No. 17-17478 and 17-17480

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

City and County of San Francisco, et al.,
Plaintiffs-Appellees,

v.

Jefferson B. Sessions, III et al.,
Defendants-Appellants.

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

Brief of Amici Curiae The International Municipal Lawyers Association, The National League of Cities, The U.S. Conference of Mayors, and The International City/County Management Association Supporting Plaintiffs-Appellees

Dated: February 12, 2018

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that *amici curiae* The International Municipal Lawyers Association, The National League of Cities, The U.S. Conference of Mayors, and The International City/County Management Association have no corporate parent, and no publicly held corporation holds 10% of any stock these entities might issue.

Dated: February 12, 2018

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IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

Amici Curiae The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935.[2] The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans. The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor. The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants

[1] No parties' counsel authored this brief in whole or in part, no party or its counsel contributed money intended to fund preparation or submission of this brief, and no person other than the *amici* or their counsel contributed money that was so intended. Fed. R. App. P. 29(a)(4)(E). *Amici* have requested and received all parties' consent to the filing of this *amicus* brief pursuant to Fed. R. App. P. 29(a)(2).

[2] IMLA develops and advances solutions to important legal issues faced by local governments, and serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada, and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members facing legal challenges.

serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

This *amicus* brief provides, among other things, the perspective of attorneys across the country who must advise their municipal clients on whether and how, if at all, those municipal clients should comply with Executive Order 13768, entitled "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order"). Moreover, the *amici* here represent a broad spectrum of localities with diverse populations and varying approaches to local policy, but these varying approaches are grounded in a common uniting principle: the critical importance of tailoring local policies, particularly policies relating to law enforcement, to community needs.

The Executive Order directly affects the *amici*'s clients and constituents. More specifically, the Executive Order conditions municipalities' receipt of all federal funding on, among other things, municipalities' compliance with extra-judicial and unconstitutional ICE detainer requests. The Executive Order thus places the *amici*'s members in an untenable situation: either advise or effectuate constitutional violations to ensure continued receipt of mission-critical federal monies, or advise or effectuate violation of the Executive Order and risk

termination of that federal funding. *Amici* are therefore deeply interested in the issues presented to the Court by the parties.

Moreover, the *amicus* brief is directly relevant to the issues raised in these appeals. Specifically, the *amicus* brief explains that the Executive Order violates the federal spending power because it conditions the receipt of federal funds on States and municipalities violating individuals' Fourth Amendment rights, and because the Executive Order imposes a funding condition on *all* federal funding that is not related to the purpose underlying *all* federal funding. The *amicus* brief also explains that the Executive Order commandeers State and local law enforcement in enforcing federal immigration laws, in violation of the Tenth Amendment. These matters are directly relevant to the disposition of the issues in this matter before the Court.

PRELIMINARY STATEMENT

Amici Curiae The International Municipal Lawyers Association, The National League of Cities, The U.S. Conference of Mayors, and The International City/County Management Association submit this brief in support of Plaintiffs-Appellees the County of Santa Clara's and City and County of San Francisco's (collectively, the "Counties") Answering Briefs. In granting summary judgment in favor of the Counties, the United States District Court for the Northern District of California ("District Court") correctly determined that Executive Order 13768, titled "Enhancing Public Safety in the Interior of the United States," Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order"), is unconstitutional. The District Court should be affirmed for at least three reasons.

First, the Executive Order requires State and local governments to violate the Fourth Amendment in order to obtain federal funding. This is an "illegitimate" and unconstitutional funding condition. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

Second, as the District Court correctly concluded (Excerpts of Record for Appellants Jefferson B. Sessions, *et al.* ("ER") 24-25), the Executive Order is overly broad because it is not tailored to the specific governmental interest it purports to advance. Instead, the Executive Order conditions *all* federal funding, or at a minimum *all* federal grants, on States' and local governments' cooperation

in enforcing immigration laws, even when the federal funding has nothing to do with immigration. For example, enforcing federal immigration laws is not even remotely related to federal funding programs dedicated to scientific research, youth homelessness, or hurricane recovery efforts. By conditioning States' and local governments' eligibility for these and all other types of federal funding on States' and local governments' cooperation in enforcing immigration laws, the Executive Order violates the Constitution. *Dole*, 483 U.S. at 207-08.

Third, as the District Court correctly concluded (ER 26-27), the Executive Order commandeers State and local law enforcement, in violation of the Tenth Amendment. Specifically, the Executive Order conditions all federal funding (or at a minimum all federal grants) on States' and local governments' cooperation in enforcing federal immigration laws, and compliance with unconstitutional federal ICE detainer requests. This is "economic dragooning that leaves the States" and local governments "with no real option but to acquiesce," and is unconstitutional. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012).

ARGUMENT

I. The Executive Order Unlawfully Induces States and Local Governments to Violate the Fourth Amendment.

The Executive Order is unconstitutional because it conditions federal funding on States' and local governments' compliance with unlawful ICE detainer requests, even where detaining individuals in compliance with unlawful ICE detainer requests violates those individuals' Fourth Amendment rights.

The United States Supreme Court has held that Congress's spending "power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Where Congress imposes a condition on federal funding that requires States to "violate the constitutional rights" of individuals, the funding condition is "illegitimate" and unconstitutional. *Id.* at 210-11; *see also All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 239 (2d Cir. 2011) (affirming preliminary injunction barring enforcement of statute that conditioned funding on First Amendment violations); *Massachusetts v. U.S. Dep't. of Health & Human Servs.*, 698 F. Supp. 2d 234, 248-49 (D. Mass. 2010) (concluding that DOMA unconstitutionally exceeded Congress's spending power by "impermissibly condition[ing] the receipt of federal funding on the state's violation of the Equal Protection Clause of the Fourteenth Amendment"); *Am. Civil Liberties Union v. Mineta*, 319 F. Supp. 2d 69, 86-87

(D.D.C. 2004) (permanently enjoining enforcement of statute that conditioned funding on unconstitutional infringement of First Amendment rights).

The Executive Order here is of course not a statute enacted by Congress, but rather, an edict issued by the President. Setting aside the fact that the Executive Order violates the separation of powers enumerated in the Constitution (ER 20-23), the limitations on the use of the federal spending power described in *Dole* and its progeny apply with at least equal force here, given that the President's Executive Order purports to wield the spending power that the Constitution vests exclusively with Congress. Here, the Executive Order far exceeds the spending power limitations set forth in *Dole*, by explicitly coercing States and local governments to unlawfully detain individuals in violation of those individuals' Fourth Amendment rights. Although the District Court did not expressly find the Executive Order unconstitutional on this basis, the District Court's judgment may – and should – be affirmed on this basis given its ample support in the record. *See Crowley v. Nevada ex rel. Nevada Sec. of State*, 678 F.3d 730, 734 (9th Cir. 2012) (a District Court's judgment may be affirmed on appeal on "any ground supported by the record").

A. The Executive Order Conditions Federal Funding On States' and Local Governments' Compliance With Unconstitutional ICE Detainer Requests.

Pursuant to the Executive Order, a State's or local government's eligibility for *any* federal funding, or at a minimum *any* federal grant, is contingent upon the State or local government complying with both 8 U.S.C. § 1373 and unconstitutional ICE detainer requests.

At a minimum, the Executive Order imposes a condition on all federal grants. Section 9(a) of the Executive Order directs the Attorney General and Secretary of the Department of Homeland Security to withhold federal funding from "sanctuary jurisdictions." Per Section 9(a), those officers "*shall ensure* that jurisdictions that willfully refuse to comply with 8 U.S.C. [§] 1373 *(sanctuary jurisdictions) are not eligible to receive Federal grants* . . . ." (Emphasis added). In Section 9(b), the Executive Order defines a "sanctuary jurisdiction" as "***any*** jurisdiction that ignore[s] or otherwise fail[s] to honor any detainers with respect to . . . aliens." (Emphasis added). Thus, as the District Court correctly concluded, "the Executive Order equates 'sanctuary jurisdictions' with 'any jurisdiction that ignore[s] or otherwise fail[s] to honor any [ICE] detainer[]" requests, and "therefore places such jurisdictions at risk of losing all federal grants." ER 26. The District Court concluded that "Section 9(a) [of the Executive Order] does not threaten all federal funding, but it does include all federal grants." ER 17. The District Court thus focused in large part on the Executive Order's imposition of

conditions on all federal grants, "which make up a significant part of the Counties' budgets" here. *See id.*

Although the District Court correctly determined that the Executive Order imposes a condition on all federal grants, the Executive Order also imposes the same condition on all other federal funding. Indeed, as the District Court accurately concluded, the "rest of the Executive Order is broader" than Section 9(a), and "address[es] all federal funding." ER 6. More specifically, according to the Executive Order, "[s]anctuary jurisdictions . . . willfully violate Federal law." Executive Order, § 1. As Section 2(c) states, "[i]t is the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law" – *i.e.*, sanctuary jurisdictions – "***do not receive Federal funds***." (Emphasis added). The Executive Order's plain language thus makes it clear that the Executive Order's purpose is to withhold from sanctuary jurisdictions all federal funds.

That the Executive Order is intended to – and does – impose a condition on all federal funding, including grants, is corroborated by Defendants' numerous statements concerning the scope of the Executive Order. *See, e.g.*, Supplemental Excerpts of Record of Appellee City and County of San Francisco ("SF SER") 8, 21. In the words of former White House Press Secretary Sean Spicer, the Executive Order "strip[s] federal grant money from sanctuary states and cities,"

"halt[s] federal funding for sanctuary cities," and is "very clear . . . that federal funds . . . should not be used to help fund sanctuary cities." ER 163; *see also id.* at 15–16. Defendants have reiterated that the Executive Order is a "weapon" that will "defund" sanctuary jurisdictions by depriving them of "the money they need to properly operate," and "make[s] sure" that sanctuary jurisdictions "don't get federal government funding." *Id.* at 164; *see also id.* at 15–16. Thus, as Defendants have made clear, the Executive Order imposes a condition on *all* federal funding, including but not limited to federal grants.[3]

On appeal, Defendants nowhere dispute that the Executive Order is unconstitutional if it conditions all federal funding on compliance with federal immigration laws and unlawful ICE detainer requests. Instead, Defendants argue that on its face, the Executive Order merely "directs the Attorney General and the Secretary [of the Department of Homeland Security], to the extent permitted by law, to impose and enforce a condition on federal grants that requires recipients to comply with 8 U.S.C. § 1373." Case No. 17-17478, Dkt. 3, at 15. Defendants

[3] There is no distinction between federal "grants" and federal "funding" paid in connection with "entitlement programs," such as Medicaid, Temporary Assistance for Needy Families ("TANF"), Supplemental Nutrition Assistance Program ("SNAP"), and Foster Care. *See Sebelius*, 567 U.S. at 575 (Medicaid funding is a "grant"); *Ariz. v. Thompson*, 281 F.3d 248, 250 (D.C. Cir. 2002) (TANF "provides federal block grants"); 42 U.S.C. § 403 (TANF provides "Grants to States"); 7 U.S.C. §§ 2020(t), 2026 (identifying various SNAP-related "grants"); 42 U.S.C. § 627 (foster care funding through "matching grants").

contend that the Executive Order "applie[s] solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding." *Id.* at 18-19. Defendants also contend that according to the Attorney General's interpretation, the Executive Order does not purport to "compel[] the Attorney General and the Secretary of Homeland Security to impose new conditions on all federal funding, without regard to whether the conditions are otherwise authorized." *See id.* at 15-16. Defendants are incorrect.

Defendants offer no support for their assertion that the Attorney General may rewrite the Executive Order by interpreting it more narrowly than the Executive Order's plain language commands. And contrary to Defendants' assertions and the Attorney General's interpretation, the plain language of the Executive Order does not narrowly apply only to future grant conditions that the Attorney General and Secretary of Homeland Security may choose to impose on grants administered solely by their respective Departments. Nor is the funding condition imposed by the Executive Order limited to compliance with 8 U.S.C. § 1373. Rather, the Executive Order is clear that jurisdictions that do not comply with 8 U.S.C. § 1373 *and* unlawful ICE detainer requests are sanctuary jurisdictions that are ineligible for *all* federal funding. Defendants' own statements confirm this.

First, as discussed above, Defendants' statements confirm that the Executive Order targets *all* federal funding; it is a "weapon" intended to "defund" sanctuary jurisdictions. ER 15-16. Second, Defendants' statements confirm that a jurisdiction's eligibility for *all* federal funding hinges on whether the jurisdiction honors unlawful ICE detainer requests. Indeed, Defendants repeatedly and publicly have explained that the term "sanctuary jurisdictions" encompasses all jurisdictions that do not comply with both the letter of 8 U.S.C. § 1373 *and* with unconstitutional ICE detainer requests. In particular, Defendants have labeled San Francisco – a jurisdiction that complies with 8 U.S.C. § 1373 *but not* with unconstitutional ICE detainer requests (ER 11–12) – as one of their primary "sanctuary jurisdiction" targets (*id.* at 15–17).

Defendants persistently have targeted San Francisco throughout this litigation, even after they expressly designated San Francisco as a "sanctuary jurisdiction." For example, recently, on November 30, 2017, Defendant Sessions released a statement concerning the highly publicized acquittal of Jose Ines Garcia Zarate in connection with a San Francisco-based murder trial. Defendant Sessions denounced San Francisco for failing to "honor[] an ICE detainer" and "refusing to cooperate with federal law enforcement officers."[4] Then, on January 24, 2018, the

[4] *See Attorney General Sessions Statement on the Verdict in People of the State of California vs. Jose Ines Garcia Zarate aka Juan Francisco Lopez Sanchez*, Office of Public Affairs, U.S. Dep't of Justice (Nov. 30, 2017), https://www.justice.gov/

Department of Justice issued a letter to San Francisco and twenty-two other jurisdictions, requesting certain documents due to the Department of Justice's avowed "concern[]" that San Francisco's and those other jurisdictions' "laws, policies, or practices may violate Section 1373, or, at a minimum, that they may be interpreted or applied in a manner inconsistent with section 1373."[5] The Department of Justice threatened among other things that it may "seek return" of San Francisco's "FY 2016 subgrant funds," in addition to withholding from San Francisco certain specifically identified types of federal funding. *Id.* Thus, although San Francisco abides by 8 U.S.C. § 1373, San Francisco is a "sanctuary jurisdiction" squarely in Defendants' sights because it does not honor unlawful ICE detainers. Under the Executive Order, San Francisco is thus in jeopardy of losing all of its federal funding, as Defendants' statements make clear.

Consideration of Defendants' statements corroborating the Executive Order's plain language is not improper. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 600 (4th Cir.), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), *and vacated and remanded as moot sub nom. Trump v. Int'l Refugee Assistance*, 138 S.

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opa/pr/attorney-general-sessions-statement-verdict-people-state-california-vs-jose-ines-garcia.

[5] *See, e.g.*, Adler, J., U.S. Dep't of Justice, *RE: Document request for Grant 2016-DJ-BX-0898, City and County of San Francisco, California* (Jan. 24, 2018), *available at* https://www.justice.gov/opa/press-release/file/1028311/download.

Ct. 353, 199 L. Ed. 2d 203 (2017) (considering President Trump's campaign statements in assessing Establishment Clause challenge, as "courts regularly evaluate decisionmakers' statements that show their purpose for acting"); *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (same).[6] These statements make clear that contrary to Defendants' post-litigation interpretation of the Executive Order, the Executive Order mandates that a "sanctuary jurisdiction" is a jurisdiction that does not honor unlawful ICE detainer requests, rendering such a jurisdiction ineligible for all federal funding pursuant to the Executive Order's plain language.

B. Compliance with Unconstitutional ICE Detainer Requests Lacking Probable Cause Violates The Fourth Amendment.

The Executive Order demands States' and local governments' strict compliance with unconstitutional ICE detainer requests, and makes no exception for instances where detainer requests are not supported by probable cause. But States and local governments cannot constitutionally detain an individual based solely on the fact that ICE requests the detention. That is prohibited by the Fourth Amendment.

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[6] *See also United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1084-86 (5th Cir. 1983) (finding executive branch representatives' statements "dispositive" as to scope of Executive Order); *see also Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1293-94 (courts may consider "ordinar[y]" meaning and "common usage" of terms in executive order).

Under the Fourth Amendment, "a fair and reliable determination of probable cause" must be made before a state actor may constitutionally hold an individual in custody. *Baker v. McCollan*, 443 U.S. 137, 142 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (probable cause is necessary for any "extended restraint of liberty following arrest"). More specifically, although the Fourth Amendment permits law enforcement to briefly detain an individual based on a reasonable suspicion that the individual is engaged in criminal activity, "any further detention" – including by holding an individual in custody – "***must*** be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (emphasis added); *see also Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST , 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) ("Prolonged detention after a seizure, such as full custodial confinement without a warrant, must be based on probable cause.").

ICE detainer requests are not warrants based on probable cause. *See Galarza v. Szalczyk*, 745 F.3d 634, 637 (3d Cir. 2014) ("The detainer was accompanied by neither a warrant, an affidavit of probable cause, nor a removal order.").[7] In fact, the applicable federal regulation governing ICE detainer requests

[7] *See also Mendia v. Garcia*, 165 F. Supp. 3d 861, 888-89 (N.D. Cal. 2016) (sustaining claims predicated on lack of probable cause underlying ICE detainer request); *Miranda-Olivares*, 2014 WL 1414305, at *10-11 (ICE detainer request not founded on probable cause); *Mercado v. Dallas Cty., Texas*, 229 F. Supp. 3d

does not condition the issuance of such requests on the existence of probable cause. *See* 8 C.F.R. § 287.7. Rather, the applicable regulation authorizes several categories of federal officers to issue detainer requests whenever the federal government "seeks custody of an alien . . . for the purpose of arresting and removing the alien," regardless of whether there is probable cause to believe that the suspected alien has committed a crime. *Id.* §§ 287.7(a)-(b).

ICE detainer requests also cannot meet the probable cause requirement to the extent they are directed to civil, as opposed to criminal, conduct. The probable cause required to support the custodial detention of an individual "can *only* exist in relation to *criminal* conduct" and "*civil disputes cannot give rise to probable cause*." *Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1995) (emphasis added). Unauthorized presence in the United States is merely a civil infraction; "it is not a crime." *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). Accordingly, where law enforcement detains an individual who lacks authorization to be in the country "based on nothing more than [the individual's] possible removability," the "predicate" probable cause required to justify the detention "is absent." *See id.*

501, 511 (N.D. Tex. 2017) (same); *Orellana v. Nobles Cty.*, 20 F. Supp. 3d 934, 946-47 (D. Minn. 2017) (same).

For these reasons, State and local governments violate the Fourth Amendment where they "blindly compl[y]" with ICE detainer requests devoid of facts supporting a probable cause determination, even where such requests allege that the individual whose detention is sought lacks authorization to be in the United States. *See Morales v. Chadbourne*, 235 F. Supp. 3d 388, 406 (D.R.I. 2017); *Galarza*, 745 F.3d at 645 (reversing dismissal of §1983 claims against county that complied with ICE detainer request absent probable cause); *see also* ER 10 (recognizing that "[s]everal courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because those requests are often not supported by an individualized determination of probable cause that a crime has been committed.").

In fact, State and local governments can be civilly liable for honoring ICE requests that violate the Fourth Amendment. *See Orellana*, 230 F. Supp. 3d at 948-49 (denying county's motion for summary judgment on claim under 42 U.S.C. § 1983 arising out of unlawful detention); *Mercado*, 229 F. Supp. 3d at 512-13 (sustaining § 1983 claims against county arising out of unlawful detention); *Alcocer v. Bulloch Cty. Sheriff's Office*, No. CV 615-94, 2017 WL 4386969, at *12 (S.D. Ga. Sept. 29, 2017) (denying in part defendants' motion for summary judgment, and permitting to proceed to trial plaintiff's claims that certain

municipal law enforcement officers detained her in violation of the Fourth Amendment); *Santoyo v. United States*, No. 5:16-CV-855-OLG, 2017 WL 2896021, at *7 (W.D. Tex. June 5, 2017) (granting summary judgment in favor of plaintiff as to liability with respect to claim arising out of unlawful detention pursuant to ICE detainer request).[8]

The Executive Order does not permit States and local governments to decline to adhere to ICE detainer requests on grounds they violate the Fourth Amendment. To the contrary, the Executive Order conditions a jurisdiction's eligibility for federal funding on strict obedience with "***any***" ICE detainer request, regardless of whether the detainer request is supported by probable cause. Executive Order, §§ 9(a)–(b) (emphasis added). This sort of strongarm tactic to engage in unlawful activity is unconstitutional. *Dole*, 483 U.S. at 217-18.

The Executive Order thus presents municipal lawyers with a Hobson's choice. On the one hand, municipal lawyers could advise their clients to comply with the Executive Order by honoring ICE detainer requests. To do so, municipal

[8] The County in *Miranda-Olivares* settled the plaintiff's wrongful detention claims for $30,100 and was ordered to pay the plaintiff's fees and costs, totaling $97,373.14. *See* Case No. 3:12-cv-2317-ST, Dkt. No. 163 (Opinion and Order), at 1 (D. Or. Aug. 28, 2015). If Santa Clara honored all ICE detainer requests, was sued by each of the 135 individuals it held pursuant to ICE detainer requests each day on average prior to October 2011 (*see* Supplemental Excerpts of Record of Appellee County of Santa Clara ("SC SER") 196), and entered into comparable settlements with each of them, the aggregate cost of those settlements alone would exceed $17,000,000.

lawyers would have to counsel their clients to engage in behavior that courts across the country have found to be both unconstitutional and grounds for imposing civil liability. On the other hand, municipal lawyers could advise their clients not to abide by the Executive Order's provisions requiring compliance with ICE detainer requests. To so advise their clients, however, municipal lawyers would be encouraging municipalities to engage in behavior that jeopardizes mission-critical federal funding.

II. The Executive Order Violates the Spending Clause By Conditioning *All* Federal Funding on Actions Not Reasonably Related to *All* Federal Funding.

The Executive Order is unconstitutional because it conditions *all* federal funding on assistance with federal immigration law enforcement, despite the fact that not *all* federal funding is related to federal immigration law enforcement. The Supreme Court in *Dole* cautioned that conditions on federal funding are "illegitimate if they are unrelated to the federal interest" in the "particular national projects or programs" through which such funds are granted. *See Dole*, 483 U.S. at 207-08 (citing *Massachusetts v. United States*, 435 U.S. 444 (1978)); *see also Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."). The Executive Order here conditions States' and local governments' eligibility for *all* federal funding on their assistance with the enforcement of federal immigration laws. The

enforcement of federal immigration laws, however, is not related to *all* federal funding programs and projects – not even close.[9]

A. The Executive Order Conditions *All* Federal Funding, or at a Minimum *All* Federal Grants, On States and Local Governments Assisting with Enforcing Federal Immigration Laws.

As discussed above, *supra* at § 1.A, pursuant to the Executive Order, a State's or local government's eligibility for *any* federal funding, or at a minimum *any* federal grant, is contingent upon the State or local government complying with both 8 U.S.C § 1373 and ICE detainer requests.

B. Assistance With Enforcing Federal Immigration Laws Is Not Reasonably Related To *All* Federal Funding.

States' and local governments' assistance with enforcing federal immigration laws is not reasonably related to the purpose of *all* federal funding, yet the Executive Order unconstitutionally conditions *all* federal funding for States and local governments on their assistance with enforcing federal immigration laws. Indeed, San Francisco and other jurisdictions across the country receive federal funding through programs and projects that have nothing to do with the

[9] Jurisdictions across the country are making budgeting decisions, including whether or not to continue critical programs that depend on federal funding. Particularly given Defendants' repeated statements confirming their intent to defund sanctuary jurisdictions – and their specific focus on and threats aimed at San Francisco as recently as three weeks ago – sanctuary jurisdictions need not wait until Defendants make good on their promises. Whether the Executive Order is unconstitutional remains a ripe issue. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (after being warned of prosecution by police, plaintiff need not "first expose himself to actual arrest or prosecution" before challenging a statute).

enforcement of federal immigration laws. Assisting with the enforcement of federal immigration laws, however, is the condition that the Executive Order purports to impose on funding from those unrelated programs and projects. As the District Court aptly concluded, "there is no nexus" between the federal immigration law policy that the Executive Order seeks to promote "and most categories of federal funding, such as funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness." ER 24. The Executive Order's funding condition is thus "illegitimate." *See Dole*, 483 U.S. at 207-08; *see also New York v. United States*, 505 U.S. 144, 167 (1992) (federal funding conditions "must (among other requirements) bear some relationship to the purpose of the federal spending[;] otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority").

Here, for example, San Francisco receives Medicaid funding from the federal government. SF SER 49–50. Medicaid's purpose is to "enabl[e] each State . . . to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396-1. The federal government pays

no Medicaid funding to enable States to provide medical assistance to undocumented immigrants, save for narrowly defined medical emergencies. Assisting the federal government with the enforcement of federal immigration laws has absolutely nothing to do with furnishing medical and rehabilitation services to individuals who are unable to afford such services, particularly because undocumented immigrants are largely ineligible to receive such services in the first place.[10]

By way of further example:

- On January 12, 2018, the Federal Disability and Rehabilitation Research Projects Program of the Department of Health and Human Services issued a notice that it was accepting applications (including from states and counties) for a new federal grant related to the Traumatic Brain Injury Model System (TBIMS) Centers Collaborative Research Project, for the purpose of "improve[ing] the lives of individuals with TBI [traumatic brain injuries] through a multi-site collaborative research project on a topic(s) related to rehabilitation following TBI."[11]

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[10] *Cf. Texas v. United States*, No. 7:15-cv-00151-O, 2016 WL 4138632, at *16-17 (N.D. Tex. Aug. 4, 2016) (sustaining constitutional challenge to condition on Medicaid funding that required States to reimburse healthcare organizations that served individuals who did not qualify for Medicaid).

[11] *See* https://www.grants.gov/web/grants/view-opportunity.html?oppId=299530.

- Days before the Executive Order was issued, San Francisco was awarded a $2.9 million grant in connection with the Department of Housing and Urban Development's Youth Homelessness Demonstration Program, to aid San Francisco in building systems intended to end youth homelessness.[12]

- Florida's Department of Economic Opportunity has been awarded a federal grant of up to $7,035,611 to fund "disaster relief employment for eligible individuals in clean-up and recovery efforts resulting from the effects of Florida Hurricane Matthew."[13]

- Missoula, Montana recently received a federal Small Community Air Service Development grant to fund a "new service from Missoula International Airport to the southern United States, specifically targeting the North Texas region."[14]

- The City of Providence, Rhode Island has received a federal grant of $25,000 from the National Endowment for the Arts "[t]o support a creative

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[12] *See Youth Homelessness Demonstration Program Community Selection Announcement*, HUD Exchange (Jan. 13, 2017), https://www.hudexchange.info/news/youth-homelessness-demonstration-program-community-selection-announcement/.

[13] *See National Dislocated Worker Grant (DWG) Summary*, U.S. Dep't of Labor, https://www.doleta.gov/DWGs/Grant-Awards/docs/FL-Disaster-Hurricane-Matthew-One-Rager-PY16.pdf.

[14] *See* https://cms.dot.gov/sites/dot.gov/files/docs/FY%2016%20SCASDP%20Selection%20Order%202016-6-21.pdf

collaboration between Trinity Repertory Company, The Steel Yard, and neighborhood residents to present public performances of adaptations of the works of Shakespeare."[15] Providence has recently declared itself a sanctuary city.[16]

- The City of Little Rock, Arkansas received a grant of nearly $500,000 from the National Park Service's African American Civil Rights Grant Program, paid through the Historic Preservation Fund for the preservation of Central High School, a civil rights monument.[17]

- The Idaho State Department of Agriculture has received through the U.S. Department of Agriculture's Specialty Crop Block Grant program nearly $2,000,000 to fund sixteen projects, one of which is designed to "fill significant knowledge gaps in the Fusarium proliferatum [fungus] and onion interaction that results in onion bulb rot."[18]

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[15] *See* Nat'l Endowment for the Arts, Grant No. 16-6200-7049, *available at* https://apps.nea.gov/grantsearch/.

[16] *See* Dan McGowan, *Mayor Elorza now calls Providence a sanctuary city, but isn't planning policy changes* (Jan. 31, 2017), *available at* http://wpri.com/2017/01/31/mayor-elorza-now-calls-providence-a-sanctuary-city-but-isnt-planning-policy-changes/.

[17] *See National Park Service Announces Over $7.5 Million in Grants to Preserve African American Civil Rights Movement Sites* (Jan. 12, 2017), https://www.nps.gov/orgs/1207/01-12-2017-civil-rights-grants.htm.

[18] *See* https://www.ams.usda.gov/sites/default/files/media/SCBGP2016DescriptionofFundedProjects.pdf

Enforcing federal immigration laws is not related to States' or local governments' scientific research concerning traumatic brain injuries, efforts to curb youth homelessness, hurricane recovery efforts, flight services, neighborhood productions of *Romeo and Juliet*, preservation of civil rights monuments, or crop blights. The Executive Order unconstitutionally threatens to cut all of this funding unless States and local governments comply with unlawful ICE detainer requests.

III. The Executive Order Violates the Tenth Amendment.

The Tenth Amendment demands that "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." U.S. Const., Art. X. Pursuant to the Tenth Amendment, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). As the District Court correctly concluded, "[t]he Executive Order's threat to pull all federal grants from jurisdictions that refuse to honor detainer requests . . . violates the Tenth Amendment's prohibitions against commandeering." ER 27.[19]

[19] The District Court also correctly concluded that the Executive Order violates the Tenth Amendment insofar as it threatens federal government enforcement actions against any jurisdiction that violates 8 U.S.C. § 1373. ER 26-27.

The Third Circuit's decision in *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), is directly on point. There, the Court addressed whether 8 C.F.R. § 287.7 – the federal regulation authorizing the issuance of ICE detainers – empowers federal officers to command States and local governments to hold suspected aliens in custody. *Id.* at 643-45. The Court carefully analyzed the relevant case law, as well as the text of Section 287.7 providing that the federal government "shall incur [no] fiscal obligation" related to any detainer request. *Id.* at 643-44 (citing 8 C.F.R. § 287.7(e)). The Court then acknowledged that "[u]nder the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government," and that a "command to detain federal prisoners at state expense is exactly the type of command that has historically disrupted our system of federalism." *Id.* at 643-44. Given the "constitutional problems" that would arise if ICE detainer requests commanded States and local governments to house suspected aliens at their own cost, the Court concluded that the language of Section 287.7 "authoriz[ed] only permissive requests." *Id.* at 645; *see also* ER 27 (reasoning that ICE detainer requests are "voluntary 'requests' precisely because the federal government cannot command states to comply with them under the Tenth Amendment").

Here, the Executive Order elevates ICE detainer requests from requests to mandatory commands, and thus presents precisely the same "constitutional

problems" that concerned the Third Circuit in *Galarza*. Indeed, the Executive Order effectively commands States and local governments to honor ICE detainer requests by resorting to "economic dragooning that leaves the States" and local governments "with no real option but to acquiesce." *See Sebelius*, 567 U.S. at 582. The funding condition here is just as coercive as the one that the Supreme Court struck down in *Sebelius*. Specifically, in *Sebelius*, the Court concluded that imposing a funding condition on approximately 10% to 16% of a State's total budget was an unconstitutional "gun to the head." *Id.* at 642. The same is true here, where the Executive Order imposes a condition on approximately 13% of San Francisco's total budget, and approximately 11% of Santa Clara's total budget. SF SER at 48–49; SC SER at 121–23. The Executive Order is thus unconstitutional because it puts a gun to the head of States and local governments, coercing them to "imprison suspected aliens subject to removal at the request of the federal government," in violation of the Tenth Amendment. *See Galarza*, 745 F.3d at 643-45.

The Executive Order upends police powers traditionally reserved for the States and local governments. Indeed, "the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000); *Bond v. United States*, 134 S. Ct. 2077,

2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity."). The reservation of the general police power to the States and local governments was no accident. As courts have long recognized, State and local municipalities are best equipped to design and maintain law enforcement policies to enhance the safety of their communities, and thus "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (recognizing "fundamental policy against federal interference with state criminal prosecutions"); *see also United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (citation and internal quotation marks omitted)).

Here, for example, San Francisco has already made the determination that complying with ICE detainer requests "undermine[s]" law enforcement by "instilling fear in immigrant communities of coming forward to report crimes and cooperate with local law enforcement agencies." ER 155, ¶ 31. The Executive Order purports to cast aside this locally-sensitive determination, and instead imposes a blanket federal policy that dictates how San Francisco and all other State and local governments are required to operate, leaving them *less* safe and *less* engaged. This is precisely the reason why the Executive Order violates the Tenth Amendment, and why the District Court's ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, the Executive Order is unconstitutional, and the District Court's judgment so concluding should be affirmed.

Respectfully submitted,

Amici Curiae The International Municipal Lawyers Association, The National League of Cities, The U.S. Conference of Mayors, and The International City/County Management Association in Support of Plaintiffs-Appellees

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Dated: February 12, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1 and Fed. R. App. P. 29(a)(5). The brief is 6,273 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) because the brief was prepared in a porportionally spaced typeface using Times New Roman in Microsoft Word 2010 in Times New Roman, size 14.

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I hereby certify that I electronically filed the foregoing Brief of Amici Curiae The International Municipal Lawyers Association, The National League of Cities, The U.S. Conference of Mayors, and The International City/County Management Association Supporting Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 12, 2018.

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