

1 LOUISE H. RENNE (SBN 36508)  
JONATHAN V. HOLTZMAN (SBN 99795)  
2 LINDA M. ROSS (SBN 133874)  
lross@publiclawgroup.com  
3 RENNE SLOAN HOLTZMAN SAKAI LLP  
1220 Seventh Street, Suite 300  
4 Berkeley, CA 94710  
Ph. (510) 995-5800  
5 Fx. (415) 678-3838

6 Attorneys for Amici Curiae

7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 CITY AND COUNTY OF SAN FRANCISCO,  
10 Plaintiff,

11 v.

12 DONALD J. TRUMP, President of the United  
States, UNITED STATES OF AMERICA,  
13 JOHN F. KELLY, Secretary of United States  
Department of Homeland Security,  
14 JEFFERSON B. SESSIONS, Attorney General  
of the United States, DOES 1-100,

15 Defendants  
16  
17  
18

19 COUNTY OF SANTA CLARA,  
20 Plaintiff,

21 v.

22 DONALD J. TRUMP, President of the United  
States of America, JOHN F. KELLY, in his  
23 official capacity as Secretary of the United  
States Department of Homeland Security,  
24 DANA J. BOENTE, in his official capacity as  
Acting Attorney General of the United States,  
25 MARK SANDY, in his official capacity as  
Acting Director of the Office of Management  
26 and Budget, and DOES 1-50,

27 Defendants  
28

Case No. 17-cv-00485-WHO  
Case No. 17-cv-00574-WHO  
(Related cases)

**MOTION BY CALIFORNIA CITIES AND  
COUNTIES FOR LEAVE TO FILE AS AMICI  
CURIAE IN SUPPORT OF MOTIONS FOR  
PRELIMINARY INJUNCTION FILED BY  
COUNTY OF SANTA CLARA AND CITY AND  
COUNTY OF SAN FRANCISCO**

**MOTION FILED BY COUNTY OF ALAMEDA,  
CITY OF BERKELEY, CITY OF DAVIS, CITY  
OF EAST PALO ALTO, CITY OF FREMONT,  
COUNTY OF MARIN, COUNTY OF  
MONTEREY, CITY OF MOUNTAIN VIEW,  
CITY OF OAKLAND, CITY OF RICHMOND,  
CITY OF SALINAS, CITY OF SAN JOSE, CITY  
OF SANTA CRUZ, AND CITY OF SANTA ROSA**

Date: April 12, 2017  
Time: 2:00 p.m.  
Judge: Hon. William H. Orrick, Ctrm. 2  
450 Golden Gate Avenue  
San Francisco, CA 94102

Action Filed: January 31, 2017

Date: April 5, 2017  
Time: 2:00 p.m.  
Judge: Hon. William H. Orrick, Ctrm. 2  
450 Golden Gate Avenue  
San Francisco, CA 94102

Action Filed: February 3, 2017

1 **I. INTRODUCTION**

2 This motion is brought by the following California cities and counties: County of Alameda, City  
3 of Berkeley, City of Davis, City of East Palo Alto, City of Fremont, County of Marin, County of  
4 Monterey, City of Mountain View, City of Oakland, City of Richmond, City of Salinas, City of San Jose,  
5 City of Santa Cruz, and City of Santa Rosa. These cities and counties respectfully move for leave to file  
6 an amicus curiae brief in support of the motions for preliminary injunction filed by the City and County  
7 of San Francisco and the County of Santa Clara. A copy of the proposed brief is attached as **Exhibit A**  
8 to this motion. The moving parties do not oppose the filing of this brief.

9 The amicus brief will assist the Court in concluding that a nationwide injunction is needed to halt  
10 the Trump administration’s program to defund “sanctuary jurisdictions.” Amici’s brief demonstrates that  
11 all California cities and counties, and those nationwide, are in the same position as the moving parties.  
12 All rely on federal funding to provide services to their most vulnerable populations. And all are at risk of  
13 being targeted as “sanctuary jurisdictions,” and denied funds, under the lawless and arbitrary mechanism  
14 established by the Executive Order.

15 **II. IDENTITY AND INTEREST OF THE AMICUS CURIAE**

16 Amici curiae are California cities and counties that rely on federal funds to provide programs that  
17 benefit their populations, particularly their most vulnerable residents. Amici are developing balanced  
18 budgets for fiscal year 2017-2018, which must be in place by June 30, 2017. These budgets depend on  
19 significant federal funding to provide basic services for residents. Accordingly, policymakers in amici  
20 curiae jurisdictions must know *now* whether federal grants will continue. Because most federal grants  
21 require amici to first spend funds, and be reimbursed later, amici are particularly vulnerable to any cut in  
22 grant funding.

23 Amici curiae are threatened by President Donald J. Trump’s January 25, 2017 Executive Order  
24 “Enhancing Public Safety in the Interior of the United States” (“the Order” or “EO”), which authorizes  
25 the Attorney General and Secretary of Homeland Security to ensure that “sanctuary jurisdictions” are not  
26 “not eligible to receive Federal grants.” (EO, Section 9(a).) The fear of losing critical federal grants is  
27 well founded. The Order broadly directs the Attorney General to take action against “any entity” that  
28 “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.” (EO,

1 Section 9(a).) In fact, Department of Homeland Security has already identified certain states, cities and  
 2 counties throughout the country as sanctuary jurisdictions and potential targets of the Order.

3 Some signers of the attached brief have explicit policies that limit cooperation with federal  
 4 immigration enforcement, consistent with state and federal law. Other signers may have no explicit  
 5 policy at all, but nonetheless may end up on the federal government’s list of “sanctuary” jurisdictions.  
 6 Given the breadth of the Executive Order, all are in danger of losing federal funds based upon an  
 7 arbitrary determination that they have “a practice that prevents or hinders the enforcement of Federal  
 8 law.” (EO, Section 9(a).)

### 9 **III. REASONS WHY MOTION SHOULD BE GRANTED**

#### 10 **A. This Court Has Broad Discretion To Permit An Amicus Curiae Brief**

11 Federal District Courts have broad discretion to permit the filing of an amicus curiae brief.  
 12 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). District Courts “frequently welcome” an amicus  
 13 curiae brief when the amicus has “unique information or perspective that can help the court beyond the  
 14 help that the lawyers for the parties are able to provide.” *Sonoma Falls Developers, LLC v. Nevada Gold*  
 15 *& Casinos, Inc.*, 272 F.Supp.2d 919, 925 (N.D. Cal. 2003) (quoting *Ryan v. Commodity Futures Trading*  
 16 *Comm’n*, 125 F. 3d 1062 1064 (7th Cir. 1997). Amicus curiae participation is particularly appropriate  
 17 where the ramifications of the decision extend beyond the current parties. *NGV Gaming, Ltd. V.*  
 18 *Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005).

#### 19 **B. The Amicus Curiae Brief Will Aid The Court In Assessing The Need For A** 20 **Nationwide Injunction**

21 The Court should exercise its discretion to permit amici California cities and counties to file the  
 22 attached amici curiae brief. Amici are familiar with the scope of the arguments presented by the parties  
 23 and do not unduly repeat those arguments. Instead, amici present additional factual information about  
 24 themselves and cities and counties nationwide that supports issuance of a nationwide injunction.

25 Amici demonstrate that other jurisdictions, like the moving parties, rely on federal funding to  
 26 provide for the well-being of their most vulnerable residents. Federal grants to cities support the  
 27 following crucial services: Section 8 housing vouchers, renovation and repair of low income housing,  
 28 community centers, food banks, Head Start programs, workforce development, public transit,

RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law

1 infrastructure, emergency preparedness, and more. Federal grants to counties support safety net  
2 programs for health and welfare. Because most federal grants require amici to first spend funds, and be  
3 reimbursed later, amici are particularly vulnerable to any cut in grant funding.

4 Amici demonstrate that other jurisdictions, like the moving parties, follow sound and legal  
5 policies that limit local enforcement of federal immigration laws. And amici demonstrate that the Trump  
6 administration is targeting jurisdictions nationwide, not based on any violation of federal law, but based  
7 on adherence to these lawful policies. On March 20, 2017, the Department of Homeland Security  
8 demonstrated the national sweep of the Executive Order when it issued a report entitled “Declined  
9 Detainers, Public Safety Advisory.” ([https://www.ice.gov/doclib/ddor/ddor2017\\_01-28to02-03.pdf](https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf).)

10 The first of a promised series of weekly reports, the Declined Detainer not only includes lists of  
11 jurisdictions that have denied detainers but also includes a “Table of Jurisdictions that have Enacted  
12 Policies which Limit Cooperation with ICE.” The lists are nationwide. Some amici are on the lists.  
13 Others are likely to be added. The report states that the number of reported jurisdictions will increase as  
14 ICE field offices resume issuing detainers to jurisdictions that previously refused to honor them.

15 The purpose of the Executive Order and the Department’s weekly list is blatant – an illegal  
16 attempt, in violation of the Fourth and Tenth Amendments, to coerce cities and counties nationwide into  
17 assisting in the enforcement of federal immigration law.

18 **IV. CONCLUSION**

19 For these reasons, amici curiae respectfully request that the Court grant leave to file the amici  
20 curiae brief attached hereto as Exhibit A.

21 Dated: March 22, 2017

RENNE SLOAN HOLTZMAN SAKAI LLP

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By: /s/ Linda M. Ross  
LINDA M. ROSS  
Attorneys for Amici Curiae

1 LOUISE H. RENNE (SBN 36508)  
JONATHAN V. HOLTZMAN (SBN 99795)  
2 LINDA M. ROSS (SBN 133874)  
lross@publiclawgroup.com  
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1220 Seventh Street, Suite 300  
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15 JOHN F. KELLY, Secretary of United States  
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16 JEFFERSON B. SESSIONS, Attorney General  
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22 DONALD J. TRUMP, President of the United  
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23 States Department of Homeland Security,  
DANA J. BOENTE, in his official capacity as  
24 Acting Attorney General of the United States,  
MARK SANDY, in his official capacity as  
25 Acting Director of the Office of Management  
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Case No. 17-cv-00485-WHO  
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(Related cases)

**BRIEF OF AMICI CURIAE CALIFORNIA  
CITIES AND COUNTIES – COUNTY OF  
ALAMEDA, CITY OF BERKELEY, CITY OF  
DAVIS, CITY OF EAST PALO ALTO, CITY OF  
FREMONT, COUNTY OF MARIN, COUNTY OF  
MONTEREY, CITY OF MOUNTAIN VIEW,  
CITY OF OAKLAND, CITY OF RICHMOND,  
CITY OF SALINAS, CITY OF SAN JOSE, CITY  
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RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law

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RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law



1 Amici file this brief in support of the motions for preliminary injunction filed by the City and  
2 County of San Francisco and the County of Santa Clara.

3 **I. INTRODUCTION**

4 California cities and counties are suffering irreparable harm from President Donald J. Trump’s  
5 January 25, 2017 Executive Order “Enhancing Public Safety in the Interior of the United States” (“the  
6 Order” or “EO”), which directs federal authorities to deny federal funds to “sanctuary jurisdictions.” The  
7 Executive Order sweeps far beyond existing law and is beyond the power of the President to issue. It  
8 impermissibly requires cities and counties to choose whether to abandon sound and lawful policies or  
9 lose federally funded programs.

10 This is budget season. Cities and counties must have balanced budgets in place by June 30 for a  
11 fiscal year that runs from July 2017 through June 2018. These budgets rely heavily on federal grant  
12 funds. For many cities, federal funds provide the lion’s share to support low cost housing, public transit,  
13 community centers, job training, infrastructure improvements and other programs. For counties, federal  
14 funds provide a safety net for health care and other human services. Generally, cities and counties must  
15 spend on programs first and then seek federal reimbursement.

16 The fear of losing federal funds – or worse, not receiving reimbursement for services already  
17 provided – is well founded. Among other things, the Executive Order broadly directs the Attorney  
18 General to take action against “any entity” that “has in effect a statute, policy, or practice that prevents or  
19 hinders the enforcement of Federal law.” Department of Homeland Security reports already identify  
20 states, cities and counties throughout the country as potential sanctuary jurisdictions. This week, as  
21 directed by the Executive Order, the Department began issuing “tables” of jurisdictions “that have  
22 Enacted Policies which Limit Cooperation with ICE.”

23 Some signers of this brief have explicit policies that limit cooperation with federal immigration  
24 enforcement, consistent with state and federal law. Others may have no explicit policy at all, but  
25 nonetheless may end up on the federal government’s list of “sanctuary” jurisdictions. Given the breadth  
26 of the Executive Order, all face danger of losing federal funds based upon an arbitrary determination that  
27 they have “a practice that prevents or hinders the enforcement of Federal law.”

28 California cities and counties provide vital services – often to vulnerable populations. They are

1 already under great financial strain due to a limited ability to raise taxes under Propositions 13 and 218,  
 2 and the 2008 “Great Recession.” They are the front line of government’s actual provision of services to  
 3 individuals, providing fire, police, paramedic services, libraries, roads, water and sewer services, public  
 4 works, transit, social services, health care, and parks. They exist not for their own sake or for the sake of  
 5 shareholders, but for the sake of residents whose welfare they are charged with protecting and  
 6 nourishing.

7 Even a delay in federal reimbursement would require immediate and drastic reductions in these  
 8 services – or possibly bankruptcy in some cases. The Department of Justice argues that the request for  
 9 preliminary injunction is “premature” because the government has not actually denied funds. But the  
 10 Executive Order is not a speech or an idle threat. It is illegal as written and forces cities and counties to  
 11 make a choice *now* that the federal government has no right to demand. The President had no authority  
 12 to issue the Executive Order. The Departments of Justice and Homeland Security have no authority to  
 13 carry out its instructions. Any action under the Executive Order, however preliminary, is illegal and  
 14 subject to injunction.

## 15 **II. ARGUMENT**

### 16 **A. The Executive Order Threatens Services Vital To Amici’s Residents**

#### 17 **1. The Executive Order Applies To All Federal Grants**

18 The Executive Order applies to all federal grant funds, including those already awarded.

19 Section 9(a) directs the Attorney General and Secretary [of Homeland Security] to ensure that  
 20 “sanctuary jurisdictions” are “not eligible to receive *Federal grants* . . . .” The only exception is for grants  
 21 “deemed necessary for law enforcement purposes by the Attorney General or the Secretary.” [Emphasis  
 22 added.] Section 9(c) directs the Director of the Office of Management and Budget to provide  
 23 “information on *all federal grant money* that currently is received by any sanctuary jurisdiction.”  
 24 [Emphasis added.]

#### 25 **2. Cities And Counties Rely On Federal Grants To Fund Vital Programs**

26 Cities and counties across the nation rely on federal funds to provide programs that benefit their  
 27 populations, particularly their most vulnerable residents. When the federal government threatens to  
 28 withhold funds, the federal government does not punish cities and counties; it punishes people.

1 Cities rely on federal funds to provide Section 8 housing vouchers, low income housing  
 2 renovation and repair, community centers, senior services, infrastructure improvements and community  
 3 policing. Counties provide crucial health and other safety net services. For many programs, an end to  
 4 federal funding will mean the end of the program.

5 Generally, cities and counties must first expend funds on these programs and then be reimbursed.  
 6 This puts them particularly at risk if the federal government denies funding. They must choose whether  
 7 to maintain legal policies, which encourage cooperation with law enforcement by undocumented  
 8 residents, or risk the potentially catastrophic consequence of being denied reimbursement for services  
 9 already provided. The following are some examples of funding received by amici from the Federal  
 10 government:

11 **Housing.** The Department of Housing and Urban Development (HUD) provides funding  
 12 nationwide for rent vouchers, low income housing, renovation and repair of low income housing, and  
 13 emergency shelter. For example, in 2016-2017, the Department provided grants of over \$25 million to  
 14 the City of Richmond and \$20 million to the City of Santa Rosa. This is a nationwide program, with  
 15 funds provided to cities and counties throughout the country. Without these funds, low income residents  
 16 would be without affordable and decent housing.

17 **Community Development Block Grants.** HUD also provides Community Development Block  
 18 Grants (CDBG) to cities to support facilities that serve low and moderate income people. These facilities  
 19 include senior centers, child care centers, homeless shelters, domestic violence shelters and food banks.  
 20 These grants are significant. In 2016-2017, the City of Oakland received \$7.1 million in an annual  
 21 recurring CDBG grant, and \$6.6 million in a separate HUD grant for emergency shelters, transitional  
 22 housing and housing for persons with AIDS. In 2016-2017, the City of Fremont received a \$1.65 million  
 23 CDBG grant. Without CDBG and HUD grant funds, centers may close.

24 **Human Services.** The Department of Health and Human Services provides funds to cities for  
 25 social services programs including Head Start, caregiver and health services for the aging, and others.  
 26 For example, in 2016-2017, Oakland received a total grant of \$17.9 million. The City of Fremont  
 27 received a grant of \$1.1 million in funds for those purposes.

28 **Workforce Development.** The Workforce Innovation and Opportunity Act provides assistance

1 and support to youth in attaining a high school diploma, an industry standard certificate, or a post-  
2 secondary degree. The programs also assist with high school level reading and math skills in order to  
3 prepare for post-secondary education or the workforce. For 2016-2017, Oakland received a grant of \$4.1  
4 million.

5 **Public Transit.** In the City of Santa Rosa, during fiscal year 2016-2107, the federal government  
6 provided over \$2 million in funds to support public transit, including operator salaries, fuel, maintenance,  
7 purchase of buses and engines, and improvements. This amount was 14.4% of the budget for transit  
8 operations.

9 **Transportation Infrastructure.** The Department of Transportation provides funds to cities for  
10 highway construction and repair. For example, in the City of Fremont, during fiscal year 2016-2017, the  
11 Department provided \$7.1 million towards road and bridge maintenance and repair. These funds are  
12 crucial to resurfacing roads and replacing aging bridges that are vulnerable to earthquakes. In 2013, the  
13 City of Salinas received an award of \$3.3 million for airport improvement.

14 **Emergency Services.** The Department of Homeland Security provides funds to support staffing  
15 for adequate Fire and Emergency Response in the event of natural disasters such as earthquake,  
16 hurricane, or flood, or in the event of terrorist attack.

17 **Community Oriented Policing.** The Department of Justice provides funds to support  
18 community policing as part of the COPS program. These funds pay for additional police officers to build  
19 trust in communities by engaging in community patrol, educational programs and school outreach.

20 **Edward Byrne Grants.** The Department of Justice provides grants to support law enforcement  
21 for technical assistance, training, purchase of equipment and supplies, information systems, and criminal  
22 justice-related research and evaluation.

23 **Counties.** The federal funding provided to counties is described in the briefs and declarations  
24 filed by the County of Santa Clara and the City and County of San Francisco. In California, counties  
25 provide crucial federally-funded safety-net services. For example, County of Alameda's budget for fiscal  
26 year 2016-2017 includes \$515 million from federal aid, 19% of its General Fund budget. Federal aid  
27 supports the county's healthcare, child welfare, and foster care services, as well as other services and  
28 programs.

1           **B.     The Executive Order Targets California Cities And Counties**

2                   **1.     California Cities And Counties Must Act To Protect All Residents**

3           According to a Pew Research Center study, California has an estimated 2.35 million  
4 undocumented residents. Other studies show high percentages of foreign born residents in California’s  
5 cities and counties. For example, 46% of Fremont’s population is foreign born.

6           Because significant percentages of the population are immigrants, law enforcement must be able  
7 to work successfully with people in all communities. If residents are afraid to come forward and report  
8 crime, entire communities become prey to intimidation and violence.

9           The California “TRUST” Act warned that local enforcement of federal immigration laws may  
10 “harm community policing efforts because immigrant residents who are victims of or witnesses to crime,  
11 including domestic violence, are less likely to report crime or cooperate with law enforcement when any  
12 contact with law enforcement could result in deportation.” (Assem. Bill 4, 2013-2014 Reg. Sess., sec.  
13 1(d) (Cal. 2013); findings for Transparency and Responsibility Using State Tools Act [“TRUST” Act],  
14 Cal. Gov. Code 7282-7282.5,)

15           In 2007, Oakland enacted a resolution that explained “enforcement of civil immigration laws by  
16 local police agencies” undermines “the trust and cooperation with immigrant communities,” increases  
17 “the risk of civil liability due to the complexity of civil immigration laws and the lack of training and  
18 expertise of local police on civil immigration enforcement” and detracts “from the core mission of the  
19 Oakland Police Department to create safe communities.” (Oakland City Council Resolution No. 80584,  
20 dated May 15, 2007; see also Resolution No. 81310, dated May 20, 2008; Resolution No. 86490, dated  
21 November 29, 2016.)

22           As recently explained by the Chief of the Richmond Police Department in an open letter to the  
23 community:

24                   The RPD does not enforce federal immigration laws --- doing so would harm  
25 community trust, and run counter to our various crime prevention and  
26 reduction efforts. Our approach has long contemplated the reality that  
27 Richmond has a substantial undocumented population whose members tend  
28 to be targets of certain types of criminal victimization, because most criminal  
offenders are “rational” in their target selection for the reason that they want  
to avoid being identified and reported to police. Perpetrators assume that  
certain targets for victimization will not report incidents to the police.

1 (Letter to the Community, Allwyn Brown, Chief of Police, Richmond Police Department.)

2 Similar policies lie behind the decision of many communities to focus their resources on local law  
3 enforcement, not enforcement of federal immigration laws.

4 **2. California Has Taken The Lead In Protecting The Rights Of Undocumented**  
5 **Individuals**

6 California is a national leader in protecting the health, safety and established legal rights of  
7 undocumented individuals. The state was among the first to recognize that ICE immigration detainer  
8 holds threaten the Fourth Amendment rights of the undocumented, a proposition now confirmed by the  
9 federal courts.

10 Federal immigration authorities issue civil “detainers,” which request that a state or local jail  
11 facility hold an individual for 48 hours after the individual’s release date to give ICE time to arrest the  
12 individual for violation of the immigration laws. (8 C.F. R. 287.7.) But these “detainers” or “holds” are  
13 only requests; there is no legal obligation to honor them. *Galarza v. Szalczyk*, 745 F.3d 634, 640-643 (3d  
14 Cir. 2014) (“immigration holds are requests and not mandatory orders”).

15 California’s “TRUST” Act, requires that California cities and counties abide by certain  
16 safeguards when deciding whether to honor an ICE detainer request. For example, the Act prohibits  
17 detaining individuals past their release date unless the individual has a record that involves a serious or  
18 violent felony. (Cal. Gov. Code §§ 7282-7282.5.) California also enacted the “TRUTH” Act, which  
19 requires local law enforcement agencies to provide persons in custody, prior to any interview with ICE,  
20 with information on their rights. Law enforcement must provide “a written consent form that explains  
21 the purpose of the interview, that the interview is voluntary, and that he or she may decline to be  
22 interviewed or may choose to be interviewed only with his or her attorney present.” (Cal. Gov. Code  
23 7283.1(a); Transparent Review of Unjust And Holds Act [“TRUTH” Act].)<sup>1</sup>

24 These laws bind all cities and counties whether or not they consider themselves to be “sanctuary  
25 jurisdictions.” In addition, a number of California cities and counties outright prohibit compliance with  
26

27 <sup>1</sup> Other jurisdictions also have enacted limits on compliance with federal immigration detainers. See,  
28 e.g., “An Act Concerning Civil Immigration Detainers,” Conn. Public Law 13-155; “District  
Compliance with Federal Immigration Detainers,” Code of the District of Columbia, § 24-211.07.

1 immigration detainees. This prohibition is consistent with federal law. Local jails may violate the Fourth  
 2 Amendment if they hold individuals beyond their release date based on an immigration detainer. See  
 3 *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*9-11 (D. Or. Apr.  
 4 11, 2014) (finding Fourth Amendment violation); *Mercado v. Dallas County*, No. 3:14-CV-3481-D 2017  
 5 WL 169102 (N.D. Texas, Jan. 17, 2017) (claim stated for violation of Fourth Amendment).

6 **C. The Executive Order Purports To Enforce 8 U.S.C. Section 1373, But Is in Fact A**  
 7 **Lawless Mandate Lacking Ascertainable Standards**

8 Under the guise of enforcing Section 1373, the Executive Order gives standardless discretionary  
 9 authority to the Attorney General and Secretary of Homeland Security, in the words of the President, to  
 10 “punish” alleged “sanctuary jurisdictions.”

11 **1. The Executive Order Grants Standardless Discretion To Define “Sanctuary**  
 12 **Jurisdictions”**

13 The Executive Order defines “sanctuary jurisdictions” as those that “willfully refuse to comply  
 14 with 8 U.S.C. 1373.” Section 1373 is very narrow. It only prohibits state and local governments from  
 15 restricting communications by their personnel to federal immigration authorities about “citizenship or  
 16 immigration” status.<sup>2</sup> But compliance with Section 1373 does not eliminate the risk of ending up on the  
 17 Attorney General’s list.

18 The Executive Order grants the Attorney General broad authority to “take appropriate  
 19 enforcement action against any entity” that “has in effect a statute, policy, or practice that prevents or  
 20 hinders the enforcement of Federal law.” (EO, Section 9(a).) The Order also equates “sanctuary  
 21 jurisdictions” with any jurisdiction that “ignored or otherwise failed to honor any detainees with respect  
 22 to such aliens.” (EO, Section 9(b).)

23 This text illegally grants unfettered authority to the Attorney General and Secretary of Homeland  
 24 Security to identify and punish “sanctuary jurisdictions.” Moreover, the Executive Order, coupled with  
 25

26 <sup>2</sup> Section 1373(a) states: “Notwithstanding any other provision of Federal, State, or local law, a Federal,  
 27 State, or local government entity or official may not prohibit, or in any way restrict, any government  
 28 entity or official from sending to, or receiving from, the Immigration and Naturalization Service  
 information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

1 the government’s actions to date, demonstrates an intent to punish jurisdictions for legally protected  
 2 conduct – not honoring detainers or not assisting in federal immigration enforcement.

### 3 **2. The Executive Order Is Unconstitutionally Vague**

4 Santa Clara correctly argues that the Executive Order is unconstitutionally vague because it (1)  
 5 fails to provide a person of ordinary intelligence fair notice of what is prohibited,” or (2) “is so  
 6 standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v.*  
 7 *Williams*, 553 U.S. 285, 304 (2008). The Executive Order grants the Attorney General and Secretary  
 8 with undefined and unlimited discretion to determine who is a “sanctuary jurisdiction” and deny federal  
 9 funds. It is illegal on its face.

### 10 **3. The Department of Homeland Security Illegally Targets Jurisdictions That** 11 **Deny Detainers**

12 Not only is the Executive Order illegally vague, the guidance it does provide illegally targets  
 13 jurisdictions, like California, that limit compliance with detainers. Indeed, the only way to stay off the  
 14 list of “sanctuary jurisdictions” may be to violate the Fourth Amendment by honoring immigration  
 15 detainers.

16 For years the Department of Homeland Security has been identifying jurisdictions that fail to  
 17 honor civil immigration detainers by compiling the “Declined Detainer Outcome Report.” The  
 18 Executive Order directs the Department to “utilize” the Report and issue weekly lists of jurisdictions  
 19 “that ignored or otherwise failed to honor any detainers with respect to such aliens.” (EO, Section 9(b).)

20 On March 20, 2017, the Department of Homeland Security implemented the Executive Order by  
 21 issuing a report entitled “Declined Detainers, Public Safety Advisory.”  
 22 ([https://www.ice.gov/doclib/ddor/ddor2017\\_01-28to02-03.pdf](https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf).) The report states that it will be “issued  
 23 weekly to highlight jurisdictions that choose not to cooperate with ICE detainers or requests for  
 24 notification, therefore potentially endangering Americans.” (*Id.* at 1.) Section II of the report is a “Table  
 25 of Jurisdictions that have Enacted Policies which Limit Cooperation with ICE.” (*Id.* at 23.) Section IV  
 26 of the report suggests that the number of reported jurisdictions will increase as ICE field offices resume  
 27 issuing detainers to jurisdictions that previously refused to honor them. (*Id.* at 34.)

28 Historically, the Department of Justice has used the Declined Detainer Reports to identify



1 jurisdictions that allegedly violated Section 1373. As early as May 31, 2016, the Office of the Inspector  
 2 General of the Department of Justice (“Inspector General”) responded to a Justice Department request  
 3 that the Inspector General “investigate the allegations that the jurisdictions reflected in the attached  
 4 spreadsheet, who are recipients of funding from the Department of Justice, are in violation of 8 U.S.C.  
 5 Section 1373.” (<https://oig.justice.gov/reports/2016/1607.pdf>.)<sup>3</sup> The “spreadsheet” detailed “Department  
 6 grants received by over 140 state and local jurisdictions.” (*Id.*)

7 In conducting the investigation into violations of Section 1373, the Inspector General compared  
 8 the list of 140 jurisdictions with two ICE reports: (1) an ICE draft “Declined Detainer Outcome Report,”  
 9 dated December 2, 2014, and (2) an ICE report listing 155 jurisdictions that have “policies that limit or  
 10 restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers.” (*Id.* at 2.)<sup>4</sup>

11 From this list, the Inspector General “judgmentally selected 10 state and local jurisdictions for  
 12 further review” including the entire state of California. (*Id.* at 3, 11.)<sup>5</sup> The Inspector General’s report  
 13 found that each of the 10 jurisdictions “limited in some way the authority of the jurisdictions to take  
 14 action with regard to ICE detainers.” (*Id.* at 4.) The report found that those limits “may be inconsistent  
 15 with at least the intent of Section 1373.” (*Id.* at 7.)

16 The Executive Order takes this approach one step further and equates violation of Section 1373  
 17 with refusal to honor immigration detainers. As explained above, there is no legal requirement that any  
 18 jurisdiction comply with detainers; in fact case law states that compliance may violate the Fourth  
 19 Amendment. The Declined Detainer Reports are proof of the Executive Order’s illegal approach.

20  
 21  
 22 <sup>3</sup> Memorandum dated May 31, 2016, to Karol V. Mason, Assistant Attorney General For The Office Of  
 23 Justice Programs, from Michael E. Horowitz, Inspector General, Subject: Department of Justice Referral  
 24 of Allegations of Potential Violations of 8 U.S.C. 1373 by Grant Recipients, at 1,  
 25 <https://oig.justice.gov/reports/2016/1607.pdf>.

26 <sup>4</sup> An earlier October 2014 Declined Detainer Report listed 276 counties in 43 states as having declined  
 27 detainers. The October 8, 2014 ICE Detainer Report is available on line on the website of the Center For  
 28 Immigration Studies. (Department of Homeland Security, Law Enforcement Systems & Analysis,  
 Declined Detainer Outcome Report, Prepared on: October 8, 2014,  
[http://cis.org/sites/cis.org/files/Declined%20detainers%20report\\_0.pdf](http://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf).)

<sup>5</sup> The Inspector General selected “the States of Connecticut and California; City of Chicago, Illinois;  
 Clark County, Nevada; Cook County, Illinois; Miami-Dade County, Florida; Milwaukee County,  
 Wisconsin; Orleans Parish, Louisiana; New York, New York; and Philadelphia, Pennsylvania.” (*Id.*  
 at 3.)

1                   **4. The Federal Government Has Illegally Attempted To Turn Section 1373 Into**  
 2                   **An Affirmative Obligation**

3                   Last year, the Office of Justice Programs of the Department of Justice notified recipients of two  
 4 grants, the Edward Byrne Memorial Justice Assistance Grant (JAG) and the State Criminal Alien  
 5 Assistance Program (SCAAP), that grantees must comply with Section 1373.<sup>6</sup>

6                   As part of this notification, the Office of Justice Programs issued “Guidance Regarding  
 7 Compliance with 8 U.S.C. 1373.” (<https://www.bja.gov/funding/8uscsection1373.pdf>.) Section 1373  
 8 does not require local entities to take any affirmative action; it only prohibits restrictions on  
 9 communicating about “citizenship or immigration status.” The Guidance, however, went beyond Section  
 10 1373 and required recipients to *affirmatively inform personnel* that “federal law does not allow any  
 11 government entity or official to prohibit the sending or receiving of information about an individual’s  
 12 citizenship or immigration status with any federal, state or local government entity and officials.” (*Id.*  
 13 at 1.)

14                   The Executive Order expands even further upon Section 1373 because it covers any “statute,  
 15 policy, or practice that prevents or hinders the enforcement of Federal law.” In other words, compliance  
 16 with Section 1373 has been expanded to include an undefined list of actions totally within the discretion  
 17 of the Attorney General.

18                   **D. The Executive Order Is An Attempt To Coerce Local Government**

19                   **1. The Executive Order Violates The Tenth Amendment**

20                   The Executive Order is an attempt by the President to conscript local governments into assisting  
 21 in the enforcement of the federal immigration laws – by honoring detainees and providing information to  
 22 ICE. As ably demonstrated by the moving parties, this attempt violates the Tenth Amendment.

23                   The Tenth Amendment prohibits the federal government from “commandeering” state and local  
 24 governments to assist enforcement of federal law. *Printz v. United States*, 521 U.S. 898 (1997). As  
 25 recently explained by a Florida state court, the nationalization of “every local corrections department

26 \_\_\_\_\_  
 27 <sup>6</sup> Letter dated July 7, 2016, from Peter J. Kadzik to John A. Culberson, attaching Memorandum dated  
 28 July 7, 2016, to Michael Horowitz, Inspector General, U.S. Department of Justice, from Karol V. Mason,  
 Assistant Attorney General, Office of Justice Programs, Subject: “Response: Department of Justice  
 Referral of Allegations of Potential Violations of 8 U.S.C. 1373 by Grant Recipients,”  
[http://culberson.house.gov/uploadedfiles/2016-7-7\\_section\\_1373\\_-\\_doj\\_letter\\_to\\_culberson.pdf](http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf).

1 from coast to coast . . . would be of invaluable aid in the performance of ICE’s regulatory mission.” The  
 2 court, however, warned: “[T]he price to be paid for that aid was determined, long ago, to be much too  
 3 high. The price would be the subjugation of state and local governments, the reduction of those  
 4 governments to mere satrapies of a central government of unlimited and illimitable power.” (*James*  
 5 *Lacroix v. Daniel Junior, as director of the Miami-Dade County Department of Corrections*, Case No.  
 6 F17-376, F17-1770, Circuit Court of The Eleventh Judicial Circuit In and for Miami-Dade County,  
 7 Florida, Order on Petition For Writ of *Habeas Corpus*, March 2017, at 13-14.)

8 Under the Tenth Amendment, the Executive Order may not require cities and counties, as a  
 9 condition of funding, to assist in the enforcement of federal immigration laws.

10 **2. The Executive Order Attempts To Wield Authority That Even Congress Does**  
 11 **Not Have**

12 The President did not have the authority to issue the Executive Order. Not even Congress has the  
 13 sweeping authority granted by the Executive Order.

14 Under its spending power, Congress may attach conditions on the receipt of federal funds. Art. I,  
 15 § 8, cl. 1; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-2602 (2012); *S. Dakota v. Dole*,  
 16 483 U.S. 203, 206 (1987). But recognizing the potential for abuse, the United States Supreme Court has  
 17 imposed limits on Congress’s power. *S. Dakota v. Dole*, 483 U.S. at 207. The President’s Executive  
 18 Order violates the limits set by the Court for Congress.

19 **First**, any conditions on federal funding must be unambiguous so that a state or local jurisdiction  
 20 knows the rules and the consequences for failure to obey. In a letter dated July 7, 2016, the Attorney  
 21 General’s Office of Justice Programs stated that agencies in receipt of certain law enforcement grants had  
 22 agreed to “Standard Assurances” which state: “The applicant hereby assures and certifies compliance  
 23 with all applicable Federal statutes, regulations, policies, guidelines and requirements.” The reference to  
 24 “all” federal requirement is not adequate notice that grantees must comply in particular with Section  
 25 1373. It certainly is not adequate to punish cities and counties for failure to honor immigration detainers.

26 **Second**, the conditions on funding must be related to the federal interest in the particular national  
 27 projects or programs that are being funded. “[O]therwise, of course, the spending power could render  
 28 academic the Constitution’s other grants and limits of federal authority.” *N.Y. v. United States*, 505 U.S.

1 144, 167 (1992). This requirement prevents the Trump administration from withholding federal funding  
 2 that is unrelated to immigration or law enforcement concerns. Ironically, those are the only funds not  
 3 covered by the Executive Order. As demonstrated above, most federal funds go to housing, social  
 4 services, and transportation – not law enforcement.

5 **Third**, the conditions on funding may not induce the states to engage in unconstitutional  
 6 activities. Courts have held that an agency violates an individual’s Fourth Amendment rights when it  
 7 honors an ICE hold and detains the individual beyond his release date. *Miranda-Olivares v. Clackamas*  
 8 *Cty.*, No.3:12-cv-02317-ST, 2014 WL 1414305, at \*9-11 (D. Or. Apr. 11, 2015); see also *Morales v.*  
 9 *Chadbourne*, 793 F.3d 208, 215-17 (1<sup>st</sup> Cir. 2015).

10 **Fourth**, even Congress may not cross the point at which pressure turns into compulsion. The  
 11 Executive Order broadly calls for the elimination of all federal grant funds, which constitute a large  
 12 percentage of local budgets for vital programs. For example, the federal government provides almost all  
 13 funding for Section 8 housing. For that reason, the Order violates the rule of *Sebelius*.

### 14 **III. CONCLUSION**

15 Without legal authority, the President’s loosely written Executive Order grants carte blanche to  
 16 the executive branch to deny funding to “sanctuary jurisdictions.” The Department of Justice argues only  
 17 that the government has not yet acted. But in fact the Order poses an imminent threat to amici – cities  
 18 and counties throughout California. The Order improperly forces their local officials to decide now  
 19 between continuing policies essential to protecting their communities or succumbing to the unauthorized  
 20 threats of the President. The President has no right to make this demand.

21 Dated: March 22, 2017

22 RENNE SLOAN HOLTZMAN SAKAI LLP

23  
 24 By: /s/ Linda M. Ross  
 25 LINDA M. ROSS

26 Attorneys for Amici Curiae

Additional Counsel for Amici Curiae

DONNA R. ZIEGLER  
County Counsel, County of Alameda  
Office of the County Counsel  
1221 Oak Street, Suite 450  
Oakland, CA 94612  
Ph. (510) 272-6700  
Email: donna.ziegler@acgov.org

*Attorney for County of Alameda*

ZACH COWAN  
City Attorney, City of Berkeley  
Berkeley City Attorney's Office  
2180 Milvia Street  
Berkeley, CA 94701  
Ph. (510) 981-6950  
Email: zcowan@ci.berkeley.ca.us

*Attorney for City of Berkeley*

HARRIET STEINER  
City Attorney, City of Davis  
Best Best & Krieger, LLP  
500 Capitol Mall, Ste. 1700  
Sacramento, CA 95814  
Ph. (916) 551-2821  
Email: Harriet.Steiner@bbklaw.com

*Attorney for City of Davis*

RAFAEL ALVARADO  
City Attorney, City of East Palo Alto  
East Palo Alto City Attorney's Office  
2415 University Avenue  
East Palo Alto, CA 94303  
Ph. (650) 853-5901  
Email: ralvarado@cityofepa.org

*Attorney for City of East Palo Alto*

HARVEY LEVINE  
Fremont City Attorney  
City Attorney's Office  
3300 Capitol Ave., Bldg. A  
Fremont, CA 94538  
Ph. (510) 284-4030  
Email: HLevine@fremont.gov

*Attorney for City of Fremont*

BRIAN E. WASHINGTON  
County Counsel, County of Marin  
Office of the County Counsel  
3501 Civic Center Dr., Ste. 275  
San Rafael, CA 94903  
Ph. (415) 473-6117  
Email: BWashington@marincounty.org

*Attorney for County of Marin*

CHARLES J. MCKEE  
County Counsel, County of Monterey  
Office of the County Counsel  
168 West Alisal St., 3<sup>rd</sup> Flr.  
Salinas, CA 93901  
Ph. (831) 755-5045  
Email: mckeecj@co.monterey.ca.us

*Attorney for County of Monterey*

JANNIE L. QUINN  
Mountain View City Attorney  
City of Mountain View  
500 Castro Street  
Mountain View, CA 94041  
Ph. (650) 903-6496  
Email: jannie.quinn@mountainview.gov

*Attorney for City of Mountain View*

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RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law

RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law

1 BARBARA PARKER  
2 City Attorney, City of Oakland  
3 Office of the City Attorney  
4 City Hall, 6<sup>th</sup> Floor  
5 1 Frank H. Ogawa Plaza  
6 Oakland, CA 94612  
7 Ph. (510) 238-3815  
8 Email: bjparker@oaklandcityattorney.org

9 *Attorney for City of Oakland*

10 BRUCE GOODMILLER  
11 City Attorney, City of Richmond  
12 Office of the City Attorney  
13 450 Civic Center Plaza, #303  
14 Richmond, CA 94804  
15 Ph. (510) 620-6509  
16 Email: Bruce\_Goodmiller@ci.richmond.ca.us

17 *Attorney for City of Richmond*

18 CHRISTOPHER A. CALLIHAN  
19 City Attorney, City of Salinas  
20 Office of the City Attorney  
21 200 Lincoln Avenue  
22 Salinas, CA 93901-2639  
23 Ph. (831) 758-7256  
24 Email: chrisc@ci.salinas.ca.us

25 *Attorney for City of Salinas*

RICHARD DOYLE  
City Attorney, City of San Jose  
Office of the City Attorney  
200 E. Santa Clara St., 16<sup>th</sup> Flr.  
San Jose, CA 95113  
Ph. (408) 535-1900  
Email: richard.doyle@sanjoseca.gov

*Attorney for City of San Jose*

ANTHONY P. CONDOTTI  
City Attorney, City of Santa Cruz  
Office of the City Attorney  
333 Church Street  
Santa Cruz, CA 95060  
Ph. (831) 423-8383  
Email: TCondotti@abc-law.com

*Attorney for City of Santa Cruz*

TERESA STRICKER  
Interim City Attorney, City of Santa Rosa  
City Attorney's Office  
100 Santa Rosa Ave., Rm. 8  
Santa Rosa, CA 95404  
Ph. (510) 995-5800  
Email: tstricker@srcity.org

*Attorney for City of Santa Rosa*

1 LOUISE H. RENNE (SBN 36508)  
JONATHAN V. HOLTZMAN (SBN 99795)  
2 LINDA M. ROSS (SBN 133874)  
lross@publiclawgroup.com  
3 RENNE SLOAN HOLTZMAN SAKAI LLP  
1220 Seventh Street, Suite 300  
4 Berkeley, CA 94710  
Ph. (510) 995-5800  
5 Fx. (415) 678-3838

6 Attorneys for Amici Curiae

7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 CITY AND COUNTY OF SAN FRANCISCO,

10 Plaintiff,

11 v.

12 DONALD J. TRUMP, President of the United  
States, UNITED STATES OF AMERICA,  
13 JOHN F. KELLY, Secretary of United States  
Department of Homeland Security,  
14 JEFFERSON B. SESSIONS, Attorney General  
of the United States, DOES 1-100,

15 Defendants

16 COUNTY OF SANTA CLARA,

17 Plaintiff,

18 v.

19 DONALD J. TRUMP, President of the United  
States of America, JOHN F. KELLY, in his  
20 official capacity as Secretary of the United  
States Department of Homeland Security,  
21 DANA J. BOENTE, in his official capacity as  
Acting Attorney General of the United States,  
22 MARK SANDY, in his official capacity as  
23 Acting Director of the Office of Management  
and Budget, and DOES 1-50,

24 Defendants

Case No. 17-cv-00485-WHO  
Case No. 17-cv-00574-WHO  
(Related cases)

**[PROPOSED] ORDER GRANTING  
CALIFORNIA CITIES AND COUNTIES'  
MOTION FOR LEAVE TO FILE AS AMICI  
CURIAE IN SUPPORT OF MOTIONS FOR  
PRELIMINARY INJUNCTION FILED BY  
COUNTY OF SANTA CLARA AND CITY AND  
COUNTY OF SAN FRANCISCO**

1 The Court hereby grants the motion to file as amici curiae, filed by County of Alameda, City of  
2 Berkeley, City of Davis, City of East Palo Alto, City of Fremont, County of Marin, County of Monterey,  
3 City of Mountain View, City of Oakland, City of Richmond, City of Salinas, City of San Jose, City of  
4 Santa Cruz, and City of Santa Rosa, in support of City and County of San Francisco’s motion for  
5 preliminary injunction (Case No. 17-cv-00485-WHO ) and County of Santa Clara’s motion for  
6 preliminary injunction (Case No. 17-cv-00574-WHO).

7 **IT IS SO ORDERED.**

8 Dated: March \_\_\_\_, 2017

RENNE SLOAN HOLTZMAN SAKAI LLP

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12 Hon. William H. Orrick  
13 District Judge, USDC-NDCA  
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RENNE SLOAN HOLTZMAN SAKAI LLP  
Attorneys at Law