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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 CITY AND COUNTY OF SAN
14 FRANCISCO,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the
 18 United States, JOHN F. KELLY, Secretary
 19 of the United States Department of
 20 Homeland Security, JEFFERSON B.
 21 SESSIONS, Attorney General of the
 22 United States, DOES 1-100,

23 Defendant.

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

**ADMINISTRATIVE MOTION FOR
 LEAVE TO FILE AMICUS BRIEF OF
 36 CITIES AND COUNTIES IN
 SUPPORT OF CITY AND COUNTY OF
 SAN FRANCISCO'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 14, 2017
 Time: 2:00 p.m.
 Dept.: Courtroom 2
 Judge: Hon. William H. Orrick

1 Pursuant to this Court's March 21, 2017 Order Regarding Amicus Briefing, Amici hereby
2 request leave to file the attached Amicus Brief of 36 Cities and Counties in Support of City and
3 County of San Francisco's Motion for Preliminary Injunction.

4 Amici represent 36 cities and counties from across the country. Each possesses an interest
5 in San Francisco's Motion for Preliminary Injunction, as set forth below, and all believe they can
6 assist the Court in resolving the issues raised by the motion. Amici's proposed brief elaborates on
7 the many reasons Section 9 of Executive Order 13768 violates the Constitution, and Amici are
8 uniquely positioned to demonstrate that adequate relief cannot be provided to any individual city
9 or county without a nationwide injunction. Amici include:

10 **County of Alameda** is in California. County of Alameda has 1,510,271 residents,
11 according to the 2010 United States Census. Every year, County of Alameda receives federal
12 funding directly, and also indirectly, through California.

13 **Cook County** is in Illinois. Cook County has 5,194,675 residents, according to the 2010
14 United States Census. Every year, Cook County receives federal funding directly, and also
15 indirectly, through Illinois.

16 **King County** is in Washington. King County has 1,931,249 residents, according to the
17 2010 United States Census. Every year, King County receives federal funding directly, and also
18 indirectly, through Washington.

19 **County of Los Angeles** is in California. County of Los Angeles has 9,818,605 residents,
20 according to the 2010 United States Census. Every year, County of Los Angeles receives federal
21 funding directly, and also indirectly, through California.

22 **County of Marin** is in California. County of Marin has 252,409 residents, according to
23 the 2010 United States Census. Every year, County of Marin receives federal funding directly,
24 and also indirectly, through California.

25 **County of Monterey** is in California. County of Monterey has 415,057 residents,
26 according to the 2010 United States Census. Every year, County of Monterey receives federal
27 funding directly, and also indirectly, through California.

28 **County of Santa Cruz** is in California. County of Santa Cruz has 262,382 residents,

1 according to the 2010 United States Census. Every year, County of Santa Cruz receives federal
2 funding directly, and also indirectly, through California.

3 **County of Sonoma** is in California. County of Sonoma has 483,878 residents, according
4 to the 2010 United States Census. Every year, County of Sonoma receives federal funding
5 directly, and also indirectly, through California.

6 **Travis County** is in Texas. Travis County has 1,024,266 residents, according to the 2010
7 United States Census. Every year, Travis County receives federal funding directly, and also
8 indirectly, through Texas.

9 **Albany** is a city within Albany County, in New York. Albany has 97,856 residents,
10 according to the 2010 United States Census. Every year, Albany receives federal funding
11 directly, and also indirectly, through Albany County and New York.

12 **Austin** is a city within Travis County, in Texas. Austin has 790,390 residents, according
13 to the 2010 United States Census. Every year, Austin receives federal funding directly, and also
14 indirectly, through Travis County and Texas.

15 **Berkeley** is a city within County of Alameda, in California. Berkeley has 112,580
16 residents, according to the 2010 United States Census. Every year, Berkeley receives federal
17 funding directly, and also indirectly, through County of Alameda and California.

18 **Cathedral City** is a city within Riverside County, in California. Cathedral City has
19 51,200 residents, according to the 2010 United States Census. Every year, Cathedral City
20 receives federal funding directly, and also indirectly, through Riverside County and California.

21 **Chicago** is a city within Cook County, in Illinois. Chicago has 2,695,598 residents,
22 according to the 2010 United States Census. Every year, Chicago receives federal funding
23 directly, and also indirectly, through Cook County and Illinois.

24 **Denver** is a city and county in Colorado. Denver has 600,158 residents, according to the
25 2010 United States Census. Every year, Denver receives federal funding directly, and also
26 indirectly, through Colorado.

27 **East Palo Alto** is a city within San Mateo County, in California. East Palo Alto has
28 28,155 residents, according to the 2010 United States Census. Every year, East Palo Alto

1 receives federal funding directly, and also indirectly, through San Mateo County and California.

2 **Jersey City** is a city within Hudson County, in New Jersey. Jersey City has 247,597
3 residents, according to the 2010 United States Census. Every year, Jersey City receives federal
4 funding directly, and also indirectly, through Hudson County and New Jersey.

5 **Los Angeles** is a city within County of Los Angeles, in California. Los Angeles has
6 3,792,621 residents, according to the 2010 United States Census. Every year, Los Angeles
7 receives federal funding directly, and also indirectly, through County of Los Angeles and
8 California.

9 **Menlo Park** is a city within San Mateo County, in California. Menlo Park has 32,026
10 residents, according to the 2010 United States Census. Every year, Menlo Park receives federal
11 funding directly, and also indirectly, through San Mateo County and California.

12 **Minneapolis** is a city within Hennepin County, in Minnesota. Minneapolis has 382,578
13 residents, according to the 2010 United States Census. Every year, Minneapolis receives federal
14 funding directly, and also indirectly, through Hennepin County and Minnesota.

15 **New Orleans** is a city within Louisiana. New Orleans has 343,829 residents, according to
16 the 2010 United States Census. Every year, New Orleans receives federal funding directly, and
17 also indirectly, through Louisiana.

18 **Oakland** is a city within County of Alameda, in California. Oakland has 390,724
19 residents, according to the 2010 United States Census. Every year, Oakland receives federal
20 funding directly, and also indirectly, through County of Alameda and California.

21 **Portland** is a city within Multnomah County, in Oregon. Portland has 583,776 residents,
22 according to the 2010 United States Census. Every year, Portland receives federal funding
23 directly, and also indirectly, through Multnomah County and Oregon.

24 **Princeton** is a city within Mercer County, in New Jersey. Princeton has 28,572 residents,
25 according to the 2010 United States Census. Every year, Princeton receives federal funding
26 directly, and also indirectly, through Mercer County and New Jersey.

27 **Sacramento** is a city within Sacramento County, in California. Sacramento has 466,488
28 residents, according to the 2010 United States Census. Every year, Sacramento receives federal

1 funding directly, and also indirectly, through Sacramento County and California.

2 **Saint Paul** is a city within Ramsey County, in Minnesota. Saint Paul has 285,068
3 residents, according to the 2010 United States Census. Every year, Saint Paul receives federal
4 funding directly, and also indirectly, through Ramsey County and Minnesota.

5 **Salinas** is a city within County of Monterey, in California. Salinas has 150,441 residents,
6 according to the 2010 United States Census. Every year, Salinas receives federal funding
7 directly, and also indirectly, through County of Monterey and California.

8 **Salt Lake City** is a city within Salt Lake County, in Utah. Salt Lake City has 186,440
9 residents, according to the 2010 United States Census. Every year, Salt Lake City receives
10 federal funding directly, and also indirectly, through Salt Lake County and Utah.

11 **Santa Ana** is a city within Orange County, in California. Santa Ana has 324,528
12 residents, according to the 2010 United States Census. Every year, Santa Ana receives federal
13 funding directly, and also indirectly, through Orange County and California.

14 **Santa Clara** is a city within Santa Clara County, in California. Santa Clara has 116,448
15 residents, according to the 2010 United States Census. Every year, Santa Clara receives federal
16 funding directly, and also indirectly, through Santa Clara County and California.

17 **Santa Fe** is a city within Santa Fe County, in New Mexico. Santa Fe has 67,947
18 residents, according to the 2010 United States Census. Every year, Santa Fe receives federal
19 funding directly, and also indirectly, through New Mexico.

20 **Santa Monica** is a city within County of Los Angeles, in California. Santa Monica has
21 89,736 residents, according to the 2010 United States Census. Every year, Santa Monica receives
22 federal funding directly, and also indirectly, through County of Los Angeles and California.

23 **Seattle** is a city within King County, in Washington. Seattle has 608,660 residents,
24 according to the 2010 United States Census. Every year, Seattle receives federal funding directly,
25 and also indirectly, through King County and Washington.

26 **Somerville** is a city within Middlesex County, in Massachusetts. Somerville has 75,754
27 residents, according to the 2010 United States Census. Every year, Somerville receives federal
28 funding directly, and also indirectly, through Middlesex County and Massachusetts.

1 **Syracuse** is a city within Onondaga County, in New York. Syracuse has 145,170
2 residents, according to the 2010 United States Census. Every year, Syracuse receives federal
3 funding directly, and also indirectly, through Onondaga County and New York.

4 **West Hollywood** is a city within County of Los Angeles, in California. West Hollywood
5 has 34,399 residents, according to the 2010 United States Census. Every year, West Hollywood
6 receives federal funding directly, and also indirectly, through County of Los Angeles and
7 California.

8 For the foregoing reasons, Amici respectfully request the Court's permission to file the
9 attached Amicus Brief, a copy of which accompanies this Administrative Motion.

10 Dated: March 29, 2017

Respectfully submitted,

11
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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, a copy of the foregoing Administrative Motion for Leave to File Amicus Brief of 36 Cities and Counties, the Amicus Brief of 36 Cities and Counties, and a Proposed Order were filed and served pursuant to the Court’s electronic filing procedures using CM/ECF.

/s/ Kelly M. Dermody
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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 CITY AND COUNTY OF SAN
14 FRANCISCO,

15 Plaintiff,

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17 DONALD J. TRUMP, President of the
 18 United States, JOHN F. KELLY, Secretary
 19 of the United States Department of
 20 Homeland Security, JEFFERSON B.
 21 SESSIONS, Attorney General of the
 22 United States, DOES 1-100,

23 Defendant.

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

**AMICUS BRIEF OF 36 CITIES AND
 COUNTIES IN SUPPORT OF CITY
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 MOTION FOR PRELIMINARY
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Date: April 14, 2017
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1 **I. INTRODUCTION**

2 Amici represent 36 cities and counties from across the country, home to 24,956,382
 3 residents. Amici’s individual policies regarding 8 U.S.C. § 1373 and/or Immigration and
 4 Customs Enforcement (“ICE”) civil detainer requests are diverse. Some Amici consider
 5 themselves to be “sanctuaries,” while others do not. But all agree that Section 9 of President
 6 Trump’s Executive Order 13768 violates the Constitution. All agree that this Court should grant
 7 the preliminary injunction sought by the City and County of San Francisco.

8 President Trump has confirmed the unlawful purpose of his Executive Order: it is a
 9 “weapon” to coerce cities, counties, and states into becoming de facto agents of the Executive
 10 Branch, by threatening to entirely “defund” them and deny them “the money they need to
 11 properly operate as a city or a state.” *See* Decl. of Cody S. Harris in Support of Mot. for Prelim.
 12 Injunction, Ex. B at 4 (Dkt. 36) (transcript of Feb. 5, 2017 interview). But President Trump does
 13 not have the ability to withhold Congressionally-authorized funding to jurisdictions that do not
 14 govern according to his instructions, or that do not conform to undefined standards that baffle
 15 his own Secretary for Homeland Security. When asked by San Diego’s Police Chief to define
 16 “sanctuary city,” Secretary Kelly responded: “I don’t have a clue.” *See* Harris Decl., Ex. D at 3
 17 (Dep’t of Homeland Sec., *Pool Notes From Secretary Kelly’s Trip to San Diego*, Feb. 10, 2017).

18 Amici urge this Court to remove this unconstitutional “gun to the head,” *Nat’l Fed’n of*
 19 *Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S.Ct. 2566, 2604 (2012), by entering a nationwide
 20 injunction. This remedy is warranted for three reasons. First, adequate relief cannot be provided
 21 to San Francisco or Amici without a nationwide injunction. Such nationwide relief is particularly
 22 appropriate where, as here, the challenged policy is unlawful on its face. Moreover, granting an
 23 injunction only as to San Francisco would not provide complete relief to San Francisco, as it
 24 receives significant funding and support from the State of California. Second, San Francisco will
 25 very likely succeed on the merits. The Executive Order violates the Tenth Amendment because it
 26 seeks to usurp local police power and commandeer scarce city and county resources. It violates
 27 the Due Process Clause because its vague language fails to provide notice of what is prohibited
 28 and encourages arbitrary enforcement. The Executive Order also fails to provide procedural due

1 process, because no procedures exist to provide notice or review of decisions to withhold funding.
 2 Third, the public interest and the balancing of hardships strongly favor granting a nationwide
 3 injunction. The requested injunction would maintain the status quo and prevent enforcement of
 4 an unconstitutional directive while the case is litigated on the merits.

5 **II. ADEQUATE RELIEF REQUIRES A NATIONWIDE INJUNCTION**

6 **A. The Court Has Broad Discretion to Fashion Nationwide Relief**

7 District courts have “broad powers and wide discretion to frame the scope of appropriate
 8 equitable relief.” *Sec. & Exch. Comm’n v. United Fin.l Grp., Inc.*, 474 F.2d 354, 358-59 (9th
 9 Cir. 1973). The scope of relief should be based on “the extent of the violation,” not the
 10 “geographical extent” of the plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (citation
 11 omitted). “Once a court has obtained personal jurisdiction over a defendant, the court has the
 12 power to enforce the terms of the injunction outside the territorial jurisdiction of the court,
 13 including issuing a nationwide injunction.” *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 770
 14 (9th Cir. 2008).

15 District courts around the country have entered nationwide injunctions that limit the
 16 federal government’s behavior vis-à-vis non-parties. *See, e.g., State of Hawaii v. Trump*, Case
 17 No. 17-00050 DKW-KSC, Dkt. 219, slip op. at 42 (D. Haw. Mar. 15, 2017) (granting a TRO to
 18 halt enforcement of executive order limiting entry into the United States); *Int’l Refugee*
 19 *Assistance Project v. Trump*, Case No. 8:17-cv-00361-TDC, --- F.Supp.3d ---, 2017 WL
 20 1018235, at *18 (D. Md. Mar. 16, 2017) (granting a nationwide preliminary injunction precluding
 21 enforcement, in part, of executive order on a nationwide basis); *Washington v. Trump*, No. 17-
 22 141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (preliminary injunction prohibited
 23 implementation of executive order nationwide); *Washington v. Trump*, 847 F.3d 1151, 1166-67
 24 (9th Cir. 2017) (holding government had failed to demonstrate it was likely to succeed on claim
 25 that nationwide injunction was overbroad).

26 Defendants erroneously cite *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir.
 27 2004), for the proposition that injunctions must be limited to the parties (*see* Dkt. 46 at 19). Yet
 28 *Price* actually held the opposite, affirming a broader injunction because “[e]ven though the effect

1 of the injunction may benefit more people than those that are party to the action,” “the breadth of
 2 the injunction was necessary to preserve the status quo” for plaintiffs. *Id.* at 1118. It is well-
 3 established that an injunction is “not necessarily made over-broad by extending benefit or
 4 protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—
 5 *if such breadth is necessary to give prevailing parties the relief to which they are entitled.*”
 6 *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis in original). *Accord Prof'l*
 7 *Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 273-74 (5th
 8 Cir. 1984).

9 **B. A Nationwide Injunction Is Particularly Appropriate Because the Executive**
 10 **Order Is Unlawful on Its Face**

11 When a federal government policy is unlawful on its face, it is not only within the trial
 12 court’s discretion to block implementation of the policy nationwide, but also the typical practice.
 13 *See, e.g., Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (“When a reviewing
 14 court determines that agency regulations are unlawful, the ordinary result is that the rules are
 15 vacated—not that their application to the individual petitioners is proscribed.”); *Earth Island Inst.*
 16 *v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom. Summers v.*
 17 *Earth Island Inst.*, 555 U.S. 488 (2009) (affirming nationwide injunction against a government
 18 policy that was not authorized by law).¹

19 Nationwide relief is also appropriate because the Executive Order, on its face, purports to
 20 apply to all jurisdictions receiving federal funding, and thus constitutes the type of uniform and
 21 widespread institutional policy or practice that the Court may enjoin as to all affected. *Cf. Davis*
 22 *v. Astrue*, 874 F.Supp.2d 856, 868-69 (N.D. Cal. 2012) (“[W]here there is a systemwide injury
 23 because of a policy or practice that pervades an institution, then widespread relief is justified to
 24 remedy that injury.”) (citing *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004)

25 _____
 26 ¹ Although claims challenging unlawful federal rules or policies often arise under the
 27 Administrative Procedure Act, the same principle applies here. *See, e.g., Washington v. Trump*,
 28 *supra*, 2017 WL 462040, at *2; *Washington v. Trump, supra*, 847 F.3d at 1166-67; *Texas v.*
United States, 809 F.3d 134, 188 (5th Cir. 2015); *cf. City of Carmel-By-The-Sea v. U.S. Dep’t of*
Transp., 123 F.3d 1142, 1166 (9th Cir. 1997) (“[U]nder certain circumstances, Executive Orders,
 with specific statutory foundation, are treated as agency action and reviewed under the
 Administrative Procedure Act.”).

1 (enjoining enforcement of policy in all California prisons was proper because the policy was
 2 applied system-wide)). In addition, a nationwide injunction is appropriate because San
 3 Francisco's challenges to the Executive Order are not premised on any unique applications as to
 4 them, but rather, to the Executive Order itself.² See, e.g., *Nat'l Mining Ass'n. v. U.S. Army Corps*
 5 *of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (when "a rule of broad applicability" is
 6 challenged and the plaintiff prevails, "the result is that the rule is invalidated, not simply that the
 7 court forbids its application to a particular individual"). Any facts particular to San Francisco
 8 (such as those related to the likelihood of irreparable harm) are "illustrative" because the merits of
 9 their claims turn on questions of statutory and constitutional interpretation applicable to all. See,
 10 e.g., *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming nationwide injunction
 11 where district court's analysis "relied primarily on the statute and regulation" and "used the
 12 evidence on funding in Milwaukee County merely as illustration").

13 Because the Executive Order is unlawful on its face, and because the Executive Order
 14 itself purports to require *all* federally funded jurisdictions to comply with its mandates, injunctive
 15 relief for all affected jurisdictions is appropriate, and would "fit[] the remedy to the wrong or
 16 injury that has been established." *Salazar v. Buono*, 559 U.S. 700, 718 (2010).

17 **C. A Nationwide Injunction Is Necessary to Provide Adequate Relief**

18 Nationwide relief is necessary for the additional reason that every city, county, and state
 19 are interconnected with other jurisdictions throughout the country. President Trump's threat to
 20 use the Executive Order to "defund" offending jurisdictions is a weapon not only against those
 21 jurisdictions, but against residents elsewhere who would be harmed if the federal government
 22 denies cities, counties, or states "the money they need to properly operate[.]" Harris Decl., p. 4.

23 No local jurisdiction is an island unto itself: free movement of persons among cities and
 24 counties is not only a fundamental right,³ but also a basic facet of modern life. A cut in funding

25 _____
 26 ² It follows that if San Francisco prevails on the merits, the Executive Order is illegal
 27 everywhere, not simply in San Francisco. This challenge is thus clearly distinguishable from
 28 *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105 (9th Cir. 2012), cited by Defendants, see Dkt.
 46 at 19. There, the Ninth Circuit affirmed the district court's refusal to issue a nationwide
 injunction because the plaintiff "failed to prove that [defendant's] conduct outside Arizona was
 illegal." 673 F.3d at 1116.

³ *United States v. Guest*, 383 U.S. 745, 758 (1966) ("Freedom to travel throughout the United

1 to one jurisdiction results in greater burdens on the services provided by nearby jurisdictions.
 2 Local governments provide the vast majority of essential services to people living in this country.
 3 Amici use federal funding (received directly or through other jurisdictions, such as counties and
 4 states) to fund essential social services, such as hospitals that provide emergency health care to
 5 the uninsured, disaster relief efforts, and programs that feed the hungry. “City government is
 6 where the rubber meets the road. Cities pave our streets, fight crime and fires, prepare us for
 7 disaster, bring water to our taps, take our trash away, build and maintain our parks—the list goes
 8 on and on. These services cost money.” Texas Municipal League, *How Cities Work* (2013), at 1,
 9 available at <https://www.tml.org/HCW/HowCitiesWork.pdf>. If San Francisco or any other
 10 jurisdiction is targeted pursuant to the Executive Order, neighboring cities, counties, and states
 11 will suffer a greater demand for *their* services, and suffer consequences to *their* residents of
 12 neighboring jurisdictions unable to “properly operate.”

13 Contrary to Defendants’ assertions, “the larger interests of society” would be served by a
 14 nationwide injunction. *Env’tl. Def. Fund. v. Marsh*, 651 F.3d 983, 1006 (5th Cir. 1981); *see* Dkt.
 15 46 at 20.

16 **III. SAN FRANCISCO IS VERY LIKELY TO SUCCEED ON THE MERITS.**

17 **A. The Executive Order Violates the Tenth Amendment.**

18 The Supreme Court has long recognized that “[t]he Constitution requires a distinction
 19 between what is truly national and what is truly local.” *United States v. Morrison*, 529 U.S. 598,
 20 617-18 (2000). It is the states and local governments, not the federal government, that “can and
 21 do perform many of the vital functions of modern government—punishing street crime, running
 22 public schools, and zoning property for development, to name but a few. . . .” *Sebelius*, 132 S.Ct.
 23 at 2578. This unique domain of authority, which “the Founders denied the National Government
 24 and reposed in the States,” is the “police power.” *Morrison*, 529 U.S. at 618.

25 By entrusting this police power to local and state governments, the Founders “ensured that
 26 powers which in the ordinary course of affairs, concern the lives, liberties, and properties of the
 27 people were held by governments more local and more accountable than a distant federal

28 States has long been recognized as a basic right under the Constitution.”).

1 bureaucracy.” *Sebelius*, 132 S.Ct. at 2578. Because state and local governments are better
 2 positioned to carry out the daily tasks of governance, “[o]nce we are in this domain of the reserve
 3 power of a State, we must respect the wide discretion on the part of the legislature in determining
 4 what is and is not necessary.” *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945).

5 The Executive Order interferes with that discretion in a core realm of local governance:
 6 the setting of enforcement priorities for local police and sheriff’s departments. There is “no better
 7 example of the police power, which the Founders denied the National Government and reposed in
 8 the States, than the suppression of violent crime and vindication of its victims.” *Morrison*, 529
 9 U.S. at 618. Local law enforcement authorities are entrusted to carry out that role, but the
 10 Executive Order impairs their ability to do so: it deprives local governments of the power to make
 11 policy judgments about local safety needs, and replaces these local judgments with the
 12 President’s unilateral preferences. Even Congress, pursuant to its exclusive legislative power,
 13 U.S. Const. art. I, § 1, could not use that power to so intrude on state and local prerogatives. *See*
 14 *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been
 15 understood to confer upon *Congress* the ability to require the States to govern according to
 16 Congress’ instructions.”) (emphasis added). It follows, then, that the President may not do so by
 17 executive fiat, particularly when doing so conflicts with duly enacted congressional
 18 appropriations that contain none of the conditions the Executive Order imposes. *Cf. In re Aiken*
 19 *Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (“[E]ven the President does not have unilateral
 20 authority to refuse to spend the funds.”).⁴

21 Amici respectfully submit that decisions as to whether local law enforcement authorities
 22 should deploy their limited resources to collect information related to immigration status or share
 23 that information with federal authorities must rest with local governments and the States. Local
 24 authorities are best positioned to assess their enforcement priorities, weigh the costs and benefits
 25

26 ⁴ Thus, the Executive Order also violates the separation of powers, as the President has no
 27 Congressional authorization to impose the spending limits. *See* U.S. Const. art. I, § 8, cl. 1 (“The
 28 *Congress* shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the
 Debts and provide for the common Defence and general Welfare of the United States”) (emphasis added).

1 of different options, and make judgments about what will best promote the safety of their
 2 communities. Moreover, local officials ultimately assume the burden of, and can be held
 3 accountable to their communities for, their policy choices. *Cf. New York*, 505 U.S. at 169
 4 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will
 5 bear the brunt of public disapproval, while the federal officials who devised the regulatory
 6 program may remain insulated from the electoral ramifications of their decision.”); *Printz v.*
 7 *United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s
 8 government will represent and remain accountable to its own citizens.”).

9 Based on decades of on-the-ground experience, some of the Amici jurisdictions have
 10 concluded that their mission of preventing crime and protecting victims can be thwarted by
 11 certain activities that amount to enforcement of federal immigration laws by local officials, such
 12 as collecting and producing information about immigration status from persons who are victims
 13 or witnesses of crimes. *See, e.g., CA TRUST Act*, 2013 Cal. Legis. Serv. Ch. 570 (A.B. 4) § 1(d)
 14 (finding that such activities “harm community policing efforts because immigrant residents who
 15 are victims of or witnesses to crime, including domestic violence, are less likely to report crime or
 16 cooperate with law enforcement when any contact with law enforcement could result in
 17 deportation”).⁵ Courts have also recognized that compelled disclosure of immigration status may
 18

19 ⁵ *See also* Governor of Illinois Pat Quinn, Executive Order Establishing Governor’s New
 20 Americans Trust Initiative, Jan. 5, 2015 at 1, available at
 21 http://www.catrustact.org/uploads/2/5/4/6/25464410/quinn_executive_order2015-02-1.pdf
 22 (“community policing efforts are hindered when immigrant residents who are victims of or
 23 witnesses to crime, including domestic violence, are less likely to report crime or cooperate with
 24 law enforcement out of fear that any contact with law enforcement could result in deportation”);
 25 Resolution dated May 21, 2012, City of Amherst, Massachusetts, available at
 26 http://www.catrustact.org/uploads/2/5/4/6/25464410/amherst_resolution_2012.pdf (finding that
 27 federal immigration cooperation “has already been shown to increase distrust and fear of local
 28 authorities, making many immigrants afraid to be witnesses and report crimes against themselves
 and others”); San Francisco’s “Due Process for All and Sanctuary” Ordinance, § 12I.1, passed
 Jun. 7, 2016, available at
http://www.catrustact.org/uploads/2/5/4/6/25464410/sf_due_process_ordinance_2016.pdf
 (finding that “civil immigration detainers and notifications regarding release undermine
 community trust of law enforcement by instilling fear in immigrant communities of coming
 forward to report crimes and cooperate with local law enforcement agencies”); King County,
 Ordinance 17706, § 1(A), passed Dec. 3, 2013, available at
http://www.catrustact.org/uploads/2/5/4/6/25464410/king_co_ice_detainer_requests_ordinance_12-2-13.pdf
 (“[t]estimony established that the threat of deportation for the immigrant community is
 so strong that many persons are afraid to report domestic violence or witnessed crime”).

1 result in “countless acts of illegal and reprehensible conduct [going] unreported,” as victims or
2 witnesses may be chilled from reporting or complaining about unlawful conduct. *See, e.g.,*
3 *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (preventing employer defendant from
4 discovering immigration status of Title VII plaintiffs alleging national origin discrimination).

5 Amici do not address the independent conclusion of each Amicus jurisdiction on this
6 issue, but collectively they contend that each locality must be able to independently evaluate its
7 own needs and set its own priorities according to its judgment. By upending the independent
8 judgment of local officials responsible for “the suppression of violent crime and vindication of its
9 victims,” *Morrison*, 529 U.S. at 618, the Executive Order intrudes upon a power reserved for the
10 states and local governments, and threatens to undermine the mission of local law enforcement.

11 The Executive Order accomplishes its unconstitutional task by seeking to commandeer the
12 scarce resources of local governments. In effect, the Executive Order “impress[es] into [the
13 federal government’s service]—and at no cost to itself—the police officers of the 50 states.”
14 *Printz*, 521 U.S. at 922; *see* Executive Order § 9(a) (applying to any “statute, policy, or practice
15 that prevents or hinders the enforcement of Federal law”). Unless cities, counties, and states
16 acquiesce, they face the risk of losing nearly all federal funding, no matter how unrelated that
17 funding is to the federal government’s immigration enforcement regime or local law
18 enforcement’s responsibilities.

19 The Constitution forbids such coercion. When conditions on federal funding “take the
20 form of threats to terminate other significant independent grants, the conditions are properly
21 viewed as a means of pressuring the States to accept policy changes.” *Sebelius*, 132 S.Ct., at
22 2603-04. Such conditions cross the line from “encouragement” to “coercion” when, as here, they
23 are not related to the purposes of the federal funding in question, becoming the equivalent of “a
24 gun to the head.” *Id.* Just as “the Federal Government may not compel the States to enact or
25 administer a federal regulatory program” through direct regulation, *New York*, 505 U.S. at 188;
26 *see also Printz*, 521 U.S. at 926, it may not achieve the same end through “economic dragooning
27 that leaves the States [and localities] with no real option but to acquiesce” to the federal
28 government’s demands. *Sebelius*, 132 S.Ct. at 2605. If the Tenth Amendment were to permit the

1 funding conditions set forth in the Executive Order, there is virtually no limit on the President’s
 2 unilateral authority to create and enforce new conditions on *all* federal funding to compel *all*
 3 cities, counties, and states to adopt whatever policy he happens to favor at the moment. This
 4 usurpation of power is contrary to our system of federalism and violates the Constitution.

5 **B. The Executive Order Is Unconstitutionally Vague.**

6 The Executive Order provides no guidance as to what acts will subject a jurisdiction to the
 7 Executive Order’s funding restrictions, and is thus unconstitutionally vague in violation of the
 8 Due Process Clause. A law is void for vagueness where it (1) “fails to provide a person of
 9 ordinary intelligence fair notice of what is prohibited,” or (2) “is so standardless that it authorizes
 10 or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285,
 11 304 (2008); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 740 (1970) (law is unconstitutionally
 12 vague where it “exposes a potential actor to some risk or detriment without giving him fair
 13 warning of the nature of the proscribed conduct”). The vagueness standards of the Due Process
 14 Clause apply to executive orders. *See United States v. Hescorp, Heavy Equip. Sales Corp.*, 801
 15 F.2d 70, 77 (2d Cir. 1986); *United States v. Soussi*, 316 F.3d 1095, 1101 (10th Cir. 2002).

16 Like San Francisco, Amici cannot know, based on the Executive Order, whether they are
 17 at risk of having federal funds withheld. The Executive Order states that “sanctuary jurisdictions”
 18 will be unable to receive federal grants except as necessary for law enforcement, and directs that
 19 the Attorney General shall “take appropriate enforcement action against any entity *that violates 8*
 20 *U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the*
 21 *enforcement of Federal law.*” Executive Order § 9(a) (emphasis added).

22 But the question of what action (or inaction) by a local jurisdiction “violates 8 U.S.C.
 23 1373” remains unanswered by the Executive Order. Is declining to honor ICE civil detainer
 24 requests sufficient for the Secretary to deem a local jurisdiction a “sanctuary jurisdiction”?⁶ The

25 _____
 26 ⁶ Just last week, ICE released its first “Declined Detainer Outcome Report,” a weekly report—
 27 which the Executive Order mandates, § 9(b)—listing every jurisdiction that failed to honor even a
 28 single ICE detainer request, regardless of the reason. *See Enforcement and Removal Operations,*
Weekly Declined Detainer Outcome Report for Recorded Declined Detainers Jan. 28 - Feb. 3,
2017 (Mar. 20, 2017), available at https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf.
 That same day, Attorney General Sessions issued a statement decrying the cities and counties on
 this list, and claiming the Department of Justice will “hold accountable jurisdictions that willfully

1 language of Section 1373 provides only that a “local government entity or official may not
 2 prohibit, or in any way restrict, any government entity or official from sending to, or receiving
 3 from, [federal immigration officials] information regarding the citizenship or immigration status
 4 . . . of any individual,” (8 U.S.C. § 1373). It is silent about ICE civil detainer requests. Further,
 5 courts have held that detaining individuals pursuant to a civil detainer request from ICE, when
 6 those individuals would otherwise have been released from custody, violates the Fourth
 7 Amendment. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 215-16 (1st Cir. 2015); *Orellana*
 8 *v. Nobles Cnty.*, No. CV 15-3852 ADM/SER, 2017 WL 72397, at *9 (D. Minn. Jan. 6, 2017); *cf.*
 9 *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (Congress may not use spending power “to
 10 induce the States to engage in activities that would themselves be unconstitutional”).

11 Nor can Amici know what activity is prohibited by the Executive Order’s statement that
 12 “enforcement action” may be taken against any entity that has a “statute, policy, or practice that
 13 prevents or hinders the enforcement of Federal law.” Executive Order § 9(a). Some jurisdictions
 14 may read this language as encompassing decisions not to honor ICE civil detainer requests, while
 15 others may not. None of the Amici can anticipate how the Attorney General and Secretary will
 16 interpret and apply the Executive Order’s ambiguous directives, currently making it impossible
 17 for Amici to make informed decisions about the course of conduct they can pursue without risk of
 18 adverse consequences under the Executive Order.

19 Because the Executive Order is “too vague and subjective” for entities “to know how they
 20 should behave in order to comply, as well as too vague to limit arbitrary enforcement,” it is
 21 unconstitutional.⁷ *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 554-55 (9th Cir. 2004).

22 violate federal law”—while never specifying which federal law he believes these jurisdictions
 23 have violated. Statement on the U.S. Immigration and Customs Enforcement Declined Detainer
 24 Outcome Report (Mar. 20, 2017), available at <https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-us-immigration-and-customs-enforcement-declined>.

25 ⁷ Two days ago, Attorney General Sessions delivered a statement to the White House press corps
 26 that drove home the confusion caused by the challenged Executive Order. Statement on
 27 Sanctuary Jurisdictions (Mar. 27, 2017), available at
 28 <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>. Mr. Sessions reiterated the Administration’s threat to revoke federal funds from sanctuary jurisdictions, but the only grants he discussed related to law enforcement—that is, the *only* funds the Executive Order (per § 9(a)) says should *not* be revoked. And though Mr. Sessions claimed this was “entirely consistent” with prior DOJ policy, the Obama Administration made clear that its 2016 guidance conditioning certain DOJ funds on compliance with § 1373 would

1 **C. The Executive Order Violates Procedural Due Process.**

2 Upon being labeled “sanctuary jurisdictions” by the Secretary, cities, counties, and states
3 will purportedly lose existing federal funding and be denied future funding, without being
4 provided notice of the designation or an opportunity to be heard to challenge the designation.
5 This violates their due process rights.

6 A law violates procedural due process when the plaintiff has (1) a protectable property
7 interest; and (2) inadequate procedural protections. *Foss v. Nat’l Marine Fisheries Serv.*, 161
8 F.3d 584, 588 (9th Cir.1998); *see also Thornton v. City of St. Helens*, 425 F.3d 1158, 1164-65
9 (9th Cir. 2005). To have a protectable property interest, a person must “have a legitimate claim
10 of entitlement to it,” rather than merely “an abstract need or desire for it.” *Bd. of Regents of State*
11 *Colls. v. Roth*, 408 U.S. 564, 577 (1972). *See also Perry v. Sindermann*, 408 U.S. 593, 601-603
12 (1972) (an “interest in a benefit is a ‘property’ interest for due process purposes if there are such
13 rules or mutually explicit understandings that support his claim of entitlement to the benefit”).

14 San Francisco—like all Amici⁸—has a legitimate claim of entitlement to, at the very least,
15 federal grants *that have already been awarded* and which they have already agreed to accept
16 according to “rules and understandings, promulgated and fostered” by federal officials. *Perry*,
17 408 U.S. at 602.⁹ Thus, at minimum,¹⁰ jurisdictions have a property interest in federal funds that

19 apply *only* prospectively, whereas Mr. Sessions threatened to “claw-back” funds already
20 disbursed. *Id.*; *see* Off. of Justice Programs, *Additional Guidance Regarding Compliance with 8*
21 *U.S.C. § 1373* (Oct. 6, 2016) (“No FY 2016 or prior year [DOJ] funding will be impacted.”),
available at <https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf>.

22 ⁸ Under Ninth Circuit law, counties may be “persons” entitled to due process for some purposes.
See Cnty. of Santa Cruz v. Sebelius, 399 F. App’x 174, 176 (9th Cir. 2010) (Medicare payments).

23 ⁹ That certain federal grants have already been awarded to San Francisco and other cities and
24 counties distinguishes this claim from cases where courts have held that discretionary funding
25 decisions do not give rise to due process protections. *See, e.g., Doyle v. City of Medford*, 606
F.3d 667, 672 (9th Cir. 2010) (government program that granted decision-maker broad discretion
does not create a property interest).

26 ¹⁰ Cities and counties also have a protected property and liberty interest in avoiding placement on
27 the Order’s blacklist of “sanctuary jurisdictions,” a designation that carries the purported
28 consequence of ineligibility for federal funding. *Cf. Nat’l Council of Resistance of Iran v. Dep’t*
of State, 251 F.3d 192, 204-205 (D.C. Cir. 2001) (holding that due process protections applied to
Secretary of State’s designation of group as a “foreign terrorist organization” because
consequences of designation included, inter alia, loss of property and money); *Al Haramain*
Islamic Found., Inc. v. U.S. Dep’t. of Treasury, 686 F.3d 965, 985 (9th Cir. 2011).

1 had already been awarded to them prior to the Executive Order.¹¹ “[S]ome form of hearing is
 2 required” before the final deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319,
 3 333 (1976); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)
 4 (“Though Congress’ power to legislate under the spending power is broad, it does not include
 5 surprising participating States with post acceptance or ‘retroactive’ conditions.”).

6 **IV. THE PUBLIC INTEREST AND BALANCING OF THE HARDSHIPS WEIGH IN**
 7 **FAVOR OF INJUNCTIVE RELIEF.**

8 In deciding a motion for preliminary injunction, courts “balance the competing claims of
 9 injury” on each party and pay “particular regard for the public consequences” of awarding or
 10 withholding the remedy. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). When the
 11 government is the opposing party, the balancing of hardships and public interest merge. *Nken v.*
 12 *Holder*, 556 U.S. 418, 435 (2009). There is no “blanket presumption in favor of the government”
 13 in preliminary injunction cases. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013).

14 In light of the Executive Order’s constitutional infirmities, the balancing of hardships and
 15 the public interest weigh in favor of granting nationwide injunctive relief for cities and counties.
 16 *See, e.g., Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1290 (11th Cir.
 17 2013) (“the public has no interest in the enforcement of . . . an unconstitutional statute”). This
 18 remedy would preserve the *status quo* and “merely return[] the nation temporarily to the position
 19 it has occupied for many previous years.” *See Washington*, 847 F.3d at 1168; *see also N.Y.*
 20 *Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (explaining that the
 21 government “does not have an interest in the enforcement of an unconstitutional law”).

22 **V. CONCLUSION**

23 Amici respectfully urge the Court to issue a nationwide preliminary injunction enjoining
 24 Defendants from enforcing or implementing the Executive Order.

25
 26
 27
 28 ¹¹ The federal government has not taken a position on whether the Executive Order applies to reimbursements, though as noted above Attorney General Sessions threatened to “claw-back” funds already awarded if jurisdictions do not fall in line. *See supra* note 7.

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Respectfully submitted,

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15 UNITED STATES DISTRICT COURT
 16
 17 NORTHERN DISTRICT OF CALIFORNIA

18 CITY AND COUNTY OF SAN FRANCISCO,

19 Plaintiff,

20 v.

21 DONALD J. TRUMP, President of the
 22 United States, JOHN F. KELLY, Secretary
 23 of the United States Department of
 24 Homeland Security, JEFFERSON B.
 25 SESSIONS, Attorney General of the
 26 United States, DOES 1-100,

27 Defendant.

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

**[PROPOSED] ORDER GRANTING
 ADMINISTRATIVE MOTION FOR
 LEAVE TO FILE AMICUS BRIEF OF
 36 CITIES AND COUNTIES IN
 SUPPORT OF CITY AND COUNTY OF
 SAN FRANCISCO'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 14, 2017
 Time: 2:00 p.m.
 Dept.: Courtroom 2
 Judge: Hon. William H. Orrick

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[PROPOSED] ORDER

On March 29, 2017, 36 Cities and Counties filed an Administrative Motion for Leave to File an Amicus Brief in Support of City and County of San Francisco’s Motion for Preliminary Injunction. Having considered the papers and pleadings on file, the Court hereby GRANTS the Administrative Motion and ORDERS that the Amicus Brief be filed.

IT IS SO ORDERED.

DATED: _____
Honorable William H. Orrick
United States District Judge