforce federal law"); *see also Haaland v. Brackeen*, 599 U.S. 255 (2023) (applying anticommandeering rules). This is a basic feature of our constitutional structure that the DOJ guidance willfully ignores: "[T]he Constitution confers upon Congress the power to regulate individuals, not States." *Murphy*, 584 U.S. at 477 (quoting *New York*, 505 U.S. at 166). Thus, while the federal government can regulate private individuals directly, it cannot dictate what state governments "may and may not do." *Id.* at 475.

Lacking authority to demand state assistance, the federal government cannot punish state officials for declining to facilitate deportations. It would be an outrageous abuse of prosecutorial authority to charge a state or local official for exercising a right that the Tenth Amendment guarantees.

Error #2: "Federal law prohibits state and local actors from . . . failing to comply with lawful immigration-related commands and requests." (page 3)

This is wrong for all the reasons outlined above. The Constitution's structure *forbids* "immigration-related commands" to state governments in any form, including statutes, policies, and individualized directives or mandatory "requests." Courts across the country have held that nothing in federal law can or does require States to lend their own resources to ICE's deportation regime.

[2] Only two Justices indicated they would have granted certiorari. *See* Amy Howe, *Court turns down government's "sanctuary state" petition*, Scotusblog.com (June 15, 2020), https://tinyurl.com/2retb796.

Courts have specifically addressed the legal status of ICE's requests for deportation assistance, which often take the form of an immigration detainer. Unsurprisingly, courts have held that these requests are and must be voluntary, not mandatory, because "immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme." *Galarza v. Szalczyk*, 745 F.3d 634, 643-45 (3d Cir. 2014). As the Fifth Circuit has explained, immigration requests cannot be mandatory, because "the Tenth Amendment prevents Congress from compelling Texas municipalities to cooperate in immigration enforcement." *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018); *id.* at 180-81 (same); *see also San Francisco v. Trump*, 897 F.3d 1225, 1241 n.7 (9th Cir. 2018) ("ICE does not reimburse local jurisdictions for the costs of continued detention, and compliance with a request is voluntary.").

In fact, ICE itself has *admitted* repeatedly that its requests for help with immigration enforcement are just that—requests, not commands. *See, e.g.*, *Lunn v. Commonwealth*, 477 Mass. 517, 526 (2017) ("The United States, in its brief as amicus curiae, concedes that compliance by State authorities with immigration detainers is voluntary, not mandatory."); *Gonzalez v. ICE*, 975 F.3d 788, 804 (9th Cir. 2020) ("the Government also argues that a detainer merely requests detention and is not a command"); *Ramon v. Short*, 399 Mont. 254, 265 (2020) (explaining that ICE's detainer form, "by its own terms, merely requests detention and does not impose any mandatory obligations on the state and local authorities that receive the requests").

The DOJ guidance thus misstates the basic legal status of the enforcement requests ICE sends to state and local government officials.

Error #3: Contemplating "prosecutions for violations of 8 U.S.C. § [1373]." (page 2)

Section 1373 is not a criminal statute. It provides no penalties of any kind—and certainly not criminal penalties.

Even a civil action to enforce Section 1373 would violate the Tenth Amendment. As explained, the Constitution reflects a "fundamental structural decision" to "withhold from Congress the power to issue orders directly to the States." *Murphy*, 584 U.S. at 470. This principle is absolute. "[E]ven a particularly strong federal interest" does not allow "direct orders to the governments of the States." *Id.* at 471-72. Yet Section 1373 is nothing if not a direct order to the States: It applies to a "State[] or local government entity or official" and specifies what they "may not" do. 8 U.S.C. § 1373(a). In light of this glaring defect, courts across the country have held that Section 1373 violates the Tenth Amendment and cannot be enforced. *See, e.g.*, *Chicago v. Sessions*, 321 F. Supp. 3d 855, 872-73 (N.D. Ill. 2018), *aff'd*, 961 F.3d 882 (7th Cir. 2020); *Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 328-31 (E.D. Pa. 2018); *Oregon v. Trump*, 406 F. Supp. 3d 940, 971-73 (D. Or. 2019), *vacated as moot*, 42 F.4th 1078 (9th Cir. 2022); *see also Colorado v. DOJ*, 455 F. Supp. 3d 1034, 1059-60 (D. Colo. 2020).[3]

[3] The Second Circuit upheld Section 1373 against a facial challenge in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), but *Murphy* later rejected its rationale. In *New York v.*

In any event, § 1373 is a narrow statute that does not impact most state and local policies. It only regulates a limited set of information, regarding a person's "citizenship or immigration status." 8 U.S.C. § 1373(a); *see San Francisco v. Garland*, 42 F.4th at 1083 ("Section 1373 only covers immigration-status information—*i.e.*, what one's status is.") (collecting cases, quotation marks omitted). Even if it were enforceable, it would only affect policies that regulate the sharing of immigration-status information, not policies that limit any other form of collaboration with ICE.

* * *

These fundamental, glaring errors in DOJ's analysis underscore that state and local officials cannot validly be prosecuted for devoting their resources to local needs rather than ICE's deportation machine. ICE remains free to operate anywhere in the country; that does not change just because a State declines to lend its own resources. But ICE cannot forcibly expand its personnel by conscripting local police into its service.

II. States Should Focus on Serving Their Residents, not Deporting Them.

DOJ's threats don't just violate the Constitution; they also violate common sense. States should use their resources to serve their residents, not to devastate their own communities.

The Trump administration is promising to carry out mass deportations on an unprecedented scale. The number of people they are pledging to deport would necessarily include people who have lived here for years or decades—people who have children, spouses, parents, jobs, homes, and businesses here. Indeed, on his first day, President Trump eliminated ICE's targeted enforcement priorities, and instead instructed the agency to round up *everyone* who might be removable.[4] If implemented, this deportation regime would split up families, ravage local economies, and leave countless children behind—as mass raids have done in the past.[5] State and local governments are right to withhold their support from this cruel and destructive project.

Local collaboration with ICE also drives immigrant communities into the shadows and makes everyone less safe. Where local officials are seen to be agents of ICE, people in mixed-

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DOJ, 951 F.3d 84 (2d Cir. 2020), the Second Circuit discussed the issue in dicta, but "declined to pursue the point," because it resolved the case on other grounds.

[4] Executive Order, "Protecting the American People Against Invasion" (Jan. 20, 2025) (rescinding prior ICE priorities, which had focused on people with criminal convictions, recent entrants, and national security concerns).

[5] Catherine Shoichet, *Their parents were taken in Mississippi immigration raids. For these kids, the trauma is just beginning*, CNN (Aug. 11, 2019); Danielle Silva, *"When is Daddy coming home?" Families still separated a month after massive ICE raid*, NBC (May 8, 2018); Report, Families in Fear: The Atlanta Immigration Raids, SPLC (Jan. 28, 2016).

status families do not feel safe going to school, seeking medical care, or talking to the police.[6] As law enforcement officials across the country have made clear, it is critical to keep local functions separate from immigration enforcement.

Lending support to ICE is also expensive. In addition to the cost of detention, municipalities across the country have faced enormous legal liability for working with ICE.[7] Indeed, New York City recently had to pay $92.5 million in a settlement with people it held on ICE detainers, on top of an earlier $14 million settlement paid by the Los Angeles County Sheriff's Department.[8] And ICE typically does not reimburse any of these costs.

State and local officials should not be bullied by the Trump administration's unconstitutional threats. Local police already cooperate with federal law enforcement in countless ways, including by sending all booking fingerprints to DOJ to check for warrants and forward to DHS. And most States that opt out of immigration enforcement make exceptions for people convicted or accused of certain crimes. But officials should not be intimidated into putting their police forces at the whims of this administration.

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[6] Reva Dhingra et al., *When local police cooperate with ICE, Latino communities under-report crime. Here's the data*, Wash. Post, (Feb. 5, 2021); Omar Martinez, Immigration Policy and Access to Health Services, 16 Journal of Immigrant and Minority Health 563-64 (2014); Laura Bellows, "The Effect of Immigration Enforcement on School Engagement: Evidence from 287(g) Programs in North Carolina," EdWorkingPaper 21-366; Nik Theodore and Robert Habans, "Policing Immigrant Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," 42:6 Journal of Ethnic and Migration Studies 970-88 (2016); Catherine Shoichet, *ICE raided a meatpacking plant. More than 500 kids missed school the next day*, CNN (Apr. 12, 2018).

[7] *See, e.g.*, In re: Jilmar Ramos-Gomez (Mich. Dept. Civil Rights settled Nov. 2019) (Grand Rapids settles claim of individual held for ICE for $190,000); Palacios-Valencia v. San Juan County, No. 14-cv-1050 (D.N.M. settled 2017) (San Juan County pays $350,000 to settle detainer class action lawsuit, pays named plaintiffs $25,000 and $15,000 to settle their claims); Figueroa-Zarceno v. City and County of San Francisco, No. 17-cv-229 (N.D. Cal. settled 2017) (San Francisco pays $190,000 settlement to person unlawfully turned over to ICE); Ahumada-Meza v. City of Marysville, et al., No. 2:19-cv-01165 TSZ (W.D. Wash. settled January 2020) (City of Marysville settles detainer lawsuit for $70,000 in damages and $15,000 in attorney's fees); Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (Lehigh County pays $95,000 settlement for holding one person on a detainer, City of Allentown pays $25,000); Miranda-Olivares v. Clackamas County, No. 12-2317, 2014 WL 1414305 (D. Or. Apr. 11, 2014), 2015 WL 5093752 (D. Or. Aug. 28, 2015) (Clackamas County pays $30,100 settlement for holding a person on a detainer, along with $97,000 in attorney fees).

[8] Luis Ferré-Sadurní, "New York City to Pay $92.5 Million to Improperly Detained Immigrants," *NYT* (Dec. 18, 2024); Alene Tchekmedyian, "Judge approves $14-million settlement over Sheriff's Department's illegal immigration holds," *L.A. Times* (Feb. 4, 2022).