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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17 COUNTY OF SANTA CLARA,

18 Plaintiff,

19 v.

20 DONALD J. TRUMP, President of the
21 United States of America, JOHN F.
22 KELLY, in his official capacity as
23 Secretary of the United States Department
24 of Homeland Security, JEFFERSON B.
25 SESSIONS, in his official capacity as
26 Attorney General of the United States,
27 JOHN MICHAEL "MICK" MULVANEY,
28 in his official capacity as Director of the
Office of Management and Budget, and
DOES 1-50,

Defendant.

Case No. 3:17-cv-00574-WHO

**AMICUS BRIEF OF 34 CITIES AND
COUNTIES IN SUPPORT OF COUNTY
OF SANTA CLARA'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 5, 2017
Time: 2:00 p.m.
Dept.: Courtroom 2
Judge: Hon. William H. Orrick

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ADEQUATE RELIEF REQUIRES A NATIONWIDE INJUNCTION	2
III. SANTA CLARA IS VERY LIKELY TO SUCCEED ON THE MERITS.	5
A. The Executive Order Violates the Tenth Amendment.	5
B. The Executive Order Is Unconstitutionally Vague.	9
C. The Executive Order Violates Procedural Due Process.	11
IV. THE PUBLIC INTEREST AND BALANCING OF THE HARDSHIPS WEIGH IN FAVOR OF INJUNCTIVE RELIEF.	12
V. CONCLUSION	12

1 **I. INTRODUCTION**

2 Amici represent 34 cities and counties from across the country, home to 24,564,018
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 County of Santa Clara.

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 and vague standards
15 that baffle even his own Secretary for Homeland Security. When recently asked by San Diego’s
16 Police Chief to define “sanctuary city,” Secretary Kelly responded: “I don’t have a clue.” *See*
17 Harris Decl., Ex. D at 3 (Dep’t of Homeland Sec., *Pool Notes From Secretary Kelly’s Trip to San*
18 *Diego*, Feb. 10, 2017).

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

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

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

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

8 District courts have “broad powers and wide discretion to frame the scope of appropriate
9 equitable relief.” *Sec. & Exch. Comm’n v. United Fin. l Grp., Inc.*, 474 F.2d 354, 358-59 (9th
10 Cir. 1973). The scope of relief should be based on “the extent of the violation,” not the
11 “geographical extent” of the plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (citation
12 omitted). “Once a court has obtained personal jurisdiction over a defendant, the court has the
13 power to enforce the terms of the injunction outside the territorial jurisdiction of the court,
14 including issuing a nationwide injunction.” *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 770
15 (9th Cir. 2008).

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

27 Defendants erroneously cite *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir.
28 2004), for the proposition that injunctions must be limited to the parties (*see* Dkt. 46 at 19). Yet

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

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

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

20 Nationwide relief is also appropriate because the Executive Order, on its face, purports to
21 apply to all jurisdictions receiving federal funding, and thus constitutes the type of uniform and
22 widespread institutional policy or practice that the Court may enjoin as to all affected. *Cf. Davis*
23 *v. Astrue*, 874 F.Supp.2d 856, 868-69 (N.D. Cal. 2012) (“[W]here there is a systemwide injury
24 because of a policy or practice that pervades an institution, then widespread relief is justified to

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 remedy that injury.”) (citing *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004)
2 (enjoining enforcement of policy in all California prisons was proper because the policy was
3 applied system-wide)). In addition, a nationwide injunction is appropriate because Santa Clara’s
4 challenges to the Executive Order are not premised on any unique applications as to them, but
5 rather, to the Executive Order itself.² See, e.g., *Nat’l Mining Ass’n. v. U.S. Army Corps of Eng’rs*,
6 145 F.3d 1399, 1409 (D.C. Cir. 1998) (when “a rule of broad applicability” is challenged and the
7 plaintiff prevails, “the result is that the rule is invalidated, not simply that the court forbids its
8 application to a particular individual”). Any facts particular to Santa Clara (such as those related
9 to the likelihood of irreparable harm) are “illustrative” because the merits of their claims turn on
10 questions of statutory and constitutional interpretation applicable to all. See, e.g., *Decker v.*
11 *O’Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming nationwide injunction where district
12 court’s analysis “relied primarily on the statute and regulation” and “used the evidence on
13 funding in Milwaukee County merely as illustration”).

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

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

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

25
26 ² It follows that if Santa Clara prevails on the merits, the Executive Order is illegal everywhere,
27 not simply in Santa Clara. This challenge is thus clearly distinguishable from *Skydive Ariz., Inc.*
28 *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.

1 No local jurisdiction is an island unto itself: free movement of persons among cities and
2 counties is not only a fundamental right,³ but also a basic facet of modern life. A cut in funding
3 to one jurisdiction results in greater burdens on the services provided by nearby jurisdictions.
4 Local governments provide the vast majority of essential services to people living in this country.
5 Amici use federal funding (received directly or through other jurisdictions, such as counties and
6 states) to fund essential social services, such as hospitals that provide emergency health care to
7 the uninsured, disaster relief efforts, and programs that feed the hungry. “City government is
8 where the rubber meets the road. Cities pave our streets, fight crime and fires, prepare us for
9 disaster, bring water to our taps, take our trash away, build and maintain our parks—the list goes
10 on and on. These services cost money.” Texas Municipal League, *How Cities Work* (2013), at 1,
11 available at <https://www.tml.org/HCW/HowCitiesWork.pdf>. If Santa Clara or any other
12 jurisdiction is targeted pursuant to the Executive Order, neighboring cities, counties, and states
13 will suffer a greater demand for *their* services, and suffer consequences to *their* residents of
14 neighboring jurisdictions unable to “properly operate.”

15 Contrary to Defendants’ assertions, “the larger interests of society” would be served by a
16 nationwide injunction. *Env’tl. Def. Fund. v. Marsh*, 651 F.3d 983, 1006 (5th Cir. 1981); *see* Dkt.
17 46 at 20.

18 **III. SANTA CLARA IS VERY LIKELY TO SUCCEED ON THE MERITS.**

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

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

27
28 ³ *United States v. Guest*, 383 U.S. 745, 758 (1966) (“Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).

1 By entrusting this police power to local and state governments, the Founders “ensured that
2 powers which in the ordinary course of affairs, concern the lives, liberties, and properties of the
3 people were held by governments more local and more accountable than a distant federal
4 bureaucracy.” *Sebelius*, 132 S.Ct. at 2578. Because state and local governments are better
5 positioned to carry out the daily tasks of governance, “[o]nce we are in this domain of the reserve
6 power of a State, we must respect the wide discretion on the part of the legislature in determining
7 what is and is not necessary.” *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945).

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

24 Amici respectfully submit that decisions as to whether local law enforcement authorities

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 should deploy their limited resources to collect information related to immigration status or share
2 that information with federal authorities must rest with local governments and the States. Local
3 authorities are best positioned to assess their enforcement priorities, weigh the costs and benefits
4 of different options, and make judgments about what will best promote the safety of their
5 communities. Moreover, local officials ultimately assume the burden of, and can be held
6 accountable to their communities for, their policy choices. *Cf. New York*, 505 U.S. at 169
7 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will
8 bear the brunt of public disapproval, while the federal officials who devised the regulatory
9 program may remain insulated from the electoral ramifications of their decision.”); *Printz v.*
10 *United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s
11 government will represent and remain accountable to its own citizens.”).

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

21 ⁵ *See also* Governor of Illinois Pat Quinn, Executive Order Establishing Governor’s New
22 Americans Trust Initiative, Jan. 5, 2015 at 1, available at
23 http://www.catrustact.org/uploads/2/5/4/6/25464410/quinn_executive_order2015-02-1.pdf
24 (“community policing efforts are hindered when immigrant residents who are victims of or
25 witnesses to crime, including domestic violence, are less likely to report crime or cooperate with
26 law enforcement out of fear that any contact with law enforcement could result in deportation”);
27 Resolution dated May 21, 2012, City of Amherst, Massachusetts, available at
28 http://www.catrustact.org/uploads/2/5/4/6/25464410/amherst_resolution_2012.pdf (finding that
federal immigration cooperation “has already been shown to increase distrust and fear of local
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

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 forward to report crimes and cooperate with local law enforcement agencies”); King County,
27 Ordinance 17706, § 1(A), passed Dec. 3, 2013, available at
28 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 *see also Printz*, 521 U.S. at 926, it may not achieve the same end through “economic dragooning
2 that leaves the States [and localities] with no real option but to acquiesce” to the federal
3 government’s demands. *Sebelius*, 132 S.Ct. at 2605. If the Tenth Amendment were to permit the
4 funding conditions set forth in the Executive Order, there is virtually no limit on the President’s
5 unilateral authority to create and enforce new conditions on *all* federal funding to compel *all*
6 cities, counties, and states to adopt whatever policy he happens to favor at the moment. This
7 usurpation of power is contrary to our system of federalism and violates the Constitution.

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

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

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

26 But the question of what action (or inaction) by a local jurisdiction “violates 8 U.S.C.
27 1373” remains unanswered by the Executive Order. Is declining to honor ICE civil detainer
28

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

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

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

23
24 ⁶ Just this week, ICE released its first “Declined Detainer Outcome Report,” a weekly report—
25 which the Executive Order mandates, § 9(b)—listing every jurisdiction that failed to honor even a
26 single ICE detainer request, regardless of the reason. *See* Enforcement and Removal Operations,
27 Weekly Declined Detainer Outcome Report for Recorded Declined Detainers Jan. 28 - Feb. 3,
28 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
violate federal law”—while never specifying which federal law he believes these jurisdictions
have violated. Statement on the U.S. Immigration and Customs Enforcement Declined Detainer
Outcome Report (Mar. 20, 2017), available at <https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-us-immigration-and-customs-enforcement-declined>.

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. The government concedes in opposition to Santa Clara’s
6 motion for preliminary injunction that the Executive Order does not establish such procedures.
7 *See* Dkt. 46 at 11-12.

8 A law violates procedural due process when the plaintiff has (1) a protectable property
9 interest; and (2) inadequate procedural protections. *Foss v. Nat’l Marine Fisheries Serv.*, 161
10 F.3d 584, 588 (9th Cir.1998); *see also Thornton v. City of St. Helens*, 425 F.3d 1158, 1164-65
11 (9th Cir. 2005). To have a protectable property interest, a person must “have a legitimate claim
12 of entitlement to it,” rather than merely “an abstract need or desire for it.” *Bd. of Regents of State*
13 *Colls. v. Roth*, 408 U.S. 564, 577 (1972). *See also Perry v. Sindermann*, 408 U.S. 593, 601-603
14 (1972) (an “interest in a benefit is a ‘property’ interest for due process purposes if there are such
15 rules or mutually explicit understandings that support his claim of entitlement to the benefit”).

16 Santa Clara—like all Amici⁷—has a legitimate claim of entitlement to, at the very least,
17 federal grants *that have already been awarded* and which they have already agreed to accept
18 according to “rules and understandings, promulgated and fostered” by federal officials. *Perry*,
19 408 U.S. at 602.⁸ Thus, at minimum,⁹ jurisdictions have a property interest in reimbursements

21 ⁷ The Ninth Circuit has recognized that counties may constitute “persons” entitled to due process
22 under the Fifth Amendment in certain circumstances. *See Cnty. of Santa Cruz v. Sebelius*, 399 F.
App’x 174, 176 (9th Cir. 2010) (Medicare payments).

23 ⁸ That certain federal grants have already been awarded to Santa Clara 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 ⁹ Cities and counties also have a protected property and liberty interest in avoiding placement on
27 the EO’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 through, or the receipt of, federal funds that have already been awarded to them prior to the
2 Executive Order.¹⁰ “[S]ome form of hearing is required” before the final deprivation of a
3 property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Pennhurst State Sch.*
4 *& Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (“Though Congress’ power to legislate under the
5 spending power is broad, it does not include surprising participating States with post acceptance
6 or ‘retroactive’ conditions.”).

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

9 In deciding a motion for preliminary injunction, courts “balance the competing claims of
10 injury” on each party and pay “particular regard for the public consequences” of awarding or
11 withholding the remedy. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). When the
12 federal government is the opposing party, as here, the balancing of hardships and weighing of the
13 public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). There is no “blanket
14 presumption in favor of the government” in preliminary injunction cases. *Rodriguez v. Robbins*,
15 715 F.3d 1127, 1146 (9th Cir. 2013).

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

24 **V. CONCLUSION**

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

27 _____
28 ¹⁰ The federal government has not taken a position that the Executive Order does not apply to
reimbursements.

1 Dated: March 22, 2017

Respectfully submitted,

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