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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

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 III, Attorney General of the United States, DOES 1-100,

Defendants.

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

CITY AND COUNTY OF SAN FRANCISCO'S REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: April 14, 2017
Time: 2:00 p.m.
Judge: Honorable William H. Orrick
Dept: Courtroom 2

Date Filed: January 31, 2017

Trial Date: Not yet set

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INTRODUCTION

States and local governments have the sovereign power to decide what laws and policies best protect the health and safety of their residents. San Francisco—alongside hundreds of other cities and states across the country—exercises that power by leaving enforcement of federal immigration policy to the federal government, and instead fostering trust with its immigrant communities in order to encourage all city residents to report crimes, send their children to school, and use public health services. Under its sanctuary city law, San Francisco does not comply with ICE detainer requests unless they are supported by a criminal warrant, and it does not inform ICE when undocumented individuals are released from county jails except under court order. These ordinances comply with 8 U.S.C. § 1373, which provides only that state and local governments may not prohibit their employees from sharing an individual's immigration or citizenship status with federal immigration agents.

Defendants nonetheless seek to force San Francisco to change its laws. On January 25, 2017, President Trump issued an unconstitutional Executive Order, threatening to deprive sanctuary cities of federal funds if they do not comply with Section 1373. More recently, Attorney General Sessions announced on March 27 that Section 1373 requires local jurisdictions to comply with detainer requests or lose certain federal funding. And he specifically denounced San Francisco and its sanctuary laws.

Defendants offer scant response to San Francisco's arguments on the merits. Instead, they claim this dispute is unripe and San Francisco's harms are not imminent. These claims are at odds with Defendants' conspicuous public pronouncements that San Francisco is a wayward jurisdiction, and they ignore that San Francisco has suffered community harm and must place significant monies in its budget on reserve by May 15, 2017 if this Court does not grant relief. More fundamentally, Section 1373 and the Executive Order work constitutional harm by intruding into local sovereignty today, and this Court need not wait for further punitive action by Defendants to enjoin these invalid enactments.

Accordingly, San Francisco seeks a preliminary order from this Court (1) enjoining Defendants from taking action against it under either the Executive Order or Section 1373, because San Francisco complies with Section 1373, or alternatively because Section 1373 exceeds Congress's powers under the Tenth Amendment; and (2) enjoining Defendants from enforcing Section 1373 and Section 9(a) of

the Executive Order against any jurisdiction because Section 9(a) is unconstitutional due to its reliance on Section 1373 and because it violates the Spending Clause, Separation of Powers, and the Tenth Amendment of the United States Constitution.

ARGUMENT

I. Defendants Have Not Clarified The Meaning Or Scope Of The Executive Order.

The Executive Order is coercive in part because it threatens unspecified yet potentially dire consequences, and fails to inform local jurisdictions what conduct places their funding at risk. In its Motion, San Francisco acknowledged that if Defendants clarified the meaning and scope of the Executive Order, they might render preliminary relief unnecessary. But Defendants have clarified nothing—and in fact their Opposition and public statements are self-contradictory and have only added to the uncertainty in both regards.

First, Defendants fail to clarify what Section 1373—and by extension, the Executive Order—require, and whether detainer "requests" are actually mandatory. The Order appeared to indicate that compliance with detainers is mandated by Section 1373. *See* Exec. Order No. 13,768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017) (defining sanctuary jurisdictions as those that refuse to comply with Section 1373; *id.* § 9(b) (equating "sanctuary jurisdictions" with jurisdictions "that ignored or otherwise failed to honor any detainers with respect to such aliens"). Yet Defendants' Opposition claims that the Executive Order has only a limited reach because it does not "alter the existing requirements of Section 1373 (or any other federal law)" (Opp. at 1), and the federal government has previously taken the position that compliance with detainer requests was voluntary. Supplemental Request for Judicial Notice in Support of Motion for Preliminary Injunction ("Supp. RJN") Exh. E.[1]

Second, Defendants also fail to clarify precisely what funds are at risk. Defendants suggest in several places that the Executive Order threatens only a defined subset of federal funds: namely,

[1] Defendants also apparently believe—but never forthrightly state—that ICE notification requests, seeking information about when an undocumented individual will be released from custody, are also mandatory. *See* Opp. at 5 n.2 (apparently disagreeing with the District Court's holding in *Steinle v. City and County of San Francisco*, No. 16-CV-02859-JCS, 2017 WL 67064 (N.D. Cal. Jan. 6, 2017), that Section 1373 does not require jurisdictions to notify federal officials of an individual's date of release from custody); *see also* Opp. at 5 (stating that Section 1373 "*ensures* the sharing of immigration information between federal and state actors") (emphasis added).

"federal grants" that are conditioned on "compliance with Section 1373." Opp. at 11; *see also id.* at 3, 9. But upon closer inspection, these suggestions are not reassuring. To San Francisco's knowledge, there are no federal grants with express statutory conditions requiring compliance with Section 1373. Instead, Congress has enacted funding statutes that require grantees to comply with "all applicable federal law," and the Department of Justice ("DOJ") has independently determined that Section 1373 is an "applicable federal law" in a few instances. *See, e.g.*, Whitehouse Decl. Exh. B. Thus, it is Defendants, rather than Congress, who currently decide whether federal funds require compliance with Section 1373—and Defendants have not specified to which grants they will apply that requirement. Similarly, Defendants contend that the Executive Order can reach only "federal grants," yet federal funds reimbursed to state and local jurisdictions for entitlement programs like Medicaid and Temporary Assistance for Needy Families may also be considered "grants." *See* Br. Amicus Curiae Int'l Municipal Lawyers Ass'n Supp. Pl.'s Mot. Prelim. Inj. 8, ECF No. 47-1. Accordingly, the ambiguity about which funds Defendants will target remains.

Adding to the uncertainty on both points, Defendants' public statements belie their representations in court. On the same day that Attorney General Sessions stated in public remarks that failure to comply with detainer requests violates federal law and will render jurisdictions ineligible for DOJ grants under Section 1373 (Supp. RJN Exh. C), he also filed a brief in the Supreme Court of Massachusetts stating that "detainers are voluntary." Supp. RJN Exh. F at 22; *see also id.* at 22-23.[2] Similarly, Defendants' statements to members of Congress that they have not yet formed any position on the intended scope of the Executive Order (*see* Opp. Attachment 1), conflict with their representations to this Court that the Executive Order threatens only limited federal funds. Defendants cannot have it one way in their public statements and another way before this Court; they should either state clearly what the Executive Order means or be held to their public boasts.

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[2] ICE's public position on this issue is evasive; in response to a frequently asked question about whether DHS has changed its legal position that detainer requests are voluntary, ICE's website states confusingly that "DHS has not retreated from its position that detainers serve as a legally-authorized request, upon which a law enforcement agency may rely . . . ." *Declined Detainer Outcome Report FAQs*, U.S. Immigration and Customs Enf't, https://www.ice.gov/declined-detainer-outcome-report (last visited Mar. 28, 2017).

II. San Francisco Is Likely To Succeed On The Merits Of Its Claims.

Section 1373 provides that a "local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual." 8 U.S.C. § 1373(a). There is controversy over what this provision means, whether San Francisco presently complies with it, whether it is constitutional even as properly construed, and whether the Executive Order may condition funding on compliance with Defendants' overly broad reading of this statute. These disputes are live now, and San Francisco is likely to prevail on each.

A. San Francisco's Claims Are Meritorious.

1. San Francisco Complies With Section 1373, As Properly Interpreted.

Defendants' expansive interpretation of Section 1373 as requiring compliance with detainer requests is irreconcilable with its plain language, which says nothing at all about such requests. *See* 8 U.S.C. § 1373; Mot. at 13-16. Accordingly, the Court should hold that Section 1373 does exactly what it says—*i.e.*, prevents local governments from restricting their officials from sharing information with ICE about an individual's citizenship or immigration status—and no more. And because San Francisco's sanctuary laws (Administrative Code Chapters 12H and 12I) do not prevent its officials from sharing citizenship or immigration information with ICE, the Court should hold that these laws comport with Section 1373.

Defendants entirely fail to respond to this argument, and accordingly they concede it for purposes of this motion. *See, e.g.*, *Newton v. Am. Debt Servs., Inc.*, 75 F. Supp. 3d 1048, 1063–64 (N.D. Cal. 2014); *Sunbelt Rentals, Inc. v. Victor*, No. C 13-4240 SBA, 2014 WL 492364, at *9 n.7 (N.D. Cal. Feb. 5, 2014). Nor could they credibly argue the point: Chapter 12H forbids employees from sharing specified categories of information—"release status" and "other such personal information"—but does not restrict employees from giving ICE information about an individual's "citizenship or immigration status." Mot. at 19-21. Because San Francisco complies with Section 1373's plain language, it is likely to succeed on the merits of its claim.

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2. Section 1373 Is Unconstitutional Even As Properly Interpreted.

Regardless of how Section 1373 is interpreted, it is unconstitutional. Even read properly, it violates the Tenth Amendment by impermissibly interfering with the operation of state and local government, for two reasons. First, Section 1373 regulates the States in their capacity as States. This is a *per se* violation of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 932 (1997) (holding there is a "fundamental defect" when "it is the whole *object* of the law to direct the functioning of the state executive") (emphasis in original). Second, it commandeers state employees to assist with enforcing federal immigration law. As the Supreme Court explained in *Printz*, the federal government cannot evade the Tenth Amendment by "command[ing] the States' officers" rather than the states themselves. *Id.* at 935. Such a trespass always violates the Tenth Amendment, and "no case-by-case weighing of the burdens or benefits is necessary" to resolve the case. *Id.*

Defendants barely respond to these arguments. Without even mentioning *Printz*, Defendants rely solely on a Second Circuit case that upheld Section 1373 against a facial challenge, holding that States cannot forbid "voluntary cooperation by state or local officials" with federal immigration enforcement efforts. Opp. at 21 (quoting *City of N.Y. v. United States*, 179 F.3d 29, 35 (2d Cir. 1999)). The Second Circuit reasoned that "the Supremacy Clause . . . bars states from taking actions that frustrate federal laws and regulatory schemes." *City of N.Y*, 179 F.3d at 35. But as the Supreme Court later held, the Second Circuit—and Defendants—are wrong. States *do* have the right to refuse to participate in federal programs, even when that might frustrate federal objectives. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2604-07 (2012) (holding Congress could not compel unwilling states to participate in the Affordable Care Act's Medicaid expansion).

The Second Circuit also failed to appreciate the extent of Section 1373's intrusion into state and local sovereignty. A local government's ability to control the actions of its employees, and the use they make of information they have obtained in performing their duties, is central to its sovereignty. Mot. at 17. By limiting San Francisco's control over its employees' use of official information, Section 1373 prevents San Francisco from assuring residents that they can interact with local officials without fear that their immigration status information will be turned over to ICE. This, in turn, hinders

San Francisco's ability to establish the community trust it has reasonably determined is necessary to promote public health and safety for the entire community. Mot. at 3, 24-25.

Moreover, the facts of this case illustrate precisely why the Supreme Court set out a bright line rule forbidding federal commands like these to state employees. What began as a simple prohibition by Congress on forbidding state employees from sharing certain information with ICE has transmuted into Defendants requiring that cities must comply with detainer requests, and emboldened Defendants to issue an Executive Order that threatens to cut all federal funding from cities that do not comply. In short, once the federal government begins to treat local employees and resources as its own, there is no cabining the intrusion. *Printz*'s bright line approach is correct, and this Court should enjoin Section 1373's ongoing intrusion into local affairs.

3. Defendants' Broad Reading Of Section 1373, And Their Executive Order Purporting To Implement It, Are Unconstitutional.

If Defendants' overly broad interpretation of Section 1373 were correct, the constitutional violation would be even more egregious. Complying with ICE detainer requests would require local personnel to commit significant resources to jail their own residents—in their own facilities at their own cost—on federal civil immigration grounds at the federal government's direct order. Hennessy Decl. ¶ 11. Forcing state and local jurisdictions to do this is a blatant violation of the Tenth Amendment's anti-commandeering principle. *See* Mot. at 14-15.

The Executive Order is inextricably intertwined with Section 1373, and because Section 1373 violates the Tenth Amendment, so too does the Executive Order. As Defendants state, "Section 9 of the Order is meant simply to 'ensure' compliance with [Section 1373]." Opp. at 21. But because Section 1373 is unconstitutional, the Executive Order's attempt to enforce it should be enjoined. The Executive Order should also be enjoined because it violates Separation of Powers by making funding decisions that the Constitution vests in Congress, not the President. Mot. at 9-10. It also violates the Spending Clause by imposing new conditions on existing federal funding, imposing conditions not germane to the purpose of the funds, dragooning the states by threatening an impermissibly large quantity of federal funds, and inducing the states to violate individuals' Fourth Amendment rights. Mot. at 10-14. For these reasons, the Court should enjoin enforcement of Section 9.

B. San Francisco's Claims About Section 1373 Are Justiciable.

Defendants baldly state that San Francisco is unlikely to succeed on the merits of any of its claims because none of them are justiciable. Opp. at 17-20. But except for a few conclusory statements that San Francisco has not suffered any concrete injury resulting from Section 1373, Defendants' justiciability argument speaks only to San Francisco's claims about the Executive Order. Defendants do not meaningfully dispute that San Francisco's request for a finding that it complies with Section 1373, or its challenge to the constitutionality of that Section, are justiciable. Nor could they.

Two components of the Article III case-or-controversy requirement are standing and ripeness. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009). To have standing, a plaintiff must have suffered an injury in fact that is "concrete and particularized," that can be fairly traced to the defendant's action, and that can be redressed by a favorable decision of the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). A dispute is ripe in the constitutional sense if it "present[s] concrete legal issues, presented in actual cases, not abstractions." *Colwell*, 558 F.3d at 1123 (internal quotation marks omitted). These concepts are "closely related." *Id.* at 1123; *see also Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) ("The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing."). Both requirements are satisfied here, because San Francisco is currently facing a "realistic danger of sustaining a direct injury as a result of [Section 1373's] operation or enforcement" (*Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)), and there is a substantial, immediate and real controversy over whether San Francisco complies with the law (*see In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009)).

Two kinds of facts make clear that San Francisco's claims are ripe and justiciable today. The first is the undisputed evidence that San Francisco has already altered its laws and taken concrete steps to comply with Section 1373. As the Board of Supervisors recently made clear, were it not for Section 1373, San Francisco would prohibit its officials from sharing information about individuals' immigration status with ICE. *See, e.g.*, March 8 Request for Judicial Notice in Support of Motion for Preliminary Injunction ("RJN") Exh. E at 8, 10. Instead, San Francisco was forced to amend its sanctuary city law to remove a provision that restricted San Francisco officials from using City resources to share information about immigration status. S.F., Cal., Ordinance No. 96-16 (June 7,

2016); *see Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) ("[B]eing pressured to change state law constitutes an injury."). And it has had to expend resources to educate City personnel about the contents and mandate of Section 1373.[3] Eisenberg Decl. Exh. H; *see Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039-41 (9th Cir. 2015) (determining there was concrete and particularized injury sufficient to confer Article III standing where plaintiffs expended resources to counteract effects of defendants' behavior).

The second category of facts illustrating ripeness is Defendants' continued insistence that San Francisco does not comply with Section 1373 and must bear a consequence. Attorney General Sessions singled out San Francisco and its "sanctuary policies," in connection with his March 27 announcement that the DOJ will require jurisdictions to comply with Section 1373, including detainer requests, or face a claw-back of their funding and other consequences. Supp. RJN Exh. C. And Representative John Culberson—the self-proclaimed "CFO of the Department of Justice," who chairs the House of Representatives subcommittee that controls DOJ spending—stated that "it's [his] responsibility to be judge and jury of when and where federal dollars are allocated," and that "starting this year" San Francisco and other jurisdictions deemed out of compliance with Section 1373 are "in for a very unpleasant surprise." Supp. RJN Exh. G at 3-4.

These facts are extant. They are not contingent or speculative, and they belie Defendants' conclusory statements that San Francisco cannot show any concrete injury resulting from Section 1373 (*see, e.g.*, Opp. at 3), and that its claims are non-justiciable.

C. San Francisco's Claims About The Executive Order Are Justiciable.

The same facts establish that San Francisco has standing to challenge Section 9(a) of the Executive Order, and that its claim is constitutionally ripe. Whatever else the Executive Order does, it unquestionably conditions the receipt of at least some federal funds on compliance with Section 1373. And although San Francisco has not yet been officially designated a "sanctuary jurisdiction" under the Executive Order, this does not defeat the Court's jurisdiction.

[3] Defendants make no mention of many of these facts, and only passing mention of others. *See* Opp. at 20 n.6. Their unsupported and conclusory assertion that "these past actions on the part of the plaintiff cannot justify prospective relief against the defendants" (*id.*) is specious.

Initially, a case may be justiciable before a plaintiff actually suffers an injury, provided that the threatened injury about which a plaintiff complains is "certainly impending" or "inevitable." *Babbitt*, 442 U.S. at 298-99; *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69 (1993) (O'Connor, J., concurring). Such is the case here. If there were any doubt that injury is inevitable because Defendants consider San Francisco a sanctuary jurisdiction, it was eliminated by Attorney General Sessions' express reference to San Francisco in his March 27 "Remarks on Sanctuary Jurisdictions." *See* Supp. RJN Exh. C.[4]

Moreover, it is well settled that "a single factual contingency" does not render a claim "impermissibly speculative." *Coleman*, 560 F.3d at 1005. In *Coleman*—a bankruptcy case in which the individual debtor sought a declaration that her student loan debt was dischargeable—the Ninth Circuit held that the "controversy" was sufficiently "definite and concrete" for Article III purposes, even though it was uncertain whether the debtor would meet the prerequisites for discharge in the first place. *Id.* Similarly, in *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), the Ninth Circuit "concluded that a challenge to the enforceability of a French court injunction was constitutionally ripe even though enforcement of that injunction had yet to be sought." *Coleman*, 560 F.3d at 1005 (discussing *Yahoo!*).

Finally, there can be no dispute that the purpose of the Executive Order is to pressure jurisdictions to change their laws.[5] This constitutes an injury sufficient to satisfy the Article III case or controversy requirement. *See Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015); *see also Texas v. United States*, 201 F. Supp. 3d 810, 822 (N.D. Tex. 2016); *cf. Alfred L. Snapp & Son, Inc. v.*

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[4] Both the Ninth Circuit and the Supreme Court have found it relevant when a defendant simply refused to confirm that adverse action would not be taken against the plaintiff. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (basing its determination that the claims were justiciable on the fact that "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do"); *Babbitt v. Farm Workers*, 442 US 289, 302 (1979) ("[T]he State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. . . . In our view, the positions of the parties are sufficiently adverse . . . to present a case or controversy within the jurisdiction of the District Court."); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1556 (9th Cir. 1989).

[5] Indeed, the Executive Order appears to be but one aspect of a multifaceted plan, which also includes increased ICE raids, to coerce jurisdictions into abandoning their sanctuary city laws. *See* Maria Santana, *Source: ICE is targeting 'sanctuary cities' with raids*, CNN.com (Mar. 25, 2017, 8:54 AM), available at http://www.cnn.com/2017/03/23/politics/sanctuary-city-ice-raids/.

Puerto Rico, ex rel., Barez, 458 U.S. 592, 601 (1982) (explaining that states have a sovereign interest in "the power to create and enforce a legal code").

San Francisco acknowledges—as it did in its Motion (*see* Mot. at 2 n.1, 5, 10 n.9)—that it is not yet clear which federal funds are at stake under the Executive Order, and that Defendants may ultimately interpret or apply the Order to render some of San Francisco's specific challenges to the Order inapplicable. Although further factual development may aid the Court's resolution of these particular arguments, this consideration is relevant only to the *prudential*—not constitutional—ripeness of these issues. *See, e.g., Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010).

Unlike Article III standing, prudential standing is discretionary. *See Adam Bros. Farming, Inc. v. Cty. of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010) ("As this case raises only prudential concerns, we have the discretion to waive the requirements of *Williamson County*, assume that ripeness is met and continue with our analysis.") (footnote omitted); *Grubbs v. Bailes*, 445 F.3d 1275, 1281 (10th Cir. 2006) ("Questions relating to *prudential* standing, however, may be pretermitted in favor of a straightforward disposition on the merits."). And the Supreme Court has questioned the "continuing vitality of the prudential ripeness doctrine" in light of courts' "virtually unflagging" obligation to "decide cases within [their] jurisdiction." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *see also U.S. v. JP Morgan Chase Bank Account No. Ending 8215 in Name of Ladislao V. Samaniego, VL: $446,377.36*, 835 F.3d 1159, 1167 (9th Cir. 2016) ("The prudential-standing addendum to the Article III standing inquiry has fallen into disfavor in recent years."). The Court should not reward Defendants' calculated refusal to clarify the scope of the Executive Order by denying the preliminary relief San Francisco seeks on this discretionary ground.

III. San Francisco Will Suffer Irreparable Harm In The Absence Of Injunctive Relief.

Defendants argue that San Francisco cannot demonstrate a likelihood of immediate irreparable harm because "a series of future actions must occur before Section 9 [of the Executive Order] or 8 U.S.C. § 1373 could have any concrete effect on San Francisco." Opp. at 12. Not so. Section 1373 and the Executive Order are harming San Francisco now in three independent ways.

1. Deprivation of Constitutional Rights. There is no dispute that San Francisco is currently required to comply with Section 1373—against its will—and to certify its compliance with the statute

in order to continue receiving DOJ funds. Nor is there any dispute that the Executive Order seeks to force cities to comply with Section 1373. In its Motion, San Francisco explained that being forced to comply with an unconstitutional law constitutes irreparable harm. Mot. at 22-23. The constitutional violation of complying with an invalid Executive Order is as immediate and as irreparable as complying with an invalid statute. In response to this argument, Defendants assert that San Francisco "does not allege a 'deprivation' of its 'constitutional rights'" because it relies primarily on the Tenth Amendment. Defendants claim a violation of the Tenth Amendment cannot be irreparable harm because it implicates a structural, not personal, right. Opp. at 16. This is incorrect for two reasons.

First, San Francisco does allege that requiring compliance with Section 1373 impermissibly interferes with *its* sovereign Tenth Amendment rights. Whether it also has broader benefits for the rest of the nation, the Tenth Amendment protects the rights of San Francisco itself. Defendants misconstrue the Tenth Amendment by casting it as merely "structural."

Further, Defendants propose there exists a hierarchy of constitutional violations, some that constitute irreparable harm and some that do not. Yet, Ninth Circuit case law does not support this position. The Ninth Circuit has repeatedly recognized that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). More recently, in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991), the Ninth Circuit reserved the question of whether violations of the Fourteenth Amendment would constitute irreparable injury. Since *Associated General Contractors*, courts in the Ninth Circuit have found irreparable harm based on violations of the right of interstate migration, (*Walsh v. City and Cty. of Honolulu*, 423 F. Supp. 2d 1094, 1108 (D. Haw. 2006)) and the Commerce Clause (*Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009)).

2. Community Harm. Section 1373 and the Executive Order are also causing community injury to San Francisco residents and employees, as evidenced by declarations submitted by the San Francisco Sheriff, the Police Department, and the Department of Public Health in support of this Motion. These declarations describe the immediate and tangible harm the Executive Order has on San Francisco's ability to serve and protect its residents. Mot. at 24-25. Defendants never rebut or

even address this evidence. *See also generally* Br. Amicus Curiae Tahirih Justice Ctr. Supp. Pl.'s Mot. Prelim. Inj. 8, ECF No. 41-1.

3. Budgetary Harm. The adverse effects of the Executive Order are also being felt today in San Francisco's budget process. Absent relief from this Court, San Francisco will soon have to place significant money into a budget reserve to account for the potential loss of federal funds. Mot. at 22. Defendants raise several arguments in support of their assertion that this does not constitute irreparable harm. Not one has merit.

First, Defendants argue that there is no harm here because "governmental budgeting always suffers from some amount of uncertainty." Opp. at 14. *Some* uncertainty is par for the course in government budgeting, but the level of funding cuts threatened by the Executive Order is unprecedented. Further, budgetary uncertainty generally stems from economic factors that are outside anyone's control and which no one can predict. Here, Defendants control the uncertainty entirely—this is a crisis of Defendants' own making. They cannot elevate the budget uncertainty to this crisis point and then claim they cause no harm because "some" uncertainty is inherent in the process.

Second, Defendants claim that any harm from creating a budget reserve is "'self-inflicted' harm, which does not constitute irreparable harm for purposes of seeking a preliminary injunction." Opp. at 15. Defendants rely on the Seventh Circuit's decision in *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846 (7th Cir. 2003). But the Seventh Circuit later clarified that "[t]he better understanding of *Second City* is that the question of whether an injury is readily avoidable and truly self-inflicted if not avoided—and thus not irreparable harm—depends on the particular circumstances of the case." *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 679 (7th Cir. 2012). Here, creating the budget reserve is *not* an avoidable choice by San Francisco, but the only fiscally responsible way for the City to attempt to mitigate the potentially "catastrophic" harm created by the Executive Order. Rosenfield Decl. ¶ 36; *see also* Whitehouse Decl. ¶¶ 8-10, 16-17.

Third, Defendants cite *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980), for the proposition that budget uncertainty is not a sufficiently real and concrete injury to justify a preliminary injunction. Opp. at 14. The case does not stand for this proposition. There, the Coliseum secured an injunction blocking enforcement of a

provision of the National Football League's Constitution and Bylaws, which the Court of Appeal reversed, finding the mere speculations of three individuals insufficient to establish a significant threat of injury. *L.A. Memorial Coliseum Commission*, 634 F.2d at 1201. Here, San Francisco has submitted evidence, not conjecture, showing that the uncertainty created by Defendants' actions is causing real harm to San Francisco and its residents.

Fourth, Defendants contend that the Executive Order cannot cause San Francisco harm because it does not expand existing law and simply restates jurisdictions' existing obligation to comply with Section 1373. Opp. at 15. But Defendants' statements in this regard are misleading, unsupported by evidence, and inconsistent with Defendants' other public statements. *See* Part I, *supra*.

Finally, Defendants blithely argue that this is a "mere economic injury," which does not constitute irreparable harm. Opp. at 15-16. But the injury caused by creating a budget reserve is not "mere[ly] economic." Money placed in the reserve will not be available for other services. Whitehouse Decl. ¶ 10. This means that San Francisco will not be able to fund other priorities such as reducing homelessness in San Francisco through family shelter expansions, youth housing subsidies, a resource center, and homeless shelter maintenance and security. *Id.* ¶ 14. Where an economic injury impacts government's ability to provide critical resources to the public, there is immediate and irreparable harm. *See, e.g.*, *United States v. North Carolina*, 192 F. Supp. 3d 620, 629 (M.D.N.C. 2016) (finding irreparable harm where the unavailability of federal funds was "likely to have an immediate impact on [the state's] ability to provide critical resources to the public, causing damage that would persist regardless of whether funding [was] subsequently reinstated").

IV. The Balance Of Equities And Public Interest Favor A Preliminary Injunction.

Defendants and San Francisco agree that in cases against the federal government, the balance of equities and public interest factors merge. *See* Mot. at 25; Opp. at 21. But they disagree about which party these merged factors favor here. Defendants cite cases stating that "compliance with the law" is generally a factor in the public interest, but there is no public interest in requiring compliance with an unconstitutional law. To the contrary, "by establishing a likelihood" of a constitutional violation, "Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir.

2014); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (finding that "it is always in the public interest to prevent the violation of a party's constitutional rights") (internal quotation marks and citation omitted).

This analysis applies both to San Francisco's claims against Section 1373 and its claims against the Executive Order. According to Defendants, "Section 9 of the Order is meant simply to 'ensure' compliance with [Section 1373]." Opp. at 21. Thus, if Section 1373 is unconstitutional, the Executive Order serves merely to enforce an unconstitutional statute. There is no public interest in allowing an unconstitutional Executive Order to stand. And indeed, the Executive Order will continue to cause significant harms—and to unconstitutionally coerce local jurisdictions—until it is enjoined.

V. The Scope Of Injunctive Relief Sought By San Francisco Is Appropriate.

A. Nationwide Injunctive Relief Is Warranted.

Because the Executive Order and Section 1373 apply nationwide, the Court should issue a nationwide injunction.[6] "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). If this Court determines that San Francisco is likely to succeed in establishing the unconstitutionality of Section 1373 and the Executive Order, this Court can protect the nation from those unconstitutional exercises of power.

Defendants claim that "courts routinely deny requests for nationwide injunctive relief" (Opp. at 22), but the few examples on which Defendants rely do not support such a proposition here. *United States Department of Defense v. Meinhold* contained no reasoning and merely entered a stay to limit the injunction's scope to the plaintiff pending appeal. 510 U.S. 939 (1993). On appeal, the Ninth Circuit explained that a limited injunction was appropriate because the action was "not a class action. Meinhold sought only to have *his* discharge voided and to be reinstated." *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (emphasis added).[7] Likewise, *Skydive Arizona, Inc. v.*

[6] If the Court grants preliminary relief only as to San Francisco's claim that it complies with Section 1373, that relief would not, of course, require a nationwide injunction.

[7] While *Meinhold* concerned matters of military judgment, which are "not lightly to be overruled by the judiciary" (34 F.3d at 1476), San Francisco seeks to protect its ability to determine how to best deploy municipal law enforcement resources, an area where the executive receives no

Quattrocchi, 673 F.3d 1105 (9th Cir. 2012), lends no support to Defendants, as it merely reinforces that a lower court does not abuse its discretion when it issues an injunction limited to the geographic scope of the facts.

Meanwhile, courts have repeatedly entered nationwide relief when a city or state challenges a federal law or executive order. *See Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (affirming nationwide injunction against travel ban executive order); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015); *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Here, Section 1373 violates the Tenth Amendment, as does the Executive Order. The violations affect cities and counties across the country. To cabin injunctive remedies to San Francisco's geographic boundaries would minimize the scope and breadth of the violations.

B. An Injunction Against The President Is Warranted.

Defendants argue that even if an injunction is warranted, the Court should not issue an injunction against the President. Defendants are correct that a "grant of injunctive relief against the President himself is extraordinary," but it is not strictly prohibited. *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality opinion). There is no question that Courts may review the constitutionality of executive action and issue appropriate relief. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). In this case, the Court has discretion to determine whether the constitutional violations in the Executive Order may be remedied by an injunction against the named inferior officers, or whether this is an extraordinary circumstance where injunctive relief against the President himself is warranted.

CONCLUSION

For the foregoing reasons, San Francisco requests that this Court grant the relief requested.

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deference—indeed, where the balance tilts the other way: in favor of the inherent sovereignty of states and their localities. *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991); *see also Bond v. United States*, 134 S. Ct. 2077, 2081 (2014) (requiring a clear statement from Congress to interfere with state sovereignty).

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