Nos. 17-17478 and 17-17480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff and Appellee.
v.
DONALD J. TRUMP, President of the United States, ET AL.,
Defendants and Appellants.

COUNTY OF SANTA CLARA,
Plaintiff and Appellee.
v.
DONALD J. TRUMP, President of the United States, ET AL.,
Defendants and Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:17-cv-00485-WHO
No. 3:17-cv-00574-WHO

BRIEF OF AMICI CURIAE THE STATES OF CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTRODUCTION AND INTERESTS OF AMICI

The States of California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and the District of Columbia submit this brief as amici curiae in support of appellees the City and County of San Francisco and the County of Santa Clara.[1]

Amici have a substantial interest in this litigation. Amici and their political subdivisions receive billions of dollars in federal grants that could be affected by Section 9(a) of the President's Executive Order on "sanctuary jurisdictions" if this Court narrows or vacates the permanent injunction entered by the district court.[2]

This brief addresses two issues relevant to this Court's review. First, Amici's past experience demonstrates that the states need flexibility to determine the degree to which their local law enforcement agencies are entangled in the enforcement of federal immigration law. Many of the

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[1] Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) ("[A] state may file an amicus-curiae brief without the consent of the parties or leave of court.").

[2] For example, the State of California receives approximately $90 billion in federal funds potentially threatened by the Executive Order. *See* N.D. Cal. 17-485 Dkt. 66-1 at 2. The State of New Jersey receives approximately $15.8 billion. *See* 2017 N.J. Laws 99, at 20.

Amici States and their political subdivisions have enacted lawful policies or statutes designed to improve public safety—which the Constitution reserves largely to the States and local governments—by focusing their local law enforcement agencies on crime prevention rather than enforcement of federal immigration law. Others are considering adopting such policies. In the experience of many Amici, these policies help local law enforcement build a relationship of trust and cooperation with their communities in which all residents feel comfortable reporting crime and participating in policing efforts without fear of immigration consequences. Amici are deeply concerned about any attempt by the federal government to coerce state and local jurisdictions into abandoning—or to prevent them from enacting—policies those jurisdictions have determined are important to the safety and well-being of their communities. Whatever policies state and local jurisdictions ultimately adopt, they know their own community needs the best and should be the ones to decide which policies are appropriate to those needs.

Second, the Executive Order creates substantial harm and uncertainty for state and local jurisdictions nationwide, which the injunction alleviates. The Executive Order's text—both its clear threats and its vagueness and ambiguity—allows the federal government to adopt shifting interpretations

of what federal funds are at issue, and what the States must do to retain their federal funding. The federal government apparently intended the Executive Order to pressure state and local authorities nationwide into complying with federal immigration detainer requests, which many courts have found unlawful. The permanent injunction brings much needed protection and certainty by preventing the federal government from enforcing the unlawful Executive Order. The scope of the injunction is appropriately tailored to the constitutional violations found by the district court.

ARGUMENT

President Trump's Executive Order directs the Attorney General and the Secretary of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants . . . ." Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801, § 9(a) (Jan. 25, 2017); ER 189. It gives the Secretary authority "to designate, in his discretion . . . a jurisdiction as a sanctuary jurisdiction," and orders the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.* The Executive Order also reinstates the

federal "Secure Communities" program, which enlists local authorities in detaining persons the federal government believes to be removable. *Id*. § 10.

On April 25, 2017, the district court issued a nationwide preliminary injunction barring the federal government from enforcing Section 9(a) of the Executive Order. ER 52. On November 20, after ruling that appellees had successfully "demonstrated that the Executive Order . . . violat[ed] the separation of powers doctrine and . . . the[] Tenth and Fifth Amendment[s]," the district court entered a nationwide permanent injunction enjoining enforcement of Section 9(a). ER 30. The federal government did not seek to stay either injunction. ER 101-08.

I. STATES NEED FLEXIBILITY TO DETERMINE THE DEGREE TO WHICH THEY BECOME ENTANGLED IN FEDERAL IMMIGRATION ENFORCEMENT

The Executive Order's adverse impact on the states is illuminated when placed into historical context. As noted above, the Executive Order is a significant departure from prior policy insofar as it grants expansive authority to the Attorney General and the Secretary of the Department of Homeland Security to withhold federal funding for jurisdictions deemed to be recalcitrant. It also resurrects the Secure Communities Program, which conscripts States and localities into federal immigration enforcement.

But the original incarnation of the federal government's "Secure Communities" program created serious public safety and constitutional concerns left unresolved by the Executive Order. These concerns led state and local jurisdictions to enact policies that calibrated their voluntary involvement in federal immigration law based on those jurisdictions' evaluation of local needs. In this light, the injunction safeguards the States' discretion to make critical public-safety judgments—which the Constitution vests in the States and local governments—without the threat of losing billions of dollars in federal funding should DOJ deem them non-compliant.

A. Past Federal Attempts to Compel Local Immigration Enforcement Undermined Public Safety and Raised Constitutional Concerns

In 2008, the Department of Homeland Security (DHS) launched the Secure Communities program, which enlisted local law enforcement agencies in federal immigration enforcement. As described further below, Secure Communities was rescinded in 2014, but subsequently reinstated by the Executive Order.

Under the original incarnation of Secure Communities, when state or local law enforcement authorities submitted the fingerprints of an arrestee to the FBI, that agency shared the fingerprints with Immigration and Customs Enforcement (ICE). ICE used this data to identify whether the person was

potentially subject to removal.[3] If so, ICE could ask state or local law enforcement to detain the person beyond the time when he or she would normally have been released under state or local law. ICE detainer requests asked States or local agencies to hold the person for an additional 48 hours to allow ICE to interview or take the detainee into federal custody.[4] The federal government did not reimburse states or localities for any of the costs of complying with these detainers.

1. Public safety concerns

Many state and local jurisdictions objected to the Secure Communities program because of its detrimental impact on the relationship between local law enforcement and their communities. The California Legislature gathered perspectives from public safety officials regarding the impact of Secure Communities. This included former San Francisco sheriff Michael Hennessey, who observed that:

> The use of fingerprints to initiate immigration scrutiny is of particular concern to victims of domestic violence. In a recent case in San Francisco, a woman called 911 to report domestic violence, but the police arrested both her and her

[3] U.S. Immigration and Customs Enforcement, "Secure Communities – Overview," https://www.ice.gov/secure-communities. The FBI continues to share these fingerprints with ICE to this day.

[4] *Id.* at "How does Secure Communities Work?"

> partner. Although no charges were ever filed against the woman, she is now fighting deportation. There should be no penalty for a victim of a crime to call the police.

Cal. Sen. Comm. on Public Safety, "Report on AB 4," at 9 (Jul. 1, 2013) (citation omitted).[5]

Local law enforcement officials nationwide echoed these and other concerns. The chief of police of Southold, New York, a small town, observed that "[o]ur department is set up to do basic law enforcement . . . and really not to specialize in immigration work . . . . We're leaving that up to the people that are being paid to do immigration work."[6] In Montgomery County, Maryland, the police chief explained that "[t]he reluctance of folks to come forward because they are undocumented and fear deportation is a much greater public safety problem than having people here who may be undocumented but are not committing other crimes."[7] And the chief of the

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[5] https://leginfo.legislature.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB4.

[6] *See* N.Y. State Office of the Att'y Gen., Office of the Att'y Gen. of Cal., et al., *Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement* 14 (May 2017) (hereinafter "Local Involvement"), https://oag.ca.gov/system/files/attachments/press_releases/setting_the_record_straight.pdf.

[7] *Id.* at 15.

Los Angeles Police Department observed that fear of local law enforcement can "create a whole population of victims" who "become prey for human predators who extort them or abuse them because they know they won't contact the police."[8]

Prominent law enforcement organizations agreed. The Major Cities Chiefs Association, which represents the 68 largest law enforcement agencies in the United States, publicly declared that having local police enforce federal immigration law "undermines the trust and cooperation with immigrant communities . . . ."[9] When undocumented immigrants' "primary concern is that they will be deported or subjected to an immigration status investigation, then they will not come forward and provide needed assistance and cooperation."[10] This "result[s] in increased crime against immigrants and in the broader community, creat[ing] a class of silent victims and

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[8] *Id.*

[9] Major Cities Chiefs Association, *Immigration Position* 1 (Oct. 2011), https://majorcitieschiefs.com/pdf/news/immigration_position112811.pdf.

[10] Craig E. Ferrell, Jr. et al., *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 6 (June 2006), https://www.majorcitieschiefs.com/pdf/news/MCC_Position_Statement.pdf; *see also* 17-cv-485 Dkt. 25 (Declaration of Commander Peter Walsh) (similar).

eliminat[ing] the potential for assistance from immigrants in solving crimes or preventing future terroristic acts."[11]

The Law Enforcement Immigration Task Force, comprised of sheriffs, police chiefs, and police commissioners from across the country, expressed similar concerns. It warned that "[c]riminals can use the fear of deportation to coerce these immigrants into silence, making our communities less safe for everybody."[12] And it further noted that undocumented immigrants who are "victims or witnesses of crime . . . might be afraid to call authorities when criminal activity is happening in their neighborhoods" or even "when someone is sick or injured."[13]

When the federal government examined the issue after Secure Communities was terminated, its own 21st Century Policing Task Force agreed that in order to "build relationships based on trust with immigrant communities" it was advisable to "[d]ecouple federal immigration enforcement from routine local policing for civil enforcement and

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[11] Ferrell, et al., at 6.

[12] Local Involvement, *supra*, at 15.

[13] *Id.*

nonserious crime."[14] It further recommended that DHS "should terminate the use of the state and local criminal justice system, including through detention, notification, and transfer requests, to enforce civil immigration laws against civil and non-serious criminal offenders."[15]

Empirical data verify these concerns. For example, a study of Latinos in Chicago, Houston, Los Angeles and Phoenix found that 70% of undocumented immigrants and 44% of all Latinos are less likely to contact law enforcement if they are victims of a crime for fear that the police will ask them, or people they know, about their immigration status.[16] Similarly, 67% of undocumented immigrants and 45% of all Latinos are less likely to voluntarily offer information about, or report, crimes because of the same fear.[17] This endangers public safety for everyone, including non-immigrant populations.

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[14] President's Task Force on 21st Century Policing, *Final Report* 18 (May 2015), https://www.phillypolice.com/assets/forms-reports/Taskforce_FinalReport.pdf.

[15] *Id.*

[16] Nik Theodore, Dep't of Urban Planning and Policy, Univ. of Ill. at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5 (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

[17] *Id.* at 5-6.

Citing no studies or empirical data, the federal government and its state amici contend that "[s]anctuary jurisdictions . . . cause harm to neighboring States," and "deprive law enforcement of the tools necessary to enforce the law effectively." *See, e.g.*, Dkt. 10 at 1. The empirical data that exist suggest the opposite. One study shows that crime is significantly lower in counties that do not comply with detainer requests compared to those that do.[18] Another study found that cities with "sanctuary policies" had lower robbery and homicide rates in neighborhoods with high concentrations of immigrants, suggesting that sanctuary policies are actually associated with lower crime rates.[19]

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[18] *See* Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Ctr. for Am. Progress (Jan. 26, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effectsofsanctuary-policies-on-crime-and-the-economy/.

[19] Lyons, C.J., Vélez, M.B., & Santoro W.A., *Neighborhood Immigration, Violence, and City-Level Immigrant Political Opportunities*, Am. Sociological Rev. 78:4 (June 2013), http://journals.sagepub.com/doi/abs/10.1177/0003122413491964. Additionally, in light of racially charged statements made about sanctuary jurisdictions, including by the federal government, at least one study focusing on white residents found that they are generally safer from homicide, firearm death, and illicit drug overdoses in urban counties with policies that restrict local cooperation with federal immigration enforcement than in urban counties without established sanctuary policies. *See* Mike Males, *White Residents of Urban Sanctuary Counties Are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties* 3, Ctr. On Juvenile and Criminal Justice (Dec. 12,

In the end, any potential policy disagreement about how to fight crime confirms that state and local jurisdictions need the flexibility to determine what works best in their own communities. *Cf. United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

2. Constitutional and federalism concerns

In addition to the substantial policy concerns created by the Secure Communities program, the program also suffered from potential constitutional infirmities. Federal courts across the country, including within this Circuit, held that detainer requests issued through that program raised serious concerns under the Fourth and Tenth Amendments.

Several courts held that prolonged detention by local authorities acquiescing to ICE detainers violated the Fourth Amendment unless "supported by a new probable cause justification." *Morales v. Chadbourne*, 793 F.3d 208, 217-218 (1st Cir. 2015) (detention solely on ICE detainer constituted a new seizure with independent probable cause requirement);

2017), http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf.

Miranda-Olivares v. Clackamas Cty., No. 12-02317, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) ("ICE detainer alone did not demonstrate probable cause"); *Gonzalez v. ICE*, No. 13-04416, 2014 WL 12605368, at *7 (C.D. Cal. July 28, 2014) (plaintiffs "sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause").

ICE detainers also raised Tenth Amendment concerns by suggesting that localities were required to hold detained individuals. This is because the federal government "cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal." *See Galarza v. Szalczyk*, 745 F.3d 634, 636, 645 (3rd Cir. 2014) (detainers must be construed as voluntary); *Miranda-Olivares*, 2014 WL 1414305, at *6 (same); *cf. Garcia v. Taylor*, 40 F.3d 299, 303-04 (9th Cir. 1994) (similar in habeas context), *superseded on other grounds by* 8 U.S.C. § 1252(i).

B. Many Amici Adopted Policies Calibrating Their Involvement with Federal Immigration Enforcement

In light of the evidence suggesting that fostering cooperation between immigrant communities and law enforcement promotes public safety, hundreds of jurisdictions across the United States enacted lawful limitations on the extent to which local agencies may become involved in the

enforcement of federal immigration laws.[20] This includes California, certain other Amici, and some of their political subdivisions.

The Tenth Amendment reserves to the States the primary responsibility for ensuring the safety of their communities. Even where Congress has authority under the Constitution to regulate certain conduct, it lacks the power "to regulate state governments' regulation" of that conduct. *New York v. United States*, 505 U.S. 144, 166 (1992). And the intrusion on state sovereignty is "worse" when the federal government strips away a State's discretion to make policy in an area peculiarly "within [its] proper sphere of authority," such as determining how best to address crime and public safety. *Printz v. United States*, 521 U.S. 898, 927-928 (1997). As the Supreme Court recognized, the "Constitution . . . withhold[s] from Congress a plenary police power." *United States v. Lopez*, 514 U.S. 549, 566 (1995); *see also Morrison*, 529 U.S. at 617 ("regulation and punishment of intrastate violence . . . has always been the province of the States"); *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) ("Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office

[20] Local Involvement, *supra*, at 3.

for state-created officials and to regulate the internal affairs of governmental bodies.").

Exercising their reserved powers, for example, certain States and local jurisdictions declined to accede to ICE detainer requests because of the federal government's unwillingness to reimburse them for detention costs or to indemnify them for potential constitutional violations. Others placed limitations on the personal, confidential information that officials could share with federal immigration enforcement agents, such as an individual's custody release date. Those restrictions were tailored to fit the public safety needs of local communities. This accords with basic principles of federalism, which recognize that what may work in one community may not work in another.

For example, when California initially enacted the Transparency and Responsibility Using State Tools (TRUST) Act, which limited the circumstances in which local law enforcement agencies may comply with detainer requests, it did so to further its public safety needs. The Legislature explicitly found that:

> The Secure Communities program and immigration detainers harm community policing efforts because immigrant residents who are victims of or witnesses to crime . . . are less likely to report crime or cooperate with law enforcement

> when any contact with law enforcement could result in deportation.

2013 Cal. Stat., Ch. 570 (A.B. 4) § 1(d). And in passing the Transparent Review of Unjust Transfers and Holds (TRUTH) Act, which provides procedural protections and oversight for individuals in custody, the California Legislature further recognized the importance of local accountability and control:

> This bill seeks to address the lack of transparency and accountability by ensuring that all ICE deportation programs that depend on entanglement with local law enforcement agencies in California are subject to meaningful public oversight.

2016 Cal. Stat., Ch 768 (A.B. 2792) § 2(h)-(i). Due to on-going constitutional concerns with ICE detainers, the recently-passed California Values Act builds on the TRUST Act to preclude state and local law enforcement compliance with detainers. *See* 2017 Cal. Stat., Ch. 495 (S.B. 54) § 3.

* * *

In 2014, DHS abandoned Secure Communities, acknowledging its constitutional infirmities and that it had provoked "general hostility" from

local law enforcement.[21] Secure Communities was superseded by the "Priority Enforcement Program" (PEP). PEP replaced detainer requests with "requests for notification" of release by local authorities. Detainer requests were authorized if consistent with the Fourth Amendment, and the new program clarified that such requests were voluntary.[22]

This remained the state of the affairs until the President issued the Executive Order at the center of this case.

II. THE PERMANENT INJUNCTION IS PROPER BECAUSE THE EXECUTIVE ORDER CREATES UNCERTAINTY THAT UNDERMINES PUBLIC SAFETY AND HARMS STATE AND LOCAL AUTHORITIES

President Trump's Executive Order 13768, which directs the withholding of federal grants from "sanctuary jurisdictions," is a significant departure from established policy. Whether by design or circumstance, the Executive Order reverses settled immigration policy and creates great uncertainty and harm for Amici States and their political subdivisions. As the district court recognized, the Executive Order is ambiguous because it "does not make clear . . . what funds are at issue and what conditions apply .

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[21] U.S. Dep't of Homeland Sec. Mem. From Jeh Charles Johnson, Sec'y of Homeland Sec., "Secure Communities," at 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/ 14_1120_memo_ secure_communities.pdf.

[22] *Id.* at 2.

. . ." ER 24. And it is vague because it "does not make clear what conduct it proscribes or give jurisdictions a reasonable opportunity to avoid its [defunding] penalties." *Id*. By barring enforcement of the defunding provision in the Executive Order, the nationwide injunction provides much needed certainty and clarity.

A. The Executive Order Purports to Deny "Sanctuary Jurisdictions" Federal Funding

Amici are directly affected by several sections in the Executive Order, which aims to punish States and local jurisdictions deemed "sanctuary jurisdictions" by authorizing the defunding of potentially billions of dollars of federal grants in all categories, encouraging wide-ranging enforcement actions against such jurisdictions, and reverting to the prior Secure Communities program. Section 2 broadly declares that it is the policy of the Executive Branch to "Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." ER 187. Section 9, titled "Sanctuary Jurisdictions," is the core defunding provision. Section 9(a) directs that the Attorney General and the DHS Secretary "in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants,

except as deemed necessary for law enforcement purposes . . . ." ER 189.[23] The DHS Secretary is authorized to "designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction." *Id.* And the Attorney General "shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.* Finally, Section 10 terminates PEP and reinstitutes Secure Communities. *Id.*

B. The Executive Order's Ambiguity and Vagueness Creates Great Uncertainty for States and Local Governments, Which the Injunction Alleviates

The district court correctly concluded the Executive Order was unlawfully ambiguous and vague, in addition to its other constitutional infirmities. The Executive Order provides no adequate or precise definition of what a "sanctuary jurisdiction" is, nor what constitutes "willfully refus[ing] to comply with 8 U.S.C. 1373." Nor does it address the constitutional deficiencies of the Secure Communities program. *See* ER 187-189. Yet, under its terms States and local governments are expected to

[23] As explained below, 8 U.S.C. § 1373 prohibits States and local governments from restricting government officials or entities from reporting immigration status information to the federal government.

comply or forfeit all federal grants. Given the billions of dollars at stake necessary for delivering public services, the States should not be put in the position of having to guess whether federal officials will deem them a "sanctuary jurisdiction" or what concrete criteria govern that designation. But that is exactly the harmful position the Executive Order puts them in.

1. The injunction is proper because it prevents unlawful federal encroachment on state and local public safety decisions

The States and local jurisdictions—not the federal government—are in the best position to make individualized "local judgment[s]" regarding "what policies and practices are most effective for maintaining public safety and community health." ER 79 [PI Order at 28]; *accord Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) ("[T]he facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed.").

State and local governments have the best perspective on what policies will encourage trust and cooperation between their law enforcement officers and the communities they serve. As explained at I.B, hundreds of jurisdictions have concluded that public safety is promoted by enacting lawful policies that avoid excessive entanglement between state and local police and the enforcement of federal immigration laws. That is because

these jurisdictions have concluded that the safety of a community increases when all residents—regardless of immigration status—can report crimes and interact with local police without fearing immigration consequences. In contrast, when state or local law enforcement officials are perceived as agents of federal immigration authorities, it can undermine the trust between law enforcement and the community.

Recent federal actions have rekindled the public safety concerns that existed during the first incarnation of Secure Communities. Since the beginning of the current federal administration, communities with large immigrant populations have experienced troubling declines in the reporting of crime. In the first six months of 2017, Latino residents in California reported significantly fewer instances of domestic violence to police compared with the same period in 2016, down 18% in San Francisco and 13.3% in San Diego.[24] In Maryland, Montgomery County reported a roughly 50% drop in calls for sexual assault and domestic violence in the

[24] James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police And Courts*, L.A. Times (Oct. 9, 2017), http://www.latimes.com/local/lanow/la-me-In-undocumented-crime-reporting-20171009-story.html.

first three months of 2017 compared with the same period in 2016.[25] And in Houston, according to police, crimes reported by Latinos fell by more than 40% in the first three months of 2017 compared to the previous year.[26]

The federal government has also targeted perceived "sanctuary jurisdictions" and taken to using state and local courthouses to arrest undocumented persons. The Chief Justice of the California Supreme Court vigorously objected to this new practice in an open letter to Attorney General Sessions and the DHS Secretary. Chief Justice Cantil-Sakauye was deeply troubled "that immigration agents appear to be stalking undocumented immigrants in our courthouses to make arrests."[27] While ICE has recently determined it will not make "indiscriminat[e]" "civil immigration arrests inside courthouses," it has recommitted to continuing to carry out arrests for civil immigration offenses inside courthouses when it

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[25] Jennifer Medina, *Too Scared to Report Sexual Abuse*, N.Y. Times (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?_r=0.

[26] Ileana Najarro & Monica Rhor, *Deeper Underground: Fear Drives Mistrust Between Police, Immigrant Communities*, Houston Chronicle (Sept. 22, 2017), http://www.houstonchronicle.com/deeperunderground/1/.

[27] *Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses*, California Courts Newsroom (Mar. 16, 2017), https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

has specific information targeting an individual person.[28] And it will subject family members or friends accompanying that person to arrest "under special circumstances," such as if the agent determines the individual "poses a threat to public safety or interferes with ICE's enforcement actions."[29]

Prosecutors across the country are also concerned that this erodes public trust in the judicial system. The City Attorney in Denver, Colorado was forced to drop four pending domestic abuse cases because "four women have let our office know they were not willing to proceed with the case for fear that they would be spotted in the courthouse and deported."[30] And the arrest of a domestic violence victim inside an El Paso courthouse worried

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[28] *FAQ on Sensitive Locations and Courthouse Arrests: Will all aliens be subject to arrest inside courthouses?*, https://www.ice.gov/ero/enforcement/sensitive-loc.

[29] *Id.* Moreover, while ICE has stated an intention to "generally" limit routine enforcement in areas of courthouses that "are dedicated to non-criminal (e.g., family court, small claims court) proceedings," such actions are still allowed with approval of a supervising agent. *Id.* at "*Is there any place in a courthouse where enforcement will not occur?*"

[30] Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, NPR (Mar. 21, 2017), https://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver.

the district attorney that this "sent a horrible message to victims of domestic violence."[31]

2. The injunction is also proper because it reduces the funding uncertainty to the states and localities

The injunction also protects the States by allowing them to receive continued federal funding on existing terms. The funding uncertainty that would otherwise result from the Executive Order is very real, as are the harms that uncertainty would cause to States and local governments. *See* II.C.

Amici States have substantial amounts of federal funds that are likely at risk under the text of the Executive Order. They count on these funds to provide public services. Although Amici's policies do not violate federal immigration law or conflict with 8 U.S.C. § 1373, the Executive Order's own clear targeting of "all federal grants," the federal government's shifting interpretations regarding the scope of the Executive Order, and direct threats to use defunding as a weapon against "sanctuary jurisdictions" all create great and harmful uncertainty about the continuing availability or potential claw back of federal funds.

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[31] *Officials: ICE Agents Arrest Alleged Domestic Abuse Victim in Court*, KFOR.com (Feb. 17, 2017), http://kfor.com/2017/02/17/officials-ice-agents-arrest-alleged-domestic-abuse-victim-in-court.

In late 2017, the Department of Justice sent letters to dozens of jurisdictions that "have preliminarily been found to have laws, policies, or practices that may violate 8 U.S.C. 1373," including Amici States or their subdivisions.[32] The letters demanded these jurisdictions justify their local policies and certify compliance with 8 U.S.C. § 1373 for the current fiscal year and in the future.[33] Although these letters only identified the Edward J. Byrne Memorial Justice Assistance Grant program, given the broad language, vagueness, and ambiguity of the Executive Order, and federal officials' shifting statements, the federal government could easily issue similar letters for any federal grant or seek to require compliance with ICE detainers.

Pressing its case, the federal government recently "demand[ed] the production of documents" showing whether certain jurisdictions, including some Amici States, are "unlawfully restricting information sharing by [their]

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[32] Department of Justice Press Release No. 17-1292, "Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 8 U.S.C. 1373," Nov. 15, 2017, https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373.

[33] *See id.*; letters available at https://www.justice.gov/opa/press-release/file/1011571/download.

law enforcement officers with federal immigration authorities."[34] It threatened to subpoena such documents if the jurisdictions "fail to respond completely, or . . . in a timely manner."[35]

While the injunction is in place, jurisdictions have at least some certainty that the impact of these aggressive federal actions will be limited to grant programs where DOJ or DHS claim independent statutory or constitutional authority to impose conditions, rather than "'all federal grant[s].'" ER 189.

C. The Federal Government Has Used the Executive Order to Pressure State and Local Authorities into Complying with ICE Detainers

The federal government argues the district court should not have considered ICE detainer requests in determining the legality of the Executive Order's commands. OB at 12-13, 24. But the federal government has repeatedly sought to tie detainer compliance to federal funding. It suggested below that whether a jurisdiction violates Section 1373 may depend on

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[34] Department of Justice Press Release No. 18-81, "Justice Department Demands Documents and Threatens to Subpoena 23 Jurisdictions as Part of 8 U.S.C. 1373 Compliance Review," Jan. 24, 2018, https://www.justice.gov/opa/pr/justice-department-demands-documents-and-threatens-subpoena-23-jurisdictions-part-8-usc-1373.

[35] *Id.*

whether the jurisdiction complies with ICE detainers. *See, e.g.*, 17-cv-485 Dkt. 35 at 7 & n.3. Attorney General Sessions has also singled out jurisdictions "refusing to detain known felons under federal detainer requests . . . ."[36]

More recently, the Acting Director of ICE threatened to "hold back the[] funding" of jurisdictions that were not complying with ICE detainers.[37] And the district court recognized that "the Executive Order equates 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers' and therefore places such jurisdictions at risk of losing all federal grants." ER 26 (quoting Section § 9(b)).[38]

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[36] U.S. Dep't of Justice News, Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions.

[37] *Fox News: Your World with Neil Cavuto*, Interview with ICE Acting Director Thomas Homan (Jan. 2, 2018), 2108 WLNR 128082, at 2-3; *see also* Harriet Sinclair, "Trump's ICE Pick Thomas Homan Warns Sanctuary State California 'Hang On Tight' Amid Immigration Crackdown," *Newsweek*, Jan. 3, 2018, http://www.newsweek.com/trumps-ice-pick-thomas-homan-warns-sanctuary-state-california-hang-tight-amid-768816 (additionally threatening to hold California elected officials "personally accountable" by "charging some of these politicians with crimes").

[38] ICE detainers should have nothing to do with Section 1373 under that statute's plain text, judicial interpretations of that statute, and the government's own position in other litigation. Section 1373's text says nothing about detention. It only precludes state or local governments from

The Executive Order places state and local governments in an untenable position. If jurisdictions comply with ICE detainers, they may violate the constitutional rights of their residents and risk significant financial liability.[39] They must also pay to house detained individuals until

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"prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); *see also Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017) ("The statute, by its terms, governs only 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual.'"). Accordingly, no penalty should attach to non-compliance with detainer requests because "[t]he United States agrees that immigration detainers are not mandatory." *Cf.* Br. of the United States as Amicus Curiae at 22-23, *Massachusetts v. Lunn*, No. SJC-12276 (Mass. Mar. 27, 2017), https://www.clearinghouse.net/chDocs/public/IM-MA-0010-0008.pdf.

[39] *See, e.g.*, Notice of Meeting at 2, *Duncan Roy v. County of Los Angeles*, No. 12-09012 (C.D. Cal. Nov. 16, 2015), http://file.lacounty.gov/SDSInter/lac/1016994_111615.pdf (settlement of $255,000 to a plaintiff who was detained for 89 days pursuant to an ICE hold); Settlement Agreement at 2-5, *Comm. for Immigrant Rights of Sonoma Cty. v. County of Sonoma*, No. 08-4220 (N.D. Cal. July 15, 2011), https://ww.aclunc.org/docs/asset_upload_file403_9271.pdf ($8,000 settlement after unlawful detainers); *Galarza v. Szalczyk*, No. 10-06815 (E.D. Pa. May 20, 2014), https://www.aclupa.org/our-work/legal/legaldocket/galarzavszalczyketal (Lehigh County paid settlement of $95,000 and City of Allentown paid settlement of $25,000 for unlawful detainer after plaintiff posted bail); Stipulation of Settlement ¶¶ 26-28, *Palacios-Valencia v. San Juan Cty. Bd. of Comm'rs*, No. 14-01050 (D.N.M. Mar. 3, 2017), http://files.constantcontact.com/b6dfe469001/833e792b-3179-4b9e-b91d-ded45bb473ac.pdf (San Juan County liable for $340,000 plus $2,000 for each member of the class unlawfully detained since November 2011).

ICE arrives, without reimbursement from the federal government. In other words, the states are forced to "absorb the financial burden" of federal immigration policy, and are "put in the position of taking the blame for its burdensomeness and for its defects." *Printz*, 521 U.S. at 930. But if jurisdictions refuse to comply with ICE detainers, they face the prospect of being threatened with the loss of some, or even all, federal grants.

State and local officials are entitled to a greater degree of certainty in order to perform their public safety duties. The uncertainty caused by shifting interpretations of the Executive Order pressures States and local jurisdictions to assent to federal detainer requests in order to avoid threats to their federal funding.

Miami-Dade County in Florida is the first known jurisdiction to acquiesce. It amended its policies days after the Executive Order when there was no injunction yet in place. Mayor Carlos Gimenez announced that, "[i]n light of the provisions of the Executive Order," he was reversing a 2013 county policy and ordering Miami-Dade jails to begin honoring ICE detainer requests.[40] The mayor was concerned about the federal government's

[40] Patricia Mazzei, *Miami-Dade Mayor Orders Jails to Comply with Trump Crackdown on 'Sanctuary' Counties*, Miami Herald (Jan. 26, 2017),

threats to cut "millions" in federal funding.[41] After changing its policy, Miami-Dade received a "letter of compliance" from the Department of Justice.[42] Amici are deeply troubled by States and localities being subjected to such federal intimidation.

D. The Public Interest and Equities Favor Affirming the Nationwide Injunction

The balance of equities and public interest also support the injunction. *See, e.g.*, *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 977-978 (9th Cir. 2017) (court examines "the balance of hardships" and "the public interest") (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 141 (2010)). The federal government advances no contrary argument on these points. *See* OB 29-36 (objecting instead to the scope of injunction).

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http://www.miamiherald.com/news/local/community/miami-dade/article128984759.html.

[41] *Id.*

[42] Memorandum from Carlos A. Gimenez, Mayor, Miami-Dade County to Honorable Chairman Esteban L. Bovo, Jr., and Members, Board of County Commissioners (Aug. 5, 2017), http://www.miamidade.gov/mayor/library/memos-and-reports/2017/08/08.05.17-DOJ-Determination-on-Miami-Dade-Countys-Compliance-with-1373-003.pdf.

1. A nationwide injunction is necessary to address the harm to Amici States

The experiences of many of the Amici States confirm that the injunction is in the public interest and that there is a need for a nationwide injunction. Reversing or narrowing the district court's injunction would return the States and their localities to the same confused state of affairs as when the Executive Order first issued, and expose them to the federal government's renewed threats to withhold all federal grants.

Nationwide injunctions are well within the recognized equitable powers of federal courts in appropriate circumstances. Particularly where, as here, the "constitutional violations are not limited to San Francisco or Santa Clara, but apply equally to all states and local jurisdictions," nationwide relief is appropriate. ER 99; *accord* ER 31; *see also Washington v. Trump*, 847 F.3d 1151, 1166-1167 (9th Cir. 2017) (affirming nationwide injunction because "limiting the geographic scope" of an injunction on an immigration enforcement policy "would run afoul of the constitutional and statutory requirement for uniform immigration law and policy"); *Texas v. United States*, 809 F.3d 134, 187-188 (5th Cir. 2015) (uniform application of immigration law justified nationwide injunction).

2. The federal government does not argue that the injunction causes it any harm

In contrast to the concrete harms that many of the Amici States and their populations face, the federal government does not argue the injunction harms it or the public interest. It suggests the injunction should be "'no more burdensome to the defendant than necessary,'" OB at 32 (citation omitted), but advances no argument about what specific burden the injunction imposes. And any argument about prejudice would be difficult to square with the federal government's litigation of this case. It has not acted with any particular urgency in this matter. It never sought a stay of the preliminary injunction or the permanent injunction from any court. Nor did it promptly file its notice of appeal or otherwise ask for expedited treatment, which this Court instead ordered *sua sponte*.

Moreover, the federal government has consistently taken the position that the Executive Order itself does nothing other than enforce existing law. *See, e.g.*, OB at 22-29; ER 20. While Amici States disagree, under this rationale, it is unclear what cognizable burden the injunction imposes. As the district court noted, "the Government can already enforce . . . the terms of [certain] grants and can enforce 8 U.S.C. 1373 to the extent legally possible under the terms of existing law" and "it does not need Section 9(a)

to do so." ER 53, 99 (preliminary injunction). This lack of harm weighed against the substantial harm to the states and localities nationwide heavily favors affirming the injunction.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: February 12, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amici Curiae are not aware of any cases pending in this Court that are related to this case as defined in Circuit Rule 28-2.6.

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I certify that this brief complies with the requirements of Ninth Circuit Rules 32-1, and the requirements of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5) and 32(a)(6), because it is proportionately spaced serif font, has a typeface of 14 points, and contains 5,284 words.

Dated: February 12, 2018

/s/Lisa C. Ehrlich

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