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ATTORNEYS FOR PLAINTIFF COUNTY OF SANTA CLARA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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.

Case No. 17-cv-00574-WHO

PLAINTIFF COUNTY OF SANTA CLARA'S MOTION FOR LEAVE TO FILE A SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: July 12, 2017
Time: 2:00 p.m.
Dept: Courtroom 2, 17th Floor
Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2018

Pursuant to Civil Local Rule 7-3(d), Plaintiff County of Santa Clara ("the County") respectfully asks the Court for leave to file a Surreply in response to Defendants' Reply in Support of Defendants' Motion to Dismiss (Dkt. 136).

Defendants' reply brief makes assertions that are directly contradicted by congressional testimony recently provided by Department of Homeland Security officials regarding the meaning and scope of Executive Order 13768 and the "sanctuary jurisdictions" that order targets. Defendants' reply brief also contains representations that stand at odds with recent official statements made by President Trump. All of these statements are subject to judicial notice, and the County intends to raise them at the hearing on defendants' motion. To provide the Court with the benefit of these public and binding statements before the hearing, the County seeks leave to file a short surreply, highlighting the statements and attaching transcripts for the Court's review. The County believes this information will aid the Court in deciding the issues presented. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:14-CV-02510, 2014 WL 7206620, at *1 n.2 (N.D. Cal. Dec. 18, 2014) (granting leave to file a surreply "in the interests of completeness and judicial efficiency"). The County's proposed surreply is attached hereto as Attachment A.

If the Court is disinclined to allow the County to file a surreply, then, in the alternative, the County requests that the Court take judicial notice of the documents attached as Exhibits A through D to the proposed surreply brief. Those documents, which consist of official White House press releases and transcripts of congressional testimony, are subject to judicial notice, and the Court may consider them when deciding defendants' motion to dismiss. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) ("[I]t is proper for the district court to take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss."); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (judicially noticing information contained on a government website); *321 Studios v. Metro Goldwin Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1107 (judicially noticing records from congressional hearings "because they are the types of documents for which the accuracy cannot reasonably be questioned."); Fed. R. Evid. 201(b)(2); *see also* Fed. R. Evid. 201(c)(2) (mandating

that the court "must take judicial notice if a party requests it and the court is supplied with the necessary information").

Dated: July 6, 2017

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Defendants.

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I. INTRODUCTION

In their Reply in Support of Defendants' Motion to Dismiss, Dkt. 136, defendants attempt for the first time to explain away Attorney General Sessions's assertion that a local government's failure to comply with Immigration and Customs Enforcement ("ICE") civil detainer requests would render that entity subject to defunding or enforcement action under Executive Order 13768 (the "Executive Order" or "EO"). This representation, among others defendants make in their reply brief, is directly contradicted by recent statements made by high-ranking executive branch officials, including Department of Homeland Security ("DHS") Secretary John Kelly, Acting Director of the Immigration and Customs Enforcement ("ICE") Thomas Homan, and President Trump himself. Plaintiff County of Santa Clara ("the County") submits this surreply to highlight these critical factual inconsistencies, and to provide relevant judicially noticeable transcripts and official documents for the Court's consideration in connection with resolving defendants' motion.

II. ARGUMENT

During a March 27, 2017 press briefing, Attorney General Sessions directly linked "sanctuary jurisdiction" status to "refusing to detain known felons on the federal detainer request [sic]." *See* Dkt. 82-1 at 1–2. The County cited this statement in its preliminary injunction briefing, *see id.*, and this Court relied on the "Sessions Press Conference" in its April 25, 2017 order. *County of Santa Clara v. Trump*, --- F. Supp. 3d ----, 2017 WL 1459081, *13 (N.D. Cal. Apr. 25, 2017). Nonetheless, for the first time in their reply brief, defendants try to contort Attorney General Sessions's plain remarks into precisely the opposite of what he said. *See* Reply Br. at 8. According to the reply brief, the Attorney General in no way suggested that "non-compliance with detainer requests would constitute non-compliance with Section 1373." *Id.* Similarly, the reply brief asserts that the AG Memorandum "authoritatively" and "conclusively" defines the Executive Order, clarifies how it will be implemented, decouples it from ICE civil detainer requests, cures its vagueness, and binds the entire executive branch, including DHS.

The public record tells a different story. While Department of Justice ("DOJ") lawyers tell this Court one thing, other executive branch officials—including the President, DHS officials,

and those charged with implementing the Executive Order—are singing a different tune. The relevant evidence is as follows.[1]

On June 13, 2017—some three weeks ***after*** Attorney General Sessions issued the AG Memorandum—Acting ICE Director Thomas Homan testified before the House Appropriations Committee's Subcommittee on Homeland Security. *See* H. Approps. Comm. Hr'g Tr., Fed. News Serv. Transcripts, 2017 WLNR 18737622 (June 13, 2017) (attached hereto as Exhibit A). One of the questions posed to Director Homan was what, exactly, a state or local government must do to comply with 8 U.S.C. § 1373, and thereby avoid being deemed a sanctuary jurisdiction. Specifically, committee members wanted to know whether honoring ICE civil detainer requests was required. Director Homan replied:

> We all understand 1373, but operationally what does it mean to us? So DHS is working with DOJ to come up with some sort of clear operational instructions to law enforcement agency on what a sanctuary city is and how we define it. . . . It begins with cooperation. And one thing I can, sir, to 1373, ***not only sharing the information, but allow us access to the jails.***

Id. at 45 (emphasis added). In other words, the Director of ICE represented to Congress that, as of mid-June, ***DHS and DOJ*** believed that whatever else Section 1373 demands, at a minimum it requires local law enforcement to provide ICE with "access to the jails." *Id.* This testimony stands at odds with defendants' reply brief, which states that "compliance with 8 U.S.C. § 1373 . . . relates only to the sharing of information." Reply Br. at 8.

What's more, Director Homan admitted that, despite the AG Memorandum, DHS and DOJ were still "struggling" with how to define the key term, "sanctuary jurisdictions." He testified:

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[1] All of the transcripts and documents discussed herein and attached hereto are subject to judicial notice. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) ("[I]t is proper for the district court to take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss."); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (judicially noticing information contained on a government website); *321 Studios v. Metro Goldwin Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1107 (judicially noticing records from congressional hearings "because they are the types of documents for which the accuracy cannot reasonably be questioned"); Fed. R. Evid. 201(b)(2).

> DHS leadership is working with DOJ leadership to try to come up with an operational meaning of what we're going to consider for operational reasons the sanctuary cities. So that's still in discussion. As soon as we, you know, get some closer to clarity, we certainly will share it with you, but that's something that we're struggling with, right?

Ex. A at 45. That testimony is striking because, according to defendants' reply brief, the AG Memorandum authoritatively and conclusively answered those questions on May 22, 2017. *See* Reply Br. at 2, 11, 18.

The reply brief's inaccuracies do not end there. The reply brief asserts that the AG Memorandum "makes clear that . . . Secretary [Kelly] was consulted on" "the meaning of the term" "sanctuary jurisdictions," and that an authoritative definition—one that would defeat the County's vagueness claim—had been reached. Reply Br. at 15. Secretary Kelly, however, apparently does not concur. On May 25, 2017—three days ***after*** Attorney General Sessions issued his memorandum—DHS Secretary Kelly testified before the Senate Appropriations Committee's Subcommittee on Homeland Security. *See* S. Approps. Comm. Hr'g Tr., Fed. News Serv. Transcripts, 2017 WLNR 16423595 (May 25, 2017) (Attached hereto as Exhibit B). During his testimony, Secretary Kelly was asked, "What are we doing about the Sanctuary Cities issue?" With respect to "the Sanctuary Cities thing," he said: "Frankly, ***I don't really know what it means***. I don't think anyone out there knows what it means . . . ." *Id.* at 16–17 (emphasis added). This comment echoes his previous statement that he didn't "have a clue" how to define a sanctuary jurisdiction. *Santa Clara*, 2017 WL 1459081, at *25. In short, it appears that the AG Memorandum failed to clarify matters for Secretary Kelly—the man charged with designating sanctuary jurisdictions under the Executive Order. That may be because, quite literally, he didn't get the memo: it was addressed only to "Grant-Making Components" within the DOJ, not to the Department of Homeland Security. *See* AG Memorandum at 1.

The reply brief also fails to mention or take into account an op-ed Attorney General Sessions published the day before defendants filed their reply brief. In the brief, defendants argue that they have not yet declared San Francisco to be a sanctuary jurisdiction, a fact "fatal" to "all three plaintiffs in these cases." Reply Br. at 7. But on June 28, 2017, Attorney General Sessions penned an op-ed for Fox News in which he singled out San Francisco as a sanctuary city with a

"city policy" he found unacceptable. *See* The White House, Office of the Press Sec'y, *AG Sessions:* "*Congress Must Pass Kate's Law and Make America Safer*," https://www.whitehouse.gov/the-press-office/2017/06/29/ag-sessions-congress-must-pass-kates-law-and-make-america-safer (June 28, 2017) (attached hereto as Exhibit C). The County maintains a similar policy. *See* Compl. ¶¶ 50–65. Particularly in light of the Attorney General's public statements, the notion that the plaintiffs in these cases lack a "credible threat" of enforcement under the Executive Order, which is all that is required for standing to pursue their claims, is fanciful. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014).

While cleaving tightly to the AG Memorandum, the reply brief avoids referencing statements made by the man who actually issued the Executive Order—President Donald Trump. As it happens, President Trump issued an official press release on June 28, 2017—more than a month after the AG Memorandum's release, and one day before defendants filed their reply brief—reaffirming his oft-professed intention to completely defund "sanctuary jurisdictions." *See* The White House, *President Donald J. Trump Taking Action Against Illegal Immigration*, June 28, 2017, https://www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration (attached hereto as Exhibit D). Specifically, the White House asserted that "President Donald J. Trump is keeping his promises to the American people and taking action to enforce our country's immigration laws." *Id.* The statement then repeats the President's "promise" to "end the sanctuary cities" and to ensure that "[c]ities that refuse to cooperate with Federal authorities ***will not receive taxpayer dollars***." *Id.* (emphasis added). As all of his statements on this issue have been, this one is categorical. The statement also contradicts the reply brief's textual argument that President Trump could not possibly have intended the defunding provision to reach all taxpayer dollars, but rather intended the provision to affect only a handful of grants issued by two agencies. Reply Br. at 4.

III. CONCLUSION

Defendants' shifting positions, clarifications, and interpretations of the Executive Order make clear why the Court's injunction is necessary. Between counsel's representations, the AG Memorandum, relevant congressional testimony, and the President's own statements, defendants

aren't merely moving the goalposts in this litigation; they're switching sports entirely. That is why it is critical to keep the focus on the Executive Order's text, read in light of the expressed intent of the man who signed it. As this Court has already concluded, that text is likely to be found unconstitutional. By omitting key statements and congressional testimony, defendants' reply brief paints an incomplete and inaccurate picture of the federal government's approach to interpreting and implementing what is, at its core, a vague, standardless, coercive, and unconstitutional Executive Order. The Court should deny defendants' motion to dismiss.

Dated: July 6, 2017

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