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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs, v. DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, JOHN F. KELLY, Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States, Defendants.	Civil Case No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff, v. DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50, Defendants.	Civil Case No. 3:17-cv-00574-WHO **ADMINISTRATIVE MOTION OF PROFESSORS OF CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND IMMIGRATION LAW FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Professors Erwin Chemerinsky, Seth Davis, Roxana Bacon, and the other legal scholars listed below hereby move the Court for leave to file a brief *amici curiae* in the above-captioned cases in support of plaintiffs' motions for preliminary injunction. Defendants take no position on the request; plaintiffs have consented to the filing. *See* Declaration of Sonya D. Winner, below, at ¶¶ 2-3. A copy of the proposed *amicus* brief is appended as an exhibit to this motion.

I. STANDARD FOR MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE.

District courts have broad discretion to permit third parties to participate in an action as *amici curiae*, and generally courts have "exercised great liberality" in allowing *amicus* briefs. *Woodfin Suite Hotels, LLC v. City of Emeryville*, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007). District courts frequently accept *amicus* briefs from non-parties when the legal issues in a case "have potential ramifications beyond the parties directly involved" or if the *amici* have "unique information or perspective that can help the court." *NGV Gaming, Ltd. v. Upstream Point Molate*, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotation marks omitted). There are no strict prerequisites that must be established to qualify for *amicus* status; an applicant must merely make a showing that its "participation is useful to or otherwise desirable to the court." *Infineon Techs. N. Am. Corp. v. Mosaid Techs., Inc.*, 2006 WL 3050849, at *3 (N.D. Cal. Oct. 23, 2006) (quoting *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991)). This Court has specifically indicated a willingness to consider *amicus* briefs in this litigation. *See* Order Regarding Amicus Briefs, *County of Santa Clara v. Donald J. Trump, et al.*, No. 17-cv-00574-WHO (N.D. Cal. Feb. 24, 2017), Dkt. No. 40; Order Regarding Amicus Briefs, *City and County of San Francisco v. Donald J. Trump, et al.*, No. 17-cv-00485-WHO (N.D. Cal. Mar. 21, 2017), Dkt. No. 31.

II. STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE.

The *amici* listed below, all of whom are independent of the parties to this action, are law professors and scholars who have a professional interest in the issues presented on this case. *Amici* have researched, studied, and taught in the areas of constitutional law, administrative law, and immigration law and have specific expertise in the issues of separation of powers and executive power addressed in this *amicus curiae* brief. Several of these *amici* have recently co-authored a letter to the President

urging him to rescind Section 9(a) of Executive Order 13768 for many of the same reasons addressed in this brief. Their expertise in the constitutional issues presented will assist the Court in understanding the jurisprudence and history relevant to this case.

Amici are:

- Roxana Bacon, Visiting Professor, University of Miami School of Law,[1] and former Chief Counsel to the United States Citizenship & Immigration Services;
- Alan Brownstein; Professor of Law, Boochever and Bird Chair for the Study and Teaching of Freedom and Equality; University of California at Davis School of Law;
- Erwin Chemerinsky, Dean of the University of California, Irvine School of Law;
- David S. Cohen, Professor of Law, Thomas R. Kline School of Law, Drexel University;
- Seth Davis, Assistant Professor of Law, University of California, Irvine School of Law;
- Marc-Tizoc González, Associate Professor of Law, St. Thomas University School of Law;
- Dina Haynes, Professor of Law, New England Law;
- Kari E. Hong, Assistant Professor, Boston College Law School;
- Aziz Huq, Frank and Bernice J. Greenberg Professor of Law, University of Chicago;
- Annie Lai, Assistant Clinical Professor of Law, University of California, Irvine School of Law;
- Stephen Lee, Professor of Law, University of California, Irvine School of Law;
- Gerald P. López; Professor of Law, University of California, Los Angeles School of Law;
- Elizabeth McCormick, Associate Clinical Professor of Law, University of Tulsa College of Law;
- M. Isabel Medina, Ferris Family Distinguished Professor of Law, Loyola University of New Orleans;

[1] All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this brief.

1 - Margaret E. Montoya, Emeritus Professor of Law, University of New Mexico;
2 - Elora Mukherjee, Associate Clinical Professor of Law, Columbia Law School, Director
3 of Columbia Law School's Immigrants' Rights Clinic;
4 - Michelle Oberman, Katharine and George Alexander Professor of Law, Santa Clara
5 University School of Law;
6 - Keramet Reiter, Assistant Professor of Criminology, University of California Irvine
7 School of Social Ecology;
8 - Carrie Rosenbaum, Adjunct Professor, Golden Gate University School of Law;
9 - Ozan Varol, Associate Professor of Law, Lewis & Clark Law School;
10 - Leti Volpp, Robert D. and Leslie Kay Raven Professor of Law in Access to Justice,
11 University of California, Berkeley School of Law; and
12 - Deborah M. Weissman, Reef C. Ivey II Distinguished Professor of Law, University of
13 North Carolina School of Law.

14 *Amici* include professors who have taught and published extensively in the area of constitutional
15 law. For example, Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law at the
16 University of California, Irvine School of Law, with a joint appointment in Political Science. His areas
17 of expertise include constitutional law, federal practice, and civil rights and civil liberties. He is the
18 author of seven books and nearly 200 articles in major law reviews, and his academic work has been
19 frequently cited by courts. Another of the *amici*, Professor Aziz Huq, is the Frank and Bernice J.
20 Greenberg Professor of Law at the University of Chicago. His research and teaching interests include
21 constitutional law, criminal procedure, federal courts and legislation, and his scholarship focuses on the
22 interaction of constitutional design with individual rights and liberties. Professor Huq has published
23 extensively about executive power and separation of powers, including the following publications:
24 *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New Press 2007), *The Cycles of*
25 *Separation-of-Powers Jurisprudence*, 126 Yale L. J. (forthcoming 2017), and *Libertarian Separation of*
26 *Powers*, 8 N.Y.U. J. L. & Liberty 1006 (2014).

27 *Amici* also have experience in administrative law. For example, Professor Seth Davis teaches
28 Administrative Law at the University of California, Irvine School of Law, and his scholarship focuses

1 on federal litigation and federal administrative law, particularly as it relates to the creation of rights of
2 action or the allocation of lawmaking authority. His work has appeared or is forthcoming in leading law
3 reviews, including the *Columbia Law Review*, the *California Law Review*, and the *Vanderbilt Law*
4 *Review*.
5 *Amici* also include doctrinal and clinical professors with a depth of immigration law experience.
6 For example, Roxana Bacon has practiced and taught immigration law for over 40 years and has served
7 as General Counsel to the American Immigration Lawyers Association, Chief Counsel to United States
8 Citizenship & Immigration Services, and represented foreign nationals and U.S. companies in every
9 aspect of immigration law. She has submitted various *amicus* briefs to the United States Supreme Court,
10 including in *United States v. Texas*, 579 U.S. ____ (2016), which involved the constitutionality of the
11 Deferred Action for Parents of Americans and Lawful Permanent Residents policy. Another of the
12 *amici*, Elora Mukherjee, is an Associate Clinical Professor of Law at Columbia Law School and
13 Director of the Law School's Immigrants' Rights Clinic, where she has provided legal representation to
14 immigrant children and adults.
15 **III. AMICI CURIAE'S EXPERTISE WILL BENEFIT THIS COURT**
16 In this case, the Court has indicated a willingness to consider *amicus* briefs. *See* Order
17 Regarding Amicus Briefs, *County of Santa Clara v. Donald J. Trump, et al.*, No. 17-cv-00574-WHO
18 (N.D. Cal. Feb. 24, 2017), Dkt. No. 40; Order Regarding Amicus Briefs, *City and County of San*
19 *Francisco v. Donald J. Trump, et al.*, No. 17-cv-00485-WHO (N.D. Cal. Mar. 21, 2017), Dkt. No. 31.
20 On the basis of their expertise, scholarship, and experience in the fields of administrative,
21 constitutional, and immigration law, *amici* meet the broad discretionary standard for filing an amicus
22 curiae brief. *See Woodfin Suite Hotels*, 2007 WL 81911, at *3. *Amici* have special expertise in
23 separation of powers and spending clause issues that will be of assistance to the Court. *See Roxford*, 790
24 F. Supp. at 997. Moreover, the "potential ramifications" of this case go far beyond the parties, as the
25 outcome may determine the fate of federal funding, not only for the City and County of San Francisco
26 and the County of Santa Clara, but also for many other "sanctuary jurisdictions" around the country.
27 *See NGV Gaming*, 355 F. Supp. 2d at 1067.
28

1 Accordingly, *amici* respectfully offer their analysis of these issues to assist the Court in its
2 deliberations.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the above-listed *amici* respectfully request this Court's leave to submit
5 the attached brief *amici curiae*.

6

7 DATED: March 22, 2017

Respectfully submitted,

8 COVINGTON & BURLING LLP

9

10 By: /s/ Sonya D. Winner

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16 Attorneys for *Amici Curiae* Professors of
17 Constitutional Law, Administrative Law,
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24 * Admitted to practice in the United States District Court for the Southern District of New York. *See*
25 Order Regarding Amicus Briefs, *County of Santa Clara v. Donald J. Trump, et al*., No. 17-cv-00574-
WHO (N.D. Cal. Feb. 24, 2017), Dkt. No. 40 (waiving the pro hac vice requirements of Northern
26 District of California Local Rule 11-3 for attorneys admitted to practice and in good standing in any
United States District Court); Order Regarding Amicus Briefs, *City and County of San Francisco v.*
27 *Donald J. Trump, et al*., No. 17-cv-00485-WHO (N.D. Cal. Mar. 21, 2017), Dkt. No. 31 (same).

28

DECLARATION OF SONYA D. WINNER

I, Sonya D. Winner, declare as follows:

1. I am an attorney in the law firm of Covington & Burling LLP, attorneys for *Amici Curiae* Professors of Constitutional Law, Administrative Law, and Immigration Law in this action. I am licensed to practice law in the State of California. The matters set forth herein are true and correct of my own personal knowledge and information provided to me. If called as a witness, I could and would testify competently thereto.

2. On March 21, 2017, my colleague, Jun Li, spoke to W. Scott Simpson, counsel for defendants, on the phone and requested a stipulation for leave to file this *amicus* brief. Mr. Simpson replied that "defendants take no position" on the motion to file this *amicus* brief.

3. Tara M. Steeley, Deputy City Attorney for the City and County of San Francisco, and Julia Spiegel, counsel for the County of Santa Clara, have informed me that they consent to the filing of this *amicus* brief.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on March 22, 2017, in San Francisco, California.

/s/ Sonya D. Winner

Sonya D. Winner

EXHIBIT 1

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Attorneys for *Amici Curiae* Professors of Constitutional Law, Administrative Law, and Immigration Law

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, JOHN F. KELLY, Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States,

Defendants.

Civil Case No. 3:17-cv-00485-WHO

COUNTY OF SANTA CLARA,

Plaintiff,

v.

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

Defendants.

Civil Case No. 3:17-cv-00574-WHO

***AMICI CURIAE* BRIEF OF PROFESSORS OF CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND IMMIGRATION LAW IN SUPPORT OF PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

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INTEREST OF AMICI CURIAE

Amici curiae are 22 leading legal scholars, including experts in constitutional law, administrative law, and immigration law. *Amici* submit this brief to address some of the important constitutional law issues raised in this litigation, with a focus on the fundamental principles of separation of powers that are so central to the United States Constitution and our democratic system of government, as well as the related boundaries and limitations of the constitutional spending power. More detail concerning these *amici* is set out in the accompanying Administrative Motion of Professors of Constitutional Law, Administrative Law, and Immigration Law for Leave to File an *Amicus Curiae* Brief.

INTRODUCTION

In these cases, the Court must determine, *inter alia*, whether Section 9 of Executive Order No. 13768, entitled "Enhancing Public Safety in the Interior of the United States," Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order"), violates the United States Constitution and its underlying principles of federalism and separation of powers. Section 9 of the Executive Order directs federal officials to "ensure" that any "sanctuary" jurisdictions that willfully refuse to comply with certain federal laws or other requirements relating to immigration "are not eligible to receive Federal grants," except as "deemed necessary for law enforcement purposes." *Id*. In doing so, the President has both usurped Congress's spending power in a clear overreach of his executive power under Article I of the Constitution and exceeded the constitutional limits on the spending power itself. *Amici* file this brief to assist the Court in understanding the history of the important separation of powers and spending clause issues at the forefront of these cases.[1]

The principle of separation of powers is the bedrock of our constitutional system of government, with its three branches of government: legislative, executive and judicial. The Constitution grants each branch specific enumerated powers and imposes an intricate system of checks and balances to ensure that no one branch oversteps its bounds. The Supreme Court has repeatedly echoed the constitutional

[1] *Amici* are aware that another group of legal scholars is submitting an amicus brief in these cases, addressing issues of federalism and anti-coercion that are beyond the scope of this brief. *Amici* here urge the Court also to consider that other brief.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

doctrine that separation of powers is essential to protect and preserve the liberty and security of the governed. *See e.g., Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc. ("MWAA")*, 501 U.S. 252, 272 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

Through the promulgation of Section 9 of the Executive Order, which conditions federal grants on compliance with legal requirements selected by the President unilaterally, the President has usurped the spending power, which the Constitution explicitly grants to Congress. Section 9 of the Executive Order has no statutory authorization from Congress and attempts to exercise the spending power in a manner that far exceeds the limits of even Congress's power of the purse.[2]

I. The Doctrine of Separation of Powers Is a Fundamental Principle Underlying the United States Constitution.

The Framers of the Constitution viewed separation of powers as the antithesis to the rule of the British monarchy. They had "lived under a form of government that permitted arbitrary governmental acts to go unchecked," which instilled in them an inherent distrust of concentrated governmental power. *See I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983); *see also Boumediene v. Bush*, 553 U.S. 723, 742 (2008). Under British rule, "the colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to a hereditary monarchy." *See Chadha*, 462 U.S. at 960 (Powell, J. concurring). The Declaration of Independence condemned the King's "establish[ment] of 'an absolute Tyranny over these States'" and blatant disregard of separation of powers. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 407 n.68 (1996) (citing The Declaration of Independence ¶ 2). Thus, at the close of American Revolution, the Framers adopted the

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[2] In a recent filing in these cases, defendants have suggested that the plaintiffs cannot show irreparable harm because the funding provision of Section 9 is to be implemented only "to the extent consistent with law." *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj., Dkt. No. 46, at 10-11 (quoting Executive Order Section 9(a)). If this is intended to suggest that Section 9 should be read as *not* purporting to impose any funding restrictions that are not already explicitly and unambiguously established by federal statute, it may be difficult to harmonize such an interpretation with the remainder of Section 9, the Executive Order more generally, and the Administration's public statements about it. In any event, however, this amicus brief does not take a position on the appropriate interpretation of the Order and instead assumes that Section 9 imposes new limits on disbursement of appropriated federal funds that are not already explicitly embodied in enacted statutes.

1 doctrine of separation of powers in order "to preclude the exercise of arbitrary power." *Youngstown*
2 *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (citing *Myers v. United*
3 *States*, 272 U.S. 52, 293 (1926)).

4 Following the Revolution, the states sought to avoid the abuses of executive power by
5 transferring power to the state legislatures in the Articles of Confederation. However, this new
6 governmental structure also eschewed separation of powers and concentrated most governmental
7 authority in one branch. As Thomas Jefferson observed of the new legislative regimes during the
8 Confederation: "All the powers of government, legislative, executive and judiciary, result to the
9 legislative body. The concentrating of these in the same hands, is precisely the definition of despotic
10 government." The Federalist No. 48, at 148-49 (James Madison) (Roy B. Fairfield ed., 1966) (quoting
11 T. Jefferson, *Notes on the State of Virginia*). The Framers, borrowing from Jefferson and Montesquieu's
12 *The Spirit of the Law*, realized that the executive branch was not the only threat to individual liberty, but
13 rather that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands,
14 whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be
15 pronounced the very definition of tyranny." The Federalist No. 47, at 139 (James Madison).

16 Determined to remedy the deficiencies of the governmental structure of the Articles of
17 Confederation, the Framers deliberately distributed power among three separate branches in the
18 Constitution: Congress was given "[a]ll legislative Powers herein granted," U.S. Const. art. I, § 1, the
19 "executive Power" was vested in the President, U.S. Const. art. II, § 1, cl. 1, and the "judicial Power of
20 the United States" was vested in the Supreme Court and the inferior courts, U.S. Const. art. III, § 1. The
21 Framers believed that only this tripartite separation could achieve the desired effect of counteracting
22 "the inevitable tendency of concentrated authority to overreach and threaten liberty." *See* Edward
23 Hirsch Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 374 (1976).

24 The doctrine of separation of powers was not just an abstract ideal championed by the Framers at
25 the close of the eighteenth century; rather, it was carefully set forth in the text of the Constitution and is
26 now woven into the fabric of American government. *See Chadha*, 462 U.S. at 946. Indeed, "the very
27 structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept
28 of separation of powers." *Id*. The Supreme Court has examined and enforced separation of powers in

1 various formulations throughout the history of its jurisprudence, and has "not hesitated to invalidate
2 provisions of law which violate this principle." *MWAA*, 501 U.S. at 273 (citing *Morrison v. Olson*, 487
3 U.S. 654, 693 (1988)); *see also Chadha*, 462 U.S. at 962-63 (Powell, J. concurring) ("Where one branch
4 has impaired or sought to assume a power central to another branch, the Court has not hesitated to
5 enforce the doctrine."). Our government relies upon a "carefully crafted system of checked and
6 balanced power within each Branch" and the tripartite structure helps to "safeguard against the
7 encroachment or aggrandizement of one branch at the expense of the other." *See Mistretta*, 488 U.S. at
8 381-82.

9 Although there may be situations in which there is a degree of fluidity of the responsibilities of
10 two branches, "there remain many specific instances in which the Constitution's text and structure, fairly
11 interpreted, all but demand that powers be allocated in a particular way." *See* Laurence H. Tribe,
12 *American Constitutional Law* 140 (3d ed. 2000). The Supreme Court has applied separation of powers
13 principles and strictly construed constitutional language to address budgeting and spending issues in
14 particular. *See Clinton v. City of New York*, 524 U.S. 417 (1998) (finding Line Item Veto Act violated
15 Constitution's Presentment Clause by allowing President to amend or repeal duly-enacted laws);
16 *Bowsher v. Synar*, 478 U.S. 714 (1986) (finding reporting provisions of Gramm-Rudman-Hollings Act
17 to violate the Constitution's requirement that Congress play no direct role in the execution of the laws).
18 This is one of those specific instances in which the text of the Constitution governs: Article I of the
19 Constitution assigns the spending power – the ability to decide who will and will not receive
20 appropriations of federal funds – to Congress. Section 9 of the Executive Order thus violates the
21 doctrine of separation of powers commanded by the Constitution.

22 **II. The Executive Order Reflects an Impermissible Encroachment by the Executive Branch on the Congressional Spending Power.**

23 The Executive Order purports to draw its authority from "the Constitution and the laws of the
24 United States." 82 Fed. Reg. at 8799. However, Article II of the Constitution does not grant the
25 President authority to identify legal requirements and policies to which he gives priority and to condition
26 receipt of federal funds on compliance with those requirements and policies, without Congressional
27 authorization of those conditions. That is an exercise of "spending power" that the Constitution assigns
28

1 to Congress. Even assuming Congress may delegate some elements of this power to the Executive, it has
2 manifestly not done so here.

3 **A. The Constitution Grants the Spending Power to Congress, Not the President.**

4 Article I of the Constitution explicitly grants the power of the purse to Congress, not the
5 President: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to
6 pay the Debts and provide for the common Defense and general Welfare of the United States; but all
7 Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1.
8 Furthermore, "no money shall be drawn from the Treasury, but in Consequence of Appropriations made
9 by Law." *Id.*, Art. I, § 9, cl. 7. Although the President plays an important role in the creation of budget
10 estimates and has the power to veto a bill passed by Congress, only Congress has the power to enact
11 appropriations laws that specify who will and will not receive distributions of federal funds.

12 The Framers purposely granted the power of the purse to Congress in order to preserve the
13 system of checks and balances: "the legislative department alone has access to the pockets of the
14 people, and has in some constitutions full discretion, and in all, a prevailing influence, over the
15 pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter."
16 The Federalist, No. 48, at 148 (James Madison); *see also* The Federalist, No. 78, at 227 (Alexander
17 Hamilton) ("The legislature not only commands the purse, but prescribes the rules by which the duties
18 and rights of every citizen are to be regulated."). Madison believed the fiscal power provided the
19 legislative branch with a strong defense against encroachments by the other two branches, the "most
20 complete and effectual weapon with which any constitution can arm the immediate representatives of
21 the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary
22 measure." The Federalist, No. 58 (James Madison).

23 Section 9(a) of the Executive Order seeks to usurp Congress's spending power by conditioning
24 receipt of previously appropriated federal grant funds on compliance with certain immigration measures
25 to which the President wishes to give priority. 82 Fed. Reg. at 8801. This condition derives neither
26 from the immigration laws at issue nor from the laws through which the funds have been appropriated.
27 Rather, it derives exclusively from the President's unilateral decision to withhold the funds as a
28 punishment for failure to comply with the laws as he interprets them.

This represents an impermissible encroachment on the spending power that the Constitution grants to Congress and represents a fundamental breach of the separation of powers that the Founders so carefully constructed. Any exercise of the powers of the legislative, executive and judicial branches must be subject to the "carefully crafted restraints spelled out in the Constitution." *See Chadha*, 462 U.S. at 959. If and to the extent Section 9 of the Executive Order has the effect of putting federal funds at stake, it reflects exactly the type of abuse of power the Framers feared: the undue concentration of legislative and executive power in one person. Indeed, in this case the usurpation is even broader, as the President is purporting to make new laws on one subject (funding) in support of his preferred method of executing an entirely different and largely unrelated set of laws. Quoting Montesquieu, Madison warned, "when the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." The Federalist No. 47, at 247 (James Madison). By purporting unilaterally to impose conditions on the receipt of federal funds – and thus to determine who will and will not receive such funds – Section 9 of the Executive Order breaches critical constitutional limits on the President's power.

B. There Is No Congressional Authorization for the Executive Order.

In addition to lacking constitutional authority for the kind of action embodied in Section 9 of the Executive Order, the President is also unable to point to any *statutory* authority for this action. There is no indication that Congress purported to delegate to the President, through 8 U.S.C. § 1373 ("Section 1373") or any other statute, the authority to withhold funding from "sanctuary" jurisdictions. No such provision appears in Section 1373 or the other immigration laws cited in the Executive Order; nor is such authority provided in the appropriations and related laws associated with the funding that the Executive Order threatens to withhold.[3]

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[3] Defendants have pointed to two statutory regimes that establish procedures for revoking federal grants: the Office of Justice Programs Hearing and Appeal Procedures, 28 C.F.R. pt. 18, and the Hazard Mitigation Grant Program, 44 C.F.R. § 206.440. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 11, No. 3:17-cv-00574-WHO, Dkt No. 46. However, those regimes are available only in very limited circumstances and for grants awarded under specific statutes. Neither applies broadly to "federal

(continued…)

1 Nor is there any basis upon which statutory delegation of this authority can be inferred. To the
2 contrary, in recent years there have been more than ten bills proposed in Congress to deny funding to
3 "sanctuary" jurisdictions; none of these bills has been enacted into law.[4] In *Food and Drug Admin. v.*
4 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000), the Supreme Court rejected the
5 FDA's claim that it had jurisdiction over tobacco products, citing the fact that Congress had considered
6 and "squarely rejected" several bills that would have granted such authority to the agency. Thus, the
7 Court should consider that Congress has expressly considered the restriction embodied in the Executive
8 Order and chosen not to adopt it. As Justice Jackson famously said in *Youngstown Sheet & Tube Co. v.*
9 *Sawyer*, "when the President takes measures incompatible with the expressed or implied will of
10 Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers
11 minus any constitutional powers of Congress over the matter." 343 U.S. at 637. Absent express
12 authorization or delegation from Congress, the President may not rely upon inherent executive powers to
13 unilaterally create laws – including laws that seek to undermine and even contradict appropriation
14 measures that Congress has adopted.

15 **C. Even if Congress Had Delegated Authority to the President to Take the Action**
16 **Reflected in Section 9 of the Executive Order, the President May Not Unilaterally**
and Retroactively Repeal Congressional Appropriations.

17 Even if the Executive Order had been the result of an explicit delegation of power from Congress
18 to the President, the President would not possess – and could not be given – the power to retroactively

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20 grants" in general, and neither authorizes the blocking of federal grant money to a jurisdiction because it
fails to comply with *immigration* laws and policies.

21 [4] *See, e.g.*, Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous
22 Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654,
114th Cong. (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2015);
23 Sanctuary City All Funding Elimination Act of 2015, H.R. 3073, 114th Cong. (2015); Mobilizing
24 Against Sanctuary Cities Act, H.R. 3002, 114th Cong. (2015); Stop Sanctuary Cities Act, S. 1814, 114th
Cong. (2015); Improving Cooperation with States and Local Governments and Preventing the Catch and
25 Release of Criminal Aliens Act of 2015, S. 1812, 114th Cong. (2015); Protecting American Citizens
Together Act, S. 1764, 114th Cong. (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th
26 Cong. (2015); A Bill to Prohibit Appropriated Funds from Being Used in Contravention of Section
642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, S. 80, 114th Cong.
27 (2015).

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repeal congressional appropriations once they become law. Here, the City and County of San Francisco and the County of Santa Clara have already been allocated a wide variety of federal funds, including funds for social services, homeless shelter maintenance, and public infrastructure projects.[5] The President "does not have unilateral authority to refuse to spend the funds" that have already been appropriated by Congress. *See In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013); *see also Train v. City of New York*, 420 U.S. 35, 44 (1975) (finding that Executive did not have discretion to spend less than the full amount authorized by Congress under the Federal Water Pollution Contract Act Amendments of 1972, stating that if "Congress intended to confer any discretion on the Executive to withhold funds from this program at the allotment stage, it chose quite inadequate means to do so"). As former Chief Justice Rehnquist wrote when he was Assistant Attorney General in 1969, "with respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. . . . It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend."[6]

The Constitution does not permit even Congress to authorize the President to cancel funds retroactively and unilaterally after they have become part of a duly enacted law. In *Clinton v. City of New York*, 524 U.S. 417 (1998) the Supreme Court struck down the Line Item Veto Act, in which Congress granted the President authority to cancel three types of provisions that had been signed into law: (1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or

[5] *See e.g.*, Decl. of Ben Rosenfield in Supp. of CCSF's Mot. for Prelim. Inj. ¶ 10-11, *City and County of San Francisco v. Trump et al.*, No. 3:17-cv-00485 (N.D. Cal. Mar. 8, 2017), Dkt. No. 22; Decl. of Melissa Whitehouse in Supp. of CCSF's Mot. for Prelim. Inj. ¶ 16, *City and County of San Francisco v. Trump et al.*, No. 3:17-cv-00485 (N.D. Cal. Mar. 8, 2017), Dkt. No. 23; Decl. of Santa Clara County Chief Operating Officer Miguel Márquez ¶¶ 16-18, *Santa Clara v. Donald J. Trump et al.*, No. 3:17-cv-00574-WH (N.D. Cal. Feb. 23, 2017), Dkt. No. 29.

[6] Memo. from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to Edward L. Morgan, Dep. Counsel to the President (Dec. 1, 1969), *reprinted in* Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 279, 282 (1971).

1 (3) any limited tax benefit. The Court held that by allowing the President to repeal or amend duly
2 enacted acts of Congress, the Line Item Veto Act violated the Presentment Clause of Article I. The
3 Court explained that the Framers designed a "single, finely wrought and exhaustively considered"
4 procedure for a bill to become law, and that by allowing the President to alter text of statutes after they
5 were already enacted, the Line Item Veto Act contravened this constitutionally mandated procedure.
6 *Clinton*, 524 U.S. at 439-40 (citing *Chadha*, 462 U.S. at 951). In a concurring opinion, Justice Kennedy
7 expounded on the importance of separation of powers and the spending power:

8 > It follows that if a citizen who is taxed has the measure of the tax or the
9 > decision to spend determined by the Executive alone, without adequate
> control by the citizen's Representatives in Congress, liberty is threatened.
10 > Money is the instrument of policy and policy affects the lives of citizens.
> The individual loses liberty in a real sense if that instrument is not subject
11 > to traditional constitutional constraints. . . . The law establishes a new
> mechanism which gives the President the sole ability to hurt a group that
12 > is a visible target, in order to disfavor the group. . .

13 *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

14 Similarly here, even if Congress had granted the Executive the authority to impose the
15 retroactive funding conditions imposed by the Executive Order (which it clearly has not done), any such
16 delegation would violate Article I of the Constitution and separation of powers. The Executive Order
17 seeks to add an additional enforcement clause to federal immigration laws that threatens "sanctuary"
18 jurisdictions with the loss of all federal funding, even though that funding has been authorized by
19 Congress in a host of unrelated statutes. Any such delegation would impermissibly vest with the
20 President unilateral power to revise laws *after* they have been enacted by Congress, giving him a wholly
21 new power to punish local jurisdictions with a powerful "instrument of policy" if they fail to comply
22 with his immigration policies. *See Clinton*, 524 U.S. at 451. Congress did not, and could not, grant the
23 Executive this new power.

24 The usurpation of power reflected in Section 9 of the Executive Order contrasts sharply with the
25 limited procedure established by the Congressional Budget and Impoundment Control Act of 1974, Pub.
26 L. No. 93-344, Title X, 88 Stat. 332, under which the President may rescind or reserve funds that have
27 already been promised by Congress if – but only if – he receives approval from Congress within 45
28 days. In order to rescind or reserve such funds, the President must transmit to Congress a "special

1 message" declaring the amount of funds proposed to be rescinded, the reasons behind such a rescission,
2 and "all facts, circumstances and considerations relating to or bearing up on the proposed rescission." 2
3 U.S.C.A. § 683(a). Unless Congress acts within 45 days to support termination of the funds, the funds
4 must be made available for obligation as originally intended. *Id.* § 683(b). Section 9 of the Executive
5 Order essentially attempts a presidential impoundment *without* the necessary express Congressional
6 approval. Without Congressional approval, the Executive simply lacks constitutional authority to limit
7 the delivery of funds that Congress has duly appropriated.[7]

8 **III. The Executive Order Purports to Exercise Spending Power That Even Congress Lacks.**

9 Section 9 of the Executive Order attempts to exercise the spending power in a manner that far
10 exceeds the limits of even Congress's power of the purse. The spending power is not unlimited and is
11 subject to important constitutional restrictions. In order for a spending condition to pass muster, (1) the
12 spending decision at issue must promote the general welfare, (2) the condition must be unambiguous,
13 (3) the condition must relate to Congress's purpose in spending the funds and the federal interest in
14 question, (4) the condition imposed on the states must not, in itself, be unconstitutional, and (5) the
15 condition must not be unduly coercive. *See South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987).

16 Section 9 of the Executive Order violates these constitutional limits on the spending power.
17 First, although the Executive Order purports to act in the interest of "national security and public
18 safety," 82 Fed. Reg. at 8799, the decision of whether particular spending should occur to promote the
19 general welfare is a decision that rests with *Congress*, not the President. As discussed above, Congress
20 has made no such determination here; to the contrary, it has considered, and chosen not to adopt,
21 measures that would have done so.
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24 [7] This situation also differs from that presented in a case like *Davis v. Monroe County Board of*
25 *Education*, 526 U.S. 629 (1999), in which the Supreme Court recognized that Congress had enacted legislation pursuant to its spending power and specifically "authorized an administrative enforcement
26 scheme" for that legislation, Title IX. *Id.* at 638. The Court emphasized that Congress had clearly
27 provided for the spending condition in Title IX itself, and the statute's "plain language confine[d] the scope of prohibited conduct." *Id.* at 644.
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Second, the spending condition was far from "unambiguous." When Congress exercises its spending power and attaches conditions to the receipt of federal funds, such conditions must be unambiguous and must be set forth clearly in advance, akin to a contract between the federal and local government. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* In order for a condition to be valid under the spending clause, the recipient must know exactly what is expected of it as a condition of the grant. The Executive Order fails this test – it applies retroactively and requires compliance with certain immigration laws and policies as a prerequisite for eligibility for almost all "Federal grants." Neither the immigration laws nor the enactments authorizing the funding grants at issue contain such conditions; nor is there any basis to conclude that San Francisco and Santa Clara County "voluntarily and knowingly" accepted the condition that nearly all of their federal funding would be dependent upon compliance with the demands of the Executive Order.

Third, there is no nexus between the condition imposed and the purpose of the overall objectives. *See Dole*, 483 U.S. at 207-208. In order to be valid, the spending condition must be "reasonably related" to the purpose of the expenditure. *See New York v. United States*, 505 U.S. 144, 172 (1992) (upholding spending conditions when both conditions and payments addressed the problem of radioactive waste disposal). By threatening to withhold *all* federal funds (with the exception of those funds "deemed necessary for law enforcement" by the Executive) based on lack of compliance with an immigration-related policy, the Executive Order does not come close to satisfying this requirement. *See* 82 Fed. Reg. at 8801. The Executive Order threatens the local jurisdictions' ability to receive funds for social services, public infrastructure projects, and many other non-law enforcement programs and sources that have no nexus to immigration. The complete absence of any nexus between the condition purportedly imposed by the Executive Order and the purposes of the appropriated funds further renders the spending condition unconstitutional.

Finally, the financial inducement cannot be "so coercive as to pass the point at which pressure turns into compulsion." *See Dole*, 483 U.S. at 211. The Supreme Court found in *National Federation of Independent Business v. Sebelius* that the threatened loss of all of a state's Medicaid funds, an amount

that would be over 10% of a state's overall budget, was so coercive as to rise to the level of a "gun to the head." 132 S. Ct. 2566, 2604 (2012). Here, the local jurisdictions are at risk of losing all federal funds – a risk that would be crippling if it is comes to fruition. Far from the "relatively mild encouragement" found in *Dole*, 483 U.S. at 211, where only 5% of a state's highway funds were at stake, the Executive Order threatens to take away almost all of the local jurisdictions' federal dollars, a threat that is too coercive to stand constitutional muster under the spending clause.

CONCLUSION

By wildly exceeding the scope of executive power and the spending clause, the President has violated both the text and the spirit of the Constitution. Accordingly, the Court should find the spending provisions of Section 9 of the Executive Order to be unconstitutional.

DATED: March 22, 2017

Respectfully submitted,

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7 UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9

10 CITY AND COUNTY OF SAN FRANCISCO, 11 Plaintiffs, 12 v. 13 14 DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, JOHN F. KELLY, Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States, 17 Defendants.	Civil Case No. 3:17-cv-00485-WHO
18 19 COUNTY OF SANTA CLARA, 20 Plaintiff, 21 v. 22 DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50, 28 Defendants.	Civil Case No. 3:17-cv-00574-WHO **[PROPOSED] ORDER GRANTING ADMINISTRATIVE MOTION OF PROFESSORS OF CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND IMMIGRATION LAW FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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The Court, having considered the Administrative Motion of Professors of Constitutional Law, Administrative Law, and Immigration Law for Leave to File an *Amicus Curiae* Brief in Support of Plaintiffs' Motion for Preliminary Injunction (the "Administrative Motion"), and for good cause appearing therefore, hereby orders that the Administrative Motion is **GRANTED**.

Amici may file the brief attached as Exhibit 1 to the Administrative Motion in the above-captioned cases.

IT IS SO ORDERED.

Dated: ___________________

By: ___________________________________
Hon. William H. Orrick
United States District Judge