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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY OF RICHMOND, a municipal corporation,

Plaintiff,

vs.

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

Defendants.

Case No. 3:17-cv-01535-WHO

CITY OF RICHMOND'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: May 10, 2017
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Dept.: Courtroom 2

Complaint Filed: March 21, 2017
No Trial Date

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I. PRELIMINARY STATEMENT

Prior to the filing of this Reply, on April 25, 2017 this Court entered its Order Granting the County of Santa Clara's and City and County of San Francisco's Motion to Enjoin Section 9(a) of Executive Order 13768 (the "Order"), in related cases *City and County of San Francisco v. Donald J. Trump et al*., 17-cv-00485-WHO and *County of Santa Clara v. Trump et al*., 17-cv-00574-WHO. In that Order, this Court issued a nationwide preliminary injunction, enjoining enforcement of Section 9(a) of Executive Order 13768 (the "Executive Order"). In their Opposition to the City of Richmond's Motion for Preliminary Injunction, Defendants made additional arguments, stating "certain decisions regarding implementation of the Executive Order have been made." Opp. at 8. As set forth below, these "decisions" regarding implementation of the Executive Order do not diminish in any way the need for the nationwide preliminary injunction that this Court has issued.

II. INTRODUCTION

In its opening brief, the City of Richmond demonstrated that the Court should enjoin enforcement of the Executive Order. In violation of the United States Constitution, the Executive Order seeks to force local police departments, such as the Richmond Police Department, to enforce federal immigration law. The Executive Order is in direct violation of the Constitution because it allows the Attorney General and Secretary of Homeland Security, based upon their discretion, to withhold "Federal funds" from public entities that are "sanctuary jurisdictions" who "willfully refuse" to comply with 8 U.S.C. § 1373, and further directs the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."

Richmond showed that the Executive Order impermissibly directs executive agencies to withhold appropriated funds, coerces the City to carry out federal immigration policies, commandeers City resources, is unconstitutionally vague, and imposes penalties without due process in violation of the Separation of Powers, the Spending Clause, the Due Process Clause of the Fifth Amendment, and the Tenth Amendment. Richmond also showed that, due to the City's

policies regarding immigrants, the Executive Order poses an imminent threat that federal funding will be withdrawn pursuant to the Executive Order.

On April 14, 2017, this Court held a hearing on the motions for preliminary injunction brought in related cases by the County of Santa Clara and the City and County of San Francisco. During oral argument, Defendants for the first time offered an "interpretation" of the Executive Order that would narrow its scope. In stark contrast to the Executive Order's broad pronouncement that "jurisdictions that fail to comply with applicable Federal law do not receive Federal funds" (Executive Order § 2(c)), counsel argued that the Executive Order was limited to specific grants that already contained express conditions regarding 8 U.S.C. § 1373 that were issued by either the Department of Homeland Security ("DHS") or the Department of Justice ("DOJ"). *See* Supplemental Request for Judicial Notice Ex. 1 (April 14, 2017 Transcript of Proceedings) at 25:1-20. Counsel apparently offered this new interpretation under the canon of constitutional avoidance. *Id.* at 41:6-12 (to "encourage this Court . . . to read [the Executive Order] narrowly" and "to avoid reading constitutional problems into the Order where possible.").[1] But to credit Defendants' new interpretation, the Court must ignore the Executive Order's plain text.

Section 2 of the Executive Order sets forth a policy of denying "all Federal funds" to targeted jurisdictions. Section 9(a) contains an express *exception* for law-enforcement related grants—the type of grants the Administration now claims are the only ones affected. Section 9(c) directs the Office of Management and Budget to provide "information on all Federal grant money that currently is received by any sanctuary jurisdiction"—this provision is pointless if the Executive Order affects only a narrow subset of two agencies' grants.

Defendants' delay in discovering this "plain-text" interpretation further undermines the argument. The Administration did not offer this interpretation until *after* the preliminary injunction motions were briefed and the Administration had made public statements threatening

[1] During the argument, Counsel conceded that the Executive Order could not retroactively change the terms of a grant, could not unilaterally impose conditions without Congress' approval (*id.* at 33:23-34:16), and that any conditions imposed by Congress would need to satisfy the nexus requirement (*id.* at 34:17-35:11).

to claw-back "federal funds" from sanctuary jurisdictions that fail to comply with applicable Federal law.[2] In its Order, this Court found that the Executive Order "is not readily susceptible to the Government's narrow interpretation." Order at 14.

In opposing Richmond's Motion for Preliminary Injunction, Defendants now appear to go even further, stating that "certain decisions regarding implementation of the Executive Order have been made." Opp. at 8 (emphasis added). "Specifically, relying on the plain text of the Executive Order and in the exercise of their 'discretion' to carry out the President's directives in Section 9, the Attorney General and the Secretary of Homeland Security have determined" that:

1. Section 9(a) will be applied only to "Federal grants" and not more broadly to other types of federal financial assistance, such as reimbursements under mandatory entitlement programs;

2. Section 9(a) will be applied only to grants administered by the Department of Justice and the Department of Homeland Security, as reflected in that provision's references to the Attorney General and the Secretary and not to other federal officials or agencies;

3. Grant funding may be suspended, revoked, or terminated for non-compliance with 8 U.S.C. § 1373 only where compliance with this statute is included as a condition in the grant documents; and

4. The Secretary's designation of "sanctuary jurisdictions" under Section 9(a) will be based on willful non-compliance with 8 U.S.C. § 1373 and will not be based solely on any refusal to comply with requests by federal immigration officials to detain aliens.

Opp. at 8:9-22.

Defendants' Opposition brief further states: "[a]dditionally, in the exercise of his authority to 'take appropriate enforcement action' under Section 9(a), the Attorney General has determined that any such action would take the form of civil litigation asserting that a jurisdiction's law or policy is preempted by federal law." *Id*. at 8:23-25.

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[2] *See* RJN, Ex. 2 (Attorney General Jefferson Sessions announcing that the Justice Department will take "steps to claw-back any funds awarded to a jurisdiction that willfully violates 1373."

These assertions do not cure the facial unconstitutionality of the Executive Order. Even if this new interpretation could be squared with the Executive Order's text and structure, Plaintiff would still require injunctive relief. To begin with, these assertions are **not binding**. They appear only as argument in Defendants' brief and are unsupported by any evidence. Defendants did not submit a declaration by either the Attorney General or the Secretary of Homeland Security to support these assertions.

In addition, even if Defendants had submitted supporting declarations, the Attorney General and the Secretary of Homeland Security assertedly made these determinations in an exercise of their '**discretion'** to carry out the President's directives. Accordingly, each asserted limitation imposed upon the Executive Order remains subject to change, by both the Attorney General and the Secretary of Homeland Security, pursuant to those same broad grants of 'discretion.' *See Cope v. Scott*, 45 F.3d 445, 450 (DC Cir. 1995) ("flexibility is the essence of discretion"); *Warren v. United States Parole Com.*, 659 F.2d 183, 196 (DC Cir. 1981) ("the essence of discretion is the absence of fixed rules").

Moreover, reading the Executive Order as Defendants now propose would not avoid the constitutional problems inherent in the Executive Order for at least four reasons. First, the Order would remain unconstitutionally coercive. Hardly a day goes by where the Attorney General does not threaten state and local governments with reprisal unless they change their local policies. Such coercion—even with a lower dollar amount at stake—constitutes irreparable harm. *See Texas v. United States*, 201 F. Supp. 3d 810, 835 (N.D. Tex. 2016) (granting injunction because new federal policy placed the plaintiffs "in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue"). Second, the separation of powers problem would also remain: Defendants have pointed to no statute tying any federal funds to the new condition they now seek to impose on federal spending. On the contrary, Congress has repeatedly considered and rejected the very conditions the Attorney General has imposed by fiat. Third, Defendants have failed to show how any of the affected funds are logically related to compliance with Section 1373, as required by *South Dakota v. Dole*, 483 U.S. 203, 213 (1987). And fourth,

nothing in Defendants' current, nonbinding interpretation solves the Executive Order's inherent vagueness; if anything, Defendants' evolving interpretation of the Order proves Plaintiff's point.

In short, without preliminary relief such as this Court granted today in the related cases, Richmond, and other jurisdictions, will continue to face imminent, irreparable harm.

III. ARGUMENT

A. RICHMOND WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF

Defendants argue that Richmond cannot demonstrate imminent irreparable harm necessary for emergency relief "because the Secretary and the Attorney General must take a series of steps before Section 9 of Executive Order 13,768 could have any tangible effect on the City." Opp. at 10. As set forth in Richmond's opening brief, however, the Executive Order is already causing irreparable harm; a finding this Court has already made as to San Francisco and Santa Clara.

Richmond showed that it faces imminent irreparable harm as a result of the uncertainty created by Executive Order Section 9(a). Motion at 18-19. In response, Defendants ignore the extraordinary magnitude of harm posed by the Executive Order to Richmond, especially to Richmond's most vulnerable residents, and assert that this is a risk that grant recipients always face. Opp. at 15. As stated by Richmond's City Manager, Bill Lindsay, withdrawal of federal funds from programs that rely on federal grants would put the City and its residents in a crisis, require a significant reduction in essential services, and endanger the health and safety of Richmond's residents. Lindsay Dec ¶ 12. Due to the Executive Order's broad and indefinite scope, Richmond does not know when federal funding cuts will take place, the extent of those cuts, or whether the federal government will "claw-back" funds allocated to ongoing programs. However, Richmond has already begun the process of adopting its annual budget for the fiscal year beginning on July 1, 2017. Without preliminary relief and clarification regarding the legality and effect of the Executive Order, the City is in an untenable financial situation, it does not know if it will be reimbursed, and decisions that must be made while awaiting a final decision in this case which could take multiple budget cycles, could cause a financial crisis. Lindsay Dec ¶ 10. This financial uncertainty constitutes imminent irreparable harm. *See Bassett v. Snyder*, 951 F.

Supp. 2d 939, 970-71 (E.D. Mich. 2013) (granting preliminary injunction in equal protection challenge, finding irreparable harm based in part on the "financial uncertainty caused by Public Act 297") (citing *Schalk v. Teledyne, Inc*., 751 F. Supp. 1261 (W.D. Mich. 1990), aff'd, 948 F.2d 1290 (6th Cir. 1991)).[3]

Richmond also showed that the Executive Order is interfering with a core function of local government, protecting the safety and welfare of its residents, by eroding trust in Richmond's large immigrant community. Motion at 18-19. Defendants argue that such harm is "abstract" and not concrete. Not so for Police Chief Allwyn Brown and Richmond's 100,000 residents. Police Chief Brown's declaration makes clear that "building community trust has resulted in a significant reduction in crime and victimization" and the "Executive Order increases fear in the immigrant community and makes it harder for RPD to fulfill its mission and protect the public." Motion at 6-7 (citing Brown Dec ¶¶ 5, 9 & Ex. 1; McLaughlin Dec ¶ 5). Defendants do not contradict this evidence of irreparable harm.

Richmond further showed that attempting to comply with the Executive Order is not viable because it is uncertain what actions the City must take to comply, and attempting to do so would likely interfere with policy decisions that the Richmond City Council has made. Motion at 19 (citing Lindsay Dec ¶ 13). Defendants argue that the Executive Order "subjects the City not to new law, but only to the bounds of existing law." Opp. at 12. The plain language of the Executive Order contradicts this assertion. Section 2(c) of the Executive Order broadly announces "the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." This clearly threatens all "Federal funds" based on a failure to comply with "applicable Federal law." Section 9(a) of the Executive Order gives the Attorney General discretionary authority to "take appropriate enforcement action against any entity . . . which has in effect a statute, policy, or practice that

[3] Defendants' reliance (Opp at 13) on *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980) is misguided. *Coliseum* did not address the issue of budget uncertainty. *Coliseum* held that unsupported speculation is insufficient to establish a significant threat of injury under the Clayton Act. *Id.* at 1201. In contrast, Richmond submitted evidence in the form of declarations showing that the financial uncertainty created by the Executive Order is inflicting irreparable harm on Richmond.

prevents or hinders the enforcement of Federal law." Section 9(a) also states that any jurisdiction that "willfully refuse[s] to comply" with section 1373 are "not eligible to receive Federal grants." Notwithstanding Defendants' new interpretation (Opp. at 16), there is nothing in the Executive Order to suggest that it is limited to the terms and conditions in preexisting grant documents.[4]

The Executive Order changes the law. Without preliminary relief Richmond will continue to be coerced to change its laws and policies under the threat of catastrophic harm to the safety and welfare of the City and its residents, in violation of the Tenth Amendment of the Constitution.

Finally, Richmond explained that being forced to comply with an unconstitutional law constitutes irreparable harm. Motion at 17 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("the deprivation of constitutional rights unquestionably constitutes irreparable injury"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017)).[5] Defendants argue there is no irreparable harm here because no "individual" constitutional rights are implicated, only violations of "constitutional structures." Opp. at 14. However, the Executive Order impermissibly interferes with Richmond's rights under the Fifth and Tenth Amendments, as well as violating the Separation of Powers. These rights are not merely "structural" and the Ninth Circuit has not recognized a hierarchy of constitutional injuries.[6] *See American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59

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[4] The assertion is also contradicted by the Attorney General's statement on that: "The Department of Justice will also take all lawful steps to claw-back **any funds** awarded to a jurisdiction that willfully violates Section 1373." RJN, Ex. 2.

[5] Defendants argue that *Washington v. Trump* "did not address whether the deprivation of constitutional rights alone constitutes irreparable harm" (Opp. at 17 n.6); however, the Court specifically found reinstatement of the Executive Order at issue would result in "substantial injuries and even irreparable harms," citing *Melendres* for the proposition that "the deprivation of constitutional rights unquestionably constitutes irreparable injury." 847 F.3d at 1169.

[6] Defendants cite the district court opinion in *American Trucking* (Opp. at 17); however, the Ninth Circuit reversed the district court on this very ground, finding a likelihood of irreparable harm. *See American Trucking*, 559 F.3d at 1059 ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.") (citation omitted)). Defendants' out-of-circuit district court cases regarding preemption are inapposite. *E.g., N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 368 (S.D.N.Y. 2008) (finding Restaurant Association "would suffer some degree of irreparable injury with respect to its preemption claim if enforcement is not stayed pending appeal").

(9th Cir. 2009) (irreparable harm in dormant Commerce Clause case where plaintiffs had to choose between unconstitutional practices and monetary harm); *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011)); *Citicorp Servs., Inc. v. Gillespie*, 712 F. Supp. 749, 753–54 (N.D. Cal. 1989) (presuming irreparable harm from an alleged violation of the Commerce Clause).

B. RICHMOND'S CLAIMS ARE JUSTICIABLE

Defendants argue that Richmond cannot establish a likelihood of success on the merits because its claims are non-justiciable under principles of ripeness and standing. Opp. at 18. As discussed in its opening brief (Motion at 17-19), and above (Section II.A), the Executive Order is already causing Richmond to suffer irreparable harm. Such injury "necessarily establish[ed] . . . standing to seek injunctive relief." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286–87 (9th Cir. 2013); *see also Coalition for Econ. Equity v. Wilson*, 1996 WL 691962, at *2 n.4 (N.D. Cal. Nov. 27, 1996).

The Executive Order is also pressuring Richmond officials to change its laws and policies under the threat of catastrophic harm to the safety and welfare of the City and its residents, in violation of the Tenth Amendment of the Constitution. This alone constitutes injury sufficient to satisfy the Article III case or controversy requirement. *See Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) ("being pressured to change state law constitutes an injury").

In addition, a plaintiff need not wait until it actually suffers an injury to challenge a law that poses a danger of injury. As stated by the Supreme Court in *Babbitt v. UFW Nat'l Union*, 442 U.S. 289 (1979):

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). But "[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Id. at 298 (citations omitted); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 128-129 (2007) ("where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("enforcement action is not a prerequisite

to challenging the law").

Richmond faces "a credible threat of prosecution" under the Executive Order. *Susan B. Anthony List*, 134 S. Ct. at 2342 (citing *Babbitt*, 442 U.S. at 298). Longstanding Richmond policies seek to "foster an atmosphere of trust and cooperation between the Richmond Police Department and all persons, regardless of immigration status, residing in the City of Richmond." Brown Dec ¶ 6; Lindsay Dec, Exs. 1 (Ordinance No. 29-90) and 2 (Resolution No. 11-07). Policy 428 of the RPD Policy Manual states it is "department policy, consistent with its obligations under state and federal law, to adhere to the City of Richmond Ordinance 29-90" and that "all individuals, regardless of their immigration status, must feel secure that contacting law enforcement will not make them vulnerable to deportation." Brown Dec ¶ 8 & Ex. 2. It is precisely such policies that are being targeted by the Executive Order.

In fact, on April 21, 2017 the Department of Justice issued a press release that chastised city officials in "California's Bay Area" for "being . . . concerned with reassuring illegal immigrants that [a] raid was unrelated to immigration . . . ."[7] The press release attached letters to federal grant recipients in nine jurisdictions stating that failure to validate compliance with 8 U.S.C. § 1373 could result in "withholding of grant funds, suspension or termination of the grant, ineligibility for future OJP grants or subgrants, or other action, as appropriate." *Id.*

Because the Executive Order is already causing Richmond to suffer irreparable harm and because Richmond faces a "credible threat" of being targeted for defunding under the Executive Order, Richmond has established injury-in-fact for purposes of Article III standing and constitutional ripeness. *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003) ("the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry").

Defendants also argue that prudential ripeness factors weigh against an injunction. Opp. at 20. Unlike Article III standing, prudential standing is discretionary. *See Adam Bros. Farming,*

[7] *See* Department of Justice Press Release, Department of Justice Sends Letter To Nine Jurisdictions Requiring Proof of Compliance With 8 U.S.C. § 1373 (attaching letters); available at: https://www.documentcloud.org/documents/3675286-DOJ-Sanctuary-City-Letters.html.

Inc. v. Cty. of Santa Barbara, 604 F.3d 1142, 1148 (9th Cir. 2010). In *Susan B. Anthony List*, the Supreme Court called into question the continued viability of the prudential ripeness doctrine:

> To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are 'prudential,' rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.

134 S. Ct. at 2347 (internal punctuation omitted) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1386 (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.").

Defendants argue that this case is not ripe because implementation of Section 9 'rests upon [several] contingent future events—including clarification of some of its terms." Opp. at 20; *see also id.* at 21 ("it is unknown what could prompt the Secretary and Attorney General to take action against any jurisdiction"). At the same time, Defendants **contradict** this assertion by arguing that "the decisions recently made regarding implementation of the Executive Order greatly diminish any likelihood of success on the merits." Opp. at 21-22. Defendants cannot have it both ways.

In any event, Richmond satisfies the prudential ripeness factors. First, the issues in this case are fit for judicial decision. The Executive Order is final and is being implemented.[8] Indeed, Defendants allege that "decisions regarding implementation of the Executive Order have been made" by the Attorney General and the Secretary of Homeland Security. And Richmond's challenge primarily presents legal issues that "will not be clarified by further factual development." *Id.* (quotations omitted). Second, requiring Richmond to "proceed without knowing whether the [Executive Order] is valid would impose a palpable and considerable hardship" on Richmond. *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 581 (1985).

[8] *See, e.g.*, Department of Justice Press Release, Department of Justice Sends Letter To Nine Jurisdictions Requiring Proof of Compliance With 8 U.S.C. § 1373 (attaching letters); available at: https://www.documentcloud.org/documents/3675286-DOJ-Sanctuary-City-Letters.html.

Defendants' additional, contradictory, argument that Defendants cannot show a likelihood of success on the merits because of "the decisions recently made regarding implementation of the Executive Order" fails for several reasons. First, these "determinations" do not cure the facial unconstitutionality of the Executive Order. Second, these assertions are **not binding**. The assertions appear as argument in Defendants' brief but are not supported by any evidence. Defendants did not submit a declaration by either the Attorney General or the Secretary of Homeland Security to support these assertions.

Third, even if Defendants had submitted supporting declarations, the Attorney General and the Secretary of Homeland Security assertedly made these determinations in an exercise of their '**discretion**' to carry out the President's directives. Accordingly, each asserted limitation imposed upon the Executive Order remains subject to change, by both the Attorney General and the Secretary of Homeland Security, pursuant to those same broad grants of 'discretion.' *Warren v. United States Parole Com.*, F.2d 183, 196 (DC Cir. 1981) ("the essence of discretion is the absence of fixed rules").

Moreover, these "determinations" do not address the coercive effect of the Executive Order, the nexus requirement under the spending clause, Separation of Powers issues, or the fact that the Executive Order is unconstitutionally vague. These flaws continue to violate the Constitution. Without preliminary relief, Richmond, and other jurisdictions, will continue to face a likelihood of imminent, irreparable harm; a finding this Court has already made in issuing the Order.

C. THE BALANCE OF THE EQUITIES SUPPORTS A PRELIMINARY INJUNCTION

In its opening brief Richmond demonstrated that without preliminary relief, Defendants would suffer immediate and tangible harm, whereas the government will suffer no harm if the motion is granted. Motion at 19. Defendants respond that "compliance with the law" is in the public interest, but there is no public interest in requiring compliance with an unconstitutional law. To the contrary, where, as here, there is a likelihood of a constitutional violation, "[t]he public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights." Motion at 19 (citing *Ariz. Dream Act Coal. v. Brewer*, No. 15-15307, 2017 U.S. App. LEXIS 1919, at *42 (9th Cir. Feb. 2, 2017); *Melendres*, 695 F.3d at 1002 ("it is always in the

public interest to prevent the violation of a party's constitutional rights")). 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.

D. AN INJUNCTION MAY ISSUE AGAINST THE PRESIDENT OR INFERIOR OFFICERS

Defendants argue that even if an injunction is appropriate, it should not issue against the President. It is well established that courts may review the constitutionality of executive action and issue appropriate relief. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). In *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), the Supreme Court directed that district courts should "evaluate[ ] whether injunctive relief against the President [i]s available. . . ." Here, the Court has determined that the extraordinary remedy of enjoining the President himself is not appropriate but is as to the other Defendants. Order at 49.

E. A NATIONWIDE INJUNCTION IS WARRANTED

Finally, Defendants ask the Court to limit any injunction to Richmond. Opp. at 23-24. However, the Executive Order indisputably applies to every "sanctuary jurisdiction" in the nation. This fact is underscored by letters sent by the Department of Justice, Office of Justice Programs, on April 21, 2017 to federal grant recipients in Sacramento, Chicago, New Orleans, Philadelphia, Las Vegas, Miami, Milwaukee, New York, and Chicago. The letters uniformly state that failure to validate compliance with 8 U.S.C. § 1373 could result in "withholding of grant funds, suspension or termination of the grant, ineligibility for future OJP grants or subgrants, or other action, as appropriate."[9] Because the Executive Order applies nationwide, the Court should issue a nationwide injunction. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff"); *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir.

[9] *See* Department of Justice Press Release, Department of Justice Sends Letter To Nine Jurisdictions Requiring Proof of Compliance With 8 U.S.C. § 1373 (attaching letters); available at: https://www.documentcloud.org/documents/3675286-DOJ-Sanctuary-City-Letters.html.

2017) (affirming nationwide injunction against travel ban executive order); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016) (affirming nationwide injunction of presidential immigration directive); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) ("district court has the power to order nationwide relief"). Here, the Court has determined that '[g]iven the nationwide scope of the Order, and its apparent constitutional flaws, a nationwide injunction is appropriate." Order at 48.

F. DEFENDANTS' "DETERMINATIONS" ARE NOT BINDING AND DO NOT CURE THE EXECUTIVE ORDER'S UNCONSTITUTIONALITY

In opposing Richmond's Motion for Preliminary Injunction, Defendants state, for the first time, that "certain decisions regarding implementation of the Executive Order have been made." Opp. at 8.

1. Section 9(a) will be applied only to "Federal grants" and not more broadly to other types of federal financial assistance, such as reimbursements under mandatory entitlement programs;

2. Section 9(a) will be applied only to grants administered by the Department of Justice and the Department of Homeland Security;

3. grant funding may be suspended, revoked, or terminated for non-compliance with 8 U.S.C. § 1373 only where compliance with this statute is included as a condition in the grant documents; and

4. the Secretary's designation of "sanctuary jurisdictions" under Section 9(a) will be based on willful non-compliance with 8 U.S.C. § 1373 and will not be based solely on any refusal to comply with requests by federal immigration officials to detain aliens.

Opp. at 8:9-22.

Defendants' Opposition brief further states: "[a]dditionally, in the exercise of his authority to 'take appropriate enforcement action' under Section 9(a), the Attorney General has determined that any such action would take the form of civil litigation asserting that a jurisdiction's law or policy is preempted by federal law." Opp. at 8:23-25.

As discussed *supra*, these assertions do not cure the facial unconstitutionality of the Executive Order. The "determinations" do not address the coercive effect of the Executive Order,

the nexus requirement under the spending clause, Separation of Powers issues, or the fact that the Executive Order is unconstitutionally vague. These flaws continue to violate the Constitution.

Significantly, these "determinations" are not binding. Defendants did not submit a declaration by either the Attorney General or the Secretary of Homeland Security to support these assertions. Even if Defendants had submitted supporting declarations, the Attorney General and the Secretary of Homeland Security assertedly made these determinations in an exercise of their 'discretion' to carry out the President's directives. Accordingly, each asserted limitation imposed upon the Executive Order remains subject to change, by both the Attorney General and the Secretary of Homeland Security, pursuant to those same broad grants of 'discretion.'

Without preliminary relief, Richmond, and other jurisdictions, will continue to face imminent, irreparable harm. Accordingly, the Motion should be granted. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (affirming preliminary injunction, noting the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.").

IV. CONCLUSION

For the foregoing reasons, Richmond had demonstrated that a Preliminary Injunction is appropriate and necessary.

Respectfully submitted,

Dated: April 25, 2017

COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Nancy L. Fineman*
NANCY L. FINEMAN
Attorneys for Plaintiff

Dated: April 25, 2017

CITY OF RICHMOND

By: */s/ Bruce R. Goodmiller*
BRUCE REED GOODMILLER
Attorneys for Plaintiff

ATTESTATION OF FILING

I, Nancy L. Fineman, hereby attest, pursuant to Northern District of California, Local Rule 5-1(i)(3) that concurrence to the filing of this document has been obtained from each signatory hereto.

/s/ Nancy L. Fineman

NANCY L. FINEMAN
Attorney for Plaintiff