ACLU Vermont

June 18, 2025

RE: Legal Guidance for Vermont Institutions Facing Unlawful Federal Directives

To leaders of private and public institutions across Vermont:

We recently passed the first 100 days of the current presidential administration. In that time, we have witnessed unprecedented attempts from the federal government to wield the power of the United States to force private and public institutions into "voluntarily" changing their conduct, policies, or practices. At this chaotic time, we write to urge—and hopefully to empower—your institution to uphold its existing obligations under state and federal law, and to decline any overture to prematurely comply with what ultimately may prove unlawful federal directives.

We also want to make clear that we, along with other key Vermont legal institutions, are standing by to offer any analysis or assistance that would be helpful. In addition, you may find it helpful to follow the work of the Vermont Attorney General's Office, which has been suing the Trump administration over numerous unlawful actions. If you or your legal counsel are unsure about whether issues of concern to you institution are already being addressed in litigation or elsewhere, you should feel free to contact the Vermont Attorney General's Office at ago.info@vermont.gov to see if they have any helpful information.

We understand that, in one sense, this is a moment of unprecedented change and uncertainty. At the time of writing, President Trump has issued over 150 executive orders during the first months of this administration. Spanning areas from education, to immigration, to climate change, and beyond, new presidential directives or proclamations appear weekly, if not daily.

In many ways, however, institutions' rights and responsibilities have not *actually* changed. Presidential executive orders, no matter how strongly worded, cannot on their own alter the underlying legal landscape. And except in a small number of specific scenarios, Congress has not meaningfully changed the U.S. Code since President Trump took office. **The upshot is that if your institution's practices complied with federal law in 2024, they likely comply with federal law today.** Accordingly, we urge you to approach any federal directive "requiring" a particular course of action with a critical, even skeptical, lens before changing any historical practices, procedures, or

policies—particularly given that litigation has halted many of these directives before they have become effective.

The Executive Branch Cannot Unilaterally Change the Law

In our constitutional system, the President cannot make—or change—law. Only Congress can do that. Instead, the President has the obligation to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. Even where that "execution" involves interpreting federal law, there are strict limits. When promulgating an interpretive rule with the force of law, executive branch agencies must first provide notice and an opportunity to comment and meaningfully respond to the public's comments on the proposed rule. 5 U.S.C. § 553(b), (c); *Perez v. Mort. Bankers Ass'n,* 575 U.S. 92, 95–96 (2015). Agencies cannot simply depart from longstanding interpretations of the law. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016). And agencies no longer receive deference from courts when construing ambiguous federal authority. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024). All of this means that the President—and their appointees—cannot change what federal law requires or permits.

This includes federal law concerning funding and appropriations. "Our Constitution gives Congress"—not the President— "control over the public fisc." *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 420 (2024); *see* U.S. Const. Art. I, § 9. Therefore, "[a]bsent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018).

All of this means that, despite any language in executive orders or federal agency directives to the contrary, institutions' actual obligations under federal law likely have not changed. If you and your institution were in compliance with federal law in 2024 and your practices and policies have not changed, it is likely that you are operating in compliance with federal law today.

Instead, the Administration Is Hoping to Exact Pre-Emptive and "Voluntary" Compliance with its Often-Unlawful Goals

The Administration knows this. It knows that federal law does not—indeed cannot—require many of the radical changes to employment practices, educational requirements, or social services that the Administration desires. And it also knows that Congress, as a body, is largely unwilling to alter federal law or federal appropriations to accomplish the Administration's sweeping agenda.

That is why this Administration has sought to leverage its vast power to force "voluntary" changes or compliance from public and private parties directly. Whether in the form of Executive Orders targeting specific law firms to dissuade them from opposing the government; threatened enforcement actions against universities to intimidate their students and faculty; pronouncements on the supposed "illegality" of diversity, equity, inclusion, or accessibility efforts; or the withholding of funds for school meals as a means of forcing transgender students out of public life—this Administration is using its power to try and pressure institutions into pre-emptive compliance with its unlawful objectives.

And make no mistake—most of these efforts by the Administration are, in fact, unlawful. When institutions have resisted and challenged these efforts in Court, they have won. The Administration is hoping, however, that if it moves fast enough—or if it is clever enough in packaging coercive leverage through normal bureaucratic processes—that institutions will either not notice, or will voluntarily comply for fear of retribution.

That is why it is essential that Vermont institutions pause and scrutinize any directive or request from the federal government before reflexively complying with what may ultimately prove to be an unlawful attempt to gain leverage. A recent illustrative example was the U.S. Department of Education's April request for "certifications" from school districts and states that they comply with Title VI. At first glance, the request may have seemed largely routine—a confirmation that states and schools are simply complying with the law. But especially when read alongside recent Executive Orders and the Department of Education's "Dear Colleague" Letter explaining its radical interpretation that Title VI prohibits diversity, equity, and inclusion initiatives, the true purpose of the "certification" became clear: to get institutions to "voluntarily" adopt the Department's radical [mis]interpretation of civil rights law as a further condition on future funding. A federal court ended up blocking the certifications nationwide.

If nothing else, the sheer volume of litigation against the Administration is reason alone to move cautiously before changing practices in response to new federal directives or conditions. Even if not immediately, states, citizens, or public interest groups like the ACLU have ultimately sued to block many of the Administration's actions. These lawsuits have then often paused, narrowed, or entirely blocked the executive actions at issue. Changing practices or policies in advance may prove unnecessary or unwise—or needlessly harmful to values Vermonters cherish, vulnerable populations, and state and local sovereignty—if the underlying directive is either tied up by court challenges or ultimately invalidated. In many cases, waiting for the litigation to run its course may be the most prudent option.

<u>Vermont's Robust Legal Protections Remain Intact</u>

Finally, always consider whether changing practices or policies may run afoul of Vermont law. As you of course know, Vermont is a welcoming state. Whether enshrined in our laws or our Constitution, we have some of the strongest anti-discrimination protections in the Nation, as well as a robust collective commitment to protecting reproductive and gender-affirming care. While there are narrow circumstances where federal law "pre-empts" or supersedes state law, these instances are rare—and almost always highly publicized. **In the absence of express directives from the Office of the Attorney General or the Governor that a federal court has invalidated a particular provision of Vermont's code, always assume that the requirements of state law—including obligations under the Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A. § 4500 *et seq.*, and the Fair Employment Practices Act (FEPA), 21 V.S.A. § 495 *et seq.*—apply in full.** Where a federal directive from the Executive Branch would require practices or actions that would run afoul of Vermont laws, institutions should be especially wary of pre-emptively complying, and instead should await confirmation or further guidance before changing any practices or policies in response.

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This is undoubtedly a scary time. The recent waves of federal directives have created deep uncertainty for many of the institutions that make Vermont Vermont: our schools, our towns, our hospitals, our businesses, and our state agencies and programs. That uncertainty, however, is the point: the Administration is banking on institutions choosing to pre-emptively and "voluntarily" comply or self-police in order to achieve its unlawful agenda. As a state, however, we have not just the tools but often the obligation to view federal demands with a critical lens at this moment—and to collectively recommit to following genuine obligations under state and federal law. Weare standing by to assist or clarify in any way we can.

Sincerely,

Lia Ernst
Legal Director
ACLU of Vermont