

1 AMY BISSON HOLLOWAY, State Bar. No. 163731
General Counsel
2 EDMUNDO R. AGUILAR, State Bar No. 136142
Assistant General Counsel
3 TODD M. SMITH, State Bar No. 170798
Assistant General Counsel
4 California Department of Education
1430 N Street, Suite 5319
5 Sacramento, California 95814
Telephone: 916-319-0860
6 Facsimile: 916-319-0155
achristensen@cde.ca.gov
7 Attorneys for Applicant State Superintendent of Public Instruction, Tom Torlakson

8 *(Applicant is a Governmental Agency and Exempt from the Provision of FRCP 7.1)*

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 County of Santa Clara,) Case No. 3:17:cv-00574-WHO
13 Plaintiff,)
14 v.) **BRIEF OF AMICUS CURIAE STATE**
15 Donald J. Trump, et al.,) **SUPERINTENDENT OF PUBLIC**
16 Defendant.) **INSTRUCTION TOM TORLAKSON**
17)

18 **INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE**

19 State Superintendent of Public Instruction, Tom Torlakson (the “SSPI”) respectfully submits
20 this amicus curiae brief in support of Plaintiff Santa Clara County’s Motion for a Preliminary
21 Injunction seeking to enjoin nationwide enforcement of Section 9 of the January 25, 2017 Executive
22 Order 13768 entitled “Enhancing Public Safety in the Interior of the United States” (the “Executive
23 Order”). The SSPI is designated with broad authority to superintend the schools of California.
24 Education Code § 33112. In this capacity the SSPI has a strong interest in the education, safety, and
25 welfare of the more than 7 million public school students, and the administration of the more than 9000
26 schools in the state.

27 Prior to and in response to the Executive Order, many public school districts adopted policies to
28 assure families and students that schools are safe places for all people, that bullying, particularly on the

1 basis of ethnic, racial or country of origin is not permitted, and that the public schools are required by
2 law to serve all students regardless of immigration status. The Executive Order seeks to coerce state
3 and local jurisdictions, including schools, school districts, and county offices of education, into taking
4 an active role in enforcing the federal immigration laws. In addition, the Executive Order undermines
5 and damages the ability of California's public schools to protect, foster and educate children. Further
6 the Executive Order contains no clear definition of "sanctuary jurisdiction" yet broadly threatens any
7 "State or political subdivision of a State," including by a grant of standardless discretion to the
8 Secretary of Homeland Security to declare an entity a "sanctuary jurisdiction" and the withholding of
9 federal funding.

10 The SSPI also urges the court to consider the amicus brief filed on behalf of public school
11 districts and educators, which identifies and addresses harms experienced at the local level, and the
12 amicus brief of the California State Attorney General, which further articulates the harm to the state as
13 a whole, which in turn causes harms to schools, school districts and county offices of education and the
14 families and children they serve.

15 ARGUMENT

16 I. The Executive Order Undermines the Security of Public School Students.

17 The Executive Order, and in particular Section 9 of that order, threatens and undermines the
18 stability of school children enrolled in California's public schools. Over 7 million children are served
19 by over 9,000 schools in California's public schools. Those schools are dependent on federal funds
20 which to support a variety of services, from instructional support programs for at-risk students, to the
21 provision of nutrition to low-income students. California receives more than \$8 billion in federal funds
22 for k-12 education, which is then largely redirected to public schools, districts and county office of
23 education to serve all public school students.

24 <http://www.cde.ca.gov/be/ag/ag/yr16/documents/sep16item02.doc> The Executive Order threatens to
25 withhold funds from any school or school district which has identified itself as a safe haven for all
26 students, including immigrants or undocumented students.

27 Education has been deemed a fundamental right under the California Constitution. Cal. Const.,
28 art. IX, §1. *See also, Butt v. State of California*, 4 Cal 4th 668, 679 (1992). The U.S. Supreme Court

1 acknowledged that education is so fundamental that all children, regardless of immigration status are
2 “entitled to equal access to public education.” *Plyler v. Doe*, 457 U.S. 202, 219-30 (1982). By
3 threatening to withhold funds from those jurisdictions which serve undocumented students and seek to
4 assure students and families that schools are a safe environment for students to attend and to learn, the
5 Executive Order threatens the very access to education guaranteed to students by *Plyler*.

6 The Executive Order places additional conditions upon the receipt on federal funds, beyond
7 those that have been authorized by Congress.

8 **II. The Executive Order Seeks to Compel Schools, School Districts and County Offices of** 9 **Education to Participate in Immigration Enforcement.**

10 It is an essential tenet of the 10th Amendment that states and local governments cannot be
11 commandeered to act as an arm of the federal government. Meaning, the U.S. government cannot
12 direct state and local jurisdictions to enforce federal law. *Printz v. United States*, 521 U.S. 898, 931
13 n.17 (1997); *New York v. U.S.*, 505 U.S. 144, 160 (1992). Though the Executive Order pays lip service
14 to the Federal-State partnership in the area of immigration, it in fact ignores a fundamental aspect of the
15 federal statutes which rely on *voluntary agreements* with state and local officials for enforcement of
16 federal immigration laws. 8 U.S.C. 1357(g). In the case of jurisdictions which the Attorney General or
17 Secretary may deem “sanctuary jurisdictions” based upon unknown criteria, the Executive Order seeks
18 to compel local jurisdictions to abandon policies they adopted for the purpose of ensuring the public
19 safety of students and families, and access to education. The U.S. government imposes a coercive
20 choice on districts by directing them to do what is asked for or risk losing all federal funds. The
21 coercive nature of the Executive Order is specifically highlighted in section 9(a) which states that “the
22 Attorney General shall take appropriate action against any entity that violates 8 U.S.C. 1373, *or which*
23 *has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal Law.*”
24 Executive Order, at 8801. (emphasis added.)

25 **III. The Executive Order lacks a clear definition of sanctuary jurisdiction or how any policy,** 26 **statute or practice can hinder enforcement of Federal law.**

27 The Executive Order is so ambiguous as to the meaning of a “sanctuary jurisdictions” as to
28 make it impossible for a state or local jurisdiction to even determine what actions might subject it to the

1 risk of losing federal funding. It permits the Attorney General and the Secretary of Homeland Security
2 to withhold federal funds from any district deemed to be a “sanctuary jurisdiction” or he declares is
3 preventing or hindering the enforcement of federal law. However, the Executive Order lacks any clear
4 definition of “sanctuary jurisdiction” or any standards or criteria to put any district on fair notice as to
5 what conduct is required or prohibited. Thus, the Attorney General and Secretary of Homeland Security
6 have unfettered discretion to determine which jurisdictions fall within the Order’s ambit, whether they
7 have “willfully refuse[d] to comply” with Section 1373, and whether “appropriate enforcement action”
8 is required. *Id.*, section 9(a). As such, the Executive Order is unconstitutionally vague. A federal law
9 is unconstitutionally vague if it (1) “fails to provide a person of ordinary intelligence fair notice of what
10 is prohibited,” or (2) “is so standardless that it authorizes or encourages seriously discriminatory
11 enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The Executive Order fails both
12 tests.

13 **IV. Preliminary injunction should issue to avoid irreparable harm to the students and public**
14 **school system in California.**

15 As articulated above, California receives in excess of \$8 billion/year from the federal
16 government to support and implement federal education programs. The Executive Order places
17 schools, schools districts and county offices of education, who have merely identified themselves as
18 safe havens for undocumented students, in the precarious position of losing large amounts of federal
19 funds without warning, notice or clear guidance about what is meant by the order, while they also seek
20 to comply with the constitutional requirements set forth in *Plyer v. Doe*. The United States government
21 has the burden to demonstrate that the “balance of equities tips in its favor and that a preliminary
22 injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374.
23 Supp.2d 980, 1007 (2010). The status quo is that local jurisdictions do not have an obligation to
24 enforce federal immigration rules. Further, the U.S. government has a long standing policy in place
25 which identifies schools as sensitive locations wherein undocumented aliens will not be “swept” up by
26 Immigration and Customs Enforcement (ICE). [https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-](https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf)
27 [policy.pdf](https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf). Department of Homeland Security has confirmed that this policy regarding sensitive
28 locations is still in place. <https://www.ice.gov/ero/enforcement/sensitive-loc>. Thus, the balance of

1 equities in this instance supports enjoining the Executive Order until the court addresses the substance
2 of the Writ.

3 **CONCLUSION**

4 For the foregoing reasons, the SSPI respectfully requests that this court grant the plaintiff's
5 preliminary injunction.

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8 Dated: _____

Respectfully submitted,

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10 AMY BISSON HOLLOWAY
General Counsel
EDMUNDO R. AGUILAR
Assistant General Counsel
11 TODD M. SMITH
Assistant General Counsel
12

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14 By: _____

15 AMY BISSON HOLLOWAY
General Counsel
Attorneys for State Superintendent of Public
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