

1 Elizabeth J. Cabraser (State Bar No. 83151)
2 Kelly M. Dermody (State Bar No. 171716)
3 Dean M. Harvey (State Bar No. 250298)
4 Katherine C. Lubin (State Bar No. 259826)
5 Yaman Salahi (State Bar No. 288752)
6 Michelle A. Lamy (State Bar No. 308174)
7 Philip M. Hernandez (State Bar No. 311111)
8 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
9 275 Battery Street, 29th Floor
10 San Francisco, CA 94111-3339
11 Telephone: 415.956.1000
12 Facsimile: 415.956.1008

13 *Attorneys for Amici Curiae City of Menlo Park and City of New Orleans*

14 *Additional Counsel for Amici Curiae Listed Below and in Appendix*

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17 CITY AND COUNTY OF SAN
18 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.

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

**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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ADEQUATE RELIEF REQUIRES A NATIONWIDE INJUNCTION	2
A. The Court Has Broad Discretion to Fashion Nationwide Relief.....	2
B. A Nationwide Injunction Is Particularly Appropriate Because the Executive Order Is Unlawful on Its Face.....	3
C. A Nationwide Injunction Is Necessary to Provide Adequate Relief.....	4
III. SAN FRANCISCO 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 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.

1 Dated: March 29, 2017

Respectfully submitted,

2
3 By: /s/ Kelly M. Dermody

4 Elizabeth J. Cabraser
5 Kelly M. Dermody
6 Dean M. Harvey
7 Katherine C. Lubin
8 Yaman Salah
9 Michelle A. Lamy
10 Philip M. Hernandez
11 LIEFF CABRASER HEIMANN &
12 BERNSTEIN, LLP
13 275 Battery Street, 29th Floor
14 San Francisco, CA 94117-3339
15 Telephone: (415) 956-1000
16 Facsimile: (415) 956-1008

*Attorneys for Amici Curiae City of Menlo Park and
City of New Orleans*

17 Kirsten Keith
18 Mayor, City of Menlo Park
19 701 Laurel Street
20 Menlo Park, CA 94025
21 Telephone: 650.308.4618

Mayor of Amicus Curiae City of Menlo Park

22 Rebecca H. Dietz
23 City Attorney, City of New Orleans
24 1300 Perdido Street, Suite 5E03
25 New Orleans, LA 70112
26 Telephone: 504.658.9800

Attorney for Amicus Curiae City of New Orleans

27 *Additional Counsel for Amici Curiae Listed in
28 Appendix*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX
Additional Counsel for Amici Curiae

DONNA R. ZIEGLER
County Counsel, County of Alameda
1221 Oak Street, Suite 450
Oakland, CA 94612
Attorney for County of Alameda

CHARLES J. MCKEE
County Counsel, County of Monterey
168 West Alisal Street
Salinas, CA 93901
Attorney for County of Monterey

KIMBERLY M. FOXX
States Attorney for Cook County
69 W. Washington, 32nd Floor
Chicago, IL 60602
Attorney for Cook County

DANA MCRAE
County Counsel
701 Ocean Street, Room 505
Santa Cruz, CA 95060
Attorney for County of Santa Cruz

H. Kevin Wright
Chief Civil Deputy
For DAN SATTERBERG
King County Prosecuting Attorney
516 Third Avenue, W400
Seattle, WA 98104
Attorney for King County

SHIRLEE ZANE
Chair, Board of Supervisors
County of Sonoma
575 Administration Drive, Room 100A
Santa Rosa, CA 95403
For County of Sonoma

MARGARET L. CARTER
APALLA U. CHOPRA
JAMES W. CROOKS
O'Melveny & Myers LLP
400 S. Hope Street, 18th Floor
Los Angeles, CA 90071
Attorney for County of Los Angeles

DAVID A. ESCAMILLA
Travis County Attorney
SHERINE E. THOMAS
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767
Attorneys for Travis County

BRIAN E. WASHINGTON
County Counsel
3501 Civic Center Drive, Room 275
San Rafael, CA 94903
Attorney for County of Marin

1 WILLIAM G. KELLY, JR.
Interim Corporation Counsel
2 Department of Law
City Hall
3 Albany, NY 12207
Attorney for City of Albany
4

JAMES SANCHEZ
City Attorney
Sacramento City Attorney's Office
915 I Street, Fourth Floor
Sacramento, CA 95814
Attorney for City of Sacramento

5 ANNE L. MORGAN
City Attorney
6 City of Austin Law Department
P.O. Box 1088
7 Austin, TX 78767
Attorney for City of Austin
8

SAMUEL J. CLARK
City Attorney, City of Saint Paul
400 City Hall
15 Kellogg Blvd W
Saint Paul, MN 55102
Attorney for City of Saint Paul

9 ZACH COWAN
City Attorney, City of Berkeley
10 2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Attorney for City of Berkeley
11

CHRISTOPHER A. CALLIHAN
City Attorney, City of Salinas
200 Lincoln Avenue
Salinas, CA 93901
Attorney for City of Salinas

12 STANLEY E. HENRY
13 Mayor, City of Cathedral City
68700 Avenida Lalo Guerrero
14 Cathedral City, CA 92234
For City of Cathedral City
15

MARGARET D. PLANE
City Attorney, Salt Lake City Corp.
451 S. State Street, Suite 505A
P.O. Box 145478
Salt Lake City, UT 84114
Attorney for Salt Lake City

16 EDWARD N. SISSEL
17 Corporation Counsel
30 N. LaSalle Street, Suite 800
18 Chicago, IL 60602
Attorney for City of Chicago
19

SONIA R. CARVALHO
City Attorney, City of Santa Ana
20 Civic Center Plaza, M-29
Santa Ana, CA 92702
Attorney for City of Santa Ana

20 KRISTIN M. BRONSON
City Attorney, City and County of Denver
21 1437 Bannock Street, Room 353
Denver, CO 80202
Attorney for City and County of Denver
22

BRIAN DOYLE
Interim City Attorney
1500 Warburton Avenue
Santa Clara, CA 95050
Attorney for City of Santa Clara

23 RAFAEL E. ALVARADO JR.
24 City Attorney, City of East Palo Alto
2415 University Avenue, 2nd Floor
25 East Palo Alto, CA 94303
Attorney for City of East Palo Alto
26

KELLEY BRENNAN
City Attorney, City of Santa Fe
P.O. Box 909
Santa Fe, NM 87501
For City of Santa Fe
27
28

1 JEREMY FARRELL
2 Corporation Counsel
3 Jersey City Law Department
4 City Hall – 280 Grove Street
5 Jersey City, NJ 07302
6 *Attorney for Jersey City*

JOSEPH LAWRENCE
Interim City Attorney, City of Santa
Monica
1685 Main Street, Suite 310
Santa Monica, CA 90401
Attorney for City of Santa Monica

5 MICHAEL N. FEUER
6 City Attorney, City of Los Angeles
7 200 N. Main Street, 800 CHE
8 Los Angeles, CA 90012
9 *Attorney for City of Los Angeles*

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Attorney for City of Seattle

8 SUSAN L. SEGAL
9 City Attorney, City of Minneapolis
10 350 South 5th Street, Room 210
11 Minneapolis, MN 55415
12 *Attorney for City of Minneapolis*

FRANCIS X. WRIGHT, JR.
City Solicitor, City of Somerville
93 Highland Avenue
Somerville, MA 02143
Attorney for City of Somerville

12 BARBARA J. PARKER
13 City Attorney
14 Oakland City Attorney's Office
15 1 Frank H. Ogawa Plaza, 6th floor
16 Oakland, CA 94612
17 *Attorney for City of Oakland*

JOSEPH E. FAHEY
Interim Corporation Counsel
City of Syracuse
233 East Washington Street, Suite 300
Syracuse, NY 13202
Attorney for City of Syracuse

16 TRACY REEVE
17 City Attorney
18 430 City Hall
19 1221 SW Fourth Avenue
20 Portland, OR 97204
21 *Attorney for City of Portland*

MICHAEL JENKINS
City Attorney, City of West Hollywood
Jenkins & Hogin, LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266
Attorney for City of West Hollywood

20 TRISHKA WATERBURY CECIL
21 Princeton Municipal Attorney
22 Mason, Griffin & Pierson, P.C.
23 101 Poor Farm Road
24 Princeton, NJ 08540
25 *Attorney for Municipality of Princeton*

28