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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 COUNTY OF SANTA CLARA,

17 Plaintiff,

18 v.

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

Defendants.

Case No. 17-cv-00574-WHO

**COUNTY OF SANTA CLARA'S MOTION
FOR PRELIMINARY INJUNCTION**

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

Date Filed: February 3, 2017

Trial Date: Not yet set

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, April 5, 2017, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the Honorable William H. Orrick at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff County of Santa Clara (the “County”) shall and hereby does move the Court pursuant to Federal Rule of Civil Procedure 65 for a preliminary injunction against Defendants Donald J. Trump, President of the United States of America, John F. Kelly, in his official capacity as Secretary of the United States Department of Homeland Security, Jefferson B. Sessions,¹ in his official capacity as Attorney General of the United States, and John Michael “Mick” Mulvaney,² in his official capacity as Director of the Office of Management and Budget (collectively, “Defendants”), and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them (the “Enjoined Defendants”). Defendants are responsible for issuing, implementing, and enforcing an unconstitutional executive order—Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the “Executive Order”)—which attempts to render “sanctuary jurisdictions” ineligible to receive all “Federal funds,” and to subject them to “enforcement action[s].” The County respectfully moves the Court to enter a nationwide preliminary injunction prohibiting the Enjoined Defendants from:

1. Enforcing Section 9 of the Executive Order;
2. Taking any action in furtherance of any withholding or conditioning of federal funds pursuant to the Executive Order; and
3. Taking any action pursuant to the Executive Order to declare any jurisdiction ineligible for federal funds or deprive any jurisdiction of funds already appropriated or allocated by Congress.

¹ Mr. Sessions was sworn in as Attorney General on February 9, 2017, thereby replacing Acting Attorney General Dana Boente as a defendant pursuant to Fed. R. Civ. P. 25(d).

² Mr. Mulvaney was sworn in as Director of the Office for Management and Budget on February 16, 2017, thereby replacing Acting Director Mark Sandy as a defendant pursuant to Fed. R. Civ. P. 25(d).

1 Absent a preliminary injunction, the County and its approximately 1.9 million residents
2 will suffer immediate, ongoing, and irreparable harm resulting from the Executive Order's
3 violation of the Constitution's separation of powers, the Tenth Amendment's prohibition on
4 commandeering state or local governments to act as arms of the federal government, and the Fifth
5 Amendment's Due Process Clause. The County is suffering four types of irreparable harm, any
6 one of which justifies the injunctive relief the County seeks. First, the County's constitutional
7 injuries constitute irreparable harm as a matter of law. Second, the Executive Order irreparably
8 harms the County by attempting to force it to alter its policies and practices under threat of losing
9 its federal funding. Third, because the County's federally funded programs operate continuously
10 and largely on a reimbursement basis, the County must decide *now* whether to continue
11 expending those funds, or instead discontinue essential safety-net services, shelve plans, and cut
12 staff. Fourth, by threatening roughly 35% of the County's annual budget, the Executive Order
13 has created a cloud of fiscal and budgetary uncertainty so overwhelming that it is imperiling the
14 County's ability to function. The requested injunction will alleviate these harms. And the
15 public—including the County's residents—have an overwhelming interest in preventing
16 Defendants from implementing this unconstitutional order.

17 This motion is based on this Notice of Motion and Motion, the accompanying supporting
18 Memorandum of Points and Authorities, the supporting declarations of Sara H. Cody, M.D.
19 (County Public Health Officer), Paul Lorenz (Chief Executive Officer of Santa Clara Valley
20 Medical Center), Miguel Márquez (County Chief Operating Officer), Robert Menicocci (Director
21 of the County's Social Services Agency), Carl Neusel (Undersheriff of the County), Dana Reed
22 (Director of the County's Office of Emergency Services), Jeffrey F. Rosen (District Attorney of
23 the County), Jeffrey V. Smith (County Executive), Laurie Smith (Sheriff of the County), and
24 Cody S. Harris, as well as the papers, evidence and records on file in this action, and any other
25 written or oral evidence or argument as may be presented at or before the time this motion is
26 heard by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

On January 25, 2017, President Donald J. Trump issued an executive order granting the Attorney General and the Secretary of Homeland Security (the “Secretary”) the power to declare any state or local government a “sanctuary jurisdiction,” thereby rendering any such jurisdiction ineligible to receive federal funds. Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the “Executive Order”). The Executive Order also directs the Attorney General to take unspecified “enforcement action” against any state, local government, or other “entity” that he believes has a “practice that prevents or hinders the enforcement of Federal law.” *Id.* § 9(a).

The Executive Order is patently unconstitutional and the Court must enjoin Defendants from implementing it. It usurps and expands Congress’s spending power in a naked effort to coerce state and local governments, including Plaintiff County of Santa Clara (“County”), into enforcing the Trump Administration’s immigration agenda. It brazenly disregards fundamental principles of federalism and separation of powers that define our republican government.

In doing so, the Executive Order has also thrown the County’s budgeting and planning process into immediate and ongoing disarray. Because it annually receives roughly \$1.7 billion in federal and federally dependent funds (about 35% of its total annual revenues), the Executive Order places the County—a governmental entity responsible for providing safety-net services to 1.9 million residents—in an untenable position. Unless Defendants are immediately restrained from implementing the Executive Order, the County will be forced to take one of three paths, none of which is viable: (1) continue to spend money today on services for which it may be denied federal reimbursement tomorrow, thereby courting a financial crisis; (2) begin slashing essential services, programs, and staff; or (3) comply with an unconstitutional directive to participate in the President’s federal immigration enforcement regime. Each of these three pathways leads to irreparable harm to the County. The County must make these decisions right now, and the health, welfare, and safety of the County’s 1.9 million residents hang in the balance. Sitting squarely in the President’s crosshairs, the County cannot wait and see what will become of the federal funding Congress has allocated to it, or what “enforcement actions” await it.

1 The County is likely to succeed on all four of its claims for relief.

2 **First**, the Executive Order shatters the constitutional boundary between executive and
3 legislative authority. Article I, section 8 of the Constitution grants *Congress* the power of the
4 purse, not the executive branch. *Congress*, not the President, may place conditions on federal
5 funding, and even then only within clearly defined constitutional limitations that respect the
6 independence of state and local governments. Ignoring these fundamental precepts, the
7 President’s Executive Order purports to exercise spending powers so overbroad, retaliatory, and
8 coercive that *even Congress* could not constitutionally have exercised them. In fact, Congress has
9 repeatedly considered and rejected legislation that would have done what the President seeks to
10 do through fiat: tying federal funds to local participation in federal immigration enforcement.
11 The Supreme Court has long held that the President’s power is at its “lowest ebb” where, as here,
12 he contravenes the “expressed or implied will of Congress.” *Youngstown Sheet & Tube Co. v.*
13 *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

14 **Second**, the Executive Order is so sweeping and coercive that it violates the Tenth
15 Amendment’s prohibition on commandeering local officials to become federal functionaries.

16 **Third**, the challenged sections of the Executive Order are so vague and standardless that
17 they violate the Fifth Amendment’s Due Process Clause.

18 **Fourth**, by depriving the County—without any process whatsoever—of congressionally
19 allocated funds to which it is legitimately entitled, the Executive Order fails to provide the
20 procedural due process guaranteed by the Fifth Amendment.

21 The Executive Order is neither a housekeeping measure nor an idle threat. It carries the
22 force of law. And President Trump has repeatedly made clear, most recently in a televised
23 interview on Super Bowl Sunday, that he believes he can deploy defunding as a “weapon” against
24 state and local governments, withholding “the money they need to operate properly as a city or
25 state” unless they fall in line with his vision of federal immigration enforcement.

26 The President is wrong. In their wisdom, our nation’s founders declined to place such
27 punitive and coercive powers in the hands of any branch of the federal government—especially
28 the President’s. The Constitution secures for state and local governments the ability to make

1 policy decisions regarding the health, welfare, and safety of the people to whom they are
 2 politically accountable. By misappropriating Congress’s spending power in an attempt to force
 3 local jurisdictions into carrying out the President’s immigration enforcement agenda, the
 4 Executive Order tramples the principles of federalism that embody and safeguard our American
 5 system of government.

6 Because the County satisfies the well-established standard for injunctive relief, it
 7 respectfully asks the Court to enter the requested preliminary injunction blocking implementation
 8 and enforcement of the Executive Order.

9 **II. STATEMENT OF FACTS**

10 **A. The Executive Order threatens to strip the County of previously allocated 11 federal funds and deny the County of all federal funds going forward.**

12 On January 25, 2017, President Donald J. Trump issued Executive Order 13768, entitled
 13 “Enhancing Public Safety in the Interior of the United States.” *See* Decl. of Cody S. Harris in
 14 Support of Mot. for Prelim. Injunction ¶ 2 & Ex. A (“EO”). The Executive Order’s plain text
 15 reveals its broad scope, as well as its frontal assault on federalism and the separation of powers.
 16 Section 1 sets forth the Order’s purpose, declaring that “Sanctuary jurisdictions across the United
 17 States willfully violate Federal law in an attempt to shield aliens from removal from the United
 18 States” and “have caused immeasurable harm to the American people and to the very fabric of
 19 our Republic.” EO § 1. Section 2 announces the “policy of the executive branch.” *Id.* § 2. It
 20 describes that policy as, among other things, “[e]nsur[ing] that jurisdictions that fail to comply
 21 with applicable Federal law do not receive Federal funds, except as mandated by law.” *Id.* § 2(c).³

22 Section 9 of the Executive Order concerns “Sanctuary Jurisdictions.” That section vests
 23 executive branch officials with unlimited, unreviewable discretion to deny federal funds to
 24 whichever jurisdictions they deem to be “sanctuary jurisdictions,” and mandates unspecified

25
 26 ³ Section 3 of the Executive Order is titled “Definitions,” but contains no specific definitions
 27 applicable to the Order. EO § 3. Instead, it states that “the terms of this order, where applicable,
 28 shall have the meaning provided by” 8 U.S.C. § 1101, which is the definition section of the
 Immigration and Naturalization Act. *Id.* The most significant terms appearing in the Executive
 Order, however, appear nowhere in 8 U.S.C. § 1101.

1 enforcement action against them. The phrase “sanctuary jurisdictions” applies—at a minimum—
 2 to state and local governments who “willfully refuse to comply with 8 U.S.C. § 1373,” EO § 9(a),
 3 or decline to honor Immigration and Customs Enforcement (“ICE”) civil detainer requests. *Id.* §
 4 9(b) (identifying “sanctuary jurisdictions,” as those “that ignored or otherwise failed to honor any
 5 detainers with respect to such aliens”). The section begins by directing executive branch officials
 6 to strip state and local jurisdictions of all federal funding:

7 [T]he Attorney General and the Secretary [of Homeland Security], in their
 8 discretion and to the extent consistent with law, shall ensure that jurisdictions that
 9 willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not
 10 eligible to receive Federal grants, except as deemed necessary for law enforcement
 11 purposes by the Attorney General or the Secretary. The Secretary has the authority
 12 to designate, in his discretion and to the extent consistent with law, a jurisdiction
 13 as a sanctuary jurisdiction.

14 *Id.* § 9(a) (the “Defunding Provision”). Thus, if the Attorney General and Secretary determine (in
 15 their discretion) that the County is “willfully refus[ing] to comply with 8 U.S.C. 1373,” then it
 16 “shall” be rendered “not eligible to receive Federal grants.” *Id.*

17 The Defunding Provision is intended to apply to all federal funds. The Executive Order
 18 describes the President’s policy as ensuring “that jurisdictions that fail to comply” with federal
 19 law “do not receive Federal funds.” EO § 2(c). To achieve this goal, Section 9(c) orders the
 20 Director of the Office of Management and Budget to provide “information on all Federal grant
 21 money that currently is received by any sanctuary jurisdiction.” *Id.* § 9(c).⁴

22 Section 9(a) also contains an enforcement provision, which orders the Attorney General to
 23 “take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has
 24 in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”
 25 EO § 9(a) (the “Enforcement Provision”). The order nowhere defines what it means to “prevent[]
 26 or hinder[]” federal law enforcement, leaving that determination to the Attorney General. Nor
 27 does the provision specify which federal laws are at issue, applying equally to federal statutes,
 28

⁴ Because the Executive Order nowhere defines or limits the phrase “Federal grants,” the County
 must interpret that phrase to apply to all federal funds, whatever their source. This interpretation
 is consistent with the Section 2(c) of the Executive Order, as well as the President’s many
 statements affirming his intention to deny all taxpayer funds to state and local governments he
 considers “sanctuary jurisdictions.” *See Compl.* ¶ 93.

1 treaties, and presumably the entire Code of Federal Regulations.

2 The Executive Order contains vague caveats suggesting that at least some of its terms will
3 be applied to the extent “consistent with law,” although that caveat is noticeably absent from the
4 Enforcement Provision. *See* EO §§ 9(a), 18(b). But the Executive Order cannot be applied
5 “consistent with law,” because it gives the executive branch power it cannot constitutionally
6 possess. The President repeatedly pledged on the campaign trail and after election to deny *all*
7 federal funding to jurisdictions he believes are hindering his immigration enforcement agenda,
8 thereby “ending” such jurisdictions altogether. *See* Compl. ¶ 93 (listing statements). For
9 example, after the Executive Order was issued, the President characterized defunding as a
10 “weapon” he could wield to deprive jurisdictions of “the money they need to properly operate as
11 a city or state.” Harris Decl. ¶ 3 & Ex. B (Tr. of Feb. 5, 2017 Bill O’Reilly Interview with
12 President Donald J. Trump [“O’Reilly Interview”]) at 4. The President’s press secretary
13 underscored the Executive Order’s broad reach, telling reporters that the President intended to
14 ensure that “counties and other institutions that remain sanctuary cities don’t get federal
15 government funding in compliance with the executive order.” *Id.* ¶ 4 & Ex. C (Tr. of Feb. 8,
16 2017 White House Press Briefing by Press Sec’y Sean Spicer) at 4–5.

17 **B. The County’s policies and practices regarding cooperation with ICE conflict**
18 **with the President’s immigration enforcement agenda.**

19 The County is undoubtedly one of the President’s intended targets. The Executive Order
20 expressly conditions federal funding, at a minimum, on “compl[iance] with 8 U.S.C. § 1373” and
21 “honor[ing]” ICE civil detainer requests. *See* EO § 9(a), (b). The County’s policies and practices
22 are at odds with this directive.

23 Section 1373 bars any local government from prohibiting “any government entity or
24 official from sending to, or receiving from, the Immigration and Naturalization Service
25 information regarding the citizenship or immigration status . . . of any individual.” 8 U.S.C. §
26 1373(a). It further forbids any person or agency from restricting any government entity from
27 sending, maintaining, or exchanging such information with federal immigration officials. *Id.* §
28 1373(b). Although Section 1373 nowhere mentions compliance with ICE civil detainer requests,

1 the Executive Order links the two. *See* EO § 9(b) (identifying “sanctuary jurisdictions” as those
2 “that ignored or otherwise failed to honor any detainees with respect to such aliens”).

3 In 2010, the County Board of Supervisors adopted a Resolution barring all County
4 employees from using County resources to transmit to ICE information collected by the County
5 in the course of providing critical services or benefits, as well as initiating an inquiry or
6 enforcement action based solely on an individual’s actual or suspected immigration status,
7 national origin, race/ethnicity, or English-speaking ability. Márquez Decl. ¶ 27 & Ex. G; Neusel
8 Decl. ¶ 7; L. Smith Decl. ¶ 6. The Resolution further prohibits the use of County resources to
9 pursue an individual solely because of an actual or suspected violation of immigration law. *Id.*
10 Given these policies, the County declined two federal grants, both of which required the County
11 to certify its compliance with “all applicable federal laws,” including 8 U.S.C. § 1373.⁵

12 Based on its extensive experience, the County has also developed policies and practices
13 regarding ICE civil detainer requests that are inconsistent with the Executive Order and the
14 President’s stated immigration enforcement agenda.⁶ An ICE civil detainer request asks a local
15 law enforcement agency voluntarily to continue to hold an immigrant inmate—who is generally
16

17 ⁵ In July 2016, the U.S. Department of Justice issued guidance linking two federal grant programs
18 in which the County had participated—the State Criminal Alien Assistance Program (“SCAAP”) and
19 Edward Byrne Memorial Justice Assistance Grant (“JAG”)—to compliance with 8 U.S.C. §
20 1373, stating that jurisdictions with *any* restrictions on information-sharing with ICE would be
21 viewed as noncompliant. *See* Letter from Peter J. Kadzik, Asst. Att’y Gen. U.S. Dep’t of Justice,
22 to Hon. John A. Culberson, Chairman of the Subcomm. on Commerce, Justice, Sci. & Related
23 Agencies, (Jul. 7, 2016), [http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-
_doj_letter_to_culberson.pdf](http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf). After receiving this guidance, to retain its full discretion in this
24 policy area, the County decided in October 2016 to decline federal SCAAP or JAG funds.
25 Márquez Decl. ¶ 29 & Ex. H.

26 ⁶ On February 20, 2017, the Secretary issued guidance primarily relating to Section 5 of the
27 Executive Order, which is not the subject of the requested injunction. *See* U.S. Dep’t of
28 Homeland Sec. Mem. from John Kelly, Sec’y of Homeland Sec., “Enforcement of the
Immigration Laws to Serve the National Interest” (Feb. 20, 2017), [https://www.dhs.gov/sites/
default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-
National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf). The Secretary’s guidance confirms the linkage between compliance with
ICE civil detainer requests and the Trump Administration’s immigration enforcement agenda.
The guidance directs the Director of ICE to provide a weekly report to the public “of non-Federal
jurisdictions that release aliens from their custody, notwithstanding that such aliens are subject to
a detainer or similar request for custody issued by ICE to that jurisdiction.” *Id.* at 6.

1 in a local jail because of actual or suspected violations of state criminal laws—for up to 48 hours
 2 after his or her scheduled release date so that ICE can decide whether to take the individual into
 3 custody and initiate removal proceedings. Neusel Decl. ¶ 9; Márquez Decl., Ex. C at 3.

4 Before late 2011, the County regularly responded to ICE civil detainer requests and other
 5 inquiries from federal immigration officials, housing an average of 135 additional inmates each
 6 day at a daily cost of approximately \$159 per inmate. Neusel Decl. ¶ 4. These additional inmates
 7 strained the County jail’s resources and facilities. *Id.* When the County raised these concerns
 8 publicly, ICE refused to reimburse detention costs or indemnify the County for liability arising
 9 from detainer requests. Márquez Decl. ¶¶ 21–25 & Exs. B–D.

10 The County Board of Supervisors then convened a task force composed of top officials
 11 from each of the County’s criminal justice agencies to review the issue and recommend a local
 12 policy. L. Smith Decl. ¶ 5; Neusel Decl. ¶ 5. The task force recommended that the County honor
 13 ICE detainer requests only for individuals with serious or violent felony convictions, as defined
 14 by California law, and the final policy adopted by the County honors such requests only if ICE
 15 agrees to reimburse the full costs to the County of honoring the requests. L. Smith Decl. ¶ 5;
 16 Neusel Decl. ¶ 6; Márquez Decl. ¶ 26 & Ex. E. ICE continues to refuse to reimburse costs
 17 associated with honoring detainees. Neusel Decl. ¶ 6. The County has declined to honor ICE
 18 detainer requests since the policy’s implementation in November 2011. *Id.*

19 The County’s policies and practices are critical to protecting and enhancing public safety.
 20 As the County’s District Attorney, Sheriff, and Undersheriff all attest, based on their judgment
 21 and experience, enforcement of federal immigration law by the County has a toxic effect on the
 22 County’s ability to fight crime and makes the entire community less safe. Rosen Decl. ¶¶ 6–12;
 23 L. Smith Decl. ¶¶ 4–9; Neusel Decl. ¶¶ 4–8. Immigrants are no more likely to commit crimes
 24 than U.S. citizens, *see* Rosen Decl. ¶ 7,⁷ and County law enforcement officials rely on members

25 ⁷ *See also, e.g.,* Walter A. Ewing, Ph.D. et al., *The Criminalization of Immigration in the United*
 26 *States*, American Immigration Council, July 2015 at 1, [https://www.americanimmigrationcouncil](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf)
 27 [.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf);
 28 Kristen F. Butcher & Anne Morrison Piehl, *Why are Immigrants’ Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation*, National Bureau of Economic Research Working Paper 13229, July 2007, <http://www.nber.org/papers/w13229.pdf>.

1 of the local community—including those who lack lawful immigration status—to assist with
2 criminal investigations and prosecutions. *Id.* ¶¶ 8–11; L. Smith Decl. ¶¶ 7–8; Neusel Decl. ¶ 8.
3 When residents perceive local law enforcement officers as ICE agents in disguise, they are less
4 willing to report crimes or offer testimony. Rosen Decl. ¶¶ 8–11; L. Smith Decl. ¶ 9; Neusel
5 Decl. ¶ 8. This compromises the County’s ability to promote public safety—one of its core
6 functions.

7 The County cannot enforce federal immigration law in accordance with the Executive
8 Order. First, forcing the County to honor ICE civil detainer requests would impose significant,
9 non-reimbursable costs that would strain the County’s already severely impacted jail system.
10 Neusel Decl. ¶¶ 9–10; Márquez Decl. ¶ 28. Second, honoring civil detainer requests would force
11 the County to violate the constitutional rights of its residents and expose the County to substantial
12 liability. Márquez Decl. ¶¶ 21, 28.⁸ Third, even if the County were to change its own policies, it
13 must still comply with state law that constrains or prohibits its participation in federal
14 immigration enforcement activities. For example, California’s Transparency and Responsibility
15 Using State Tools (TRUST) Act, Cal. Gov’t Code § 7282.5, prohibits local law enforcement
16 agencies from honoring ICE detainer requests for individuals without specific prior criminal
17 convictions or charges as to which a judge has made a finding of probable cause. Perhaps with
18 the TRUST Act in mind, President Trump identified the entire State of California as an “out of
19 control” sanctuary jurisdiction, threatening to “defund” it completely. Harris Decl., Ex. B
20 (O’Reilly Interview) at 4. Finally, it is a core County function to determine and implement
21 policies and practices that enhance and protect public health, welfare and safety. The County has
22 determined that its current policies, rather than those demanded by the President, serve those
23 objectives. *See generally* Rosen, L. Smith, and Neusel Decls.

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⁸ *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 215–16 (1st Cir. 2015); *Orellana v. Nobles Cnty.*, 2017 WL 72397, at *9 (D. Minn. Jan. 6, 2017); *Mendia v. Garcia*, 2016 WL 2654327, at *6–7 (N.D. Cal. May 10, 2016); *Miranda-Olivares v. Clackamas Cnty.*, 2014 WL 1414305, at *11–12 (D. Or. Apr. 11, 2014).

1 **C. The County relies on federal funding to provide essential services to 1.9**
 2 **million residents.**

3 In fiscal year 2015-2016, the County received approximately \$1.7 billion in federal and
 4 federally dependent funds, representing roughly 35% of the County’s revenue during that fiscal
 5 year.⁹ J. Smith Decl. ¶ 6; Márquez Decl. ¶ 8. The County uses the vast majority of this federal
 6 funding to provide essential safety-net programs and social services to its residents. Márquez
 7 Decl. ¶¶ 5–8. Without these federal funds, the County would be forced to make extraordinary
 8 cuts to critical services—or even eliminate key County services and functions altogether. *Id.* ¶¶
 9 4, 16-18; J. Smith Decl. ¶¶ 6–11. The withdrawal, or any substantial reduction, of federal funding
 10 “would decimate the County budget and cause immediate and devastating injury to the 1.9
 11 million residents who rely on the essential services that the County provides.” J. Smith Decl. ¶ 6.

12 The Executive Order poses an immediate and concrete threat to the County and its
 13 residents. In support of this motion, the County has submitted declarations from the County
 14 Executive, Chief Operating Officer, Director of Emergency Management, Public Health Officer,
 15 Director of the Social Services Agency, and CEO of Santa Clara Valley Medical Center detailing
 16 the Executive Order’s devastating impact on the County and its residents. *See generally* J. Smith,
 17 Márquez, Reed, Cody, Menicocci, and Lorenz Decls. These declarations demonstrate that the
 18 Executive Order’s threat to strip the County of federal funding would decimate the County’s
 19 ability to provide basic services to its residents.¹⁰

20 For example, Valley Medical Center, Santa Clara County’s only public safety-net
 21 healthcare provider for indigent and underserved patients, relies on approximately \$1 billion in
 22 federal funds—comprising roughly 70% of its annual expenses. Lorenz Decl. ¶¶ 3, 7. If Valley

23 ⁹ The County received roughly \$1 billion in federal funds not commingled with other funding
 24 sources. Márquez Decl. ¶ 8. It received an additional approximately \$680 million in revenues
 25 which included a significant federal funding component and was dependent upon the receipt of
 26 federal funds through a matching requirement or other mechanism. *Id.* These two funding
 27 streams are referred to herein, collectively, as the County’s “federal funding” or “federal funds.”

28 ¹⁰ As discussed above, the phrase “Federal grants” in Section 9(a) of the Executive Order applies
 to all federal funds, whatever their source. But even if that phrase were limited to federal funds
 that are *not* provided through entitlement programs, the County still received more than \$338
 million in non-entitlement federal grant awards in fiscal year 2014-2015. Márquez Decl. ¶ 20.

1 Medical Center were to lose this funding, it could no longer provide services to thousands of
2 poor, elderly and vulnerable people that rely on it for their basic healthcare needs, leaving them
3 with no viable healthcare options. *Id.* ¶ 8. The complete loss of federal funding, and resulting
4 service cuts, would force the Valley Medical Center to lay off thousands of employees, and
5 potentially close the County’s only public safety-net hospital. *Id.*; *see also* Márquez Decl. ¶ 16.

6 Similarly, the County’s Social Services Agency receives more than \$300 million in
7 federal funding annually, compared to approximately \$775 million in its total expenditures.
8 Menicocci Decl. ¶ 5. The Social Services Agency uses this money to provide services to the
9 County’s most vulnerable residents, including child welfare and protection, aid to needy families,
10 support for disabled children, adults, and the elderly, and various other public benefits programs.
11 *Id.* ¶¶ 7–16. Eliminating federal funding would force the Social Services Agency to drastically
12 reduce its services and cut staff, severely harming the County’s most vulnerable communities and
13 threatening more than 23,000 jobs that fully or partially depend on federal funding received by
14 the Social Services Agency. *Id.* ¶¶ 17–26; *see also* Márquez Decl. ¶ 17.

15 The County’s Public Health Department receives more than \$38 million in federal funding
16 annually—nearly 40% of its expenditures—for public health services provided to residents. Cody
17 Decl. ¶¶ 5–12. Eliminating this funding would compromise the County’s ability to staff its
18 facilities and respond to public health emergencies. *Id.* ¶¶ 13–15; *see also* Márquez Decl. ¶ 18.

19 The County Office of Emergency Services (“OES”) relies on millions of dollars in federal
20 grant funds to help the County prepare for and respond to disasters of all types, from earthquakes
21 to terrorism. Reed Decl. ¶¶ 3–9. This federal funding represents more than two-thirds of OES’s
22 total funding, and it “could not perform its current functions without it.” *Id.* ¶¶ 8, 10–20.

23 It is a near certainty that the County’s approximately \$1.7 billion in federal funding
24 touches each of its 1.9 million residents. Without this federal funding, the County would be
25 forced to roll back the programs and services that comprise the very fabric of the community, and
26 protect the health, welfare, and safety of its residents. *See* J. Smith Decl. ¶¶ 5–7.

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1 **D. The Executive Order forces the County to make immediate budget decisions.**

2 The Executive Order has thrown the County’s current budgetary and planning processes
 3 into disarray. Márquez Decl. ¶ 19. Each year, the County Executive develops and recommends a
 4 budget for approval by the Board of Supervisors. *Id.* ¶ 13. The ability to rely on federal funding
 5 commitments plays a critical role in the County’s budgeting process. *Id.* ¶ 14. For the current
 6 fiscal year, the County adopted a balanced budget based on the expectation that it will receive the
 7 federal funds to which it is entitled under existing agreements with federal and state agencies. *Id.*
 8 The County largely receives these federal funds on a reimbursement or fee-for-service basis,
 9 which means the County first spends its own money before being repaid in whole or part with
 10 federal funds. *Id.* ¶ 9. The County is *currently* spending millions of dollars on services for which
 11 it ultimately will seek to be reimbursed from federal funds. *Id.* ¶ 15.

12 As a direct result of the Executive Order, the County suddenly faces the reality that
 13 roughly \$1.7 billion in anticipated annual revenues could disappear at the President’s whim. J.
 14 Smith Decl. ¶¶ 6–11; Márquez Decl. ¶¶ 4, 11, 14–15. Because the Executive Order includes no
 15 notice provision, these funds could vanish without the County receiving notice of its ineligibility.
 16 The County has no means by which it could absorb the resulting shortfall. J. Smith Decl. ¶ 11;
 17 Márquez Decl. ¶ 11.

18 **III. LEGAL STANDARD**

19 To secure a preliminary injunction, the plaintiff must establish that (1) it “is likely to
 20 succeed on the merits,” (2) it “is likely to suffer irreparable harm in the absence of preliminary
 21 relief,” (3) “the balance of equities tips in [its] favor,” and (4) “an injunction is in the public
 22 interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Courts evaluate these
 23 factors on a “sliding scale,” such that “serious questions going to the merits and a balance of
 24 hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,
 25 so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
 26 injunction is in the public interest.” *Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014)
 27 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011)).
 28

1 **IV. ARGUMENT**

2 **A. The County is likely to succeed on the merits of its claims.**

3 **1. The County is likely to prevail on its separation of powers claim**
 4 **because the Executive Order usurps and distorts Congress’s spending**
 5 **power without any constitutional or statutory authorization.**

6 Because neither the Constitution nor an act of Congress grants the President the coercive
 7 spending powers he now claims, the Executive Order violates the separation of powers inherent in
 8 the Constitution. *See* Compl. ¶¶ 118–34.

9 **a. The Executive Order attempts to exercise spending power that**
 10 **even Congress lacks.**

11 The President has attempted, through the Executive Order, both to take Congress’s
 12 spending power for himself, and to extend that power far beyond its constitutional limits. Article
 13 I of the Constitution vests the federal spending power exclusively in Congress. *See* U.S. Const.
 14 art. I, § 8, cl. 1. Nothing in the Constitution’s text, or in more than two centuries of judicial
 15 decisions interpreting that text, confers on the executive branch any power either to dictate federal
 16 spending or to place conditions or limits on such spending. The Executive Order contravenes the
 17 constitutional provisions that establish the separation of powers between the political branches,
 18 including the President’s obligation to “take Care that the Laws be faithfully executed,” *id.* art. II
 19 § 3, cl. 5, and the limitation that Congressional enactments “be presented to the President of the
 20 United States,” who may then sign or veto them, but may not revise or amend them, *id.* art. I § 7
 21 cls. 2–3; *Clinton v. New York*, 524 U.S. 417, 440 (1998).

22 Not only has the President attempted to seize power that the Constitution grants to
 23 Congress alone, he also purports to wield that power in a manner not available even to Congress.
 24 No branch of the federal government has the power to use spending in a manner that is “so
 25 coercive as to pass the point at which pressure turns into compulsion.” *South Dakota v. Dole*, 483
 26 U.S. 203, 211 (1987) (internal quotations omitted). But that is the Executive Order’s goal. The
 27 Supreme Court has articulated five limitations on the congressional spending power, and this
 28 Executive Order violates them all.

1 **First**, any federal spending must be made “in pursuit of ‘the general welfare.’” *Id.* at 207
2 (quoting U.S. Const. art. I, § 8). Courts typically defer to Congress’s policy judgment on this
3 question. *Id.* Here, however, there is no congressional judgment to which the Court may defer—
4 the President has usurped Congress’s authority. For its part, as discussed below, Congress has
5 repeatedly *declined* to provide the executive branch the “weapon” it now seeks to unleash.

6 **Second**, if Congress wishes to place certain conditions on federal funds, “it must do so
7 unambiguously,” so that states and local governments may “exercise their choice knowingly,
8 cognizant of the consequences of their participation.” *Id.* at 203 (internal quotation marks
9 omitted). Accordingly, Congress may not surprise a state or local government by approving
10 spending, then later imposing a condition on those funds. *See Nat’l Fed. of Indep. Bus. v.*
11 *Sebelius* (“*NFIB*”), 132 S. Ct. 2566, 2602–04 (2012). “The legitimacy of Congress’s exercise of
12 the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of
13 the contract” at the time Congress offers the money. *Id.* at 2602.

14 The Defunding Provision fails this test, imposing a new, retroactive condition on all
15 “Federal funds,” “Federal grants,” and “all Federal grant money that currently is received by any
16 sanctuary jurisdiction.” EO §§ 2(c), 9(a), 9(c). It is also ambiguous regarding what the County
17 must do to avoid defunding. There is conflicting judicial guidance on how to “comply with 8
18 U.S.C. § 1373.” *Compare, e.g., Bologna v. City & Cty. of San Francisco*, 192 Cal. App. 4th 429,
19 438–39 (2011) with *Steinle v. City & Cty. of San Francisco*, 2017 WL 67064, at *11 (N.D. Cal.
20 Jan. 6, 2017) (disagreeing “with the *Bologna* court’s characterization of the scope of § 1373(a)”).
21 Further, it is unclear whether Section 1373 requires a jurisdiction to honor ICE detainer requests,
22 although the Executive Order links the two. *See* EO § 9(b). And it is anyone’s guess what
23 conduct the executive branch might deem “hinder[ing] the enforcement of Federal law”—a vast
24 category that includes statutes, regulations, and international treaties.

25 **Third**, “Congress may condition grants under the spending power only in ways reasonably
26 related to the purpose of the federal program” at issue. *Dole*, 483 U.S. at 213. This nexus
27 requirement means that Congress may not burden the payment of funds to a state or local
28 government for one purpose with a condition that serves a different federal interest. The

1 Executive Order ignores this limitation, withholding *all* federal funds, whether or not they relate
2 to immigration enforcement. EO § 9(a) & (c). Indeed, the Order renders the County ineligible
3 for funding related to Medicare and Medicaid, transportation, child welfare services,
4 immunization and vaccine programs, emergency preparedness, and a myriad of other programs
5 and services that have absolutely nothing to do with immigration. *See* J. Smith Decl. ¶ 5;
6 Márquez Decl. ¶¶ 16–18; Lorenz Decl. ¶ 8; Cody Decl. ¶ 13–15; Reed Decl. ¶¶ 8, 10–20.
7 Congress has no constitutional authority to enact such a sweeping condition on all federal
8 spending—and certainly the President has no power to do so by diktat.

9 The Defunding Provision not only fails the *Dole* nexus test—it does the *opposite* of what
10 *Dole* requires. It denies sanctuary jurisdictions all federal funds with the exception of funding
11 “deemed necessary for law enforcement purposes,” which the Attorney General or Secretary may
12 discretionarily allow to be remitted. EO § 9(a). These are the sorts of funds to which Congress
13 *might* have been able to impose immigration enforcement conditions consistent with *Dole*.
14 Instead, the Executive Order threatens all funding *unrelated* to law enforcement, while
15 paradoxically providing a mechanism by which potentially relevant funding may escape the ban.

16 **Fourth**, Congress may not condition federal spending on a local jurisdiction taking
17 actions that violate the Constitution. *Dole*, 483 U.S. at 208. Here, the order makes clear that any
18 jurisdiction that fails to honor ICE civil detainer requests will find itself ineligible for federal
19 funding. *See* EO § 9(b). But federal courts in this District and across the country have held that
20 detaining individuals who would otherwise be released from custody, at ICE’s request, violates
21 the Fourth Amendment. *See, e.g., Morales*, 793 F.3d at 215–16; *Orellana*, 2017 WL 72397, at
22 *9; *Mendia*, 2016 WL 2654327, at *6–7; *Miranda-Olivares*, 2014 WL 1414305, at *11–12.

23 **Fifth**, Congress may not offer “financial inducement . . . so coercive as to pass the point at
24 which pressure turns to compulsion.” *Dole*, 483 U.S. at 211 (internal quotation marks omitted).
25 As the Supreme Court most recently held in *NFIB* when striking down the Affordable Care Act’s
26 Medicaid expansion provision, where legislation becomes coercive, it “runs contrary to our
27 system of federalism” because Congress may not use the power of the purse to “coerce[] a State
28 to adopt a federal regulatory system as its own.” 132 S. Ct. at 2602. The Constitution therefore

1 forbids Congress from imposing spending conditions so draconian that they amount to “a gun to
2 the head,” leaving the state or local government no realistic choice but to comply. *Id.* at 2604.

3 The Executive Order easily fails this test. If the Affordable Care Act’s threat of denying
4 Medicaid funds was an unconstitutional “gun to the head,” *id.*, then the Executive Order is a
5 nuclear weapon. The Medicaid expenditures at issue in *NFIB* amounted to 20% of the average
6 state’s budget, “with federal funds covering 50 to 83 percent of those costs.” *Id.* Here, the
7 Executive Order threatens not only the County’s Medicaid funding, but also every other federal
8 dollar the County receives.

9 Just as the President said, the Executive Order is crafted to deprive the County and similar
10 entities of their ability “to properly operate.” Harris Decl., Ex. B (O’Reilly Interview) at 4. But
11 the President’s threat is “contrary to our system of federalism.” *NFIB*, 132 S. Ct. at 2602. The
12 Constitution simply does not give the federal government the authority to coerce a state or local
13 government “to adopt a federal regulatory scheme as its own.” *Id.*

14 **b. The Executive Order is an invalid exercise of executive power**
15 **under *Youngstown*.**

16 It is well-settled that the President’s power, “if any,” to issue executive orders “must stem
17 either from an act of Congress or from the Constitution itself.” *Youngstown*, 343 U.S. at 585.
18 The Constitution in no way grants the President the spending power he now claims. Although “a
19 President sometimes has policy reasons . . . for wanting to spend less than the full amount
20 appropriated by Congress for a particular project or program,” “even the President does not have
21 unilateral authority to refuse to spend the funds.” *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C.
22 Cir. 2013). While serving as Assistant Attorney General, the late-Chief Justice Rehnquist put it
23 this way: “With respect to the suggestion that the President has a constitutional power to decline
24 to spend appropriated funds, we must conclude that existence of such a broad power is supported
25 by neither reason nor precedent.”¹¹ The future Chief Justice had it right—the President lacks the
26 power he has granted himself with a pen stroke.

27 _____
28 ¹¹ Memo. from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to Edward
L. Morgan, Dep. Counsel to the President (Dec. 1, 1969), *reprinted in* Executive Impoundment of

1 The Executive Order evinces little attempt to ground the vast new authority it seizes for
 2 the executive branch in any specific constitutional or statutory authority. In issuing this sweeping
 3 order, President Trump points only to “the Immigration and Nationality Act (INA) (8 U.S.C.
 4 1101 *et seq.*),” as well as “Article II, Section 3 of the United States Constitution and section 3331
 5 of title 5, United States Code.” EO §§ 1, 2. But none of those provisions grants the President the
 6 powers he now claims. The INA says nothing about withholding federal funds from “sanctuary
 7 jurisdictions” or taking enforcement actions against them. Indeed, the phrase “sanctuary
 8 jurisdiction” is found nowhere in the Act. Article II, Section 3 of the Constitution is the “Take
 9 Care” clause, which by its terms requires the President to follow and execute the laws Congress
 10 enacted, not to seize legislative power for himself. That clause has never been interpreted to
 11 allow a power grab of the type the President now attempts. And 5 U.S.C. § 3331 is the oath of
 12 office every federal official—except the President—takes when appointed to a federal office. It
 13 provides no independent authority for the President’s order.

14 Not only does the Executive Order lack any statutory basis, it also enacts a policy that
 15 Congress has already expressly considered and rejected. “When the President takes measures
 16 incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for
 17 then he can rely only upon his own constitutional powers minus any constitutional powers of
 18 Congress over the matter.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (adopted in
 19 *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981)). The President’s power is at its lowest ebb
 20 here. On multiple occasions, both houses of Congress have expressly considered and rejected
 21 tying state and local governments’ compliance with 8 U.S.C. § 1373 to their eligibility for
 22 particular federal funding streams.¹² The fact that none of these introduced bills became law

23
 24 Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on
 the Judiciary, 92d Cong. 279, 282 (1971).

25 ¹² *See, e.g.*, Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop
 26 Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities
 27 Act, H.R. 5654, 114th Cong. (2016); Stop Sanctuary Policies and Protect Americans Act, S.
 28 2146, 114th Cong. (2015); Sanctuary City All Funding Elimination Act of 2015, H.R. 3073,
 114th Cong. (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. (2015);
 Stop Sanctuary Cities Act, S. 1814, 114th Cong. (2015); Improving Cooperation with States and
 Local Governments and Preventing the Catch and Release of Criminal Aliens Act of 2015, S.

1 indicates that Congress has considered the matter and rejected the President’s defunding scheme
 2 as bad policy. *Cf. Youngstown*, 343 U.S. at 637–38; *see also Pangilinan v. I.N.S.*, 809 F.2d 1449,
 3 1455 n.2 (9th Cir. 1987) (where legislation “died in committee,” Congress “considered the matter
 4 and refused to provide a remedy”) (Kozinski, J., dissenting from order denying en banc review).

5 Moreover, by granting the executive branch absolute authority to impound federal funds,
 6 the Executive Order contravenes the Impoundment Control Act of 1974. 2 U.S.C. § 683. That
 7 statute requires the President to *propose* the rescission of specific, congressionally allocated
 8 funds, allowing *Congress* to decide whether to approve that rescission. *Id.* The Executive Order,
 9 by contrast, unilaterally impounds federal funds wholesale.

10 In sum, the Executive Order claims for the executive branch powers that the Constitution
 11 grants to other branches by design. That design was no accident. These powers, consolidated,
 12 represent the threat to liberty James Madison warned of in the Federalist Papers. *See* The
 13 Federalist No. 47 (James Madison). Quoting Montesquieu, Madison warned: “When the
 14 legislative and executive powers are united in the same person or body . . . there can be no liberty,
 15 because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical
 16 laws to EXECUTE them in a tyrannical manner.” *Id.* The Executive Order epitomizes the
 17 danger the Founders designed the Constitution to thwart. The County is therefore likely to
 18 succeed on the merits of its separation of powers claim.

19 **2. The County is likely to prevail on its claim that the Executive Order**
 20 **violates the Tenth Amendment.**

21 Because the County is likely to prevail on its separation of powers claim, the Court need
 22 not consider its other claims to grant the requested preliminary injunction. *See Ariz. Dream Act*

23
 24 1812, 114th Cong. (2015); Protecting American Citizens Together Act, S. 1764, 114th Cong.
 25 (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015); A Bill to
 26 Prohibit Appropriated Funds from Being Used in Contravention of Section 642(a) of the Illegal
 27 Immigration Reform and Immigrant Responsibility Act of 1996, S. 80, 114th Cong. (2015). Most
 28 strikingly, then-Senator Jeff Sessions introduced one such bill in 2015. *See* Michael Davis, Jr.
 and Danny Oliver in Honor of State and Local Law Enforcement Act, S. 1640, 114th Cong.
 (2015). Although Mr. Sessions’s bill died in the Senate Judiciary Committee, the Executive
 Order now grants him—as U.S. Attorney General—the same power (plus more) that he failed to
 win through the legislative process as a Senator. *See* Compl. ¶¶ 96–106.

1 *Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014). Even so, the County is equally likely to
2 succeed on the merits of its remaining claims.

3 The County is likely to prevail on its Tenth Amendment claim. The Supreme Court has
4 “made clear that the Federal Government may not compel the States to implement, by legislative
5 or *executive* action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925
6 (1997) (emphasis added); *see also New York v. United States*, 505 U.S. 144, 175–76, 188 (1992)
7 (federal government may not “compel the states to enact or administer a federal regulatory
8 program”). Yet that is exactly what the Executive Order is designed to accomplish.

9 Under the Supreme Court’s Tenth Amendment jurisprudence, the federal government may
10 neither direct a state or locality to enact certain legislation, nor require it to implement and
11 enforce federal law. In *Printz*, for example, the Supreme Court held that the federal government
12 violates the Tenth Amendment’s prohibition against commandeering local governments even
13 when the federal government requires the states only to provide “limited, non-policymaking help
14 in enforcing” federal law. 521 U.S. at 926–27.

15 The Executive Order makes the unconstitutional provision struck down in *Printz* appear
16 modest by comparison. There, Congress had required local law enforcement officers to perform
17 background checks on firearm purchasers using existing federal and state databases. *Id.* at 933–
18 34. Here, the Executive Order conscripts state and local law enforcement officials, under penalty
19 of the most severe federal reprisal possible, to participate in federal immigration enforcement
20 activities by actively sharing information with ICE and jailing immigrants who would otherwise
21 be eligible for release. EO § 9(a)–(b). To make matters worse, the Executive Order directs the
22 Attorney General to “take appropriate enforcement action”—whatever that might be—“against
23 any entity,” including a local government such as the County, that “has in effect a statute, policy,
24 or practice that prevents or hinders the enforcement of Federal law.” *Id.* § 9(a).

25 These conditions violate the Tenth Amendment. They put a gun to the head of state and
26 local governments, forcing them to make the unconstitutional choice of doing whatever the
27 federal government tells them to or forfeiting the federal funds they depend on to provide
28 essential services and responsibly budget, all the while fearing unspecified federal “enforcement

1 actions” brought in the Attorney General’s unfettered discretion. As the Court held in *NFIB*, even
 2 Congress could not constitutionally “force the States to implement a federal program” through a
 3 coercive use of the spending power. 132 S. Ct. at 2602. The President certainly cannot do so via
 4 executive order. Accordingly, the County is likely to succeed on its Tenth Amendment claim.

5 **3. The County is likely to prevail on its claim that the Executive Order is**
 6 **void for vagueness.**

7 The County is likely to prevail on its claim that the Executive Order is unconstitutionally
 8 vague under the Fifth Amendment’s Due Process Clause. *See* Compl. ¶¶ 135–42. A federal law
 9 is unconstitutionally vague if it (1) “fails to provide a person of ordinary intelligence fair notice of
 10 what is prohibited,” or (2) “is so standardless that it authorizes or encourages seriously
 11 discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The
 12 constitutional vagueness standard applies with full force to executive orders. *See United States v.*
 13 *Soussi*, 316 F.3d 1095, 1101 (10th Cir. 2002). The Executive Order fails both of these tests.

14 **First**, the Executive Order fails to provide the County with fair notice of what conduct is
 15 required or prohibited. *See supra* at 12–13. It is far from clear what full compliance with the
 16 Trump Administration’s immigration enforcement agenda entails, let alone what the County must
 17 do (or stop doing) to persuade the Attorney General that it has no “practice that prevents or
 18 hinders the enforcement of Federal law.” EO § 9(a). Indeed, the order is “so vague and
 19 standardless” that even one of the Defendants charged with implementing it—Secretary of
 20 Homeland Security John Kelly—is at a loss to explain it. *See Giaccio v. Penn.*, 382 U.S. 399,
 21 402–403 (1966). When asked during a recent press event to define a “sanctuary city,” he
 22 responded, “***I don’t have a clue.***” Harris Decl. ¶ 5 & Ex. D (Dep’t of Homeland Sec., *Pool Notes*
 23 *from Secretary Kelly’s Trip to San Diego*, Feb. 10, 2017) at 3 (emphasis added).

24 **Second**, the Executive Order lacks any clear standards or criteria, vesting the Attorney
 25 General and Secretary with unfettered discretion to determine which jurisdictions fall within the
 26 Executive Order’s ambit, whether they have “willfully refuse[d] to comply” with Section 1373,
 27 and whether “appropriate enforcement action” is required. *Id.* § 9(a). Where, as here, “vagueness
 28

1 permeates the text” of a law, it violates the Fifth Amendment. *City of Chicago v. Morales*, 527
 2 U.S. 41, 56 (1999). The County is likely to succeed on the merits of this claim.

3 **4. The County is likely to prevail on its claim that the Executive Order**
 4 **deprives the County of procedural due process.**

5 Finally, the County is likely to succeed on its claim that the Executive Order fails to
 6 provide it with the procedural due process the Fifth Amendment demands. The County must
 7 establish two elements: (1) a protectable liberty or property interest; and (2) a denial of adequate
 8 process. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

9 **First**, to have a protectable property interest, a person “must have more than a unilateral
 10 expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents*
 11 *v. Roth*, 408 U.S. 564, 577 (1972).¹³ A legitimate claim of entitlement may be derived from
 12 contracts with public entities. *See Doran v. Houle*, 721 F.2d 1182, 1184–85 (9th Cir. 1983).

13 The County has a legitimate claim of entitlement to federal funds that Congress has
 14 already appropriated and directed to local entities such as the County. The Supreme Court has
 15 “repeatedly characterized” congressional appropriations to state and local jurisdictions as “in the
 16 nature of a *contract*.” *NFIB*, 132 S. Ct. at 2602 (internal quotation marks omitted) (emphasis in
 17 original). Once Congress appropriates federal money and the County has “voluntarily and
 18 knowingly accept[ed] the terms of the contract,” Congress (much less the President) lacks the
 19 power to retroactively impose eligibility conditions on those funds, clawing the money back if the
 20 County fails to meet the newly imposed conditions. *Id.*; *see also Pennhurst State Sch. & Hosp. v.*
 21 *Halderman*, 451 U.S. 1, 17 n.13 (1981) (“The legitimacy of Congress’ power to legislate under
 22 the spending power thus rests on whether the State voluntarily and knowingly accepts the terms
 23 of the ‘contract’”). Indeed, the Supreme Court has repeatedly recognized that state and local
 24 governments have a constitutionally protected interest in being free from coercive violations of
 25 the congressional spending power. *See NFIB*, 132 S. Ct. at 2602; *Dole*, 483 U.S. at 211. The
 26

27 ¹³ The Ninth Circuit has held that counties are “persons” for the purpose of asserting due process
 28 claims related to payment of federal funds. *County of Santa Cruz v. Sebelius*, 399 Fed. App’x
 174, 176 (9th Cir. 2010).

1 Executive Order runs headlong into this constitutional prohibition.

2 The County has a “legitimate claim of entitlement” to funds that Congress committed and
3 the County accepted. Indeed, the County developed its budget based on “the expectation that the
4 County would receive the federal funds to which it is entitled under its agreements with a number
5 of federal and state agencies.” Márquez Decl. ¶¶ 12–14. In doing so, the County accepted the
6 terms of a congressional contract and began performing under it. The livelihoods of thousands
7 and the welfare of hundreds of thousands more depend on the money’s continued availability.
8 Accordingly, the County has a protectable property interest in federal appropriations previously
9 authorized by Congress, and the Executive Order directly threatens that interest.

10 **Second**, the Defunding and Enforcement Provisions provide no process at all. Instead,
11 they set up a star chamber, where the Attorney General and Secretary caucus privately to
12 determine whether a state or local government is a “sanctuary jurisdiction” or “hinders the
13 enforcement of Federal law.” EO § 9(a). And after making either such finding, those officials
14 “shall” find the jurisdiction ineligible for federal funds, and “shall” take enforcement action. *Id.*

15 A targeted state or local government receives no notice, no opportunity to be heard before
16 its fate is decided, and no right to appeal any adverse finding. The Executive Order fails even to
17 require that a jurisdiction deemed guilty of either offense be given notice when the finding is
18 made. Instead, the jurisdiction might learn of the decision only when the expected funds never
19 arrive, when the federal government attempts to claw back previously appropriated funds
20 retroactively, or when the enforcement action is levied. The targeted state or local government
21 has no administrative or judicial recourse at any stage of this process.

22 By purporting to strip the County of federal funding without notice, the opportunity to be
23 heard, administrative or judicial review, or appellate rights, the Executive Order violates the Fifth
24 Amendment. The County is likely to succeed on the merits of this claim.

25 **B. The Executive Order causes imminent and irreparable harm to the County.**

26 The Executive Order is intended to carry the force of law. *Legal Aid Soc. of Alameda Cty.*
27 *v. Brennan*, 608 F.2d 1319, 1329 n.14 (9th Cir. 1979). As such, it has concrete and immediate
28 effects on the County’s budget and, fundamentally, its ability to operate. The County is suffering

1 at least four types of immediate and irreparable harm directly tied to the Executive Order—each
2 of which is independently sufficient to support the requested preliminary injunction.

3 **First**, as a matter of law, “the deprivation of constitutional rights ‘unquestionably
4 constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)
5 (internal quotation marks omitted); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th
6 Cir. 2013) (same). As explained above, the Executive Order shreds the County’s constitutional
7 rights by contravening the separation of powers inherent in the Constitution, conscripting County
8 officials to carry out a federal regulatory program, and imposing crippling financial penalties
9 without any semblance of due process.

10 The County need not wait for a funding ineligibility determination or an enforcement
11 action before obtaining an injunction. Injunctive relief is appropriate once a party has shown a
12 “credible threat of prosecution” under an unconstitutional law. *Valle del Sol Inc. v. Whiting*, 732
13 F.3d 1006, 1029 (9th Cir. 2013). Given the County’s policies regarding ICE detainers and federal
14 immigration enforcement, there is no doubt that the County has a “credible threat” of being
15 targeted under the Executive Order.

16 **Second**, forcing the County to change its policies to comply with an unconstitutional order
17 invades its independent policymaking role and constitutes irreparable harm. Where, as here, an
18 executive directive is “designed to force Plaintiffs to amend their policies to comply or place their
19 federal funding in jeopardy,” preliminary injunctive relief is appropriate. *Texas v. United States*,
20 No. 7:16-CV-00054-O, 2016 WL 4426495, at *5 (N.D. Tex. Aug. 21, 2016).

21 An injunction is especially necessary here in light of the fact that compliance with the
22 Executive Order is impossible. The order is so vague that the County has no idea what it must do
23 to avoid being deemed ineligible for federal funds and other unspecified enforcement actions by
24 Defendants. Moreover, if the County were to change its policies and begin holding inmates
25 beyond when they would otherwise be held on criminal charges, the County would violate the
26 Fourth Amendment rights of those inmates and potentially subject itself to civil liability. *See*
27 *Morales*, 793 F.3d at 215–16; *Miranda-Olivares*, 2014 WL 1414305, at *11–12. And it is far
28 from clear that the County could simultaneously comply with the Executive Order and

1 California's TRUST Act. *See* Cal. Gov't Code § 7282.5 (limiting state and local governments'
2 compliance with ICE civil detainer requests). Finally, because much of the County's federal
3 funds flow through the State of California, *see* Márquez Decl. ¶ 8, County compliance would do
4 little good if the President follows through on his promise to rein in "out of control" California by
5 withdrawing federal funds from the entire state. Harris Decl., Ex. B (O'Reilly Interview) at 4.

6 **Third**, the County is currently spending hundreds of millions of dollars each month on
7 services for which it is entitled to, but now may be denied, federal reimbursement. As County
8 Executive Jeff Smith explained, unless the Executive Order is enjoined, the County will be forced
9 to choose between two devastating alternatives: either "continue to provide services to its
10 residents without any assurance that it will be reimbursed by the federal government for those
11 services," or "discontinue essential and mandatory services to its residents." J. Smith Decl. ¶ 9.
12 And complying with the Executive Order is not a viable option, as discussed above. *See id.* ¶ 12;
13 Márquez Decl. ¶¶ 21, 28. Because the County's federally funded programs operate continuously
14 and largely on a reimbursement basis, the County must decide (and is deciding) **now** whether to
15 continue incurring costs that the Executive Order imperils, or instead discontinue critical health,
16 safety, and welfare services, shelve plans, and lay off scores of County employees and
17 contractors. J. Smith Decl. ¶¶ 8–10; Márquez Decl. ¶¶ 14–15, 19; *see also* Lorenz Decl. ¶ 8;
18 Cody Decl. ¶ 13–15; Reed Decl. ¶¶ 8, 10–20. Adopting a wait-and-see approach is not feasible;
19 every day that the County expends funds on the expectation of federal reimbursement, the County
20 risks a retroactive ineligibility determination and clawback under the Executive Order.

21 **Fourth**, the Executive Order has created a cloud of financial uncertainty so overwhelming
22 that it irreparably harms the County's ability to budget, govern, and ultimately provide services to
23 the residents it serves. *See* J. Smith Decl. ¶¶ 6–11; Márquez Decl. ¶¶ 4, 11–21. Based on its
24 entitlement to receive previously allocated federal funds, the County has made (and is making)
25 budgeting, programming, and hiring decisions. Márquez Decl. ¶¶ 12–14, 17. The Executive
26 Order fundamentally destabilizes the foundation of those decisions. Indeed, because the
27 Executive Order provides no mechanism by which the federal government must notify the County
28 that it has been rendered ineligible for federal funds, Defendants may already have made such a

1 determination unbeknownst to the County.

2 These injuries are neither speculative nor hypothetical—the County is suffering them
3 now. As County Executive Jeff Smith stated in his sworn declaration, without preliminary
4 injunctive relief, “the County will be in an untenable financial situation, and decisions that must
5 be made while awaiting a final decision could cause the County to go into a financial crisis.” J.
6 Smith Decl. ¶ 8. The County cannot operate under this cloud of fiscal uncertainty.¹⁴

7 **C. The balance of hardships and the public interest both favor the County.**

8 The Court “must balance the competing claims of injury and must consider the effect on
9 each party of the granting or withholding of the requested relief,” while paying “particular regard
10 for the public consequences” of entering the injunction. *Winter*, 555 U.S. at 24. Because both
11 parties are government entities, this balancing merges with the consideration of the public
12 interest. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v.*
13 *Holder*, 556 U.S. 418, 435 (2009)). The County therefore addresses these two factors together.

14 The balance of hardships and the public interest tilt sharply in the County’s favor. As a
15 general matter, these factors favor “prevent[ing] the violation of a party’s constitutional rights.”
16 *Melendres*, 695 F.3d at 1002; *see also Ariz. Dream Act Coal.*, 757 F.3d at 1069. In addition, the
17 harm to the County if the Executive Order is not enjoined far outweighs any harm an injunction
18 may cause Defendants. If the Court enters the requested injunction, which is narrowly tailored to
19 affect only those parts of the Executive Order causing irreparable harm to the County, Defendants
20 will still be able to enforce federal immigration laws in a constitutional manner. Further, because
21 the Executive Order will likely “be found unconstitutional, it is therefore questionable whether

22 _____
23 ¹⁴ Because the County has shown irreparable harm, it has established Article III standing as a
24 matter of law. *See, e.g., Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286–87 (9th
25 Cir. 2013) (“The same facts by which Shell has shown (1) a likelihood of success on the merits . .
26 . . , and (2) that the resulting harm would be irreparable, necessarily establish that Shell has
27 standing to seek injunctive relief.”); *Coal. for Econ. Equity v. Wilson*, No. C 96 4024 TEH, 1996
28 WL 691962, at *2 n.4 (N.D. Cal. Nov. 27, 1996) (“Because the Court finds that plaintiffs have
demonstrated immediate irreparable injury sufficient to support a TRO, plaintiffs have plainly
met the lower threshold for standing.”). There can also be no question that the County’s claims
are ripe. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (“[W]here
threatened action by government is concerned,” a plaintiff need not “expose himself to liability
before bringing suit to challenge the basis for the threat.”).

1 the [Administration] has any ‘valid’ interest in enforcing” it. *Planned Parenthood Ass’n of*
2 *Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987).

3 The requested injunction would also serve the public interest. “[T]he public is certainly
4 interested in the prevention of enforcement of ord[ers] which may be unconstitutional.” *Id.*
5 Moreover, according to the President, the Executive Order’s very purpose is to allow him and his
6 subordinates to deny disfavored jurisdictions, such as the County, the ability to “properly operate”
7 as local governments. *See* Harris Decl., Ex. B (O’Reilly Interview) at 4. There is no valid federal
8 interest in forcing state and local governments to act as federal immigration enforcers against
9 their will. Under our Constitution’s federalist structure, the County cannot be coerced to enforce
10 federal policy. Absent an injunction, the Executive Order will subjugate the general public’s
11 health, welfare and safety to the President’s whims. The public interest in curbing this abuse of
12 power is paramount.

13 **V. CONCLUSION**

14 For the foregoing reasons, the Court should grant the preliminary injunctive relief
15 requested. Because the Executive Order applies to state and local governments across the
16 country—and because partial geographic implementation would lead to inconsistent
17 enforcement—the injunction should apply nationwide. *See Washington v. Trump*, No. 17-35105,
18 2017 WL 526497, at *9 (9th Cir. Feb. 9, 2017) (declining to “limit the geographic scope” of a
19 nationwide TRO enjoining application of President Trump’s executive order banning entry of
20 nationals from seven countries); *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015)
21 (affirming nationwide injunction of federal immigration directive to ensure uniformity and
22 provide full relief), *aff’d by an equally divided Court*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

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Respectfully submitted,

Dated: February 23, 2017

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