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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 COUNTY OF SANTA CLARA,
15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the
United States of America, JOHN F. KELLY,
18 in his official capacity as Secretary of the
United States Department of Homeland
Security, DANA J. BOENTE, in his official
19 capacity as Acting Attorney General of the
United States, MARK SANDY, in his
20 official capacity as Acting Director of the
Office of Management and Budget, and
21 DOES 1-50,

22 Defendants.
23

Case No.

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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INTRODUCTION

1
2 1. This lawsuit challenges President Donald J. Trump’s January 25, 2017 executive
3 order directing reprisals against state, local, and municipal governments that he deems to be so-
4 called “sanctuary jurisdictions.” Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the
5 “Executive Order”). The Executive Order is patently unconstitutional under the Constitution’s
6 plain text, as well as settled United States Supreme Court precedent. The Executive Order throws
7 Plaintiff County of Santa Clara’s current budgetary and planning process into chaos, and also
8 poses a real risk to the health, welfare, and safety of thousands of County residents.

9 2. The Executive Order purports to seize for the President and his subordinate
10 executive officers—namely, the Attorney General and the Secretary of Homeland Security—the
11 power to declare any “sanctuary jurisdiction” ineligible to receive any federal funds. The
12 Executive Order nowhere defines the term “sanctuary jurisdiction.” The Secretary of Homeland
13 Security has plenary authority to designate any state, city, county, or other entity as a “sanctuary
14 jurisdiction,” despite that term having no defined meaning.

15 3. The Executive Order fails to provide any state or local government designated as a
16 “sanctuary jurisdiction” with a right to challenge the designation through judicial review or any
17 other means. Indeed, the Executive Order does not even require the federal government to
18 provide notice to a state or local government that it has been designated a “sanctuary
19 jurisdiction.” Accordingly, the Executive Order gives the President and his executive agents
20 unfettered, unreviewable discretion to strip any state or local government of its right to obtain any
21 federal money, at any time or for any purpose, including money Congress has already
22 appropriated and directed be paid.

23 4. The Executive Order does not stop there. It also directs the Attorney General to
24 “take appropriate enforcement action” not only against so-called “sanctuary jurisdictions,” but
25 also any “entity” that “has in effect a statute, policy, or practice that prevents or hinders the
26 enforcement of Federal law.” The Executive Order does not define what constitutes “preventing”
27 or “hindering” enforcement of federal law. As a result, this broadly and carelessly worded
28 directive requires our nation’s top law-enforcement officer to take reprisals against any state, city,

1 county, or other municipality that he may decide, in his sole and unreviewable discretion, has
2 taken any act that he believes “hinders” any interest set forth in the vast body of federal law. An
3 aggrandizement of executive power of this magnitude has rarely been attempted in the history of
4 the Republic.

5 5. The Executive Order also grants the Attorney General authority to commandeer
6 local law enforcement officers to carry out the President’s immigration agenda. It further
7 obligates the Attorney General to retaliate against a local government whose law enforcement
8 officers fail to provide what he considers “full compliance,” in his sole and unreviewable
9 discretion.

10 6. The Executive Order contains other enormous and obvious problems. Section 5,
11 for example, vastly expands federal immigration enforcement priorities by prioritizing for
12 removal undocumented immigrants who, *inter alia*, have allegedly “committed acts that
13 constitute a chargeable criminal offense,” “abused any program related to receipt of public
14 benefits,” or who, “[i]n the judgment of an immigration officer, otherwise pose a risk to public
15 safety or national security.” Executive Order, Sec. 5(c), (e), (g) at 8800. These standardless
16 provisions encourage and sanction arbitrary, subjective, and discriminatory enforcement. And
17 Section 6 of the Executive Order requires assessment of “fines and penalties” against not only
18 undocumented persons but anyone who “facilitate[s] their presence in the United States.” This
19 undefined and unbounded category may include anyone who unknowingly rents a room to or
20 conducts business with an undocumented person, medical personnel who provide essential or
21 even life-saving services to an undocumented person, or even a lawyer defending such a person in
22 immigration proceedings.

23 7. Through this lawsuit, the County of Santa Clara (“the County”) challenges only
24 those aspects of the Executive Order’s unconstitutionality that directly injure the County’s
25 interests and are ripe for judicial review. Other challenges by other plaintiffs are sure to follow.
26 This action alleges that the Executive Order is unconstitutional for the following independent
27 reasons.

28

1 8. First, the Executive Order seizes for the President and the executive branch the
2 power of the federal purse, which belongs exclusively to Congress under Article I, section 8,
3 clause 1 of our federal Constitution. Only Congress has the power to appropriate and spend
4 federal dollars. This power includes the right to determine who is eligible to receive federal
5 funds, as well as which conditions, if any, they must fulfill to receive those funds. The President
6 has no power to appropriate funds or unilaterally place conditions on eligibility for receipt of
7 federal money, much less to bar by fiat a state, city, or county from receiving any federal money
8 whatsoever. Yet that is what the Executive Order purports to do.

9 9. In fact, the Executive Order is so unconstitutionally overbroad that it claims
10 spending power for the President and the executive branch that even Congress lacks. Under a
11 long and unbroken line of United States Supreme Court precedent, Congress's power to place
12 conditions on the receipt of federal funds is limited in several fundamental respects. Once it
13 provides money to a state, county, or city and the money is accepted, Congress is barred from
14 imposing new conditions. Nor may Congress impose conditions on federal money that are
15 unrelated to the federal interest furthered by the appropriated funds. And Congress cannot
16 impose a condition that is so coercive that it amounts to "a gun to the head," leaving the state or
17 local government with no real choice but to buckle to a federal demand. The Executive Order
18 attempts to do all these things. Accordingly, even if the Executive Order were an Act of
19 Congress, or authorized by one, it would be unconstitutional.

20 10. Congress has not only failed to grant the President the spending power he now
21 claims, but it also considered and rejected the very policy the Executive Order now seeks to
22 impose by dictate. Indeed, Senator Jeff Sessions—the man tapped to become the Attorney
23 General referenced in the Executive Order—introduced a Senate bill in 2015 that would have
24 conditioned the receipt of certain, law-enforcement-related federal funds on compliance with
25 federal immigration enforcement directives and priorities. The bill died in committee, as did its
26 counterpart in the House of Representatives. After Mr. Sessions failed to achieve his policy ends
27 through the legislative process, the President simply imposed them through the Executive Order,
28 which repeats portions of Mr. Sessions's failed bill verbatim. A long line of Supreme Court

1 precedent makes clear that when the President acts in derogation of the “expressed or implied will
2 of Congress, his power is at its lowest ebb.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
3 579, 637 (1952) (Jackson, J., concurring). That is the case here. The President cannot enact Mr.
4 Sessions’s bill by executive order, especially when Congress itself declined the opportunity.

5 11. Second, the Executive Order is unconstitutional because it is too vague to provide
6 the County with reasonable notice of what it must do to comply with its terms and avoid
7 unspecified “enforcement actions.” The Executive Order requires states, cities, and counties to
8 refrain from “hinder[ing]” any enforcement of any federal law. Because this standard is nowhere
9 defined in the Executive Order and its application is left up entirely to the sole and unreviewable
10 discretion of the Attorney General, a state, city, or county could suffer whatever reprisals deemed
11 appropriate by the Attorney General for any act deemed insufficiently supportive of federal law
12 enforcement. Such a vague order cannot stand.

13 12. Third, the Executive Order denies the County the procedural due process
14 protections afforded to it by the Fifth Amendment. The Executive Order provides the County no
15 clue as to which acts would trigger the “hindrance” standard, and no opportunity to contest the
16 Attorney General’s decision or have that decision reviewed by an independent tribunal. Indeed,
17 the Executive Order fails to guarantee that the County will even receive notice that it has been
18 designated a “sanctuary jurisdiction” subject to deprivation of federal funds and unspecified
19 enforcement actions. Because it fails to provide affected jurisdictions with reasonable notice or
20 any opportunity to be heard, the Executive Order violates the Due Process Clause of the Fifth
21 Amendment to the United States Constitution.

22 13. Fourth, the Executive Order violates the Tenth Amendment and the federalism
23 principles that animate our governmental structure. By requiring that County officials take
24 unspecified actions to avoid “prevent[ing] or hinder[ing]” the federal government in the
25 enforcement of “Federal law,” the Executive Order commandeers state and local officials,
26 transforming them into federal apparatchiks and severing the bonds of political accountability
27 inherent in our federal system.

28

1 official capacity.

2 21. Defendant John F. Kelly is the Secretary of the U.S. Department of Homeland
3 Security, a federal government agency responsible for, among other things, the enforcement of
4 U.S. immigration laws. Defendant Kelly is sued solely in his official capacity.

5 22. Defendant Dana J. Boente is the Acting Attorney General of the U.S. Department
6 of Justice.¹ Defendant Boente is sued solely in his official capacity.

7 23. Defendant Mark Sandy is the Acting Director of the Office of Management and
8 Budget.² Defendant Sandy is sued solely in his official capacity.

9 24. The true names and capacities of Defendants identified as DOES 1-50 are
10 unknown to Plaintiff, and Plaintiff will amend this Complaint to insert the true names and
11 capacities of those fictitiously named Defendants when they are ascertained.

12 **FACTUAL ALLEGATIONS**

13 **A. The County Relies on Federal Funding.**

14 **1. 1.9 million residents depend upon the County for essential services.**

15 25. The County was established in 1850 as one of the first counties in California
16 statehood. Today, 1.9 million people reside in the County, and rely on it to provide essential
17 services, such as law enforcement, health and hospital care, education, care for youth and elderly,
18 and social services. Many of the County's programs serve the neediest County residents, such as
19 abused and neglected children, indigent and uninsured individuals requiring health care, persons
20 who are mentally ill or substance dependent, and persons who are physically or mentally
21 disabled.

22 26. The County also oversees most regional public health and public safety functions,
23 including emergency planning and services, disease control and prevention, and criminal justice
24 administration, in addition to operating roads, airports, parks, libraries, election systems, fire
25 departments, and many other critical functions.

26 ¹ The President has nominated Senator Jeff Sessions to serve as Attorney General, and, if
27 confirmed, Senator Sessions will replace Acting Attorney General Boente.

28 ² The President has nominated Congressman Mick Mulvaney to serve as Director of the Office of
Management and Budget and, if confirmed, Representative Mulvaney will replace Acting
Director Sandy.

1 **2. The County relies on federal funds to provide essential services and**
2 **meet its budget.**

3 27. The County receives approximately \$1 billion annually in federal funds,
4 representing about 15% of its \$6 billion annual budget. Only a small fraction of the federal
5 funding the County receives relates to immigration or law enforcement. Much of the federal
6 funding the County receives is passed through the State of California.

7 28. As discussed below, the vast majority of federal funding the County receives is
8 used to provide essential safety-net programs and social services to its residents. Without these
9 federal funds, the County would be forced to make extraordinary cuts to critical services—and in
10 some cases totally eliminate key County services and functions. The elimination, or even
11 reduction, of federal funding would require the County to fundamentally and globally reallocate
12 funds and services. And, because the Executive Order purports to withdraw *all* federal funds
13 from “sanctuary jurisdictions,” the County is forced to determine now whether and how much to
14 cut services, and whether a global reallocation of resources is necessary.

15 Santa Clara Valley Medical Center

16 29. Santa Clara Valley Medical Center (“SCVMC”) is the only safety-net healthcare
17 provider in the County. Wholly owned and operated by the County, SCVMC provides healthcare
18 services to indigent and underserved patients whom other healthcare providers often refuse to
19 serve. It operates a 574-bed hospital, specialized centers that provide trauma, burn and
20 rehabilitation, renal and ambulatory care, ten ambulatory care clinics, and four medical and dental
21 units.

22 30. Approximately seventy percent of SCVMC’s \$1.4 billion annual budget comes
23 from direct federal funding, as well as funds from other sources that are dependent on the
24 existence of a federal funding stream, and would not be provided in the absence of federal funds.
25 Together, these funds help pay for the full suite of health care that SCVMC provides, including
26 critical ambulatory primary and specialty care, women’s and children’s health services, neonatal
27 and pediatric intensive care, comprehensive adult and pediatric specialty services, comprehensive
28 oncology services, comprehensive trauma and emergency services, and other essential medical

1 services, as well as emergency and acute psychiatric services. Federal funds also allow SCVMC
2 to invest in research, programs, and technologies that benefit all patients and society more
3 broadly.

4 31. If SCVMC were to lose the funding that it receives from federal grants and
5 reimbursements, hundreds of thousands of patients—including infants and children, the elderly,
6 and those with chronic disease—would be left without viable healthcare options. This would
7 create an untenable healthcare crisis in the community.

8 Social Services Agency

9 32. The County’s Social Services Agency (“SSA”) provides a wide array of services
10 to the County’s most vulnerable residents, including child welfare and child protective services,
11 aid to needy families, services and support to disabled children and adults, services and protection
12 to elderly individuals, and administration of many public benefits programs.

13 33. The SSA receives over \$300 million in federal funding each year—approximately
14 40% of its budget—to support these essential safety-net services. Nearly all of the County’s SSA
15 funding is reimbursement-based, requiring the County to front the money necessary to provide
16 services to its residents now based on the federal government’s promise to reimburse the County
17 later.

18 34. The County relies on these federal funds to provide critical social services to its
19 neediest residents—including child welfare services, in-home care and nutrition services for the
20 elderly, and time-limited assistance to the County’s lowest-income families. Furthermore,
21 because a substantial amount of SSA’s federal funding pays for service providers, cutting those
22 funds would threaten the jobs of approximately 23,000 workers who perform social work, home
23 health care, and food services.

24 Behavioral Health Services Department

25 35. The County’s Behavioral Health Services Department provides essential services
26 to residents struggling with mental illness and substance abuse. It offers a broad range of services
27 including mental health urgent care, crisis intervention, housing and support services, psychiatric
28

1 services, residential treatment programs, substance abuse treatment and services, jail diversion
2 programs, and substance abuse prevention and education services.

3 36. The Behavioral Health Services Department receives approximately \$131 million
4 in direct federal funding annually, accounting for over 30% of its operating budget.

5 37. Without this federal funding, the County would be forced to drastically reduce the
6 quantity and quality of behavioral health services it provides, and would be forced to significantly
7 cut staff. In turn, residents would lose access to critical behavioral health services, making them
8 more vulnerable to crises or decompensation, relapse, and increased risk of homelessness,
9 addiction, criminal activity, incarceration, and death.

10 Public Health Department

11 38. The County's Public Health Department protects and promotes the health of the
12 County's residents through programs to identify, treat, and stop the spread of communicable and
13 potentially lethal diseases; to provide disease and injury prevention; to offer immunizations for
14 children and travelers; and to provide health education. The fifteen cities within the County lack
15 their own public health departments and depend entirely on the County's Public Health
16 Department to provide these services.

17 39. Federal funds comprise approximately \$40 million of the Public Health
18 Department's \$100 million annual budget.

19 40. The loss of federal funds would have a devastating impact on the County's ability
20 to continue providing core public health services for the communities most in need. The County
21 depends on these federal funds to support, among other things: the prevention of communicable
22 diseases; maternal, child, and adolescent health care; food benefits, breastfeeding support, and
23 nutrition education for low-income mothers and their children; medical care for uninsured and
24 underinsured individuals living with HIV/AIDS; services for severely disabled children with
25 chronic diseases; immunization support and vaccination services for children and schools; and
26 programs to prepare for and respond to public health emergencies and potential terrorism.

27 Office of Emergency Services
28

1 41. The County’s Office of Emergency Services (“OES”) is responsible for facilitating
2 the County’s preparation for, response to, and recovery from disasters of all types—from severe
3 weather events to terrorism to major earthquakes. Among its responsibilities, OES provides
4 emergency management training exercises; engages in region-wide hazard planning; operates the
5 Santa Clara County Emergency Operations Center during emergency incidents; and coordinates
6 regional efforts to recover following emergency incidents.

7 42. For fiscal year 2016, OES has been awarded more than \$5 million in federal
8 funding, representing almost two-thirds of its budget. All of this funding is provided by the
9 federal government on a reimbursement basis, with several million in grant funding currently
10 outstanding—i.e., the funds have been awarded by the federal government, but the County has
11 not yet been reimbursed.

12 43. These federal funds are critical to keeping the local community safe during natural
13 disasters, man-made emergencies, acts of terrorism, and other large-scale catastrophic events.
14 Furthermore, these funds are essential to the County’s community- and region-wide emergency
15 planning and preparedness.

16 Other Federal Funding

17 44. Despite their broad reach, the funding streams described above represent only a
18 fraction of the County’s federal funding sources. Numerous other County departments and
19 agencies rely on federal funding to provide essential health, safety, and welfare services to the
20 community, including the Consumer and Environmental Protection Agency, the Office of
21 Supportive Housing, the Roads and Airports Department, the Facilities and Fleet Department, the
22 Department of Child Support Services, the Probation Department, the Sheriff’s Office, the
23 Department of Parks and Recreation, and the Office of the County Executive.

24 45. Without federal funding, these departments and agencies would have to roll back
25 their support of programs that comprise the very fabric of the community, including housing and
26 community development, housing stability and supportive services for the chronically homeless,
27 highway planning and construction, water quality improvement, agricultural pest management,
28 child support, juvenile justice, security and intelligence initiatives, and multifaceted crime

1 prevention. It is a near certainty that the County's federal funding touches each and every one of
2 its 1.9 million residents in some way or another.

3 **3. The County must make budgetary decisions today for future services.**

4 46. Each year, as required by the County Charter, the County Executive develops a
5 recommended budget for approval by the Board of Supervisors. To develop that budget, County
6 staff carefully analyzes and weighs a multitude of factors including anticipated revenues, specific
7 service needs for diverse subsets of County residents, salary and benefits costs for the County's
8 18,000 employees, and an array of local priorities.

9 47. The County is currently in the process of formulating its budget for the fiscal year
10 beginning on July 1, 2017.

11 48. Reliable access to federal funding plays a critical role in the County's budgeting
12 process. The County receives federal funds in several different forms. For example, many of the
13 federal funds the County receives are provided as reimbursements, under which the County first
14 expends its own funds, and later seeks partial or complete reimbursement from the federal
15 government. Other federal revenues are provided on a fee-for-service basis, under which the
16 County must expend its own resources to deliver services, and then subsequently seek fee-based
17 payments from the federal government. Still other federal funds are provided to the County in the
18 form of direct, upfront grants. The County receives all federal funding either directly from the
19 federal government, or passed through the State of California or other government entities.

20 49. The Executive Order has thrown the County's budget process into chaos, as the
21 County suddenly faces the possibility that more than \$1 billion of its anticipated revenues could
22 disappear at the executive branch's whim. The County's contingency reserve is approximately
23 \$130 million, so there is no means by which the County could possibly absorb the resulting
24 shortfall. Because the County's federally funded programs operate continuously, the County
25 must decide whether to continue incurring hundreds of millions of dollars in costs that may never
26 be reimbursed by the federal government, or instead discontinue basic safety-net services
27 delivered to its most vulnerable residents.

28

1 **4. County policies and practices regarding cooperation with U.S.**
2 **Immigration and Customs Enforcement (“ICE”) conflict with the**
3 **President’s stated policies.**

4 50. The County is responsible for operating numerous criminal justice agencies,
5 including the County Sheriff’s Office, Department of Correction, District Attorney’s Office,
6 Public Defender’s Office, Probation Department, and Office of Pretrial Services. These agencies
7 investigate and prosecute crimes; provide criminal defense to indigent defendants; provide
8 services to arrestees during the pretrial phase as well as post-sentencing to reduce flight and
9 recidivism; and ensure the safety and security of all residents of the County, including those in
10 custody in the County jail system, which is the fifth largest in California.

11 51. As part of their responsibility to apprehend and detain those suspected or
12 convicted of committing criminal offenses, the County Sheriff’s Office and Department of
13 Correction have had significant experience with ICE “civil detainer requests” and other
14 immigration enforcement mandates.

15 52. An ICE civil detainer request asks a local law enforcement agency to continue to
16 detain an immigrant inmate—who is generally being held in a local jail for violations or
17 suspected violations of state criminal laws—for up to 48 additional hours after his or her regularly
18 scheduled release date so that ICE can decide whether to take the individual into custody and
19 initiate removal proceedings.

20 53. Prior to late 2011, the County Sheriff’s Office and Department of Correction
21 regularly responded to ICE civil detainer requests and other inquiries from federal immigration
22 officials. As a result of ICE civil detainer request, during this period, the County was holding on
23 average 135 additional inmates at a time, at a daily cost of \$159 per person.

24 54. In a public exchange of letters from August through October 2010, then-County
25 Counsel Miguel Márquez asked ICE to clarify, among other things, (i) whether ICE viewed
26 detainer compliance as compulsory, and (ii) whether the federal government would indemnify
27 and reimburse the County for the costs associated with civil detainer requests. ICE responded
28 that detainees are “requests,” but that ICE would neither reimburse detention costs nor indemnify
localities for any liability arising from responding to detainer requests.

1 55. Over the next several months, a task force convened by the County Board of
2 Supervisors, and comprised of officials from each of the County criminal justice agencies listed
3 above, carefully reviewed the County's history of compliance with ICE detainer requests, placing
4 special focus on the impact on public safety in the community. The task force determined that a
5 tailored approach of honoring ICE detainer requests only for individuals with serious or violent
6 felony convictions, as defined under California law, would best protect public safety in the
7 County.

8 56. When the Board of Supervisors formally adopted this position in the County Civil
9 Detainer Policy in October 2011, it also included a provision stating that the County would honor
10 ICE detainer requests for individuals with the requisite convictions only if ICE would enter into a
11 prior written agreement "by which all costs incurred by the [C]ounty in complying with the ICE
12 detainer shall be reimbursed." To date, ICE has refused to enter into a reimbursement agreement
13 with the County, so the County has not honored any detainer requests since October 2011.
14 Although the precise scope and meaning of the undefined term "sanctuary jurisdictions" is
15 unknown and the executive branch's discretion to declare a state or local government to be such a
16 jurisdiction is boundless, the County reasonably anticipates that its practices would place it on the
17 Department of Homeland Security's weekly list of jurisdictions "that ignored or otherwise failed
18 to honor any detainees." Executive Order, Sec. 9(b) at 8801.

19 57. Additionally, in 2010, the County Board of Supervisors adopted a Resolution
20 affirming the separation between County services and the enforcement of federal civil
21 immigration law. The Resolution prohibits County employees, including law enforcement
22 officers, from initiating an inquiry or enforcement action based solely on an individual's actual or
23 suspected immigration status, national origin, race/ethnicity, or English-speaking ability. It also
24 prohibits the use of County funds or resources to investigate, question, apprehend, or arrest an
25 individual solely because of an actual or suspected violation of immigration law, or to transmit to
26
27
28

1 ICE for purposes of federal immigration enforcement information collected by the County in the
2 course of providing critical social services.³

3 58. The County's policies relating to involvement in federal immigration enforcement
4 were specifically designed to advance public safety. County law enforcement officials rely on
5 members of the local community—including those who lack lawful immigration status—to report
6 crimes, come forward as witnesses, aid in apprehending individuals with bench warrants, and
7 assist with criminal prosecutions.

8 59. When local law enforcement officers are perceived as immigration enforcers, the
9 result is a dangerous chilling effect on trust and cooperation from the community. Individuals are
10 less likely to seek police officers' help for fear of being questioned about their immigration status.
11 Crimes go unreported. Victims and witnesses are hesitant to offer testimony. And communities
12 are less safe. The view that involving local officials in federal immigration enforcement
13 undermines public safety is not unique to the County of Santa Clara. Indeed, local law
14 enforcement agencies around the country echo the County's experience.

15 60. The Executive Order wrongly suggests that only maximum cooperation with
16 federal immigration enforcement priorities by local law enforcement agencies can protect public
17 safety. In fact, forcing local governments such as the County to engage in immigration
18 enforcement—whether by requiring them to honor ICE civil detainer requests or, more broadly,
19 by compelling them to act as federal immigration officers—drives a wedge between local law
20 enforcement officers and the communities they serve and protect, undercutting law enforcement's
21 core public safety mandate.

22 61. Compelling the County to engage in immigration enforcement also threatens the
23 County's fiscal stability. First, civil detainer requests impose significant costs that the federal

24 ³ Starting in 2016, two federal grant programs in which the County had participated—the State
25 Criminal Alien Assistance Program (SCAAP) and Edward Byrne Memorial Justice Assistance
26 Grant (JAG)—required the County to certify its compliance with “all applicable federal laws.”
27 On July 7, 2016, the U.S. Department of Justice issued guidance explaining that 8 U.S.C. § 1373,
28 which relates to sharing of immigration status information, is now considered an “applicable
federal law” for purposes of SCAAP and JAG funds, and that state and local governments with
any restrictions on information-sharing with ICE would be viewed as noncompliant. To retain its
discretion, the County decided in October 2016 not to apply for or accept future SCAAP or JAG
funds from the federal government.

1 government refuses to reimburse. Although a civil detainer request formally asks a local law
2 enforcement agency to maintain custody of an individual for an additional 48 hours beyond when
3 he or she would otherwise be released, individuals subject to civil detainers typically are held for
4 much longer than they would absent the detainer—largely because the existence of a detainer
5 request makes an individual highly unlikely to be offered a bail bond to facilitate his or her
6 release from custody pending trial. The costs associated with compliance with ICE detainer
7 requests can quickly skyrocket, diverting County resources away from critical public safety
8 functions to federal civil immigration enforcement.

9 62. Second, honoring civil detainer requests would expose the County to substantial
10 liability for constitutional violations. Federal courts around the country have held that honoring
11 ICE civil detainer requests exposes local law enforcement agencies to liability under the Fourth
12 Amendment. *E.g., Morales v. Chadbourne*, 793 F.3d 208, 215-16 (1st Cir. 2015); *Miranda-*
13 *Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11-12 (D. Or.
14 Apr. 11, 2014). The federal government has made clear that it will not indemnify local law
15 enforcement agencies against constitutional claims, even when they arise directly out of actions
16 the local agency has taken at the federal government’s behest.

17 63. In addition, the County is currently a defendant in a class action lawsuit alleging
18 Eight and Fourteenth Amendment violations relating to significant overcrowding in the County
19 jails. Substantially increasing the jail population by honoring ICE detainers would directly and
20 immediately compound the County’s potential liability.

21 64. Even if the County rescinded its policies governing local participation in federal
22 immigration enforcement, as the Executive Order seeks to compel, the County would still be
23 required to comply with state laws that also significantly constrain its participation in federal
24 immigration enforcement activities. California’s Transparency and Responsibility Using State
25 Tools (TRUST) Act, Cal. Gov. Code § 7282.5, permits local law enforcement agencies to honor
26 ICE detainer requests only with respect to individuals in their custody who have specific prior
27 criminal convictions or criminal charges as to which a judge has made a finding of probable
28 cause. Moreover, the pending “California Values Act,” Senate Bill 54, would (a) prohibit state

1 and local law enforcement agencies and school police from using public resources to investigate,
 2 interrogate, detain, detect, or arrest anyone solely for immigration enforcement purposes, and (b)
 3 require state agencies to ensure that information collected from individuals in the course of
 4 service delivery is limited to that necessary to provide services and is not used or disclosed for
 5 any other purpose.

6 65. Indeed, in a memorandum issued by the Department of Justice's Office of the
 7 Inspector General (OIG) relating to 8 U.S.C. § 1373, the OIG called out the entire State of
 8 California as a jurisdiction that does not fully comply with federal immigration enforcement
 9 priorities.⁴ Because much of the County's federal funding is passed through agencies of the State
 10 of California, these active questions about the continuation of federal funding streams to the State
 11 of California as a whole substantially exacerbate the County's fiscal uncertainty.

12 **B. The President's Executive Order Regarding "Sanctuary Jurisdictions" is**
 13 **Unconstitutional.**

14 **1. The Executive Order constitutes an unprecedented attempt to expand**
 15 **executive power.**

16 66. On January 25, 2017, President Donald J. Trump issued Executive Order 13768,
 17 entitled "Enhancing Public Safety in the Interior of the United States." That Executive Order was
 18 published in the Federal Register on January 30, 2017, at Vol. 82, No. 18. It is available on the
 19 White House public website ([https://www.whitehouse.gov/the-press-](https://www.whitehouse.gov/the-press-office/2017/01/25/Presidential-executive-order-enhancing-public-safety-interior-united)
 20 [office/2017/01/25/Presidential-executive-order-enhancing-public-safety-interior-united](https://www.whitehouse.gov/the-press-office/2017/01/25/Presidential-executive-order-enhancing-public-safety-interior-united)), and is
 attached hereto as **Exhibit A**.

21 67. The Executive Order represents a gross overreach of executive power. This power
 22 grab comes at the expense of powers constitutionally vested in the Congress, as well as state and
 23 local governments.

24 68. Section 1 of the Executive Order announces the order's "[p]urpose." Executive
 25 Order, Sec. 1 at 8799. It declares that "Sanctuary jurisdictions across the United States willfully

26
 27 ⁴ Memorandum from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att'y
 28 Gen. for the Office of Justice Programs, "Department of Justice Referral of Allegations of
 Potential Violations of 8 U.S.C. § 1373 by Grant Recipients," at 13 (May 31, 2016),
<https://oig.justice.gov/reports/2016/1607.pdf> ("Horowitz Memo").

1 violate Federal law in an attempt to shield aliens from removal from the United States. These
2 jurisdictions have caused immeasurable harm to the American people and to the very fabric of our
3 Republic.” *Id.*

4 69. Section 2 of the Executive Order sets forth the “policy of the executive branch.”
5 *Id.* Sec. 2 at 8799. It describes that policy as, among other things, “[e]nsur[ing] that jurisdictions
6 that fail to comply with applicable Federal law do not receive Federal funds, except as mandated
7 by law.” *Id.* Sec. 2(c) at 8799.

8 70. Section 3 of the Executive Order is titled “Definitions,” but contains no specific
9 definitions applicable to the order. *Id.* Sec. 3 at 8799. Instead, it states that “the terms of this
10 order, where applicable, shall have the meaning provided by” 8 U.S.C. § 1101. *Id.*

11 71. In a sharp break with past practice, Section 5 of the Executive Order expands the
12 federal government’s immigration enforcement priorities well beyond any threshold needed to
13 protect public safety. Section 5 calls upon the Department of Homeland Security to “prioritize
14 for removal those aliens” who are removable on a large number of grounds, including that they:

- 15 i) have criminal charges that have not been resolved;
16 ii) “have committed acts that constitute a chargeable criminal offense” even if
17 no charges have been filed;
18 iii) are arriving without prior admission (e.g., asylum-seekers);
19 iv) have “abused any program related to receipt of public benefits”; or
20 v) “otherwise pose a risk to public safety or national security” in the judgment
21 of “an immigration officer,” not an immigration judge. Executive Order, Sec. 5 at 8800.

22 72. These vague categories sweep in millions of individuals who have not been
23 convicted of any criminal offense, let alone a serious or violent one. For example, “acts that
24 constitute a chargeable criminal offense” could include a wide range of ordinary and
25 nonthreatening conduct. Leaving unbridled discretion in the hands of immigration officers to
26 brand individuals as “criminals” or “risks to public safety or national security”—without any
27 clear standards or criteria—raises serious due process concerns.

28

1 73. Section 6 of the Executive Order is equally vague and subject to arbitrary and
 2 discriminatory enforcement. Section 6 purports to impose “fines and penalties” upon not only
 3 “aliens unlawfully present in the United States,” but also upon “those *who facilitate their*
 4 *presence* in the United States.” Executive Order, Sec. 6 at 8800 (emphasis added). This
 5 undefined phrase could result in attempts by the executive branch to impose penalties upon
 6 County employees who provide essential or even lifesaving services to immigrants who are
 7 unlawfully present; their friends and family members; churches and other religious organizations
 8 that assist them; landlords, co-workers, or employers; or even attorneys who represent them in
 9 immigration proceedings.

10 **2. Section 9 of the Executive Order purports to vest the President with**
 11 **legislative powers that even Congress does not lawfully possess.**

12 74. Section 9 of the Executive Order concerns the so-called “Sanctuary Jurisdictions”
 13 that are the subject of the order, as noted in Section 1. The Executive Order includes no clear
 14 definition of that phrase, nor is that phrase defined in 8 U.S.C. § 1101.

15 75. Section 9(a) purports to vest executive branch officials with broad authority and
 16 unlimited, unreviewable discretion to deny federal funds to whichever jurisdictions they deem to
 17 be Sanctuary Jurisdictions, and to take unspecified enforcement action against them. It begins
 18 with an unconstitutional provision allowing the executive branch to strip federal funding from
 19 such purported Sanctuary Jurisdictions:

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

27 Executive Order, Sec. 9(a) at 8801 (the “Defunding Provision”).

28 76. The Defunding Provision places entirely new and amorphous conditions on
 jurisdictions, like the County, which rely on federal funds to provide services to their residents.
 Under the Executive Order, if the Attorney General and Secretary of Homeland Security
 determine (in their unbounded discretion) that a jurisdiction is “willfully refus[ing] to comply

1 with 8 U.S.C. 1373,” then those jurisdictions will be rendered “not eligible to receive Federal
2 grants.”⁵ *Id.*

3 77. Section 1373 provides, *inter alia*, that local governments may not prohibit or
4 restrict “any government entity or official from sending to, or receiving from, the Immigration
5 and Naturalization Service information regarding the citizenship or immigration status . . . of any
6 individual.” 8 U.S.C. § 1373(a). It further forbids any person or agency from prohibiting or
7 restricting any government entity from sending, maintaining, or exchanging such information
8 with federal immigration officials. *Id.* § 1373(b).⁶

9 78. The Defunding Provision includes no process or procedure by which a state or
10 local government may review, challenge, or even receive notice regarding its designation as a
11 “sanctuary jurisdiction.”

12 79. The Defunding Provision makes no mention of any statutory authority for the new
13 conditions it imposes on the affected jurisdictions. Indeed, it makes no reference to Congress or
14 Congressional action whatsoever. Rather, it grants the power to impose the new conditions—as
15 well as to determine if those conditions have been met and to deny funding on that basis—solely
16 to executive branch officials.

17 80. The Defunding Provision is incredibly broad. On its face, it appears to apply to
18 existing and expected federal funds. It makes no distinction between block grants provided to
19 states or municipalities, funds disbursed as reimbursements for previous or expected
20 expenditures, funds disbursed under a fee-for-service model, or funds provided to state and local
21 governments through entitlements such as Medicare or Medicaid.

22 81. Section 9(c) of the Executive Order makes clear that the Defunding Provision is
23 intended to apply to all federal funds. Section 9(c) orders the Director of the Office of

24 ⁵ Because the phrase “Federal grant” is nowhere defined in the Executive Order, the County must
25 interpret that phrase to apply to all federal funds, whatever their source. This interpretation is
26 consistent with the President’s statements regarding his desire to cut off taxpayer funds to state
27 and local governments he considers to be “sanctuary jurisdictions.” *See infra* ¶¶ 91–95.

27 ⁶ The federal government has expanded on its view of what Section 1373 requires through
28 various memoranda and guidance documents. *See, e.g.*, Horowitz Memo; Office of Justice
Programs, *Guidance Regarding Compliance with 8 U.S.C. § 1373*, U.S. Dep’t of Justice (July 7,
2016); Office of Justice Programs, *Additional Guidance Regarding Compliance with 8 U.S.C. §*
1373, U.S. Dep’t Just. (October 6, 2016).

1 Management and Budget “to obtain and provide relevant and responsive information on *all*
2 *Federal grant money that currently is received* by any sanctuary jurisdiction.” Executive Order,
3 Sec. 9(c) at 8801 (emphasis added). On its face, the order targets “all” federal funds, whatever
4 their source, and includes funds that affected jurisdictions—including the County—have
5 “currently received.” *Id.* It is therefore unbounded in both scope and time. Furthermore, the
6 notion that the federal government may, pursuant to this order, attack County funds retroactively
7 is no hypothetical scenario. For each type of funding the County receives, the federal government
8 may attempt to claw back those funds.

9 82. By executive fiat, the Defunding Provision imposes new funding conditions that
10 Congress could not constitutionally have imposed. The Defunding Provision applies to all
11 “Federal grants,” regardless of whether those grants have any connection, relation, or nexus to
12 immigration. Executive Order, Sec. 9(a) at 8801. Such an untethered condition far exceeds
13 Congress’s power under the Spending Clause.

14 83. The order provides a mechanism by which certain monies “deemed necessary for
15 law enforcement purposes” may be exempted from the blanket Defunding Provision. *Id.* That
16 exemption gets the law exactly backwards, because funds related to law enforcement bear at least
17 some connection to compliance with 8 U.S.C. § 1373, and are arguably the only funds that
18 Congress could conceivably have tied to such compliance in a constitutional manner. *See S.*
19 *1640, 114th Cong. § 114(d) (2015); H.R. 1148, 114th Cong. § 114(d) (2015).* But Congress has
20 never imposed any such restriction, and in fact has specifically considered and rejected similar
21 restrictions. *See id.*

22 84. By threatening all of a jurisdiction’s federal funding, the Defunding Provision goes
23 beyond encouragement and becomes unduly coercive. It is, in effect, “a gun to the head.” *Nat’l*
24 *Fed’n of Indep. Bus. v. Sebelius (“NFIB”), 132 S. Ct. 2566, 2604 (2012).* The point of the threat
25 is to compel each affected jurisdiction to “adopt a federal regulatory system as its own,” which is
26 “contrary to our system of federalism.” *Id.*

27 85. The new spending conditions are also constitutionally infirm. Section 1373 itself
28 raises a host of constitutional issues, particularly under the Tenth Amendment. And to the extent

1 that the executive branch determines that compliance with 8 U.S.C. § 1373 requires jurisdictions
2 to detain individuals who would otherwise be released from custody, the Executive Order forces
3 jurisdictions to violate the Fourth, Eighth, and Fourteenth Amendment rights of individuals
4 within those jurisdictions, thereby risking civil liability, including personal liability against
5 individual law enforcement officers.

6 86. The Executive Order not only claims the power to strip affected jurisdictions of the
7 federal funding they rely on to govern, but also promises unspecified enforcement action against
8 those jurisdictions:

9 The Attorney General shall take appropriate enforcement action against any entity
10 that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that
prevents or hinders the enforcement of Federal law.

11 Executive Order, Sec. 9(a) at 8801 (the “Enforcement Provision”).

12 87. Like the Defunding Provision, the Enforcement Provision is both extremely broad
13 and entirely vague in its wording. It promises enforcement action against any jurisdiction that
14 “prevents or hinders the enforcement of Federal law.” *Id.* By its terms, this provision applies to
15 *all* federal law—all 54 titles of the U.S. Code, and presumably the entire Code of Federal
16 Regulations to boot. Nor is it limited to violations of federal law; it targets any jurisdiction that
17 has a “statute,” “policy,” or “practice” that simply “hinders” enforcement of those laws. The
18 Enforcement Provision does not define what “hinders” means, vesting entirely in the executive
19 branch the power to make that determination and offering no judicial review or other recourse to
20 any jurisdiction deemed to have violated it.

21 88. Taken at face value, the Enforcement Provision reworks the entire structure of our
22 federal republic, granting the federal executive branch untrammelled discretion to punish state and
23 local governments for taking any action—or simply having a policy or practice—that the federal
24 government finds inconvenient. The Enforcement Provision thus violates the anti-
25 commandeering aspect of the Tenth Amendment, as well as federalism principles more generally.

26 89. The Executive Order makes no attempt to ground the vast new authority it seizes
27 for the executive branch in any specific constitutional or statutory authority. The only sources of
28 authority President Trump has claimed for the sweeping and unprecedented order are “the

1 authority vested in me as President by the Constitution and laws of the United States of America,
2 including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*),” as well as “Article
3 II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code.”
4 Executive Order, Secs. 1, 2 at 8799.

5 90. None of these cited provisions grants the President any of the powers he has taken
6 for his own. Justifying itself by reference to the “authority vested” in the President by the
7 Constitution and federal law, the Executive Order begs the question of whether the President has
8 such authority in the first place. The INA says nothing about withdrawing or restricting federal
9 funds from jurisdictions that fail to comply with 8 U.S.C. § 1373, or imposing “appropriate
10 enforcement action” against certain jurisdictions. Indeed, the phrase “sanctuary jurisdiction” is
11 found nowhere in the Act. Article II, Section 3 of the Constitution is the “Take Care” clause,
12 which by its terms requires the President to follow and execute the law Congress enacted, not to
13 seize legislative power for himself. That clause has never been interpreted to allow the power
14 grab the President is attempting here. And 5 U.S.C. § 3331 is the oath of office every federal
15 official—except the President—takes when appointed to a federal office. The oath provides no
16 independent authority for the powers claimed by the Executive Order.

17 **3. The President’s and his subordinates’ statements reveal the Executive**
18 **Order’s unconstitutionally broad scope.**

19 91. The Executive Order contains a few vague caveats indicating that it will, in part,
20 be applied “to the extent consistent with law” (a caveat noticeably absent from the Enforcement
21 Provision). *See* Executive Order, Sec. 9 at 8801. But the President’s and his subordinates’ own
22 statements belie that blithe assurance. On the contrary, there is no indication that the executive
23 branch understands, respects, or has any intention to interpret or enforce the Executive Order
24 consistent with governing law and well-established constitutional limitations.

25 92. The President’s own statements—and those of other officials in his
26 administration—reveal that the executive branch intends the Executive Order to go far beyond
27 current law. Indeed, the President has repeatedly promised, both on the campaign trail and once
28 elected, that his goal is not to use the spending power (which is not his, in any event) to

1 encourage jurisdictions to cooperate with his federal immigration program. Rather, he proposes
2 to deny *all* federal funding to jurisdictions he believes are failing to comply with federal
3 immigration laws, “ending” them altogether. That approach is undoubtedly unconstitutional,
4 however implemented.

5 93. The President’s and his aides’ statements unambiguously point to a broad, and
6 therefore unconstitutional, interpretation of the Executive Order. For instance:

7 i) On August 31, 2016, then-candidate Donald J. Trump issued an “Address
8 on Immigration,” which included a heading entitled “Block Funding for Sanctuary Cities.”
9 *Donald J. Trump: Address on Immigration*, Donald J. Trump for President (Aug. 31, 2016),
10 <https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-on-immigration>. Mr.
11 Trump stated, “We will end the Sanctuary Cities that have resulted in so many needless deaths.
12 ***Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars***, and we
13 will work with Congress to pass legislation to protect those jurisdictions that do assist federal
14 authorities.” *Id.* (emphasis added).

15 ii) On January 25, 2017—the day on which the President issued the Executive
16 Order—the President’s press secretary, Sean Spicer, made clear that the order targets all federal
17 funding: “***We are going to strip federal grant money from the sanctuary states and cities that***
18 ***harbor illegal immigrants***. The American people are no longer going to have to be forced to
19 subsidize this disregard for our laws.” White House, *1/25/17: White House Press Briefing*,
20 YouTube (Jan. 25, 2017), <https://www.youtube.com/watch?v=OaPriMVvtZA> (begin at 3:57
21 mark) (emphasis added).

22 iii) On January 26, 2016, President Trump reiterated his plan to target
23 sanctuary jurisdictions during remarks at the Congressional Republican Retreat: “And finally, at
24 long last, ***cracking down on sanctuary cities***. It’s time to restore the civil rights of Americans, to
25 protect their jobs, their hopes and their dreams for a much better future.” Donald J. Trump,
26 *President Trump Remarks at Congressional Republican Retreat*, C-Span (Jan. 26, 2017),
27 [https://www.c-span.org/video/?422829-1/President-trump-tells-congressional-republicans-now-](https://www.c-span.org/video/?422829-1/President-trump-tells-congressional-republicans-now-deliver)
28 [deliver](https://www.c-span.org/video/?422829-1/President-trump-tells-congressional-republicans-now-deliver) (begin at 13:54 mark) (emphasis added).

1 iv) On January 28, 2017, the White House issued a press release stating,
2 “President Trump signed an executive order to ensure that immigration laws are enforced
3 throughout the United States, **including halting federal funding for sanctuary cities.**” Press
4 Release, The White House, Office of the Press Secretary, President Trump’s First Week of Action
5 (Jan. 28, 2017), [https://www.whitehouse.gov/the-press-office/2017/01/28/President-trumps-first-](https://www.whitehouse.gov/the-press-office/2017/01/28/President-trumps-first-week-action)
6 [week-action](https://www.whitehouse.gov/the-press-office/2017/01/28/President-trumps-first-week-action) (emphasis added).

7 v) That same day, the President stated, “Here are just a few of the executive
8 actions that I have taken in the last few days An order to immediately begin the border wall
9 and to **crack down on sanctuary cities.** They are not safe, we have to take care of that horrible
10 situation.” Press Release, The White House, Office of the Press Secretary, President Trump’s
11 First Weekly Address (Jan. 28, 2017), [https://www.whitehouse.gov/the-press-](https://www.whitehouse.gov/the-press-office/2017/01/28/President-trumps-first-weekly-address)
12 [office/2017/01/28/President-trumps-first-weekly-address](https://www.whitehouse.gov/the-press-office/2017/01/28/President-trumps-first-weekly-address) (emphasis added).

13 vi) The White House’s public website likewise states that President Trump “is
14 dedicated to enforcing our border laws, **ending sanctuary cities**, and stemming the tide of
15 lawlessness associated with illegal immigration.” The White House, *Standing Up For Our Law*
16 *Enforcement Community*, <https://www.whitehouse.gov/law-enforcement-community> (last
17 accessed on February 1, 2017) (emphasis added).

18 vii) Mr. Spicer, the President’s press secretary, reiterated this goal on February
19 1, 2017, stating in a press briefing, “I think the President’s goal in **ending sanctuary cities** is
20 pretty clear. . . . [T]he President has been very clear through his executive order that **federal**
21 **funds, paid for by hardworking taxpayers, should not be used to help fund sanctuary cities.**”
22 Press Release, The White House, Office of the Press Secretary, *Press Briefing by Press Secretary*
23 *Sean Spicer, 2/1/2017, #6* (Feb. 1, 2017), [https://www.whitehouse.gov/the-press-](https://www.whitehouse.gov/the-press-office/2017/02/01/press-briefing-press-secretary-sean-spicer-212017-6)
24 [office/2017/02/01/press-briefing-press-secretary-sean-spicer-212017-6](https://www.whitehouse.gov/the-press-office/2017/02/01/press-briefing-press-secretary-sean-spicer-212017-6) (emphases added).

25 94. The Executive Order itself confirms the sweeping scope outlined by the President
26 and his aides. It cannot refer merely to existing executive power to limit spending; if that is all
27 the order accomplishes, then it is superfluous. There would be no need to order what the
28 President may already accomplish through existing statutory authorization.

1 95. In addition to comments regarding the Executive Order, the President’s more
2 recent statements reveal a complete lack of understanding of, and respect for, the boundaries
3 between executive and legislative powers. For example, commenting on reports of violent
4 protests at U.C. Berkeley in response to a planned speaking event, the President tweeted, “If U.C.
5 Berkeley does not allow free speech and practices violence on innocent people with a different
6 point of view – NO FEDERAL FUNDS?” @realDonaldTrump, Twitter (Feb. 2, 2017, 3:13 AM),
7 <https://twitter.com/realDonaldTrump/status/827112633224544256> (last accessed Feb. 2, 2017).
8 The President seems to hold the misimpression that the executive branch controls the power of
9 the purse, and that he can simply turn off the federal funding spigot to states, local governments,
10 and other publicly funded entities he disfavors. The Founders drafted and designed our
11 Constitution to avoid precisely this result.

12 **C. Congress Considered and Rejected Conditioning Federal Law Enforcement**
13 **Funds on Compliance with Section 1373.**

14 96. The Executive Order not only claims legislative power in excess of what the
15 Constitution grants to Congress, but it also represents an attempt to enact a policy that Congress
16 has already expressly considered and rejected. In fact, one of the individuals who will likely be
17 tasked with implementing and enforcing the Executive Order is the same person who tried and
18 failed to persuade Congress to enact the policy the executive branch is now imposing by dictate:
19 Jeff Sessions.

20 97. On June 22, 2015, Senator Jeff Sessions—now the President’s nominee for
21 Attorney General of the United States—introduced a bill in the United States Senate. The bill, S.
22 1640, is entitled the “Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law
23 Enforcement Act,” and is attached hereto as **Exhibit B**. Senator Sessions’s bill sought to tie
24 certain federal funds to compliance with 8 U.S.C. § 1373. S. 1640, 114th Cong. (2015). That is
25 the same power, on a narrower scale, the President now claims.

26 98. Only seven Senators co-sponsored Mr. Sessions’s bill, which died in the Senate
27 Judiciary Committee.

28

1 99. Senator Sessions’s bill had a counterpart in the United States House of
2 Representatives. There, U.S. Representative Trey Gowdy introduced H.R. 1148, entitled the
3 “Michael Davis, Jr. in Honor of State and Local Law Enforcement Act.” H.R. 1148, 114th
4 Cong. (2015). The House bill is attached hereto as **Exhibit C**. Only 50 House Members co-
5 sponsored Mr. Gowdy’s bill, which was reported out of the House Judiciary Committee, but
6 languished in the Committee on Homeland Security. It never received a vote on the floor of the
7 House.

8 100. Senator Sessions’s unsuccessful legislation, as well as its companion bill in the
9 House, was a narrower version of the sweeping Executive Order the President issued after
10 nominating Mr. Sessions to be his Attorney General. Its declared purpose was to “amend the
11 Immigration and Nationality Act to improve immigration law enforcement within the interior of
12 the United States.” S. 1640, 114th Cong. (2015). Section 114 of the bill, entitled, “State
13 Violations of Enforcement of Immigration Laws,” proposed an amendment to 8 U.S.C. § 1373
14 that is strikingly similar to the Executive Order Mr. Sessions will enforce if he is confirmed as the
15 Attorney General. Section 114(d) provided as follows:

16 “(d) Compliance.—

17 “(1) IN GENERAL.—A State, or a political subdivision of a State, that has
18 in effect a statute, policy, or practice that prohibits law enforcement
19 officers of the State, or of a political subdivision of the State, from assisting
20 or cooperating with Federal immigration law enforcement in the course of
21 carrying out the officers’ routine law enforcement duties shall not be
22 eligible to receive—

23 “(A) any of the funds that would otherwise be allocated to the State
24 or political subdivision under section 241(i) of the Immigration and
25 Nationality Act (8 U.S.C. 1231(i)) or the ‘Cops on the Beat’
26 program under part Q of title I of the Omnibus Crime Control and
27 Safe Streets Act of 1968 (42 U.S.C. 3796dd et seq.); or

28 “(B) any other law enforcement or Department of Homeland
Security grant.

“(2) ANNUAL DETERMINATION.—The Secretary shall determine
annually which State or political subdivision of a State are not in
compliance with this section and shall report such determinations to
Congress on March 1 of each year.

“(3) REPORTS.—The Attorney General shall issue a report concerning the
compliance of any particular State or political subdivision at the request of
the House or Senate Judiciary Committee. Any jurisdiction that is found to

1 be out of compliance shall be ineligible to receive Federal financial
2 assistance as provided in paragraph (1) for a minimum period of 1 year,
3 and shall only become eligible again after the Attorney General certifies
4 that the jurisdiction is in compliance.

5 S. 1640, 11th Cong. § 114(d) (2015).⁷

6 101. Shortly after introducing his bill in the U.S. Senate, Mr. Sessions issued a press
7 release calling on Congress to pass a law restricting federal funds to sanctuary cities—the very
8 authority the President now claims as his own. Senator Sessions said: “I am calling today on
9 Congress to make its first item of business ***the immediate passage of legislation to cut off***
10 ***relevant federal monies to sanctuary cities.***” News Release, Office of Senator Jeff Sessions,
11 *Senator Sessions Calls on Congress to Take Up Immigration Reform for Americans* (July 9,
12 2015), [http://www.sessions.senate.gov/public/index.cfm/2015/7/senator-sessions-calls-on-](http://www.sessions.senate.gov/public/index.cfm/2015/7/senator-sessions-calls-on-congress-to-take-up-immigration-reform-for-americans)
13 congress-to-take-up-immigration-reform-for-americans (emphasis added).

14 102. Two aspects of Senator Sessions’s statement bear emphasizing, and each of them
15 demonstrates the unconstitutionality of the Executive Order Mr. Sessions will be charged with
16 implementing if he is confirmed as Attorney General. First, Senator Sessions is flatly admitting
17 that current law does *not* allow funds to be “cut off” from sanctuary jurisdictions. As Senator
18 Sessions understood, new legislation would be needed to accomplish that objective. Second,
19 Senator Sessions is recognizing that only “***relevant federal monies***” may be conditioned on
20 compliance with certain immigration laws. *Id.* (emphasis added). Senator Sessions did not call
21 on Congress to render sanctuary jurisdictions ineligible from receiving *all* federal grants, whether
22 or not those grants were germane to immigration or law enforcement, because such a law would
23 be patently unconstitutional.

24 103. Despite Senator Sessions’s exhortation, Congress never enacted his proposed bill,
25 which would have cut off certain federal funding to state and local governments deemed
26 insufficiently compliant with federal immigration directives. In fact, the precise opposite is true:

27
28 ⁷ The companion House bill, H.R. 1148, contained an identical provision. *See* H.R. 1148, 114th
Cong. § 114(d) (2015).

1 both houses of Congress have independently and expressly considered and rejected the policy that
2 the President and Mr. Sessions now claim for the executive branch by fiat.

3 104. The similarities between Senator Sessions’s failed bill and the Executive Order are
4 striking, and likely not coincidental.⁸ The two documents share common phrases nearly
5 verbatim, targeting any jurisdiction that “has in effect a statute, policy, or practice” that the
6 federal government finds problematic. They both declare that such jurisdictions shall not be
7 “eligible to receive” federal funds. And they both vest in the Secretary of Homeland Security the
8 ability to designate certain jurisdictions as noncompliant. They also both contemplate the
9 Attorney General publishing a report listing jurisdictions that the Attorney General has deemed
10 noncompliant.

11 105. The differences between the failed bill and the Executive Order are also telling.
12 The bill appears to have made at least some effort to conform to constitutional limitations on
13 Congress’s spending power. For example, the bill tied only certain law-enforcement-related
14 funds to the proposed funding condition, signaling out “Cops on the Beat” funds, and other law
15 enforcement or Department of Homeland Security grants. S. 1640, 114th Cong. § 114(d)(1)(A-
16 B). That limitation stands in stark contrast to the Executive Order, which renders affected
17 jurisdictions ineligible to receive all “Federal grants.” Executive Order, Sec. 9(a) at 8801. The
18 failed bill also vested the Secretary of Homeland Security with primary authority for
19 implementing the legislation. By contrast, the Executive Order vests the Attorney General—
20 presumably Mr. Sessions—as well as the Secretary with ensuring fund ineligibility. *Id.*

21 106. The President’s attempt to secure by executive fiat what Senator Sessions failed to
22 win through the legislative process violates the separation of powers principles that undergird our
23

24 ⁸ Media reports confirm that Senator Sessions played a prominent role in the executive orders that
25 the President issued during his first week in office. One article states that Senator Sessions was
26 the “intellectual godfather” of Mr. Trump’s executive orders, and that his longtime chief of staff,
27 along with one of his mentees, drafted the orders. *See* Philip Rucker & Robert Costa, *Trump’s*
28 *Hard-Line Actions Have an Intellectual Godfather: Jeff Sessions*, Wash. Post, Jan. 30, 2017.
Indeed, administration officials have stated that Senator Sessions “helped devise the President’s
first-week strategy, in which Trump signed a blizzard of executive orders that begin to fulfill his
signature campaign promises — although Sessions had advocated going even faster.” *Id.*
According to the reports, Senator Sessions “lobbied for a ‘shock-and-awe’ period of executive
action that would rattle Congress, impress Trump’s base and catch his critics unaware.” *Id.*

1 system of government. As Justice Jackson stated in his seminal concurrence in *Youngstown*,
2 “When the President takes measures incompatible with the expressed or implied will of Congress,
3 his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus
4 any constitutional powers of Congress over the matter.” 343 U.S. at 637 (Jackson, J.,
5 concurring). In issuing the Executive Order, the President operated at his lowest ebb of power,
6 since Congress had already expressed its will by considering and rejecting the very powers the
7 President has claimed for himself with the stroke of a pen.

8 **D. The County Requires Immediate Relief.**

9 107. The County has standing to challenge the Executive Order and its claims are ripe
10 for adjudication today.

11 108. The County has suffered an injury-in-fact. As set forth above, the County receives
12 approximately \$1 billion in federal funding per year, which amounts to more than 15% of its total
13 budget. The Executive Order purports to strip away all of this federal funding, decimating the
14 County’s ability to provide basic services to its residents. The “loss of funds promised under
15 federal law” is a quintessential economic injury that “satisfies Article III’s standing requirement.”
16 *See Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015) (en banc),
17 *cert. denied sub nom. Alaska v. Organized Vill. of Kake, Alaska*, 136 S. Ct. 1509 (2016).

18 109. Furthermore, the Executive Order applies to, and purportedly would bar the
19 County from receiving, federal funds to reimburse the County for established programs and
20 services that the County is *currently* providing, and for which Congress has already approved
21 funding. The County is an eligible recipient of, expects to receive, and has made budgeting,
22 programming, and hiring decisions based on these prior congressional funding decisions. Now,
23 the Executive Order purports to require retroactive imposition of the condition that municipalities
24 comply with federal immigration provisions to already-approved funds. This is precisely the sort
25 of “substantial contingent liability” that confers standing because it “immediately and directly
26 affects the borrowing power, financial strength, and fiscal planning” of the County. *See Clinton*
27 *v. City of N.Y.*, 524 U.S. 417, 430-31 (1998).

28

1 110. The County’s injuries are “actual or imminent.” *Susan B. Anthony List v.*
2 *Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quotations omitted). The County has already suffered
3 harm as a result of the Executive Order, and its injuries will only continue to grow unless the
4 Executive Order is declared unlawful and its implementation enjoined. Indeed, the Executive
5 Order has thrown the County’s ongoing budgeting process into chaos, forcing the County to
6 choose whether to continue incurring hundreds of millions of dollars in costs that may never be
7 reimbursed or discontinue providing basic safety-net services to its most vulnerable residents.
8 And, because the County’s federally funded programs operate continuously, the County is
9 currently spending millions of dollars that may never be reimbursed by the federal government
10 pursuant to the Executive Order.

11 111. Furthermore, Defendants have made clear that their express purpose in adopting
12 the Executive Order is to “[h]alt federal funding for,” “strip federal grant money from,” and
13 “crack down on” municipalities, like the County of Santa Clara, which do not comply with
14 federal directives, as purportedly required by the Executive Order. *See supra* ¶¶ 91–95.

15 112. Given the County’s policies described above, and Defendants’ repeated threats to
16 pull federal funding from jurisdictions that refuse to carry out the commands of federal
17 immigration officials, there is a “credible threat” that Defendants will seek to enforce the
18 unconstitutional Executive Order against the County. *See Susan B. Anthony List*, 134 S. Ct. at
19 2342 (collecting cases). The County is not required to “expose [itself] to liability before bringing
20 suit to challenge the basis for [Defendants’] threat.” *MedImmune, Inc. v. Genentech, Inc.*, 549
21 U.S. 118, 128–129 (2007).

22 113. The County’s injuries are “fairly traceable to the challenged action”—in fact, they
23 are directly caused by the Executive Order. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,*
24 *Inc.*, 528 U.S. 167, 180 (2000). But for the Executive Order, the County would continue to receive
25 federal funds for programs and services that it currently provides, and would be able to make
26 budgeting and programming decisions without the threat that its federal funds will disappear.

27 114. The Court can redress the County’s injuries by declaring the Executive Order
28 unconstitutional and enjoining its implementation and enforcement.

1 221. Article I of the Constitution vests the federal government’s spending power
2 exclusively in Congress. *See* U.S. Const. art. I, § 8, cl. 1. By contrast, nothing in the
3 Constitution’s text, or in more than two centuries of judicial decisions interpreting the
4 Constitution, purports to confer on the President or the executive branch any power either to
5 dictate government spending or to place conditions or limits on the spending power that is vested
6 in the legislative branch. Those powers reside solely with Congress.

7 222. Although the Constitution vests the spending power exclusively in Congress, it
8 does not confer unlimited discretion on the legislative branch when that branch seeks to place
9 conditions on federal spending directed to states and local governments. As the Supreme Court
10 held in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), “[t]he spending power is of course not
11 unlimited.” In its *Dole* decision, the Court identified and explained particular limits on
12 Congress’s power to spend. Subsequent cases have given further definition to those limits.

13 223. First, as the words of the Constitution make clear, any “exercise of the spending
14 power must be in pursuit of ‘the general welfare.’” *Dole*, 483 U.S. at 207.

15 224. Second, if Congress wishes to place certain conditions on federal funds, “it must
16 do so unambiguously,” so that states and local governments may “exercise their choice
17 knowingly, cognizant of the consequences of their participation.” *Id.* (internal quotation marks
18 omitted). Accordingly, Congress may not surprise a state or local government by initially
19 approving spending unconditionally, then later imposing a condition on receipt of those funds.
20 *See NFIB*, 132 S. Ct. at 2602–04. As the Court explained in *NFIB*, “[w]e have repeatedly
21 characterized ... Spending Clause legislation as much in the nature of a *contract*.” *Id.* at 2602
22 (internal quotation marks omitted) (emphasis in original). Under this framework, “[t]he
23 legitimacy of Congress’s exercise of the spending power thus rests on whether the state
24 voluntarily and knowingly accepts the terms of the contract” at the time Congress offers the
25 money. *Id.* (internal quotation marks omitted).

26 225. Third, the Supreme Court has “repeatedly said that Congress may condition grants
27 under the spending power only in ways reasonably related to the purpose of the federal program”
28

1 at issue. *Dole*, 483 U.S. at 213. In other words, Congress may not burden the payment of funds
2 to a state or municipality for one purpose with a condition that serves a different federal interest.

3 126. Fourth, a conditional grant of federal funds may be barred if it would violate some
4 independent constitutional provision. *Id.* at 208. For example, Congress could not condition
5 federal grants on a municipality's agreement to perform unlawful searches and seizures in
6 violation of the Fourth Amendment.

7 127. Fifth, "in some circumstances the financial inducement offered by Congress might
8 be so coercive as to pass the point at which 'pressure turns to compulsion.'" *Dole*, 483 U.S. at
9 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Congress may not
10 constitutionally "force the States to implement a federal program," *NFIB*, 132 S. Ct. at 2602, and
11 may not end-run this limitation by imposing conditions on federal spending that are so draconian
12 that they amount to "a gun to the head" leaving the state or municipality no realistic choice but to
13 comply. *Id.* at 2604.

14 128. Section 9(a) of the Executive Order violates most, if not all, of the constitutional
15 principles and binding precedents outlined above.

16 129. The Executive Order claims the power to establish conditions governing federal
17 spending—which Congress has declined to impose through legislation—and to direct subordinate
18 executive branch officials to restrict eligibility for federal spending without statutory authority to
19 do so. Such powers lie beyond the President's constitutional authority. They claim for the
20 executive branch powers exclusively assigned to Congress under the Spending Clause, U.S.
21 Const. art. I, § 8, cl. 1.

22 130. To the extent the President is purporting to impose any conditions or limitations on
23 federal spending, or to direct subordinate executive branch officials to do the same, without
24 express statutory authority, the Executive Order also unlawfully exceeds the President's powers
25 under other provisions of the Constitution that establish the separation of powers among the
26 branches of our government, including:

- 27 i) the President's obligation to "take Care that the Laws be faithfully executed,"
28 U.S. Const. art. II, § 3, cl. 5 (Take Care Clause); and

1 ii) the limitation that Congressional enactments must “be presented to the
2 President of the United States,” who then may sign that enactment or veto it,
3 but has no power to merely revise it, either upon presentment or after
4 enactment, U.S. Const. art. I, § 7, cls. 2-3 (Presentment Clause).

5 131. The Executive Order not only attempts to commandeer Congress’s spending
6 power, but it also establishes conditions on federal spending that even Congress could not
7 constitutionally impose. In other words, the President has claimed powers over federal spending
8 that even Congress does not possess, and could therefore never delegate. For example:

- 9 i) The Defunding Provision makes no distinction between federal funding
10 already approved by Congress and funding to be approved in the future, and
11 thus applies equally to both categories. But Congress, let alone the President,
12 could not impose a condition on federal spending retroactively.
- 13 ii) The Defunding Provision applies to *all* federal funding related to any subject.
14 It is not restricted to funding related to a legitimate federal interest in
15 enforcement of immigration laws by municipalities. But the Constitution
16 requires that any federal funding conditions Congress imposes must be
17 reasonably related to the federal interest to which the expenditure relates (the
18 “*Dole* nexus test”). The Executive Order fails that test utterly: the Defunding
19 Provision applies to, and would bar the County from being eligible for funding
20 for, Medicare and Medicaid programs, transportation, child welfare services,
21 elder care programs, mental health services, immunization and vaccine
22 programs, and a myriad of other programs and services that have absolutely
23 nothing to do with the enforcement of federal immigration laws by state or
24 local governments. *See supra* ¶¶ 27–45.⁹

25 ⁹ The Defunding Provision not only fails the *Dole* nexus test—it gets it exactly backwards. It
26 contains only one possible exception, for funding “deemed necessary for law enforcement
27 purposes,” which the Attorney General or Secretary of Homeland Security discretionarily allow
28 to be remitted. These are the sorts of funds that *might* have withstood constitutional scrutiny had
 Congress passed them (and indeed, Congress considered such restrictions and declined to impose
 them, *see* S. 1640, 114th Cong. § 114(d) (2015)). The Executive Order threatens all funding
 unrelated to law enforcement, while paradoxically allowing a mechanism by which relevant
 funding may escape the ban.

1 iii) The Executive Order requires County law enforcement officers to undertake
2 actions that are themselves unconstitutional. For example, the Executive
3 Order's text, as well as the President's statements, indicate that he interprets
4 the Executive Order to require County law enforcement officers to comply
5 with federal directives regarding detainer actions by U.S. Immigration &
6 Customs Enforcement. Courts across the country have already determined that
7 these directives violate the Fourth Amendment. If County law enforcement
8 personnel are obligated to violate the Fourth Amendment in order to receive
9 the federal funds they rely upon to provide services, County personnel would
10 subject themselves to personal liability (including punitive damages), and
11 potentially subject the County to municipal liability, under 42 U.S.C. § 1983
12 and related federal civil rights laws.

13 iv) The new funding conditions the Executive Order imposes are profoundly
14 coercive to the County. Affecting all federal funds, the conditions go far
15 beyond the potential withdrawal of Medicaid funds, which the Supreme Court
16 described as an unconstitutional "gun to the head" in *NFIB*. As set forth
17 above, the County receives about \$1 billion in federal funding per year,
18 amounting to approximately 15% of its total budget. If the President makes
19 good on his threat to strip all of this federal funding away, it would decimate
20 the County's ability to provide basic services, including health care, to its
21 residents. Furthermore, unlike the congressional enactment in *NFIB*, which
22 permitted withdrawal of Medicaid funding if the Secretary of Health and
23 Human Services so decided, the Executive Order here unambiguously requires
24 the Attorney General and the Secretary of Homeland Security to "ensure that
25 jurisdictions" refusing the condition "are not eligible to receive Federal
26 grants." In other words, the conditions the Executive Order imposes are not
27 only broader in scope than the unconstitutional condition Congress imposed in
28 *NFIB*, but they are also mandatory rather than permissive.

1 138. The Executive Order, which reads more like a slapdash press release than it does a
2 serious expression of federal policy, fails to satisfy this constitutional minimum. It fails to
3 provide fair notice of the conduct it requires from the County.

4 139. Section 9(a) of the Executive Order fails to define key terms, such as “sanctuary
5 jurisdiction,” “Federal grants,” “law enforcement purposes,” “appropriate enforcement action,”
6 and “entity,” as well as the all-important phrase “statute, policy, or practice that prevents or
7 hinders the enforcement of Federal law.” Executive Order, Sec. 9(a) at 8801. Having such a
8 “practice” subjects a jurisdiction to “enforcement action,” which could be draconian in nature. *Id.*
9 What such a practice might be is left undefined, and subject to the executive branch’s unbridled
10 discretion.

11 140. The Executive Order lends itself to subjective interpretation and discriminatory
12 enforcement; indeed, that seems to be its point. The order grants the Secretary of Homeland
13 Security unfettered discretion to designate a state or local government as a “sanctuary
14 jurisdiction” that is “not eligible to receive Federal grants.” *Id.* The order likewise grants the
15 Attorney General unfettered discretion to take “appropriate enforcement action” against any
16 “entity” that, in his estimation, violates 8 U.S.C. § 1373, or has a “statute, policy, or practice that
17 prevents or hinders the enforcement of Federal law.” *Id.* Such a vast, standardless, and
18 overbroad power invites arbitrary, subjective, and discriminatory enforcement.

19 141. Other portions of the Executive Order are equally vague. Section 6, for example,
20 requires assessment of “fines and penalties” against not only undocumented persons but also
21 anyone who “facilitate[s] their presence in the United States.” *Id.* Sec. 6 at 8800. It is unclear
22 what “facilitate” means in this context, and could apply to County employees who provide
23 undocumented persons with basic, safety-net services, landlords, employers, friends, family,
24 churches or non-profit organizations who assist undocumented persons, or even lawyers who
25 represent undocumented persons in immigration proceedings. Not only does this standardless
26 provision exceed the President’s authority by legislating through executive order, but it also
27 encourages and sanctions arbitrary, subjective, and discriminatory enforcement.

28

1 threat, he continued: “Were the federal Constitution, therefore, really chargeable with the
 2 accumulation of power, or with a mixture of powers, having a dangerous tendency to such an
 3 accumulation, no further arguments would be necessary to inspire a universal reprobation of the
 4 system.” *Id.* Quoting Montesquieu, Madison focused on the particular dangers posed by an
 5 executive that claims for himself the legislative power: “When the legislative and executive
 6 powers are united in the same person or body . . . there can be no liberty, because apprehensions
 7 may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them
 8 in a tyrannical manner.” *Id.*

9 154. Capital lettering notwithstanding, Madison’s statement was no tweet. It describes
 10 a bedrock notion—the separation of powers—that lies at the very legal heart of our nation. And
 11 if the nation, and the Constitution that created it, are to endure, then that principle must yet have
 12 force. Executive Order 13768 is unconstitutional, and the courts must declare it so.

PRAYER FOR RELIEF

14 WHEREFORE, Plaintiff County of Santa Clara respectfully requests that this Court enter
 15 judgment in its favor, and grant the following relief:

- 16 1. A declaration that Section 9 of the Executive Order is unconstitutional and invalid
 17 on its face;
- 18 2. A declaration that the Section 9 of the Executive Order is unconstitutional and
 19 invalid as applied to the policies and practices of the County;
- 20 3. A preliminary and permanent injunction enjoining Defendants from enforcing
 21 Section 9 of the Executive Order, or taking any other action in furtherance of any withholding or
 22 conditioning of federal funds based on the Executive Order;
- 23 4. A declaration that Section 6 of the Executive Order is unconstitutional and invalid
 24 on its face;
- 25 5. A declaration that Section 6 of the Executive Order is unconstitutional and invalid
 26 as applied to the policies and practices of the County;
- 27 6. A preliminary and permanent injunction enjoining Defendants from taking any
 28 action, or exercising any purported authority, against “those who facilitate [an alien’s] presence in

1 the United States” pursuant to Section 6 of the Executive Order;

2 7. An award to the County of reasonable costs and attorneys’ fees; and

3 8. Such other and further relief that this Court may deem fit and proper.

4 Respectfully submitted,

5 Dated: February 3, 2017

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