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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 CITY AND COUNTY OF SAN FRANCISCO,

18 Plaintiff,

19 v.

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

24 Defendants.

Case No. 3:17-cv-00485-WHO

**THE INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION’S MOTION
FOR ADMINISTRATIVE RELIEF FOR
LEAVE TO FILE BRIEF AS *AMICUS
CURIAE* IN SUPPORT OF PLAINTIFF
CITY AND COUNTY OF SAN
FRANCISCO’S MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 12, 2017
Time: 2:00 p.m.
Judge: Honorable William H. Orrick
Courtroom: Courtroom 2

Filed/Lodged Concurrently with:
1. Proposed Amicus Curiae Brief; and
2. Proposed Order Granting Mtn. for
Administrative Relief

1 *Amicus Curiae* The International Municipal Lawyers Association (“IMLA”) respectfully
2 moves this Court for leave to file the accompanying amicus brief in support of Plaintiff City and
3 County of San Francisco’s (“San Francisco”) Motion for Preliminary Injunction (“Motion”) pursuant
4 to this Court’s Order Regarding *Amicus* Briefing.¹ Dkt. No. 31.

5 IMLA is a non-profit, professional organization that has been an advocate and resource for
6 local government attorneys since 1935. IMLA develops and advances solutions to important legal
7 issues faced by local governments, and serves as an international clearinghouse of legal information
8 and cooperation on municipal legal matters. IMLA collects and disseminates information to its
9 membership across the United States and Canada, and helps governmental officials prepare for
10 litigation and develop new local laws. Every year, IMLA’s legal staff provides accurate, up-to-date
11 information and valuable counsel to hundreds of requests from members. IMLA also provides a
12 variety of services, publications, and programs to help members facing legal challenges.

13 Executive Order 13768, entitled “Enhancing Public Safety in the Interior of the United
14 States,” 82 Fed. Reg. 8799 (Jan. 25, 2017) (the “Executive Order”), directly affects IMLA members’
15 municipal clients. More specifically, the Executive Order conditions municipalities’ receipt of all
16 federal funding on, among other things, municipalities’ compliance with extra-judicial and
17 unconstitutional ICE detainer requests. The Executive Order thus places IMLA’s member lawyers
18 in untenable situations in advising their clients: either advise constitutional violations to ensure
19 continued receipt of mission-critical federal monies, or advise violation of the Executive Order and
20 risk termination of that federal funding. IMLA is therefore deeply interested in the issues presented
21 to the Court by the parties.

22 IMLA respectfully submits that consideration of *amicus* briefing in connection with the
23 Motion is desirable. With respect to IMLA in particular, IMLA’s proposed *amicus* brief provides
24 the perspective of attorneys across the country who must advise their municipal clients on whether

25 _____
26 ¹ In a related case filed by the County of Santa Clara, the plaintiff also has filed a motion for a
27 nationwide preliminary injunction that presently is set for hearing on April 5, 2017. Given the
28 similarities between the complaints and preliminary injunction motions filed by the plaintiffs in the
two related cases, IMLA’s amicus brief may be considered supportive of the preliminary injunction
motion filed by the County of Santa Clara as well.

1 and how, if at all, those municipal clients should comply with the Executive Order. Moreover,
2 IMLA's proposed, attached *amicus* brief is directly relevant to the issues raised in San Francisco's
3 Motion. Specifically, IMLA explains that the Executive Order violates the federal spending power
4 because it conditions the receipt of federal funds on States and municipalities violating individuals'
5 Fourth Amendment rights, and because the Executive Order imposes a funding condition on *all*
6 federal funding that is not related to the purpose underlying *all* federal funding. Moreover, IMLA's
7 proposed *amicus* brief explains that the Executive Order commandeers State and local law
8 enforcement in enforcing federal immigration laws, in violation of the Tenth Amendment. These
9 matters are directly relevant to the disposition of the issues in this matter before the Court.

10 WHEREFORE, IMLA respectfully request that this Court grant it leave to file the proposed,
11 attached *amicus* brief.

12
13 Dated: March 23, 2017

Respectfully submitted,

14
15 By: /s/ Brett M. Schuman

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on March 23, 2017. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of March 2017.

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23 JEFFERSON B. SESSIONS, Attorney General
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**BRIEF OF *AMICUS CURIAE* THE
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION IN SUPPORT
OF PLAINTIFF CITY AND COUNTY OF
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1 **I. PRELIMINARY STATEMENT**

2 *Amicus Curiae* International Municipal Lawyers Association (“IMLA”) submits this
 3 memorandum with respect to Executive Order 13768, titled “Enhancing Public Safety in the Interior
 4 of the United States.” Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the “Executive
 5 Order”). IMLA is a nonprofit organization of local government lawyers. The goal of IMLA is to
 6 develop fair and realistic legal solutions to problems facing local government lawyers. As the
 7 lawyers charged with advising municipalities on how to deal with executive orders such as this one,
 8 IMLA has a strong interest in ensuring fair and realistic legal solutions that also comply with the
 9 law. The Executive Order does not comply with the law and it puts ethical municipal lawyers in an
 10 untenable situation in advising their clients: either advise constitutional violations to ensure
 11 continued receipt of mission-critical federal monies, or advise violation of the Executive Order and
 12 risk termination of that federal funding.

13 The Executive Order violates the U.S. Constitution. First, the Executive Order requires State
 14 and local governments to violate the Fourth Amendment in order to get federal funding. This is an
 15 “illegitimate” and unconstitutional funding condition. *South Dakota v. Dole*, 483 U.S. 203, 210
 16 (1987). Second, the Executive Order is overly broad because it is not tailored to the specific
 17 governmental interest. Instead, the Executive Order conditions *all* federal funding on States’ and
 18 local governments’ cooperation in enforcing immigration laws, even when the federal funding has
 19 nothing to do with immigration. This, too, is unconstitutional. *Id.* at 207-08. Third, the Executive
 20 Order commandeers State and local law enforcement, in violation of the Tenth Amendment.

21 **II. ARGUMENT**

22 **A. The Executive Order Unlawfully Induces States and Local Governments to**
 23 **Violate the Fourth Amendment.**

24 The United States Supreme Court has held that Congress’s spending “power may not be used
 25 to induce the States to engage in activities that would themselves be unconstitutional.” *Dole*, 107 S.
 26 Ct. at 210. Where Congress imposes a condition on federal funding that requires States to “violate
 27 the constitutional rights” of individuals, the funding condition is “illegitimate” and unconstitutional.
 28 *Id.* at 211.; *see also Comm. of Mass. v. U.S. Dep’t. of Health & Human Servs.*, 698 F. Supp. 2d 234,

1 248-49 (D. Mass. 2010) (concluding that DOMA unconstitutionally exceeded Congress’s spending
 2 power by “impermissibly condition[ing] the receipt of federal funding on the state’s violation of the
 3 Equal Protection Clause of the Fourteenth Amendment”); *Am. Civil Liberties Union v. Mineta*, 319
 4 F. Supp. 2d 69, 86-87 (D.D.C. 2004) (permanently enjoining enforcement of statute that conditioned
 5 funding on unconstitutional infringement of First Amendment rights); *Alliance for Open Society*
 6 *Int’l, Inc. v. U.S. Agency for Int’l Development*, 651 F.3d 218, 239 (2d Cir. 2011) (affirming
 7 preliminary injunction barring enforcement of statute that conditioned funding on First Amendment
 8 violations). Here, the Executive Order violates this fundamental precept: it explicitly coerces States
 9 and local governments to unlawfully detain individuals in violation of those individuals’ Fourth
 10 Amendment rights. *See Dole*, 107 S. Ct. at 210; *Comm. of Mass.*, 698 F. Supp. 2d at 248-49.¹

11 **1. The Executive Order Conditions Federal Funding On States and Local**
 12 **Governments Complying with All ICE Detainer Requests.**

13 The Executive Order commands that if a jurisdiction does not abide by ICE detainer requests,
 14 that jurisdiction is a “sanctuary jurisdiction” ineligible for federal funding. Section 9(a) of the
 15 Executive Order directs the Attorney General and Secretary of the Department of Homeland
 16 Security to withhold federal funding from “sanctuary jurisdictions.” Per Section 9(a), those officers
 17 “shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (*sanctuary*
 18 *jurisdictions*) are not eligible to receive Federal grants” (Emphasis added). In Section 9(b),
 19 the Executive Order defines a “sanctuary jurisdiction” to be “*any* jurisdiction that ignore[s] or
 20 otherwise fail[s] to honor any detainers with respect to . . . aliens.” (Emphasis added). Thus,
 21 pursuant to Sections 9(a) and 9(b), if a State or local government “ignore[s] or otherwise fail[s] to
 22 honor” ICE detainer requests,” that jurisdiction is a “sanctuary jurisdiction” that is no longer
 23 “eligible” to receive federal funding.

24 Indeed, Defendants have not disputed this interpretation of the Executive Order. *See* Dkt.
 25 No. 35 (Opp. to Mot.) at 12-13; *see also* Case No. 17-cv-485 (“*Santa Clara Action*”), Dkt. No. 46

26 _____
 27 ¹ The Executive Order here is of course not a statute enacted by Congress, but rather, an edict issued
 28 by the President. Nonetheless, the limitations on the use of the federal spending power described in
Dole and its progeny apply with at least equal force here, given that the President’s Executive Order
 purports to wield the spending power that the Constitution vests exclusively with Congress.

1 (Opp. to Santa Clara’s Mot.) at 11-12. Instead, Defendants fall back on their hollow assertion that
 2 the Attorney General and/or Secretary of Homeland Security will further assess what constitutes a
 3 “sanctuary jurisdiction,” and a “willful refusal to comply with 8 U.S.C. § 1373.” Dkt. No. 35, at 12-
 4 13. But the government nowhere suggests that the Attorney General or Secretary could possibly
 5 conclude that Sections 9(a) and 9(b) mean anything other than what they say, which is that a State or
 6 local government that does not abide by ICE detainer requests is a “sanctuary jurisdiction” that
 7 “shall” not be “eligible” for federal funding.

8 The Defendants’ statements corroborate this interpretation of the Executive Order’s plain
 9 language. Defendants repeatedly and publicly explained that the term “sanctuary jurisdictions”
 10 encompasses all jurisdictions that do not comply with both the letter of 8 U.S.C. § 1373 *and* with
 11 ICE detainer requests. In particular, Defendants have labeled San Francisco – a jurisdiction that
 12 complies with 8 U.S.C. § 1373 *but not* with ICE detainer requests (Dkt. No. 20, Am. Compl. (“AC”)
 13 ¶¶ 26, 39-46) – as one of their primary “sanctuary jurisdiction” targets (*id.* ¶¶ 68-70).² *See, e.g., Int’l*
 14 *Refugee Assistance Project v. Trump*, Case No. 8:17-cv-00361-TDC, Dkt. No. 149 at 26-27 (D. Md.
 15 Mar. 16, 2017) (“District of Maryland TRO Order”) (“Considering [Defendant Trump’s] statements
 16 . . . is appropriate” as “[s]uch evidence is perfectly probative and is considered as a matter of
 17 common sense; indeed courts are forbidden to turn a blind eye to the context in which the policy
 18 arose.” (quoting *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987) & *McCreary Cty. v. Am. Civil*
 19 *Liberties Union*, 545 U.S. 844, 866 (2005) (internal quotation marks and alterations omitted)); *State*
 20 *of Hawai’i v. Trump*, Case No. 1:17-cv-00050-DKW-KSC, Dkt. No. 219 at 28 (Order Granting Mot.
 21 for Temporary Restraining Order) (D. Haw. Mar. 15, 2017) (Court was “enlightened by the specific
 22 historical context, contemporaneous public statements, and specific sequence of events leading to
 23 [executive order’s] issuance”).³

24 _____
 25 ² Defendants’ argument that the government is not bound by now-President Trump’s campaign
 26 promises to defund sanctuary jurisdictions such as San Francisco (Opp. at 14) misses the mark
 27 because it ignores the many statements that Defendants made *after* President Trump took office and
 issued the Executive Order. *See* AC ¶ 71. Moreover, whether campaign statements “bind” the
 federal government is a strawman where, here, the statements simply illuminate the meaning of the
 language of the Executive Order.

28 ³ *See also United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1084-86 (5th Cir. 1983) (finding executive
 branch representatives’ statements “dispositive” as to scope of Executive Order); *see also Dubois v.*

1 2. **Compliance with ICE Detainer Requests Lacking Probable Cause**
 2 **Violates The Fourth Amendment.**

3 The Executive Order demands States’ and local governments’ strict compliance with ICE
 4 detainer requests, and makes no exception for instances where detainer requests are not supported by
 5 probable cause. But States and local governments cannot constitutionally detain an individual based
 6 solely on the fact that ICE requests the detention. That is prohibited by the Fourth Amendment.

7 Under the Fourth Amendment, “a fair and reliable determination of probable cause” must be
 8 made before a state actor may constitutionally hold an individual in custody. *See Baker v.*
 9 *McCollan*, 443 U.S. 137, 142 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (probable cause is
 10 necessary for any “extended restraint of liberty following arrest”). More specifically, although the
 11 Fourth Amendment permits law enforcement to briefly detain an individual based on a reasonable
 12 suspicion that the individual is engaged in criminal activity, “any further detention” – including by
 13 holding an individual in custody – “**must** be based on consent or probable cause.” *United States v.*
 14 *Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (emphasis added); *see also Miranda-Olivares v.*
 15 *Clackamas Cty.*, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (“Prolonged detention after a
 16 seizure, such as full custodial confinement without a warrant, must be based on probable cause.”).

17 ICE detainer requests are not warrants based on probable cause. *See Galarza v. Szalczyk*,
 18 745 F.3d 634, 637 (3d Cir. 2014) (“The detainer was accompanied by neither a warrant, an affidavit
 19 of probable cause, nor a removal order.”).⁴ In fact, the applicable federal regulation governing ICE
 20 detainer requests does not condition the issuance of such requests on the existence of probable cause.
 21 *See* 8 C.F.R. § 287.7. Rather, the applicable regulation authorizes several categories of federal
 22 officers to issue detainer requests whenever the federal government “seeks custody of an alien . . .
 23 for the purpose of arresting and removing the alien,” regardless of whether there is probable cause to
 24 believe that the suspected alien has committed a crime. *Id.* §§ 287.7(a)-(b).

25 *U.S. Dept. of Agriculture*, 102 F.3d 1273, 1293-94 (courts may consider “ordinar[y]” meaning and
 “common usage” of terms in executive order).

26 ⁴ *See also Mendia v. Garcia*, 165 F. Supp. 3d 861, 889 (N.D. Cal. 2016) (sustaining claims
 27 predicated on lack of probable cause underlying ICE detainer request); *Miranda-Olivares v.*
 28 *Clackamas Cty.*, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (ICE detainer request not founded
 on probable cause); *Mercado v. Dallas Cty., Texas*, 2017 WL 169102, at *7 (N.D. Tex. Jan. 17,
 2017) (same); *Orellana v. Nobles Cty.*, 2017 WL 72397, at *9 (D. Minn. Jan. 6, 2017) (same).

1 ICE detainer requests also cannot meet the probable cause requirement to the extent they are
 2 directed to civil, as opposed to criminal, conduct. The probable cause required to support the
 3 custodial detention of an individual “can *only* exist in relation to *criminal* conduct” and that “*civil*
 4 *disputes cannot give rise to probable cause.*” *Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir.
 5 1995) (emphasis added). Unauthorized presence in the United States is merely a civil infraction; “it
 6 is not a crime.” *Ariz. v. United States*, 132 S. Ct. 2492, 2505 (2012). Accordingly, where law
 7 enforcement detains an individual who lacks authorization to be in the country “based on nothing
 8 more than” the individual’s “possible removability,” the “predicate” probable cause required to
 9 justify the detention “is absent.” *See id.*

10 For these reasons, State and local governments violate the Fourth Amendment where they
 11 “blindly compl[y]” with ICE detainer requests devoid of facts supporting a probable cause
 12 determination. *See Morales v. Chadbourne*, 2017 WL 354292, at *13 (D.R.I. Jan. 24, 2017);
 13 *Galarza*, 745 F.3d at 645 (reversing dismissal of section 1983 claims against county that complied
 14 with ICE detainer request absent probable cause). In fact, State and local governments can be liable
 15 for honoring ICE requests in violation of Fourth Amendment rights. *See Orellana*, 2017 WL 72397,
 16 at *11 (denying county’s motion for summary judgment on claim under 42 U.S.C. § 1983 arising out
 17 of unlawful detention); *Mercado*, 2017 WL 169102, at *7 (sustaining section 1983 claims against
 18 County arising out of unlawful detention).⁵

19 Despite the fact that ICE detainer requests frequently do not establish the probable cause
 20 required to justify the detentions they seek, and that detentions made pursuant to such ICE detainer
 21 requests thus violate the Fourth Amendment, the Executive Order does not allow States and local
 22 governments to decline to adhere to ICE detainer requests. To the contrary, the Executive Order

23
 24 ⁵ Prior to October 2011, Santa Clara spent on average \$159 per day for each of the 135 inmates that
 25 Santa Clara held pursuant to ICE detainer requests, or over \$21,000 per day in total. *See Santa*
 26 *Clara Action*, Dkt. No. 26, at 7. Additionally, the potential civil exposure that jurisdictions face for
 27 unconstitutional detentions carried out pursuant to ICE detainer requests is stunning. For example,
 28 the County in *Miranda-Olivares* settled the plaintiff’s wrongful detention claims for \$30,100 and
 was ordered to pay the plaintiff’s fees and costs, totaling \$97,373.14. *See Case No. 3:12-cv-2317-*
ST, Dkt. No. 163 (Opinion and Order), at 1 (D. Or. Aug. 28, 2015). If Santa Clara honored all ICE
 detainer requests, was sued by each of the 135 individuals it held pursuant to ICE detainer requests,
 and entered into comparable settlements with each of them, the aggregate cost of those settlements
 alone would exceed \$17,000,000.

1 conditions “*any*” jurisdiction’s eligibility for federal funding on strict obedience with “*any*” ICE
 2 detainer request, regardless of whether the detainer request is supported by probable cause.
 3 Executive Order, §§ 9(a)–(b) (emphasis added).⁶ This sort of strongarm tactic to engage in unlawful
 4 activity is unconstitutional. *Dole*, 107 S. Ct. at 2010.

5 The Executive Order thus presents municipal lawyers with a Hobson’s choice. On the one
 6 hand, municipal lawyers could advise their clients to comply with the Executive Order by honoring
 7 ICE detainer requests. To do so, municipal lawyers would have to counsel their clients to engage in
 8 behavior that courts across the country have found to be both unconstitutional and grounds for
 9 imposing civil liability. On the other hand, municipal lawyers could advise their clients not to abide
 10 by the Executive Order’s provisions requiring compliance with ICE detainer requests. To so advise
 11 their clients, however, municipal lawyers would be encouraging municipalities to engage in behavior
 12 that jeopardizes mission-critical federal funding.

13 **B. The Executive Order Violates the Spending Clause By Conditioning All Federal**
 14 **Funding on Actions Not Reasonably Related to All Federal Funding.**

15 The Supreme Court in *Dole* cautioned that conditions on federal funding are “illegitimate”
 16 “if they are unrelated to the federal interest” in the “particular national projects or programs” through
 17 which such funds are granted. *See Dole*, 483 U.S. at 207-08 (citing *Massachusetts v. United States*,
 18 435 U.S. 444 (1978)); *see also Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958)
 19 (“[T]he Federal Government may establish and impose reasonable conditions relevant to federal
 20 interest in the project and to the over-all objectives thereof”).⁷ The Executive Order here conditions

21 ⁶ ICE recently published its first weekly Declined Detainer Outcome Report pursuant to Section
 22 9(b) of the Executive Order. *See* https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf.
 23 Tellingly, the report labels as “non-cooperative” (*id.* at 23) jurisdictions that refuse to honor detainer
 24 requests that are unsupported by probable cause. *See id.* at 24 (DeKalb County, Georgia deemed
 25 non-cooperative because it “will not honor an ICE detainer unless ICE first presents the sheriff’s
 26 office with a warrant or ‘sufficient probable cause’”); *id.* at 25 (Montgomery County, Maryland
 27 deemed non-cooperative because it “will not honor ICE detainees without adequate probable
 28 cause”).

⁷ As discussed herein, *supra* n.1, *Dole* and its progeny describe the limitations on the spending
 power that the Constitution vests with Congress. The Constitution does not vest with the President
 any spending power. Thus, if anything, the funding condition imposed by the Executive Order is
 entitled to even less deference than a funding condition imposed through a statute duly enacted by
 Congress. *Cf.* District of Maryland TRO Order, at 26-27 (the President’s power in the immigration
 context “derives from ‘the statutory authority conferred by Congress.’” (quoting *Abourezk v.*
Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986)).

1 States' and local governments' eligibility for *all* federal funding on their assistance with the
 2 enforcement of federal immigration laws. The enforcement of federal immigration laws, however, is
 3 not related to *all* federal funding programs and projects – not even close.

4 **1. The Executive Order Conditions All Federal Funding On States and**
 5 **Local Governments Assisting with Enforcing Federal Immigration Laws.**

6 Pursuant to the Executive Order, a State's or local government's eligibility for *any* federal
 7 funding is contingent upon the State or local government complying with both 8 U.S.C § 1373 and
 8 ICE detainer requests. As discussed, *supra* at 2-3, under the Executive Order, a “sanctuary
 9 jurisdiction” is any jurisdiction that fails to comply with 8 U.S.C § 1373 and ICE detainer requests.
 10 According to the Executive Order, “[s]anctuary jurisdictions . . . willfully violate Federal law.”
 11 Executive Order, § 1. As Section 2(c) states, “[i]t is the policy of the executive branch to ensure that
 12 jurisdictions that fail to comply with applicable Federal law” – *i.e.*, sanctuary jurisdictions – “***do not***
 13 ***receive Federal funds.***” (Emphasis added). Likewise, as Section 9(a) states, the Attorney General
 14 and Secretary of Homeland Security “shall ensure” that “sanctuary jurisdictions” are “***not eligible to***
 15 ***receive Federal grants,*** except as deemed necessary for law enforcement purposes by the Attorney
 16 General or the Secretary.” (Emphasis added).

17 Although Section 2(c) of the Executive Order speaks of withholding “Federal funds” from
 18 sanctuary jurisdictions, whereas Section 9(a) speaks of withholding “Federal grants,” this is largely a
 19 distinction without a difference. Indeed, the White House has used the terms “federal funding” and
 20 “federal grants” interchangeably when explaining that the Executive Order is intended to cut off *all*
 21 federal monies to sanctuary jurisdictions. In the words of White House Press Secretary Sean Spicer,
 22 the Executive Order “strip[s] federal grant money from sanctuary states and cities,” “halt[s] federal
 23 funding for sanctuary cities,” and is “very clear . . . that federal funds . . . should not be used to help
 24 fund sanctuary cities.” AC ¶ 71; *see also id.* ¶ 72 (the Executive Order is a “weapon” to “defund”
 25 sanctuary jurisdictions by depriving them of “the money they need to properly operate,” and
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 27
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1 “make[s] sure” that sanctuary jurisdictions “don’t get federal government funding”).⁸ Thus, as
 2 Defendants have made clear, the Executive Order imposes a condition on *all* federal funding.

3 Nor is there any distinction between funds paid through a “grant” and funds paid in
 4 connection with “entitlement programs.” Indeed, although San Francisco speaks of funding it
 5 receives through “grants” and through “entitlement programs,” including Medicaid, Temporary
 6 Assistance for Needy Families (“TANF”), Supplemental Nutrition Assistance Program (“SNAP”),
 7 and Foster Care (AC ¶ 134), it is indisputable that federal funds paid in connection with each of
 8 these entitlement programs are “grants.” *See, e.g., Nat’l Federation of Independent Bus. v. Sebelius*,
 9 132 S. Ct. 2566, 2601 (2012) (federal Medicaid funding is a “grant”); 42 C.F.R. § 430.30 (same);
 10 *Ariz. v. Thompson*, 281 F.3d 248, 250 (D.C. Cir. 2002) (TANF “provides federal block grants that
 11 states may use for their own public assistance programs”); 42 U.S.C. § 403 (TANF provides “Grants
 12 to States”); 7 U.S.C. §§ 2020(t) & 2026 (federal “grants” used to fund SNAP eligibility
 13 determinations, improved access to benefits, and research); 42 U.S.C. § 627 (federal government
 14 funds foster care through “matching grants”).⁹

15 **2. Assistance with Enforcing Federal Immigration Laws Is a Condition Not**
 16 **Reasonably Related to the Purpose of All Federal Funding.**

17 San Francisco and other jurisdictions across the country receive federal funding through
 18 programs and projects that have absolutely nothing to do with the enforcement of federal
 19 immigration laws. Assisting with the enforcement of federal immigration laws, however, is the
 20 condition that the Executive Order purports to impose on funding from those wholly unrelated

21 ⁸ Defendants nowhere dispute that the Executive Order, on its face and construed in conjunction with
 22 the White House’s statements regarding the order’s expansive scope, puts *all* federal funding at risk.
 23 Instead, Defendants suggest that the executive branch may choose to contradict the express terms of
 24 the Executive Order and apply the Executive Order more narrowly. *See* Dkt. 35, at 13; *Santa Clara*
 25 *Action*, Dkt. No. 46, at 18. Defendants have no support for their assertion that a facially
 26 unconstitutional executive order withstands scrutiny because it might or might not be applied
 27 constitutionally.

28 ⁹ Jurisdictions across the country are making budgeting decisions, including whether or not to
 continue critical programs that depend on federal funding. Particularly given Defendants’ repeated
 statements confirming their intent to defund sanctuary jurisdictions, sanctuary jurisdictions need not
 wait until Defendants make good on their promises. Whether the Executive Order is
 unconstitutional is a ripe issue. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (after being
 warned of prosecution by police, plaintiff need not “first expose himself to actual arrest or
 prosecution” before challenging a statute).

1 programs and projects. The Executive Order’s funding condition is thus “illegitimate.” *See Dole*,
 2 483 U.S. at 207-08; *see also N.Y. v. United States*, 505 U.S. 144, 167 (1992) (federal funding
 3 conditions “must (among other requirements) bear some relationship to the purpose of the federal
 4 spending[;] otherwise, of course, the spending power could render academic the Constitution’s other
 5 grants and limits of federal authority”).

6 For example, San Francisco receives Medicaid funding from the federal government. AC ¶
 7 134. Medicaid’s purpose is to “enabl[e] each State . . . to furnish (1) medical assistance on behalf of
 8 families with dependent children and of aged, blind, or disabled individuals, whose income and
 9 resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and
 10 other services to help such families and individuals attain or retain capability for independence or
 11 self-care.” 42 U.S.C. § 1396-1. The federal government pays *no* Medicaid funding to enable States
 12 to provide medical assistance to undocumented immigrants, save for narrowly defined medical
 13 emergencies. Assisting the federal government with the enforcement of federal immigration laws
 14 has absolutely nothing to do with furnishing medical and rehabilitation services to individuals who
 15 are unable to afford such services, particularly where undocumented immigrants are largely
 16 ineligible to receive such services in the first place.¹⁰

17 By way of further example:

18 • Florida’s Department of Economic Opportunity is to receive a federal grant of up to
 19 \$7,035,611 to fund “disaster relief employment for eligible individuals in clean-up and recovery
 20 efforts resulting from the effects of Florida Hurricane Matthew.”¹¹

21 • Missoula, Montana recently received a federal Small Community Air Service
 22 Development grant to fund a “new service from Missoula International Airport to the southern
 23 United States, specifically targeting the North Texas region.”¹²

24 _____
 25 ¹⁰ *Cf. Texas v. United States*, 2016 WL 4138632, at *16-17 (N.D. Tex. Aug. 4, 2016) (sustaining
 26 constitutional challenge to condition on Medicaid funding requiring States to reimburse healthcare
 27 organizations serving individuals who did not qualify for Medicaid).

28 ¹¹ *See* <https://www.doleta.gov/DWGs/Grant-Awards/docs/FL-Disaster-Hurricane-Matthew-One-Rager-PY16.pdf>.

¹² *See* <https://www.transportation.gov/sites/dot.gov/files/docs/FY%2016%20SCASDP%20Selection%20Order%202016-6-21.pdf>.

1 • The City of Providence, Rhode Island – which has already declared itself a sanctuary
2 city¹³ – has received a federal grant of \$25,000 from the National Endowment for the Arts “[t]o
3 support a creative collaboration between Trinity Repertory Company, The Steel Yard, and
4 neighborhood residents to present public performances of adaptations of the works of
5 Shakespeare.”¹⁴

6 • The City of Little Rock, Arkansas received a grant of nearly \$500,000 from the
7 National Park Service’s African American Civil Rights Grant Program, paid through the Historic
8 Preservation Fund for the preservation of Central High School, a civil rights monument.¹⁵

9 • The Department of Labor has given the City of Madison, Wisconsin over \$150,000 to
10 research and analyze the development and implementation of a paid-leave program for city
11 employees.¹⁶

12 • The Idaho State Department of Agriculture has received through the U.S. Department
13 of Agriculture’s Specialty Crop Block Grant program nearly \$2,000,000 to fund sixteen projects, one
14 of which is designed to “fill significant knowledge gaps in the *Fusarium proliferatum* [fungus] and
15 onion interaction that results in onion bulb rot.”¹⁷

16 Enforcing federal immigration laws is not related to States’ or local governments’ hurricane
17 recovery efforts, flight services, neighborhood productions of *Romeo and Juliet*, preservation of civil
18 rights monuments, paid-leave research, or crop blights. But the Executive Order threatens to cut all
19 of this funding unless States and local governments assist with enforcing federal immigration laws.

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23 ¹³ See “Mayor Elorza now calls Providence a sanctuary city, but isn’t planning policy changes,” Dan
24 McGowan (Jan. 31, 2017), available at <http://wpri.com/2017/01/31/mayor-elorza-now-calls-providence-a-sanctuary-city-but-isnt-planning-policy-changes/>.

25 ¹⁴ See Nat’l Endowment for the Arts, Grant No. 16-6200-7049, available at
<https://apps.nea.gov/grantsearch/>.

26 ¹⁵ See <https://www.nps.gov/orgs/1207/01-12-2017-civil-rights-grants.htm>.

27 ¹⁶ See <https://www.cityofmadison.com/news/city-of-madison-awarded-department-of-labor-grant>.

28 ¹⁷ See <https://www.ams.usda.gov/sites/default/files/media/SCBGP2016DescriptionofFundedProjects.pdf>

1 **C. The Executive Order Violates the Tenth Amendment**

2 The Tenth Amendment demands that “powers not delegated to the United States by the
3 Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the
4 people.” U.S. Const., Art. X. Pursuant to the Tenth Amendment, “[t]he Federal Government may
5 neither issue directives requiring the States to address particular problems, nor command the States’
6 officers, or those of their political subdivisions, to administer or enforce a federal regulatory
7 program.” *Printz v. United States*, 521 U.S. 898, 935 (1997). This is exactly what the Executive
8 Order does, in violation of the Tenth Amendment.

9 The Third Circuit’s decision in *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), is directly
10 on point. There, the Court addressed whether 8 C.F.R. § 287.7 – the federal regulation authorizing
11 the issuance of ICE detainers – empowers federal officers to command States and local governments
12 to hold suspected aliens in custody. *Id.* at 643-45. The Court carefully analyzed the relevant case
13 law, as well as the text of Section 287.7 providing that the federal government “shall incur [no]
14 fiscal obligation” related to any detainer request. *Id.* at 643-44 (citing 8 C.F.R. § 287.7(e)). The
15 Court then acknowledged that “[u]nder the Tenth Amendment, immigration officials may not order
16 state and local officials to imprison suspected aliens subject to removal at the request of the federal
17 government,” and that a “command to detain federal prisoners at state expense is exactly the type of
18 command that has historically disrupted our system of federalism.” *Id.* Given the “constitutional
19 problems” that would arise if ICE detainer requests commanded States and local governments to
20 house suspected aliens at their own cost, the Court concluded that the language of Section 287.7
21 “authoriz[ed] only permissive requests.” *Id.* at 645.

22 Here, the Executive Order elevates ICE detainer requests from permissive to mandatory, and
23 thus presents precisely the same “constitutional problems” that concerned the *Galarza* Court.
24 Indeed, the Executive Order effectively commands States and local governments to honor ICE
25 detainer requests by resorting to “economic dragooning that leaves the States” and local
26 governments “with no real option but to acquiesce.” *See Sebelius*, 132 S. Ct. at 2605. The funding
27 condition here is just as coercive as the one struck down in *Sebelius*. Specifically, in *Sebelius*, the
28 Court concluded that imposing a funding condition on approximately 10% to 16% of a State’s total

1 budget was an unconstitutional “gun to the head.” *Id.* at 2604-05. The same result follows here,
2 where the Executive Order imposes a condition on approximately 13% of San Francisco’s total
3 budget. AC ¶ 93. The Executive Order is thus unconstitutional because it puts a gun to the head of
4 States and local governments, coercing them to “imprison suspected aliens subject to removal at the
5 request of the federal government,” in violation of the Tenth Amendment. *See Galarza*, 745 F.3d at
6 643-45.

7 This unconstitutional defect dramatically upends police powers traditionally vested with the
8 States and local governments. Indeed, “the principle that the Constitution created a Federal
9 Government of limited powers, while reserving a generalized police power to the States, is deeply
10 ingrained in our constitutional history.” *United States v. Morrison*, 529 U.S. 598, 619 (2000); *Bond*
11 *v. United States*, 134 S. Ct. 2077, 2086 (2014) (“Perhaps the clearest example of traditional state
12 authority is the punishment of local criminal activity.”). The reservation of the general police power
13 to the States and local governments was no accident. As courts have long recognized, State and
14 local municipalities are best equipped to design and maintain law enforcement policies to enhance
15 the safety of their communities, and thus “[t]he right to formulate and enforce penal sanctions is an
16 important aspect of the sovereignty retained by the States.” *Kelly v. Robinson*, 479 U.S. 36, 47
17 (1986) (recognizing “fundamental policy against federal interference with state criminal
18 prosecutions”); *see also United States v. Lopez*, 514 U.S. 549 n.3 (1995) (“Under our federal system,
19 the States possess primary authority for defining and enforcing the criminal law.”).

20 Here in particular, San Francisco has already made the determination that complying with
21 ICE detainer requests “undermine[s]” law enforcement by “instilling fear in immigrant communities
22 of coming forward to report crimes and cooperate with local law enforcement agencies.” AC ¶ 33.
23 The Executive Order casts aside this locally-sensitive determination, instead imposing a blanket
24 policy that dictates how San Francisco and all other State and local governments are required to
25 operate, leaving them *less* safe and *less* engaged. To prevent this harm, this Court should enjoin the
26 enforcement of the unconstitutional Executive Order.

27 **III. CONCLUSION**

28 For all the foregoing reasons, the Executive Order is unconstitutional.

1 Dated: March 23, 2017

Respectfully submitted,

2
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14
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on March 23, 2017. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of March 2017.

/s/ Brett M. Schuman
Brett M. Schuman

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Lawyers Association

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 CITY AND COUNTY OF SAN FRANCISCO,

18 Plaintiff,

19 v.

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

24 Defendants.

Case No. 3:17-cv-00485-WHO

**[PROPOSED] ORDER GRANTING THE
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION’S MOTION
FOR ADMINISTRATIVE RELIEF FOR
LEAVE TO FILE AN AMICUS CURIAE
BRIEF**

Date: April 12, 2017
Time: 2:00 p.m.
Courtroom: Courtroom 2
Judge: Honorable William H. Orrick

1 Now, therefore, it is hereby ORDERED that:

2 Upon consideration of The International Municipal Lawyers Association Motion for
3 Administrative Relief for Leave to File an *Amicus Curiae* Brief in Support of Plaintiff City and
4 County of San Francisco's Motion for Preliminary Injunction, the Court finds that the proposed
5 *amicus curiae* brief may assist in the determination of the matters before this Court.

6 The International Municipal Lawyers Association is granted leave to file its *amicus curiae*
7 brief.

8

9

10 Dated: _____, 2017

11 HON. WILLIAM H. ORRICK
United States District Judge

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on March 23, 2017. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of March 2017.

/s/ Brett M. Schuman
Brett M. Schuman