Nos. 17-17478, 17-17480
Oral Argument Set: April 11, 2018 – 9:00 a.m.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SANTA CLARA,

Plaintiff/Appellee,

v.

DONALD J. TRUMP, President of the United States of America, et al.,

Defendants/Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEE COUNTY OF SANTA CLARA

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INTRODUCTION

Section 9(a) of Executive Order 13768 (the "Executive Order") is unconstitutional. It purports to seize for the President spending powers that belong solely to Congress, then distorts and expands those powers beyond constitutional limitations. It baldly attempts to compel state and local governments to become agents of the federal government's immigration enforcement agenda, violating core principles of federalism. The Executive Order's plain text establishes its unlawfulness. Section 9(a) instructs executive branch officials to render "sanctuary jurisdictions" "not eligible to receive Federal grants," and to subject them to unspecified enforcement actions, unless they abandon local policies and participate in immigration enforcement activities in a manner the Attorney General and Secretary of Homeland Security, in their unbounded discretion, deem sufficient. Because Section 9(a), on its face, violates the separation of powers inherent in the Constitution, the Tenth Amendment, and the Fifth Amendment's due process clause, the district court properly declared it unconstitutional and permanently enjoined its implementation nationwide.

Although the executive branch officials named as defendants in this case (collectively, "Defendants") have taken the position that the Executive Order is nothing more than a directive to do solely what the law already allows and requires, and although they state in this litigation that they intend to implement the Order narrowly, the district court rightly rejected that argument as incompatible with the text

of the Executive Order and wholly inconsistent with the Trump Administration's repeated public representations. This Court should uphold the district court's grant of summary judgment and a permanent injunction.

STATEMENT OF THE ISSUES

1. Whether the district court correctly interpreted the Executive Order based on its plain text, stated policy, and intent.

2. Whether, after determining the Executive Order is facially unconstitutional, the district court abused its discretion by ordering a nationwide injunction.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. Under 28 U.S.C. § 1291, this Court has jurisdiction "of appeals from all final decisions of the district courts of the United States," including Defendants' appeal of the district court's final judgment entered on November 22, 2017. *See* ER 3, 103.

STATEMENT OF THE CASE

A. Executive Order 13768 and the Trump Administration's Promise to End "Sanctuary Jurisdictions."

President Trump and his Administration have vowed to "end . . . Sanctuary Cities." *See* Donald J. Trump, "Address on Immigration" (Aug. 31, 2016) [Ex. A to Request for Judicial Notice ("RJN")], at 8. Although nowhere clearly defined, the term "sanctuary jurisdictions" generally refers to states and localities, like the County

of Santa Clara ("County"), in which local officials have decided to allocate scarce local law enforcement resources to investigation of crimes, rather than enforcement of federal civil immigration law. This includes jurisdictions, including the County, that decline to comply with "civil detainer requests," through which Immigration and Customs Enforcement ("ICE") requests that a locality detain individuals in local jails beyond the time when they would otherwise be released, so that the federal government can decide whether to place them into removal proceedings. The Trump Administration has repeatedly promised to take extraordinary action against these jurisdictions unless they abandon local polices and participate in civil immigration enforcement—including stripping them of "the [federal] money they need to properly operate as a city or state." *See* Fed. News Serv., "President Donald Trump is Interviewed on Fox" (Feb. 5, 2017) [SER 258]. The President has described his purported authority to withhold federal funding as a "weapon" he will wield to coerce these jurisdictions into abandoning policies adopted by local lawmakers and supplanting them with the President's preferred policies. *Id.*

The President began targeting sanctuary jurisdictions even before he took office. While on the campaign trail, then-candidate Trump gave a public "Address on Immigration" in which he promised to "block funding for sanctuary cities." Ex. A to RJN, at 8. Similarly, in his "Contract with the American Voter"—a "100-day action plan" for his presidency—he pledged to "cancel *all* federal funding to sanctuary cities" and promised to pursue this action "immediately" on "the first day of [his] term of

office." Donald J. Trump, "Contract with the American Voter," (Oct. 23, 2016) [Ex. B to RJN], at 1.

On January 25, 2017, just days after taking office, President Trump made good on these promises by issuing the Executive Order. Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [ER 187-91]. Section 2 of the Executive Order declares that "[i]t is the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." Exec. Order § 2(c) [ER 187]. Section 9 implements that policy by directing federal officials to take punitive actions against state and local governments the Trump Administration deems to be "Sanctuary Jurisdictions":

> *Sanctuary Jurisdictions.* It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.
>
> (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.
>
> (b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

> (c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Id. § 9 [ER 189].

Although the Executive Order nowhere defines the key term "sanctuary jurisdictions," Section 9 makes clear that, at a minimum, it refers to state and local governments that "willfully refuse to comply with 8 U.S.C. § 1373,"[1] or that decline to honor ICE civil detainer requests. *See id.* §§ 9(a), 9(b) [ER 189]. Similarly, while it instructs the Attorney General to "take appropriate enforcement action against" jurisdictions that "prevent[] or hinder[]" federal law enforcement, the Executive Order neither explains what actions this encompasses, nor cabins or defines the phrase "Federal law" in any way.

On the day the President issued the Executive Order, the White House confirmed its clear intent: "We're going to strip federal grant money from the sanctuary cities and states that harbor illegal immigrants." Priscilla Alvarez, "Trump Cracks Down on Sanctuary Cities," *The Atlantic* (Jan. 25, 2017) [Ex. C to RJN], at 2.

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[1] 8 U.S.C. § 1373 ("Section 1373"), in pertinent part, provides that local governments may not prohibit or restrict the sharing of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual," with the Department of Homeland Security ("DHS"). *See id.* § 1373(a). Section 1373 does not, by itself, condition federal funds on compliance with this obligation, and, in fact, legislative proposals seeking to impose such a condition have been repeatedly rejected. *See* ER 22-23 (listing proposed, but rejected, legislation). Notably, Defendants have not pointed to any federal grant that Congress has expressly conditioned on compliance with Section 1373.

A few days later, a White House press release boasted that President Trump "followed through on his pledge" from the campaign by "sign[ing] an executive order to ensure that immigration laws are enforced throughout the United States, including *halting federal funding for sanctuary cities*." The White House, Office of the Press Secretary, "President Trump's First Week of Action" (Jan. 28, 2017) [Ex. F to RJN], at 4 (emphasis added); *see also* C-SPAN, "President Trump Remarks at Congressional Republican Retreat" (Jan. 26, 2017) [Ex. D to RJN]. President Trump then used his very first weekly address as President to highlight how the Executive Order furthers his Administration's attack on sanctuary jurisdictions. *See* The White House, "President Trump's First Weekly Address" (Jan. 28, 2017) [Ex. G to RJN]. And on February 1, 2017, the White House reiterated the Executive Order's intent: "[T]he President's goal in ending sanctuary cities is pretty clear. . . . [T]he President has been very clear *through his executive order* that *federal funds . . . should not be used to help fund sanctuary cities*." The White House, Office of the Press Secretary, "Press Briefing by Press Secretary Sean Spicer" (Feb. 1, 2017) [Ex. I to RJN], at 5 (emphasis added).

On March 27, 2017, Attorney General Sessions stated that any jurisdiction the Department of Justice ("DOJ") deems noncompliant will suffer not only "withholding [of] grants, termination of grants, and disbarment or ineligibility for future grants," but also the "claw back" of "any funds" previously awarded. Fed. News Serv., "White House Press Secretary Sean Spicer – Briefing" (Mar. 27, 2017) [SER 230]. And on June 28, 2017, the White House issued a press release asserting

that the President "is keeping his promise[]" to "end the sanctuary cities" and to ensure that "[c]ities that refuse to cooperate with Federal authorities will not receive taxpayer dollars." The White House, "President Donald J. Trump Taking Action against Illegal Immigration" (Jun. 28, 2017) [Ex. J to RJN], at 1-2.

B. The County and Its Challenge to the Executive Order.

The County is responsible for providing essential services and safety-net programs to approximately 1.9 million Santa Clara County residents. Decl. of Miguel Márquez ISO County's MSJ ("Márquez Decl.") ¶¶ 5-7 [SER 121]. These services and programs include health care, law enforcement, emergency planning and response, care for the County's youth and elderly, and many other critical social services. SER 121. It is undisputed that federal funding and related revenue composes approximately 35% of the County's annual budget—roughly $1.7 billion, including more than $565 million in federal grant funding. ER 13; *see also* Márquez Decl. ¶¶ 5-8; Decl. of Sara H. Cody ISO County's MSJ ¶ 5; Decl. of Robert Menicocci ISO County's MSJ ¶ 6; Decl. of Paul E. Lorenz ISO County's MSJ ¶ 6; Decl. of Dana Reed ISO County's MSJ ("Reed Decl.") ¶ 8 [SER 121, 159, 168-69, 177, 191]. Any substantial loss of federal funds would force the County to reduce or eliminate services and programs. Márquez Decl. ¶¶ 17-19; Reed Decl. ¶ 8 [SER 124-25, 191].

It is also undisputed that the County is among the jurisdictions targeted by the Executive Order. The County has adopted policies and practices that reflect the judgment of its elected officials as to how best to protect public safety and serve

County residents. Those policies significantly curtail the degree to which County staff participate in federal immigration enforcement efforts. *See* Márquez Decl. ¶¶ 22-29; Decl. of Sheriff Laurie Smith ISO County's MSJ ("Smith Decl.") ¶¶ 4-11; Decl. of Undersheriff Carl Neusel ISO County's MSJ ("Neusel Decl.") ¶¶ 4-11; Decl. of District Attorney Jeffrey F. Rosen ISO County's MSJ ("Rosen Decl.") ¶¶ 5-12 [SER 126-28, 180-82, 196-98, 201-02]. The County's District Attorney, Sheriff, and Chief of Correction all concur that entanglement with federal civil immigration enforcement would undermine the County's ability to fight crime and make the entire community less safe. *See* Smith Decl. ¶¶ 4-11; Neusel Decl. ¶¶ 5-11; Rosen Decl. ¶¶ 3-12 [SER 180-82, 196-98, 201-02]. Further, immigrants are no more likely to commit crimes than U.S. citizens, *see* Rosen Decl. ¶ 7 [SER 201], and County law enforcement officials rely on all members of the local community—including undocumented individuals—to assist with criminal investigations and prosecutions, Smith Decl. ¶¶ 8-9; Neusel Decl. ¶ 9; Rosen Decl. ¶¶ 8-11 [SER 181-82, 197, 201-02]. When residents perceive local law enforcement officers as cooperating with ICE, they are less willing to report crimes, offer testimony, or seek other critical services. *Id.*

Reflecting this assessment, in 2011, the County adopted a policy limiting the circumstances under which it would honor ICE civil detainer requests, and the County has not honored any such requests since that time. Smith Decl. ¶ 5 [SER 180-81]. The County's decision not to honor ICE detainer requests was also predicated on the fact that, as numerous federal courts around the country have confirmed,

honoring these requests may violate individuals' rights under the Fourth Amendment.[2]

In addition to its policy on ICE detainers, the County Board of Supervisors passed a Resolution barring County employees from using County resources to initiate inquiries or enforcement actions based solely on an individual's actual or suspected immigration status, and from transmitting to ICE information collected by the County in the course of providing services or benefits. Márquez Decl. ¶ 5, Ex. H; Smith Decl. ¶ 7 [SER 121, 156, 181]. The Resolution further prohibits the use of County resources to pursue an individual solely because of an actual or suspected civil violation of federal immigration law. Márquez Decl. Ex. H [SER 156].

Defendants do not dispute that the County is among the jurisdictions the Executive Order targets. In the weeks after the Executive Order was announced, ICE issued three "Declined Detainer Outcome Reports" under Section 9(b) of the Executive Order, identifying counties deemed "sanctuary jurisdictions." ICE identified the County in all three. *See* ICE Enf't And Removal Operations, "Weekly

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[2] *See, e.g.*, *Santoyo v. United States*, No. 16-855, 2017 WL 2896021, at *8 (W.D. Tex. Jun. 5, 2017); *Mercado v. Dallas Cty.*, 229 F. Supp. 3d 501, 515, 519 (N.D. Tex. 2017); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 946 (D. Minn. 2017); *Mendia v. Garcia*, No. 10-3910, 2016 WL 2654327, at *6-7 (N.D. Cal. May 10, 2016); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014); *Miranda-Olivares v. Clackamas Cty.*, No. 12-2317, 2014 WL 1414305 at *9-11 (D. Or. Apr. 11, 2014).

Declined Detainer Outcome Report" (Feb. 11-17, 2017; Feb. 4-10, 2017; Jan. 28-Feb. 3, 2017) [SER 11, 31, 56, 63]. Further, Defendants have made clear that they consider California in general, and many of the state's larger counties in particular, sanctuary jurisdictions that hinder the President's immigration enforcement agenda.[3]

In light of the catastrophic effect that a loss of all federal funding would have on the County and its residents, the County filed this lawsuit on February 3, 2017, a little over a week after the Executive Order was issued, raising multiple constitutional challenges to the Executive Order and seeking declaratory and injunctive relief. *See* ER 191-234. The County's purpose was twofold: (1) to protect its residents from the harms they would suffer if the County were deprived of the federal funding to which it is entitled under law; and (2) to protect the County's sovereign authority to enact policies reflecting the policy prerogatives of the local community—authority that is a hallmark of our federalist system of government. *See* ER 194-98.

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[3] On March 29, 2017, Attorney General Sessions and then-Secretary of Homeland Security Kelly sent a letter to the Chief Justice of the California Supreme Court, asserting that "the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests." Letter to Hon. Tani G. Cantil-Sakauye (Mar. 29, 2017) [SER 227-28]. Following many of its local jurisdictions, the State of California has adopted laws that restrict officials' involvement in the enforcement of federal immigration law. *See* Cal. Gov't Code §§ 7282, 7282.5, 7284 *et seq.*

C. The County's Motion for a Preliminary Injunction and Defendants' Post-Hoc Defenses of the Executive Order.

The President and his Administration continued to emphasize the Executive Order's expansive scope and coercive purpose even after the County filed its complaint. On February 8, 2017, the White House reiterated that the President's goal in issuing the Executive Order was to coerce sanctuary jurisdictions to change their policies, describing the Order as a tool to ensure that "counties and other institutions that remain sanctuary cities don't get federal government funding." The White House, Office of the Press Secretary, "Press Briefing by Press Secretary Sean Spicer" (Feb. 8, 2017) [SER 99]. In fact, the White House even lauded one jurisdiction—Miami-Dade County, Florida—that responded to the Executive Order by immediately reversing its local policies. *See id*; *see also* Donald J. Trump Twitter account, @realDonaldTrump (Jan. 26, 2017) [Ex. E to RJN]. The day after the Executive Order was announced, Miami-Dade's Mayor ordered the county jails, "*[i]n light of the Executive Order*," to begin honoring "all immigration detainer requests." Mem. from Carlos A. Gimenez, Mayor, to Daniel Junior, Interim Director (Jan. 26, 2017) [SER 118] (emphasis added). The memo stated the Mayor's intent "to fully cooperate with the federal government." *Id.*

In view of the profound threats to the County and Defendants' ongoing coercive tactics, three weeks after it filed its complaint—on February 23, 2017—the County moved for a preliminary injunction blocking enforcement of the Executive

Order's broad mandates. *See* ER 52, 254-55. The County argued that Section 9(a) of the Executive Order violates constitutional separation of powers principles; attempts to force the County to implement a federal program; violates procedural due process; and is unconstitutionally vague and standardless. *See* ER 53. The County submitted extensive, unrebutted evidence of the irreparable harm it would suffer from implementation of the Executive Order. *See* ER 70-76, 80-83.

In their briefing opposing the County's motion, Defendants declined to address the merits of the County's constitutional claims, focusing instead on whether the County had standing and whether the case was ripe for review. *See* ER 53. Notably, Defendants' opposition brief did not dispute the County's interpretation of the Executive Order as directing the withholding of all federal funding, or at a minimum all federal grants, from sanctuary jurisdictions. At the preliminary injunction hearing on April 14, 2017, however, counsel for Defendants offered, for the first time, a new reading of the Executive Order not included in Defendants' brief. *See* ER 53. Counsel argued that the Executive Order, despite its plain language and clear intent to withhold "federal funds" or "federal grants" from sanctuary jurisdictions, actually applied only to the subset of federal grants administered by DOJ and DHS, and, of those, only those that could lawfully be conditioned on compliance with 8 U.S.C. §

1373.[4] *See* ER 53; *see also* SER 217-20. Defendants also defended the Executive Order as a "perfectly permissible use of the bully pulpit" to "highlight issues" the President "care[s] about." SER 220.

On April 25, 2017, the district court granted the County's motion for a preliminary injunction. ER 52-55. It rejected Defendants' attempt to read the Executive Order as a narrow directive applicable to only a small pool of federal funds, stating that "the Government's new interpretation of the Order is not legally plausible." ER 53-54. The district court held, among other things, that the Executive Order violates core Separation of Powers, Spending Clause, and Tenth Amendment principles by seeking to impose unauthorized conditions on congressionally appropriated funds, and by coercing localities to change their policies or risk the

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[4] The DOJ has never made clear whether, under its narrow reading of the Executive Order, it intends to impose new conditions on *all* grants administered by DOJ and DHS or only *some* of them. When the district court asked Defendants' counsel whether its enforcement of the Executive Order's directives would be limited to three specific DOJ grants Defendants directly identified, counsel responded that "the Executive Order is directed to only grants issued by DHS and DOJ," and that the specific "DOJ and, potentially, DHS grants" targeted "will be known to the parties" at some undefined later date. *See* Tr. of Proceedings before the Hon. William H. Orrick (Apr. 14, 2017) [SER 220]. DHS has remained completely silent as to its plans, and, indeed, whether it agrees with the DOJ's interpretation of the Order. Notably, the County receives vital funding from DHS's Federal Emergency Management Agency, representing approximately two-thirds of the budget of the County's Office of Emergency Services. The County relies on this funding to prevent, respond to, mitigate, and recover from acts of terrorism, natural disasters, and other hazards; and to engage in emergency preparedness and training activities. *See* Reed Decl. ¶¶ 9-19 [SER 191-94].

withholding of these funds. *See* ER 52-100. The district court enjoined Defendants from implementing or enforcing Section 9(a) of the Executive Order nationwide.[5] ER 100.

D. The Attorney General's Attempt to Reinterpret the Executive Order.

A month after the district court issued the preliminary injunction, the Attorney General—a Defendant in this litigation—issued a two-page memorandum (the "AG Memorandum") which memorialized the reading of the Executive Order that counsel had offered at oral argument and the district court rejected as "implausible." *See* ER 184-85. According to Defendants, the AG Memorandum "mak[es] clear . . . the Justice Department's understanding of the Executive Order," and explains how DOJ intends to implement it. Brief for Appellants at 9, 19; *see also* Tr. of Proceedings before the Hon. William H. Orrick (Jul. 12, 2017) [SER 206].

In the AG Memorandum, Attorney General Sessions stated that Section 9(a) of the Executive Order does no more than "direct[] the Attorney General and the Secretary of Homeland Security to exercise, as appropriate, their lawful discretion to ensure that jurisdictions that willfully refuse to comply with [8 U.S.C. §] 1373 are not

[5] The district court declined to enjoin actions by the President, instead enjoining the members of his Administration charged with implementing the Executive Order's directives. *See* ER 100.

eligible to receive [DOJ] or [DHS] grants." ER 185.[6] The Attorney General further stated, "I have determined that section 9(a) of the Executive Order, which is directed to the Attorney General and the Secretary of Homeland Security, will be applied solely to federal grants administered by [DOJ] or [DHS], and not to other sources of federal funding." ER 184. The AG Memorandum did not purport to bind, and was not signed by the head of, any executive branch agencies other than the DOJ. *See* ER 184.

Arguing that the AG Memorandum constituted a 'binding" interpretation of the Executive Order, Defendants sought reconsideration of the district court's preliminary injunction order.[7] *See* ER 37-38. The district court denied the motion, finding that the AG Memorandum was not binding on executive branch agencies. ER 42-45. The district court held that the AG Memorandum was "persuasive only to the extent that it is an accurate and credible reading of the Executive Order," but concluded that interpretation outlined in the Memorandum was "not legally plausible." ER 38.

E. The County's Motion for Summary Judgment and Evidence of Harm Warranting a Permanent Injunction.

On August 30, 2017, the County filed a motion for summary judgment, seeking declaratory relief and a permanent injunction barring Defendants from implementing

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[6] Notably, Defendants have not pointed to any federal grant that Congress has expressly conditioned on compliance with Section 1373.

[7] On appeal, Defendants appear to have abandoned the contention that the AG Memorandum is binding.

Section 9(a) of the Executive Order. *See* ER 266. On November 20, 2017, the district court granted summary judgment and permanently enjoined Defendants "from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions." ER 31. The court held that the Executive Order "attempts to reach all federal grants, not merely the three grants listed in the AG's Memorandum," and that the AG Memorandum "provides an implausible interpretation of Section 9(a)," "does not bind the Executive Branch," and cannot "change the plain meaning of the Executive Order." ER 6-7. It affirmed the County's standing, finding that the County established a well-founded fear that the Executive Order would be enforced against it, as well as concrete injuries in the form of policy coercion, threatened loss of funds, and budgetary uncertainty. ER 14-20.

The district court also held that the Executive Order is unconstitutional in several respects. First, the court held that the Executive Order violates separation of powers because it purports to exercise a power—placing conditions on federal funds—that belongs to Congress, not the President. ER 17-20. Second, the district court held that because the Executive Order (a) purports to retroactively impose ambiguous conditions on federal funds that were not agreed to at the time of receipt; (b) targets broad categories of funds without a sufficient nexus to the condition imposed; and (c) constitutes a grave threat akin to a "gun to the head," it represents a set of conditions on federal funds that not even Congress could constitutionally

impose.[8] ER 20-24. Third, the district court held that the Executive Order violates the Tenth Amendment because it coerces states and local jurisdictions into complying with ICE detainer requests and thereby conscripts them into carrying out a federal program. ER 25-27. Finally, the court held that the Executive Order is unconstitutionally vague and fails to provide procedural due process, thereby violating the Fifth Amendment. ER 27-30. Because "Section 9(a) is unconstitutional on its face, and not simply in its application to the plaintiffs here," the district court imposed the permanent injunction on a nationwide basis. ER 31. The district court entered judgment in the County's favor on November 22, 2017. ER 3.

Notwithstanding the permanent injunction, the Administration continues to threaten to withhold federal funding from sanctuary jurisdictions and to threaten other unconstitutional actions to punish such jurisdictions.[9]

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[8] The Executive Order expresses an intent to withdraw both "federal funds," Exec. Order § 2(c) [ER 187], and "federal grants," *id.* § 9(a) [ER 189]. The district court found that section 9(a) targets federal grants, but that these grants alone are significant enough that a threat to withdraw them constitutes unconstitutional coercion. ER 25. Whether construed as covering "federal funds" or "federal grants," the constitutional questions posed by the Executive Order are the same, a point Defendants appear to concede.

[9] Most recently, those threats have been directed at the local officials that have adopted and implemented "sanctuary" policies. On January 2, 2018, Acting ICE Director Thomas Homan said that the federal government should "charge some of these sanctuary cities with violating federal law," including personally "charging some of these [local] politicians with crimes." Fox News, "Acting ICE Director: California made a foolish decision" (Jan. 2, 2018) [Ex. K to RJN], at 2. Testifying before a Senate Committee, DHS Secretary Kirstjen Nielsen—one of the officials specifically

SUMMARY OF THE ARGUMENT

Defendants' position that the Executive Order is nothing more than a command to do what the law already allows or requires is wholly inconsistent with the Executive Order's plain text, stated purpose, and the repeated express intent of the President and his Administration in issuing the Order. The district court properly construed the Executive Order, and Defendants do not dispute that, when so construed, the Order is unconstitutional. Defendants' argument that the Executive Order is susceptible to the tortured narrowing interpretation they propose is meritless, as is their suggestion that the Order's facial unconstitutionality is cured by its inclusion of the phrase "consistent with law." Defendants' attempts to avoid having the Order declared unlawful by stating, in the context of this litigation, that they will not enforce its broad mandates are similarly unavailing. Accordingly, this Court should affirm the district court's judgment.

Because the district court found Section 9(a) of the Executive Order to be facially unconstitutional, it properly exercised its discretion to enjoin enforcement of that Section nationwide. Defendants' suggestion that the County lacks standing to

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tasked with implementing the Executive Order, and a Defendant in this case—confirmed that her agency "is reviewing what avenues might be available" to hold state and local officials criminally liable for enacting policies like the County's. Newsweek Business, "'Trump Administration Wants to Arrest Mayors of 'Sanctuary Cities'" (Jan. 16, 2018) [Ex. L to RJN], at 2.

obtain a nationwide injunction is wrong as a matter of law, as is their assertion that a nationwide injunction forecloses other courts' adjudication of cases and claims similar to the County's. Instead, the district court properly fashioned an injunction appropriately tailored to the Executive Order's unconstitutionality.

ARGUMENT

I. Defendants' Sole Argument on Standing and the Merits Fails Because the District Court Properly Interpreted the Executive Order.

On appeal, Defendants have substantially narrowed the issues before the Court. Defendants do not dispute that if the Executive Order broadly directs termination of federal funding to sanctuary jurisdictions, then the County has standing to challenge it and the district court properly held it unconstitutional. Instead, Defendants argue only that the district court misconstrued the Order. In their view, Section 9(a) applies narrowly to a handful of grants that DOJ and DHS already have ostensible authority to withhold from sanctuary jurisdictions. And on that reading, they argue, the Executive Order is entirely lawful and does not affect the County, which accordingly lacks standing to challenge it. Brief for Appellants at 15-16.[10]

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[10] Defendants' standing objection thus collapses into their argument on the merits, as would any question regarding ripeness. In *Virginia v. American Booksellers Association, Inc.,* 484 U.S. 383, 390 (1988), the Supreme Court rejected a similar attempt to convert a debate about the best reading of a legal document into a threshold question of justiciability. In that case, the defendants likewise "challenged plaintiffs' reading of the statute's reach," arguing that it was narrower than the plaintiffs feared and therefore constitutional. Yet the Supreme Court was "not troubled" by plaintiffs' pre-enforcement challenge and found standing easily satisfied—" the law is aimed directly

But this position is inconsistent with any reasonable construction of the Executive Order, which must "begin with its text" and be "consistent[] with the Order's object and policy." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). Defendants' unnatural reading is irreconcilable with the Executive Order's broad language and aggressive directive. And it is incompatible with the President's stated objective—to use the Executive Order as a "weapon" against jurisdictions like the County. This Court should therefore reject Defendants' unsupported, litigation-driven construction and uphold the district court's judgment and injunction.

A. The District Court's Interpretation is Consistent with the Executive Order's Plain Text, Policy, and Objective.

The district court gave the text of Section 9(a) its most natural, and only plausible, reading: as a directive to disqualify sanctuary jurisdictions from receiving federal grants. "[T]he interpretation of an Executive Order begins with its text," *id.* at 934, and the text here compels the district court's reading. [11]

First, Section 9(a) is a categorical command to the Attorney General and the

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at plaintiffs, who, *if their interpretation of the statute is correct*, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392-93 (emphasis added). That analysis applies equally to Defendants' arguments here.

[11] In addition to its proper finding that Section 9(a) is a directive to withdraw all federal grants, the district court also properly found that the Executive Order reflects an intent to defund jurisdictions that do not comply with ICE detainer requests. ER 16, 26. This finding underlies the district court's holding that the Executive Order violates the Tenth Amendment.

DHS Secretary to "ensure that [sanctuary jurisdictions] *are not eligible to receive Federal grants*."[12] ER 189 (emphasis added). This categorical language is limited only by a narrow and discretionary exception for grants "deemed necessary for law enforcement purposes." ER 189. The plain language of Section 9(a) thus makes clear that President's directive applies, at a minimum, to all "Federal grants" that do not fall within this exception. ER 189. Indeed, that Section 9(a) includes a specific exception indicates that no other exceptions were contemplated. *See, e.g.*, *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994) (inclusion of one exception implies that others were not intended).

The plain text thus forecloses Defendants' contention that the Executive Order targets only DOJ and DHS grants. To the contrary, the Order states that the Attorney General and the DHS Secretary are responsible for ensuring ineligibility for "Federal grants," without limitation. *See* ER 189. That the President would charge specific officials with executing this broad command is unremarkable. The Attorney General is charged with "giv[ing] his advice and opinion on questions of law," such as

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[12] Although Defendants previously claimed that the Executive Order was merely a "use of the bully pulpit" to "highlight issues" the President "care[s] about," SER 220, Defendants now acknowledge that Section 9(a) directs action by the Attorney General and DHS Secretary, Brief for Appellants at 18. They have also abandoned their previous claim that Section 9 is a mere statement of policy – and for good reason. By its terms, Section 2 is the Executive Order's statement of policy. ER 187. By contrast, each provision of Section 9 directs action by various members of the Administration, and Section 9(a) explicitly directs action "in furtherance of [the Executive Order's] policy." ER 189.

on grant eligibility, "when required by the President," *see* 28 U.S.C. § 511, and the DHS Secretary is charged under the Order with designating entities as "sanctuary jurisdictions," *see* ER 189. Contrary to Defendants' assertions, the fact that direction is given to these specific officials does not suggest the Order applies only to DOJ and DHS grants. Rather, it is critical to effectuating the Order's much broader scope.

Second, Section 9(c) confirms the breadth of the President's command. It instructs the Director of OMB to "obtain and provide" information on "*all* Federal grant money that currently is received by any sanctuary jurisdiction." ER 189 (emphasis added). Defendants' suggestion that the Order applies only to DOJ and DHS grants renders OMB's task—which, given the countless federal grants that are potentially at issue, will undoubtedly be a massive one—without any apparent purpose. Defendants offer no explanation for why, if Section 9(a) of the Order is limited to only a very small subset of grants, OMB is nonetheless directed by Section 9(c) to gather information and report on *all* federal grants, which, to take just a few examples, would include agencies such as the Department of Agriculture, Department of Transportation, and Department of Health and Human Services. The district court's construction, by contrast, is consistent with this provision and properly reads Section 9(a) in light of the Executive Order as a whole. *Cf. Maracich v. Spears*, 570 U.S. 48, 65 (2013) ("It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.").

Third, the district court's reading of the Executive Order reflects and aligns with the Order's clearly stated policy and intent. *See Bassidji*, 413 F.3d at 934. Section 2 of the Executive Order, which describes the policy the Order is intended to advance, confirms that its goal is to wield federal funding as a cudgel: the Order directs executive branch officials "[m]ake use of *all available systems and resources* to ensure the efficient and faithful execution of the immigration laws of the United States"; to "[e]nsure that jurisdictions that fail to comply with applicable Federal law *do not receive Federal funds*, except as mandated by law"; and to "*ensure*, to the fullest extent of the law, that a State, or a political subdivision of a State, *shall comply with 8 U.S.C. 1373*." ER 187, 189 (emphasis added). The district court's interpretation of Section 9 gives effect to these policies and is commensurate with their scope. Defendants flatly ignore the Executive Order's sweeping stated aims, which they effectively concede cannot be implemented constitutionally, and suggest the district court should have ignored Section 2's statements regarding the Executive Order's policy and intent when construing Section 9. Following well-established precedent, however, the district court instead adopted a natural reading of Section 9's plain text that aligns with the Executive Order's clear intent.

Finally, the propriety of the district court's reading of the Order has been repeatedly confirmed by the Order's author, the President. The President and his Administration have made clear, on numerous occasions both before and after the Executive Order issued, that his intent in issuing it was to "cancel *all* federal funding

to sanctuary cities." Ex. B to RJN at 1. In official, contemporaneous statements, the White House described the Executive Order as "halting federal funding for sanctuary cities," Ex. F to RJN at 4, and sending a "clear" message that "federal funds . . . should not be used to help fund sanctuary cities," Ex. I to RJN at 5. The district court did not "presume," *see* Brief for Appellants at 25, that the Administration intended to implement the Executive Order in an unlawful way; the district court instead took the Administration at its word, as expressed in the Executive Order itself and in public statements describing the Order.

Defendants argue that statements by the President and his Administration "cannot alter the plain meaning of the Executive Order." Brief for Appellants at 27. But these statements are *entirely consistent* with the reading the plain text compels; the district court looked to these statements to confirm its natural reading, not to alter it. And if there were any ambiguity in Section 9(a)'s command (which there is not), it would be entirely appropriate—indeed, necessary—to look to the President's statements to give meaning to his directive. As Defendants note, the Executive Order is not a statute; it is a directive to the President's subordinates to take action to advance Presidential policies. *See Myers v. United States*, 272 U.S. 52, 135 (1926). And these subordinates may well take action informed just as much by the President's statements and his policy goals as by the precise language of his Executive Order. For that reason, this Court instructs consideration of the Executive Order's "policy and object," *Bassidji*, 413 F.3d at 934, and courts have relied on similar statements to

determine the meaning of executive orders. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (relying on the President's intent to determine severability of executive order); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 275-76 (1974) (considering executive branch officials' statements when analyzing whether executive order restricted protected speech under the National Labor Relations Act).

Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994), cited by Defendants, does not hold otherwise. *Barclays* has nothing to do with whether a President's intent is considered in understanding how an Executive Order will be implemented; instead, it concerns the question of whether California's income-based corporate franchise tax is constitutional as applied to domestic corporations with foreign parents or to foreign corporations with either foreign parents or foreign subsidiaries worldwide. In this context, the Supreme Court considered whether the California tax impermissibly interferes with the Federal Government's ability to "speak with one voice." *Id.* at 329-30. The Court found that, in the face of Congress condoning the tax, certain Executive Branch statements were "merely precatory" and did not overcome Congress's expression of intent. *See id.* ("Executive Branch communications that … lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.").

Under the circumstances of this case, the Court is not at liberty to ignore the

Executive Order's context and the President's "object" in issuing it. *See Bassidji*, 413 F.3d at 934. Defendants would have this Court conclude that the Executive Order does not mean what it says—and what the Administration took pains to convince the world it means. The district court properly rejected that invitation, as should this Court.

B. The Executive Order is not Susceptible to Defendants' Interpretation.

Defendants ask this Court to reject the district court's interpretation of the Oder, and instead hold that the President's plain command is overridden by a three-word phrase in Section 9(a) of the Executive Order: "[T]he Attorney General and the Secretary, in their discretion and to the extent *consistent with law*, shall ensure that [sanctuary jurisdictions] are not eligible to receive Federal grants." ER 189 (emphasis added). Specifically, Defendants argue that this passing reference to application of the Executive Order "consistent with law" negates Section 9(a)'s facially broad command to withhold all federal grants, and limits its application to a very small subset.[13] But the mere inclusion of this phrase does not insulate the Executive Order from legal

[13] In the County's view, *no* grants that Defendants have identified can lawfully be conditioned on compliance with 8 U.S.C. § 1373. Indeed, there is ongoing litigation challenging the constitutionality of Defendants' attempts to impose compliance with Section 1373 as a condition of several federal grants. *See City of Los Angeles v. Sessions*, No. 17-7215 (C.D. Cal.); *City of Philadelphia v. Sessions*, No. 17-3894 (E.D. Pa.), No. 18-1103 (3d Cir.); *State of California v. Sessions*, No. 17-4701 (N.D. Cal.); *City and County of San Francisco v. Sessions*, No. 17-4642 (N.D. Cal.); *City of Chicago v. Sessions*, No. 17-5720 (N.D. Ill.), No. 17-2991 (7th Cir.).

challenge; it instead demonstrates the extent to which President was mistaken about what he can command "consistent with law."

1. Defendants cannot rely on the phrase "consistent with law" to save a facially unconstitutional directive.

The words "consistent with law" in Section 9(a) do nothing more than state the obvious: that all executive action must be consistent with law. But this background rule cannot save a facially unconstitutional command, and simply inserting the phrase "consistent with law" in an otherwise patently unlawful Executive Order or statute cannot do so either. Otherwise, a facial challenge to an unconstitutional law or Executive Order could always be defeated by inclusion of this boilerplate, and injunctive relief could never be obtained to prevent the executive branch from taking or threatening illegal action. But the Constitution "does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). [14]

[14] In addition, Defendants have taken the position in this litigation that Section 9(a)'s command that the Attorney General "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law" simply means that the Attorney General will bring lawsuits against entities like the County. But the Order is silent on exactly what this provision means. Moreover, this provision does not even include the "consistent with law" language on which Defendants rely so heavily in their attempt to rewrite the rest of Section 9(a).

This principle applies with particular force here. The question of which federal grants may be withheld under what circumstances is not a simple one. It requires, at a minimum, analysis of the grant conditions Congress has authorized federal agencies to impose, U.S. Const. art. I, § 8, cl. 1; whether the conditions contemplated are germane to the grant at issue, *see South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987); whether the conditions were clearly stated in advance of acceptance, *see id.*; and whether the cumulative effect of the total deprivation is retroactive or so severe as to constitute a "gun to the head" of the jurisdiction rendered ineligible, *see Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-06 (2012). The generic phrase "consistent with law" spells out none of this. Indeed, the Executive Order contains no express requirement at all that those charged with its implementation evaluate their actions against *any* constitutional provision.

In other words, although the Executive Order entirely fails to acknowledge the limits on executive branch authority to impose conditions on federal funding, Defendants would read the words "consistent with law" to import a vast body of law, to negate the Executive Order's otherwise clearly unlawful directives, and to set up a presumption that Defendants will comply with the very laws the Executive Order violates. That presumption is not reasonable as to any facially unconstitutional law or directive. It is even less reasonable here, where the President has repeatedly described the Executive Order's aim—withholding of all federal funds from sanctuary jurisdictions—in unqualified and plainly unconstitutional terms.

Defendants' primary case, *Building & Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28, 29 (D.C. Cir. 2002), is not to the contrary. *Allbaugh* did not hold that a generic caveat like "consistent with law" can excuse a command that is illegal in most, if not all, of its applications.[15] It did not bar injunctive relief in the face of a President's repeated statements that he intends an Executive Order to be applied in a plainly illegal manner. And it did not consider a situation, like that here, where the coercive force of an Executive Order's sweeping language is itself sufficient, under principles of federalism, to cause constitutional harm to state and local jurisdictions. Rather, *Allbaugh* stands for the proposition that, where an agency has been directed to implement a command "to the extent permitted by law," "[t]he mere possibility that some agency might make a legally suspect decision to award a contract or to deny funding for a project does not justify an injunction against enforcement of *a policy that, so far as the present record reveals, is above suspicion in the ordinary course of administration*." *Id.* at 33 (emphasis added).

To say the least, Section 9(a) is not above suspicion. Defendants do not

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[15] In addition, to the extent that Defendants rely upon *Allbaugh* for the proposition that a facial challenge cannot be maintained here because there ostensibly is a single, constitutional application of the Order, that contention is put to rest by *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("constitutional 'applications' [relied upon prevent facial relief] are irrelevant" where "they do not involve actual applications of the statute"), and *Jackson v. City & County of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (facial challenge can be brought when the challenged law cannot be narrowly construed or interpreted).

contest that the Executive Order is unconstitutional if it is interpreted as it has been described by the President who authored it. Unconstitutional enforcement in this case is not a "mere possibility"; it has been specifically threatened, and is inevitable under a plain reading of the President's directive. If *Allbaugh* prohibited an injunction in a case like this one, a President could force policy change in local jurisdictions by threatening illegal action by Executive Order, but avoid judicial intervention by including a generic phrase vaguely prohibiting illegal action. *Allbaugh* cannot be read to endorse such coercive tactics.[16]

If the President wished to withdraw and rewrite the Order to specify grants to be withdrawn, or to make clear that the Order applies only to grants that the Administration has express congressional authorization to condition on compliance with Section 1373, that would be a radically different executive order. President Trump alone has the power to rewrite the Executive Order. *See Stevens*, 559 U.S. at 481; *Bassidji*, 413 F.3d at 934; *see also Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (holding that courts may not "insert missing terms into [a] statute or adopt an interpretation precluded by [its] plain language").[17] His subordinates cannot do

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[16] *Allbaugh* is of course not binding on this Court, and to the extent that *Allbaugh* can be read to establish a categorical rule that a boilerplate clause, like the one at issue here, can excuse a facially illegal command, this Court should decline to follow it.

[17] The President is capable of promulgating an Order that clearly commands the Attorney General to evaluate the consistency of grant funding within the DOJ with presidential policies, as well as the adequacy of existing law to support those policies,

that for him by pressing a litigation-driven interpretation of boilerplate language that is unsupported by the law or the Order's text.

2. Defendants' interpretation of the phrase "consistent with law" is implausible.

On its face, Section 9(a) is a categorical command to deny sanctuary jurisdictions the ability to receive "Federal grants," excluding only grants "deemed necessary for law enforcement purposes." *See supra* at 4. Under Defendants' reading, however, the phrase "consistent with law" dramatically narrows the categorical term "Federal grants" and effectively replaces it with a different term—that is, any federal grant administered by DOJ or DHS for which the Attorney General or the Secretary already has congressional authority to condition upon compliance with 8 U.S.C. § 1373. *See* Brief for Appellants at 18-19. This reading renders the term "Federal grants"—and the blanket command to withdraw them—unrecognizable. It is therefore not a plausible interpretation. Had the President wished to target only a very small subset of federal grants, he would not have written an Executive Order that categorically targets, and declares as its purpose, the withdrawal of *all* federal grants except those deemed necessary for law enforcement purposes.

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even on topics as urgent and important as law enforcement officer safety. Executive Order 13774, issued only a few weeks after the Executive Order at issue here, relates to prevention of violence against law enforcement officers. In it, the Administration states a policy to "to further enhance the protection and safety of Federal, State, tribal, and local law enforcement officers." Exec. Order 13774, 82 Fed. Reg. 10695 (Feb. 9, 2017). To that end, the Attorney General is instructed to: "thoroughly evaluate all grant funding programs currently administered by the Department" and "recommend to the President any changes to grant funding." *Id.* § 2(f)-(g).

The federal government operates countless grant programs administered by dozens of agencies. The County receives more than $565 million annually in these "Federal grants." Márquez Decl. ¶ 21 [SER 125-26]. The vast majority of these funds come through grant programs administered not by DOJ or DHS, but by the Departments of Agriculture, Housing and Urban Development, Interior, Transportation, Treasury, and Health and Human Services. Márquez Decl. Ex. A [SER 136-39]. All of this funding is undoubtedly "Federal grant money" on which Section 9(c) requires the OMB Director to report. *See* ER 189. But under Defendants' current reading of the Executive Order, none of these grants are "Federal grants" within the meaning of Section 9(a). So far, Defendants have identified a total of *three* grants that purportedly come within their interpretation, *see* ER 64; the County submits none do, *see supra* at 26 n. 13. But whatever the precise number, the phrase "consistent with law" cannot be read to so dramatically narrow a term that, under any natural reading, encompasses hundreds of federal grants. *Cf. South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 346 (1998) ("Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a 'sensible construction' that avoids this 'absurd conclusion.'").

Defendants' interpretation also flies in the face of the Executive Order's policies and the President's stated objectives. As Defendants read it, the phrase "consistent with law" would defuse President Trump's intended weapon and render Section 9(a) virtually useless in achieving the Executive Order's policies. The DOJ

and DHS grants that Defendants now say are at issue compose a small percentage of the County's budget, *see* Márquez Decl. Ex. A [SER 136-39], which would be true of other jurisdictions as well. Withdrawal of only these funds is not the profound threat the Executive Order contemplates.[18]

The Court should not conclude that the Executive Order effectively nullifies its own command. Instead, the proper conclusion is that the Executive Order is fundamentally mistaken about the *lawfulness* of its command. Defendants' rewriting of the Order renders it unrecognizable and clearly conflicts with the President's intent in issuing it. This cannot be what the President intended; it certainly is not what he said.

C. The AG Memorandum Does Not, and Cannot, Rewrite the Executive Order or Destroy the County's Standing.

Defendants make much of the fact that their construction of Section 9(a) has been memorialized in a memorandum issued by the Attorney General. But this memorandum cannot overcome the fatal flaws in Defendants' interpretation. Nor does it have any impact on the County's standing.

1. The AG Memorandum is not binding.

Defendants do not appear to dispute the district court's finding that the AG Memorandum is not a legal opinion binding on other federal agencies, including

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[18] Indeed, the County has, in the past, simply chosen to decline some of these funds, rather than challenge the constitutionality of the conditions DOJ has imposed on them. *See* ER 58.

DHS. ER 41-42.[19] The AG Memorandum was not requested by the President or the head of any agency, and was issued only to grantmaking personnel *within DOJ*. There is no evidence that it represents anything more than the *current* Attorney General's *current* thinking on the interpretation of the Executive Order—against the backdrop of an existing injunction—which may not be shared by the heads of other federal agencies, including DHS.[20] Nor does the AG Memorandum even purport to bind other Administration officials. It is neither signed by, nor addressed to, the other official responsible for implementation of Section 9's command: the DHS Secretary.

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[19] By statute, the Attorney General can issue formal legal opinions on matters of law at the request of the President or the heads of agencies. 28 U.S.C. §§ 511-513. These opinions are rendered by the Office of Legal Counsel. 28 C.F.R. § 0.25. Indeed, Defendants cite one such opinion issued in response to a Presidential request regarding a proposed Executive Order. Brief for Appellants at 26 (citing Office of Legal Counsel, *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. O.L.C. 59 (1981). Of course, even such a memorandum could not save or limit an otherwise unconstitutional presidential directive, as the Attorney General must follow the President's commands. *Myers*, 272 U.S. at 135 (the President "may properly supervise and guide [executive officers'] construction of the statutes under which they act.").

[20] Indeed, the AG Memorandum confirms that conditions will be applied to some DHS grants, but does not specify which grants, or whether DHS will apply the same procedures and criteria as the Attorney General, including procedures that are clearly necessary (but not sufficient) to ensure compliance with the Constitution. *See* ER 185. But in any case, imposing compliance with 8 U.S.C. § 1373 as an eligibility criterion on the County's DHS grants would violate the Constitution, as those grants bear no relationship to immigration or immigration enforcement, but instead relate to, for example, disaster preparedness. *See* Reed Decl. ¶¶ 10-16 [SER 191-93]. Defendants have also proffered no congressional authorization that would permit DHS to impose such a condition.

See ER 184-85. As such, the AG Memorandum is not authoritative and is only as persuasive as the legal arguments it presents.

2. The AG Memorandum's interpretation of the Executive Order is inconsistent with the Order's plain text.

As discussed above, the interpretation of Section 9(a) that the AG Memorandum espouses is flatly inconsistent with the text of Executive Order. *See supra* at 31-33. The memorandum therefore is not persuasive, much less a controlling interpretation.

Rather, the AG Memorandum is not an attempt to *interpret* the Order; it is an attempt to *rewrite* it. *See Stevens*, 559 U.S. at 481 (courts do not adopt interpretations that "require[] rewriting, not just reinterpretation"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (stating that courts need not "adopt an interpretation precluded by the plain language of the ordinance"); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (limits "claim[ed to be] implicit in [a] law [must] be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice); *Doe v. Harris*, 772 F.3d 563, 580-81 (9th Cir. 2014) (same). For example, according to the AG Memorandum, Attorney General Sessions "determined," after consulting with the DHS Secretary, that "sanctuary jurisdiction" would mean "only . . . jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" ER 185. But the Executive Order reserves this authority to the DHS Secretary *alone*, and she is not a signatory to, or recipient of, the

AG Memorandum. As another example, Section 9(a) directs the Attorney General and DHS Secretary to withdraw from sanctuary jurisdictions all "Federal grants, *except* as deemed necessary for law enforcement purposes." ER 189 (emphasis added). But to date, the three grant programs that Defendants have identified as potentially subject to defunding, *see* ER 64, are all undisputedly related to law enforcement. In other words, the AG Memorandum applies Section 9(a) only to the very type of grants the same provision contemplates exempting.

Finally, the AG Memorandum is inconsistent with the expressed intent of the President who signed the Executive Order. The President has, on many occasions, made clear his position that "all" federal funds should be withdrawn. He has never disavowed this position. The Attorney General's view on the meaning of the Executive Order cannot, of course, supersede that of its author, the President. *See Myers*, 272 U.S. at 164.

3. The AG Memorandum cannot defeat the County's standing.

While the AG Memorandum cannot change the unambiguous scope of the Executive Order, Defendants nonetheless suggest that it reflects a commitment to enforce the Executive Order more narrowly than its terms provide. But that promise does not moot the County's challenge or eliminate the need for the district court's injunction. If, as the district court rightly found, the Executive Order can only be read as a directive to withhold *all* of the County's federal grants, the Attorney

General's promise not to enforce the Order as written amounts to nothing more than a voluntary cessation of concededly illegal action.

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). "[T]he standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case *might* become moot if subsequent events make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (emphasis added). The "heavy burden" to establish "that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* at 189. [21]

Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013) is instructive here. In *Bell*, homeless individuals challenged two city ordinances prohibiting camping and sleeping

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[21] Indeed, to the extent Defendants' reading of the Order deprives any party of standing, it would be Defendants themselves. Whether appellate standing is characterized as constitutional, statutory, or prudential in nature, "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). By their own reckoning, Defendants are not aggrieved by the district court's order. According to Defendants, the Executive Order does nothing more than direct executive branch officials to exercise their already-existing statutory authority to deny certain federal funds to state or local governments they deem to be "sanctuary jurisdictions" "where permitted by law." Brief for Appellants at 15. Defendants concede, however, that the injunction expressly allows them to do exactly that. *See* Brief for Appellants at 11.

in public. In the midst of litigation, the Boise Police Chief issued a "Special Order" prohibiting nighttime enforcement of the ordinances. *Id.* at 893-94. This Court held that the Special Order did not moot the plaintiffs' claims for injunctive relief, reasoning that it was not "absolutely clear" the unlawful practices would not resume because the Special Order was a mere "internal policy" issued unilaterally to police department staff. *Id.* at 900. The Court emphasized "the ease with which the Chief of Police" could "abandon[] or alter[]" the Special Order in the future, observing that it was distinguishable from "entrenched" and "permanent" policy changes that might result in mootness. *Id.* at 900-01.

Like the Special Order in *Bell*, the AG Memorandum is hardly an "entrenched" and "permanent" policy shift that makes it "absolutely clear" Defendants will not return to a reading of the Executive Order that is faithful to its plain text. As discussed above, the AG Memorandum is nothing more than the current Attorney General's current reading, issued while a preliminary injunction blocking enforcement of any broader reading of the Executive Order was in effect. *Compare White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (finding mootness where a new policy memorandum "represent[ed] a permanent change in the way" the defendants conducted the challenged actions, "not a temporary policy that the agency will refute once this litigation has concluded"). These considerations are particularly heightened in a case like this one where the Administration is expressly using the Executive Order's broad commands to threaten state and local governments into changing their policies. The

AG Memorandum provides no comfort to the County, and plainly cannot extinguish its standing.

D. Even if the Executive Order's Directive Were Susceptible to a Narrow Reading, the County Would Be Entitled to Relief.

Finally, all of Defendants' efforts to evade the evident meaning of the Executive Order overlook that the ultimate question is not whether their reading of the Order—*standing alone*—is convincing. It is whether the County faces a "credible threat" of government action that "implicates a constitutional interest," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014), and whether the Order represents an attempt to "compel the [County] to implement, by . . . executive action, federal regulatory programs," *see Printz v. United States*, 521 U.S. 898, 925 (1997). The broader context giving rise to this litigation cannot be ignored: the President and his Administration have made abundantly clear that they intend to cut off sanctuary jurisdictions' funds unless they implement the President's preferred immigration policies. For that reason, Defendants cannot prevail in this case simply by convincing the Court that a narrow reading of the Executive Order is a plausible, or even the best, interpretation of the Order. The Executive Order is not a statute, but is instead a directive to the President's subordinates. And in this case, the President and his subordinates have spoken with exceeding clarity about their plans for sanctuary jurisdictions, both before and after the Executive Order was issued. *See supra* at 2-7.

Defendants must, therefore, not only convince this Court to adopt their reading of the Order, but also rebut the overwhelming evidence that by issuing the Order and consistently describing it as calling for the withholding of *all* federal funds, they engaged in the type of coercive action the Constitution forbids. Miami-Dade County's decision to change its policies in direct response to the Order's issuance and the Trump Administration's related threats makes the coercive effect of those actions quite plain. *See supra* at 11. Indeed, even if the Executive Order could be read to command only a narrow withholding of certain funds from sanctuary jurisdictions, Defendants cannot lawfully evade the restrictions of the Tenth Amendment by combining the Order with much broader threats designed to compel localities to change their policies. *See Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is [not] compatible with this independence and autonomy that their officers be 'dragooned' … into administering federal law." (internal citations omitted)).

II. The District Court Properly Granted a Nationwide Injunction against the Executive Order's Facially Unconstitutional Directive.

The district court's decision to enjoin the facially unconstitutional Executive Order nationwide was not an abuse of its broad discretion. "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court," *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), and the court "has broad

latitude in fashioning equitable relief when necessary to remedy an established wrong," *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994). Abuse of discretion review also applies to "the scope of injunctive relief." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654 (9th Cir. 2011) (the Court "review[s] the district court's entry of a nationwide injunction for abuse of discretion").

A. The District Court Exercised its Broad Discretion to Fashion Appropriate Injunctive Relief in Light of the Executive Order's Facial Invalidity.

An injunction's proper scope is "determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (citation omitted). In this case, the district court appropriately exercised its broad equitable power to tailor the permanent injunction to the nature and scope of the constitutional harms the County established. *See id.* The district court carefully "remed[ied] the specific harm shown," *see Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987), by enjoining *only* the relevant provision of the Executive Order—Section 9(a)—as to *only* the specific federal officials involved in its implementation. *See* ER 31.

The court's decision to apply this tailored injunction on a nationwide basis was well within its discretion. "There is no general requirement that an injunction affect only the parties in the suit." *Bresgal*, 843 F.2d at 1169. And as the Supreme Court has recognized, facial constitutional challenges *ordinarily* warrant "facial relief"—i.e., complete invalidation of the law or policy held invalid. *See, e.g.*, *Whole Woman's Health*

v. Hellerstedt, 136 S. Ct. 2292, 2300, 2307 (2016) (invalidation "across the board" is proper "if the arguments and evidence show that a statutory provision is unconstitutional on its face"); *see also Foti*, 146 F.3d at 635 ("A successful challenge to the facial constitutionality of a law invalidates the law itself.").[22] That such "facial relief" runs nationwide here is a fitting consequence of the nature and scope of Defendants' unconstitutional action.

Defendants do not dispute that the Executive Order—if interpreted as the district court did—violates foundational separation of powers principles and the Fifth and Tenth Amendments. *See* ER 31. Defendants have never argued, much less submitted evidence establishing, that the merits of these constitutional claims differ across jurisdictions. Thus, the nationwide injunction is required to provide "complete relief" for the wrongs the County established.[23] *See Bresgal*, 843 F.2d at 1170-71.

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[22] For this reason, a number of Defendants' cited cases, including *Zepeda v. U.S. Immigration and Naturalization Service*, 753 F.2d 722 (9th Cir. 1983), an as-applied challenge to practices of the former Immigration and Naturalization Service; *Meinhold v. U.S. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), an as-applied challenge to a Department of Defense policy; and *McKenzie v. City of Chicago*, 118 F.3d 552 (7th Cir. 1997), an out-of-circuit case involving an as-applied challenge to a city ordinance, are unavailing.

[23] Defendants are simply wrong that the County cannot "plausibly assert that an injunction that extends to other jurisdictions is necessary to remedy [its] claimed harm." *See* Brief for Appellants at 31. At a minimum, a permanent injunction encompassing the State of California and its subdivisions is vital to redressing the County's harm. The County provided undisputed evidence that much of its federal funding passes through the State of California prior to being awarded to the County.

While Defendants complain the injunction is too "burdensome," Brief for Appellants at 32, they "cannot reasonably assert that [they are] harmed in any legally cognizable sense by being enjoined from constitutional violations," *see Zepeda*, 753 F.2d at 727.

Numerous cases both within and outside this circuit, none of which Defendants address, have concluded that nationwide injunctions granted in the face of broad, across-the-board violations are an appropriate exercise of discretion. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (upholding nationwide injunction against immigration program in case in which only one State plaintiff had standing); *Decker v. O'Donnell*, 661 F.2d 598, 617-18 (7th Cir. 1980) (upholding nationwide injunction against enforcement of federal statute and regulation in case brought by three taxpayers because it involved a "challeng[e] [to] facial constitutionality"); *cf. Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *aff'd in part, rev'd in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (affirming nationwide injunction against Forest Service regulations); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998) (upholding nationwide injunction against Army Corps of

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See Márquez Decl. ¶¶ 8-9 [SER 121-22]. Therefore, the injunction must apply, at a minimum, to the entire State and its localities to provide the County with full relief.

Engineers rule). Indeed, such injunctions are commonplace to prevent the implementation of categorically unlawful federal action.[24]

The key case on which Defendants rely—*Los Angeles Haven Hospice,* 638 F.3d at 665—is inapposite. In that case, this Court concluded that the district court abused its discretion by enjoining application of a Medicare regulation nationwide, rather than against the plaintiff alone. The Court's conclusion, however, depended on the fact that the plaintiff's challenge to a regulation that had been in effect for 25 years would upend the status quo and create widespread uncertainty:

> a nationwide injunction would not be in the public interest because it would significantly disrupt the administration of the Medicare program by inhibiting [the Department of Health and Human Services] from enforcing the statutorily mandated hospice cap as to over 3,000 hospice providers, and would create great uncertainty for the government, Medicare contractors, and the hospice providers.

Id. In this case, by contrast, the County filed suit almost immediately after the Executive Order was issued—prior to its enforcement—and the nationwide injunction *preserves* the status quo, *preventing* disruption of local governments' constitutionally protected policymaking authority and the uncertainty that would

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[24] *See, e.g.*, *Regents of the Univ. of Cal., et al. v. U.S. Dep't of Homeland Sec.*, No. 17-5211, 2018 WL 339144 (N.D. Cal. Jan. 9, 2018); *Karnoski v. Trump*, No. 17-1297, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); *Doe 1 v. Trump*, No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017 Sep. 15, 2017); *Nw. Immigrants' Rights Project v. Sessions*, No. 17-716, 2017 WL 3189032 (W.D. Wash. Jul. 27, 2017).

result if the Executive Order were permitted to be partially enforced. Thus, the injunction was not an abuse of the district court's broad discretion.

B. The Scope of the District Court's Injunction Does Not Implicate Article III Standing Requirements.

Defendants argue that the County "do[es] not have standing to seek an injunction broader than necessary to remedy [it] own asserted injuries." Brief for Appellants at 31. But a plaintiff need only "demonstrate standing for each *claim* he seeks to press" and "each *form* of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added). The County has established its standing as to each claim on which relief was granted by the district court, and as to the form of that relief. In asserting the County must establish standing for the *scope* of relief ordered, Defendants rely on inapposite cases in which courts rejected attempts to obtain relief *solely benefiting others*—i.e., where the *plaintiff itself demonstrated no injury-in-fact.*

For example, in *Summers*, 555 U.S. at 491-92, the district court entered a nationwide permanent injunction invalidating several regulations even though the parties had settled their dispute about application of the regulations to the plaintiffs. The Supreme Court held that the plaintiffs lacked standing to seek *any* injunctive relief because they were not "threatened with injury in fact." *Id.* at 494-97. Indeed, the Court specifically distinguished the issue of standing from the separate, unresolved "question whether, if respondents prevailed, a nationwide injunction would be appropriate." *Id.* at 500-01. Similarly, in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S.

139, 163 (2010), the Supreme Court held that where an injunction was not needed to personally protect the *plaintiffs* from any harm, they lacked standing to seek one "on the ground that it might cause harm to other parties."[25]

Unlike in *Summers* and *Monsanto*, the County has sought an injunction on the ground that the Executive Order causes *direct harm to the County*. The relief granted by the district court is aimed at remedying *the County's* constitutional injuries. That it may also collaterally benefit others is not of Article III concern. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). In arguing otherwise, Defendants "confuse[] the standing requirements of injury in fact and redressability with the ultimate scope of the court's remedy." *Alaska Ctr. for Env't*, 20 F.3d at 984.[26] Indeed, just last year, the Supreme Court left in place the nationwide scope of an injunction against the President's

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[25] *Alvarez v. Smith*, 558 U.S. 87 (2009), which Defendants also cite, is even less on point. In *Alvarez*, the Supreme Court held that a case regarding property seizure was moot because the property had been returned to some plaintiffs, while others had forfeited their rights, so there was no remaining injury for the court to redress. *Id.* at 91-94. Defendants do not contend the County's case is moot.

[26] Defendants' contention that the district court's injunction fell outside the bounds of what the County had standing to seek also appears to be based on a misinterpretation of Article III's redressability requirement. Redressability requires a showing that "a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quoting *Warth*, 422 U.S. at 508). Thus, the redressability requirement is not met if the relief the plaintiff is asking the court to grant would *only* benefit others, or no one at all. No case that Defendants have identified, however, supports the idea that if relief benefiting a plaintiff *also* benefits others, it has not redressed the plaintiff's injury. That interpretation would turn the redressability requirement on its head.

second "travel ban," although it narrowed the provisions enjoined. In doing so, the Court expressed no constitutional concern with nationwide injunctive relief. *See Trump v. Int'l Refugee Assistance Project ("IRAP")*, 137 S. Ct. 2080, 2087-89 (2017).

Defendants' suggestion that the County is required to pursue a class action to obtain nationwide relief is also unsupported. Defendants cite *Zepeda*, 753 F.2d 719, for the proposition that plaintiffs lack standing to seek an injunction fully invalidating an unlawful action absent class certification. But this gets *Zepeda* backwards. *Zepeda* relied on the federal rule requiring that an injunction "bind[] only 'the parties to the action.'" *Id.* at 727 (citing Fed. R. Civ. P. 65(d)). The permanent injunction the County obtained *binds* only Defendants—parties to the case who had a full opportunity to litigate the issues—even if it provides an ancillary *benefit* to non-parties, which Rule 65 does not prohibit. As a subsequent decision of this Court confirms, "[t]he import of the rule underlying *Zepeda* is that an injunction cannot issue *against* an entity that is not a party to the suit." *Bresgal*, 843 F.2d at 1170 (emphasis added).[27]

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[27] This rule arises from the longstanding principle that, when a court has personal jurisdiction over a party (which Defendants do not dispute), it may issue orders restraining that party's conduct even outside the court's territorial jurisdiction. *See, e.g.*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932) (respondent "submitted itself to the jurisdiction of the court with respect to all the issues embraced in the suit," and court's order "bound the respondent personally . . . . throughout the United States"); *State of New Jersey v. City of New York*, 283 U.S. 473, 482 (1931) ("The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction."); *see also Zepeda*, 753 F.2d at 727 ("A

That is not the case here.

C. The Injunction Does Not Foreclose Other Courts' Consideration of the Issues Raised in this Case.

Defendants' final, failed shot at the district court's injunction is that it improperly "forecloses" adjudication by other courts of the issues raised in this case. Many of the legal issues presented here have also been raised in three other lawsuits challenging the Executive Order. *See City of Seattle, et al. v. Trump*, No. 17-497 (W.D. Wash. filed Mar. 29, 2017); *City of Richmond v. Trump*, No. 17-1535 (N.D. Cal. filed Mar. 21, 2017); *City of Chelsea, et al. v. Trump*, No. 17-10214 (D. Mass. filed Feb. 8, 2017). Defendants' assertion that the "nationwide injunction effectively renders that litigation meaningless," Brief for Appellants at 33, is both incorrect and disingenuous. In fact, the court presiding over the *City of Seattle* case *has* considered and issued an order on the merits. But instead of pursuing further litigation in that case and the *City of Chelsea* case,[28] Defendants agreed to stay both matters pending resolution of this case, affirmatively arguing in the *City of Seattle* matter that "further action by the parties or the Court . . . should await the final disposition" of the County's case. *See* Parties'

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federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim[.]").

[28] The City of Richmond's lawsuit was dismissed for lack of standing to bring a pre-enforcement challenge to the Executive Order. *See City of Richmond v. Trump*, No. 17-01535, 2017 WL 3605216 (N.D. Cal. Aug. 21, 2017).

Joint Req. to Stay Proceedings, *City of Seattle*, ECF No. 47 [Ex. M to RJN], at 2; *see also* Plfs. Unopp. Mot. to Stay Proceedings, *City of Chelsea*, ECF No. 25 [Ex. N to RJN].

As Defendants are surely aware, the issuance of an injunction by one federal court does not automatically preclude consideration of the same issues by other courts in different districts or circuits. In the past year alone, multiple courts have simultaneously considered and decided the issues raised in multiple lawsuits challenging executive actions. In lawsuits against the President's "travel ban"[29] and his ban on transgender service members,[30] courts have even issued multiple injunctions invalidating the challenged policies. Here, it is thus Defendants' own acquiescence—not the district court's injunction—that "foreclosed" additional review, and Defendants can complain of no unfairness.

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[29] *See Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *IRAP v. Trump*, 241 F.Supp.3d 539 (D. Md. 2017) (granting nationwide injunctions of Exec. Order 13780); *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (affirming injunctions); *Hawai'i v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017); *IRAP v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017) (granting nationwide injunction of Pres. Procl. 9645); *Hawai'i v. Trump*, 878 F.3d 662 (9th Cir. 2017).

[30] *See Karnoski, 2017* WL 6311305 (granting preliminary injunction in case challenging ban on transgender service members); *Stone v. Trump*, No.17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017); *Doe 1*, 2017 WL 4873042 (same).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed, and the nationwide permanent injunction should remain intact.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court, other than the consolidated case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Ninth Circuit Rule 32-1(a) because it contains 13,285 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in Garamond 14-point font, a proportionally spaced typeface.

s/Danielle L. Goldstein
DANIELLE L. GOLDSTEIN

ADDENDUM OF PERTINENT AUTHORITIES

A. U.S. CONSTITUTION, ART. I, § 8 (EXCERPT)

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

. . . .

B. U.S. CONSTITUTION, AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

C. U.S. CONSTITUTION, AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

D. U.S. CONSTITUTION, AMEND. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

E. 8 U.S.C. § 1373

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

F. 28 U.S.C. § 511

The Attorney General shall give his advice and opinion on questions of law when required by the President.

G. 28 U.S.C. § 512

The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.

H. 28 U.S.C. § 513

When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secretary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition.

I. 28 C.F.R. § 0.25 (EXCERPT)

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Office of Legal Counsel:

(a) Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.

(b) Preparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General.

(c) Rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department.

(d) Approving proposed orders of the Attorney General, and orders which require the approval of the Attorney General, as to form and legality and as to consistency and conformity with existing orders and memoranda.

…

J. Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799 (Jan. 25, 2017)

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows

Section 1. *Purpose.* Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal,

State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. *Policy*. It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. *Definitions.* The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

Sec. 4. *Enforcement of the Immigration Laws in the Interior of the United States.* In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. *Enforcement Priorities.* In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense, where such charge has not been resolved;

(c) Have committed acts that constitute a chargeable criminal offense;

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. *Civil Fines and Penalties.* As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. *Additional Enforcement and Removal Officers.* The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. *Federal-State Agreements.* It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.

Sec. 9. *Sanctuary Jurisdictions*. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not

eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. *Review of Previous Immigration Actions and Policies.*

(a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as "Secure Communities" referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed

regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. *Department of Justice Prosecutions of Immigration Violators*. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. *Recalcitrant Countries*. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. *Office for Victims of Crimes Committed by Removable Aliens*. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.

Sec. 14. *Privacy Act*. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. *Reporting*. Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. *Transparency*. To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. *Personnel Actions.* The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

Sec. 18. *General Provisions.*

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
January 25, 2017.

K. County of Santa Clara Board of Supervisors Policy 3.54, "Civil Immigration Detainer Requests" (adopted 10/8/11)

It is the policy of Santa Clara County (County) to honor civil detainer requests from the United States Immigration and Customs Enforcement (ICE) by holding adult inmates for an additional 24-hour period after they would otherwise be released in accordance with the following policy, so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed:

(A) Upon written request by an Immigration Customs and Enforcement (ICE) agent to detain a County inmate for suspected violations of federal civil immigration law, the County will exercise its discretion to honor the request if one or more of the following apply:

(1) The individual is convicted of a serious or violent felony offense for which he or she is currently in custody.

(a) For purposes of the policy, a serious felony is any felony listed in subdivision (c) of Section 1192.7 of the Penal Code and a violent felony is any felony listed in subdivision (c) of Section 667.5 of the Penal Code.

(2) The individual has been convicted of a serious or violent felony within 10 years of the request, or was released after having served a sentence for a serious or violent felony within 5 years of the request, whichever is later.

(a) If the individual has been convicted of a homicide crime, an immigration detainer request will be honored regardless of when the conviction occurred.

(b) This subsection also applies if the Santa Clara County Department of Corrections has been informed by a law enforcement agency, either directly or through a criminal justice database, that the individual has been convicted of a serious or violent offense which, if committed in this state, would have been punishable as a serious or violent felony.

(B) In the case of individuals younger than 18 years of age, the County shall not apply a detainer hold.

(C) Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources' responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.

L. County of Santa Clara Board of Supervisors Resolution No. 2010-316, "Resolution of the Board of Supervisors of the County of Santa Clara Advancing Public Safety and Affirming the Separation Between County Services and the Enforcement of Federal Civil Immigration Law," (Adopted June 22, 2010)

WHEREAS, the County of Santa Clara is home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world; and

WHEREAS, approximately one-third of all County residents are foreign born, and approximately two-thirds live in families with at least one foreign-born member; and

WHEREAS, the Board of Supervisors recognizes that fostering a relationship of trust, respect, and open communication between County employees and County residents is essential to County departments' core mission of ensuring public safety and serving the needs of the entire community; and

WHEREAS, the Board of Supervisors wishes to encourage all residents of Santa Clara County to report crimes to County law enforcement officials and to use County services without fear of being arrested by or reported to U.S. Immigration and Customs Enforcement ("ICE"); and

WHEREAS, the Board of Supervisors believes that laws like Arizona's SB 1070 erode the relationship of trust between immigrant communities and local governments, subject individuals to racial profiling, discourage crime victims and

witnesses from coming forward and cooperating with local law enforcement officials, and make people afraid to seek the services and medical assistance they and their children need, thereby undermining the health, safety, and well-being of citizens and non-citizens alike; and

WHEREAS, the enforcement of federal civil immigration law is the responsibility of the federal government and not of the County; and

WHEREAS, consistent with the U.S. Constitution's prohibition on the federal commandeering of local resources, the Board of Supervisors has long opposed measures that would deputize local officials and divert County resources to fulfill the federal government's role of enforcing civil immigration law; and

WHEREAS, the Board of Supervisors has consistently sought to protect the rights of all County residents to be free from discrimination, abuse, violence, and exploitation, as reflected by its enduring commitment to protecting victims of hate crimes, domestic violence, elder abuse, human trafficking, and immigration practitioner fraud in Santa Clara County; and

WHEREAS, in this time of economic difficulties, the Board of Supervisors remains committed to maximizing public safety, public health, and vital services on which the entire community depends, and recognizes that the best way to achieve these priorities is to foster an environment of inclusiveness and trust between the government and all County residents;

NOW, THEREFORE, BE IT RESOLVED that, as to all County departments and agencies subject to the Board of Supervisors' jurisdiction:

1. No County department, agency, officer, or employee shall initiate any inquiry or enforcement action based solely on a person's actual or suspected immigration status, national origin, race, ethnicity, and/or inability to speak English.

2. No County department, agency, officer, or employee shall use any County funds, resources, or personnel to investigate, question, apprehend, or arrest an individual solely for an actual or suspected civil violation of federal immigration law.

3. No County department, agency, officer, or employee shall condition the provision of County services or benefits on the citizenship or immigration status of the individual except where such conditions are lawfully imposed by federal or state law or local public assistance eligibility criteria.

4. No County department, agency, officer, or employee who collects information for the purpose of determining eligibility for services or benefits, or for seeking reimbursement from federal, state, or third-party payors, shall use any County funds or resources to provide that information to ICE for purposes of assisting in the enforcement of federal civil immigration law.

5. The County calls on ICE agents performing official business in the County to identify themselves as federal immigration officers, to make clear that they are not officers, agents, or employees of the County, and to comply with legal mandates to

refrain from racial profiling and to respect the due process rights of County residents, including but not limited to providing all required warnings concerning an individual's right to remain silent, the right not to sign documents he or she does not understand, and the right to speak with a lawyer.

BE IT FURTHER RESOLVED that:

6. Nothing in this resolution shall be construed to prohibit any County officer or employee from participating in task force activities with federal criminal law enforcement authorities.

7. Nothing in this resolution shall be construed to prohibit any County law enforcement officer from investigating violations of criminal law.

8. The County Counsel shall work with County departments and agencies to implement this resolution.

9. The Clerk of the Board shall make copies of this resolution available to the public in English, Spanish, Vietnamese, Chinese, and Tagalog.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Danielle L. Goldstein
DANIELLE L. GOLDSTEIN