

Appeal Nos. 17-17478 & 17-17480

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Appellee,

v.
DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

COUNTY OF SANTA CLARA,
Plaintiff-Appellee,

v.
DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal From the United States District Court for the
Northern District of California, Case Nos. 17-485 & 17-574
District Judge William H. Orrick

**Brief of *Amici Curiae* Southern Poverty Law Center, National Immigrant
Justice Center, American Civil Liberties Union, and Other *Amici Curiae* in
Support of County of Santa Clara and City and County of San Francisco**

Nathan M. McClellan
Dechert LLP
633 W. 5th Street, Suite 4900
Los Angeles, CA 90071
(213) 808-5700

Attorneys for Amici
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

Sarah M. Rich
Southern Poverty Law Center
150 E. Ponce de Leon Ave., Suite 340
Decatur, GA 30317
(404) 521-6700

Attorney for Additional Amici
(see signature page)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state as follows:

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Dated: February 12, 2018

By: /s/ Nathan M. McClellan
Nathan M. McClellan
Attorney for *Amici*
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

Sarah M. Rich
Attorney for *Amici*
Adelante Alabama Worker Center,
Alabama Coalition for Immigrant Justice,
American Civil Liberties Union of Northern
California,
American Civil Liberties Union of Southern
California,
American Civil Liberties Union of San
Diego and Imperial Counties,
American Federation of Teachers
Americans for Immigrant Justice,
Asian American Legal Defense and
Education Fund,
Asian Americans Advancing Justice (Los
Angeles and Atlanta),
Bet Tzedek Legal Services,
California Partnership to End Domestic
Violence,
Coalition for Humane Immigrant Rights,

Florida Legal Services, Inc.,
Greater Rochester Coalition for Immigration
Justice,
Illinois Coalition for Immigrant and Refugee
Rights,
Immigrant Legal Resource Center,
Impact Fund,
Jobs With Justice
Kids for College,
Latin American Legal Defense and
Education Fund,
LatinoJustice PRLDEF,
Legal Aid at Work,
National Employment Law Project,
National Immigration Law Center,
Northwest Forest Worker Center,
Southeast Immigrant Rights Network,
Tennessee Immigrant and Refugee Rights
Coalition,
Wayne Action for Racial Equality,
We Belong Together,
Worker Justice Center of New York, Inc.,
Workers Defense Project,
Worksafe

ATTESTATION

This certifies that all *amici* joining in this document concur in its content and have authorized this filing.

/s/ Nathan M. McClellan
Nathan M. McClellan
Attorney for *Amici*
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

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INTERESTS OF *AMICI*

Amici are the Southern Poverty Law Center, National Immigrant Justice Center, American Civil Liberties Union, Adelante Alabama Worker Center, Alabama Coalition for Immigrant Justice (ACIJ), American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego and Imperial Counties, American Federation of Teachers, Americans for Immigrant Justice, Asian American Legal Defense and Education Fund (AALDEF), Asian Americans Advancing Justice (Los Angeles and Atlanta), Bet Tzedek Legal Services, California Partnership to End Domestic Violence, Coalition for Humane Immigrant Rights (CHIRLA), Florida Legal Services, Inc., Greater Rochester Coalition for Immigration Justice, Illinois Coalition for Immigrant and Refugee Rights (ICIRR), Immigrant Legal Resource Center, Impact Fund, Jobs With Justice, Kids for College, Latin American Legal Defense and Education Fund (LALDEF), LatinoJustice PRLDEF, Legal Aid at Work, National Employment Law Project, National Immigration Law Center, Northwest Forest Worker Center, Southeast Immigrant Rights Network (SEIRN), Tennessee Immigrant and Refugee Rights Coalition (TIRRC), Wayne Action for Racial Equality, We Belong Together, Worker Justice Center of New York, Inc., Workers Defense Project, and Worksafe.

Amici are a group of organizations that work to protect the most vulnerable

members of society. Together, these organizations protect the civil rights of numerous immigrants and migrant workers, many of whom face discrimination, exploitation, and outright abuse. The breadth of experience among *amici* includes assisting migrant workers, offering healthcare and education to immigrant children, defending the legal rights of immigrants, promoting civic engagement and legislative initiatives, combatting violence in immigrant communities, and improving migrant living conditions. *Amici* have witnessed first-hand the federal government's efforts in recent years to conscript local law enforcement into federal immigration enforcement and the harmful consequences of local involvement in immigration enforcement for local jurisdictions and the immigrant communities who live in them, and *amici* in this brief seek to share their collective experience with the Court. *Amici* are deeply interested in this litigation because the Executive Order, if implemented, will have a dramatic impact on issues that are central to their missions and work.¹

SUMMARY OF ARGUMENT

This litigation involves the constitutionality of Executive Order 13768, 82 Fed. Reg. 8799, issued by President Donald J. Trump on January 25, 2017 (the

¹ *Amici* hereby certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* and their counsel contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this *amicus* brief.

“Executive Order”), which purports to withdraw federal funding from any state or local government that the Attorney General and Secretary of Homeland Security declare to be a “sanctuary jurisdiction.” The district court properly enjoined the Executive Order, holding that it violates the separation of powers, constitutional principles of federalism, and due process. *County of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 5569835, at *16 (N.D. Cal. Nov. 20, 2017).

The Southern Poverty Law Center (“SPLC”), National Immigrant Justice Center (“NIJC”), American Civil Liberties Union (“ACLU”), and other *amici* submit this amicus brief in support of Appellees Santa Clara County (“Santa Clara”) and the City and County of San Francisco (“San Francisco”) in order to (1) place the Executive Order within the context of the federal government’s ongoing efforts to conscript local law enforcement agencies as tools of federal immigration enforcement, and (2) explain the devastating consequences that such conscription has on immigrant and non-immigrant communities and local law enforcement.

For years, the federal government has sought to leverage local jurisdictions’ law enforcement resources as part of its immigration enforcement program. Too often—and particularly within the last year—its efforts have involved misleading, pressuring, and coercing local jurisdictions to entangle themselves in the deportation system, despite constitutional safeguards ensuring local governments can choose otherwise. The Executive Order is a particularly sweeping example of

this troubling campaign. The consequences that result when local police become *de facto* federal immigration agents are devastating. *Amici* have seen firsthand the costs borne by local communities across the country, including harm to immigrant and non-immigrant residents, to local law enforcement, and to the community as a whole.

In light of the serious harm that would result from the Executive Order's conscription of local governments into the business of immigration enforcement, *amici* urge this Court to affirm the District Court's rejection of Section 9 of the Executive Order.

ARGUMENT

I. The Executive Order is Part of a Years-Long Campaign to Conscript State and Local Police into Immigration Enforcement.

The Executive Order was issued as part of a multi-year campaign by the federal government to recruit or conscript local law enforcement into the federal government's immigration enforcement efforts. These efforts have consistently trenched on the Constitution's federalism principles, which prevent the federal government from "impress[ing] into its service—and at no cost to itself—the police officers of the 50 States." *Printz v. United States*, 521 U.S. 898, 922 (1997); *see also id.* at 931-32 & n. 15 (federal government cannot force even "a minimal and only temporary" regulatory burden on local officers); *New York v. United States*, 505 U.S. 144 (1992) (federal government cannot force states to regulate).

The Executive Order’s sweeping threats thus must be understood in the context of the federal government’s other efforts to “indirectly coerce[]” localities to assist with deportations. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012).

A. ICE’s Expanding Use of Local Criminal Justice Systems.

For decades, federal immigration agents’ interactions with local law enforcement agencies (LEAs) were sporadic and ad hoc. But starting in 2006, Immigration and Customs Enforcement (ICE) began to systematically target individuals encountered by LEAs and to use local criminal justice systems as a platform for civil immigration enforcement.²

Local conscription for civil immigration enforcement increased dramatically in 2008, when ICE rolled out a fingerprint-sharing program called Secure Communities. Through Secure Communities, every time an LEA sends an individual’s fingerprints to the FBI to check for any criminal warrants or history,

² A key program ICE used as part of this effort to leverage state and local law enforcement is the “Criminal Alien Program” (CAP), in which ICE agents closely monitor state and local prisons and jails to identify individuals who may be removable. By July 2012, CAP officers were screening 100% of reported foreign-born individuals in federal and state prisons, a total of over 4,300 facilities. *See* American Immigration Council, *The Criminal Alien Program: Immigration Enforcement in Prisons and Jails*, at 5 (Aug. 2013) (citing Deposition of Jamison Matuszewski, Unit Chief for Criminal Alien Program), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf.

those fingerprints and booking information (including country of birth and citizenship, if collected) automatically are shared with ICE to check for possible removability.³ ICE championed the program as a “force-multiplier” by which it could “leverage” local police forces nationwide.⁴

ICE originally sold the program as voluntary.⁵ As local opposition grew, states began considering withdrawing from Secure Communities.⁶ Instead of honoring states’ decisions, ICE reversed course and decided to force states and localities to participate in Secure Communities if they wanted access to the FBI’s criminal database—an essential tool for law enforcement.⁷ In August 2011, ICE informed every state that Secure Communities was now mandatory, despite its

³ ICE, “Secure Communities: Standard Operating Procedures” (2009), *available at* https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf.

⁴ ICE, *Press Release, Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year* (Nov. 12, 2009), *available at* <https://www.dhs.gov/news/2009/11/12/secure-communities-initiative-identified-more-111000-criminal-aliens-its-first-year>; *see also supra* note 3.

⁵ *See supra* note 4; ICE, FOIA Library, “Secure Communities-Memorandums of Agreement,” *available at* <https://www.ice.gov/foia/library>.

⁶ *See* Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES (May 5, 2011), *available at* <http://www.nytimes.com/2011/05/06/us/06immigration.html>.

⁷ Elise Foley, *DHS Overrides State, Says Illinois Must Share Fingerprint Data For Deportations*, HUFF. POST (May 6, 2011), *available at* http://www.huffingtonpost.com/2011/05/06/dhs-secure-communities-illinois_n_858528.html.

explicit prior representations that the program was optional.⁸

This change in policy effectively forced all LEAs nationwide to contribute to civil immigration enforcement on a massive scale. Because states and localities cannot effectively opt out of Secure Communities, its fingerprint-sharing regime has involuntarily transformed local officers across the country into frontline immigration agents. By February 28, 2015, when ICE's public reporting ended, ICE had screened over 47 million LEA fingerprint checks.⁹

B. The Proliferation of ICE Detainers.

ICE's principal tool for seeking the custody of an individual in local custody identified through Secure Communities or other means has been the immigration detainer. A detainer is a checkbox form that requests advance notice of release and asks LEAs to detain people for up to an additional 48 hours after local detention

⁸ Example letter sent to States Governors available at *City of Chicago v. Sessions*, Case No. 17-5720, Dkt. 62-1, Ex. C (N.D. Ill.); Elise Foley, *Secure Communities Agreements Canceled, Participation Still Required*, HUFF. POST (Aug. 5, 2011), available at http://www.huffingtonpost.com/entry/secure-communities-update-department-of-homeland-security_n_919651.html.

⁹ ICE, "Secure Communities Nationwide Interoperability Statistics-Year to Date FY2015" (Feb. 28, 2015), available at https://web.archive.org/web/20160410031749/https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf. The Obama administration replaced "Secure Communities" with the "Priority Enforcement Program." See ICE, "Priority Enforcement Program," <https://www.ice.gov/pep>. The Trump administration has reinstated Secure Communities. See ICE, "Secure Communities," <https://www.ice.gov/secure-communities>. Despite the change in nomenclature, ICE's access to fingerprints submitted to the FBI for criminal history checks has remained in place under both regimes.

authority expires (for reasons such as posting of bail, dismissal of charges, or completion of sentence).¹⁰

Over the last decade, the number of detainees sent to local jails has skyrocketed. In fiscal year 2005, ICE issued 7,090 detainees; by fiscal year 2012, that number had shot up by a factor of 40, to 276,181.¹¹ In Appellees' jurisdictions alone, ICE has requested Plaintiffs make 13,355 detainer arrests since 2006.¹² This ballooning entanglement of local police and jails with ICE left many community members with the understanding that contact with police would lead to immigration consequences. Fear of local police among immigrant communities across the country dramatically increased.

ICE stoked this fear by using a dragnet approach, placing detainees on

¹⁰ See Detainer Form I-247A (Mar. 2017), available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>. Until June 2015, the immigration detainer form requested detention for up to 48 hours, excluding weekends and holidays, thus up to 5 days.

¹¹ Transactional Record Access Clearinghouse (TRAC), *Detainer Use Stabilizes Under Priority Enforcement Program*, Tbl. 1 (Jan. 21, 2016), available at <http://trac.syr.edu/immigration/reports/413/>. In November 2014, DHS announced the Priority Enforcement Program (PEP), which continued the Secure Communities fingerprint and information-sharing but limited the categories of individuals that ICE could target with detainees. Accordingly, the number of detainees issued to LEAs in 2015 and 2016 declined. The Trump administration has eliminated the PEP restrictions, such that ICE's detainer use has again climbed. TRAC, *Use of ICE Detainers Obama v. Trump* (Aug. 30, 2017), available at <http://trac.syr.edu/immigration/reports/479/>.

¹² TRAC, *Latest Data: Immigration and Customs Enforcement Detainers* (data through July 2017), available at <http://trac.syr.edu/phptools/immigration/detain/>.

people with little to no criminal record. According to ICE's own data, nearly half of all detainers in 2012 targeted people with no criminal record at all, and almost two-thirds targeted people with very minor offenses, if any, such as traffic offenses.¹³ In Santa Clara, a full 94 percent of ICE detainers in 2012 were issued against individuals with no criminal convictions.¹⁴

Detainers were also expensive for local governments themselves, because ICE refused to reimburse them for the cost of detention, *see* 8 C.F.R. § 287.7(e),¹⁵ and because localities faced steep civil liability when ICE made mistakes, such as issuing detainers for U.S. citizens. *See, e.g., Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014) (granting summary judgment against county); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 38 (D.R.I. 2014) (denying motion to dismiss claims against state defendant), *aff'd in part, dismissed in part*, 793 F.3d 208 (1st Cir. 2015); *Gonzalez Goodman v. Penzone*, Case No. 16-4388, Dkt. 32-1 (D. Ariz. filed Dec. 14,

¹³ TRAC, *Few ICE detainers Target Serious Criminals*, Tbl. 3 (Sept. 17, 2013), available at <http://trac.syr.edu/immigration/reports/330/>.

¹⁴ TRAC, *Targeting of ICE Detainers Varies Widely by State and by Facility*, Tbl. 3 (Feb. 11, 2014), available at <http://trac.syr.edu/immigration/reports/343/>.

¹⁵ Letter from David Ventrueella, Asst. ICE Director, to Miguel Marquez, County Counsel for Santa Clara County, at 3, available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers%20-%20ICE%20response%20to%20Santa%20Clara.pdf>.

2016).¹⁶

Despite these problems, ICE carefully cultivated the perception that local officers were *required* to hold people pursuant to immigration detainers, even though a mandate to detain a person would have been a blatant violation of the anti-commandeering rule. *See Printz*, 521 U.S. at 931-32 & n. 15. ICE wrote on its 2011 version of the detainer request form, “This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency ‘shall maintain custody of an alien’ once a detainer has been issued by DHS.”¹⁷ In fact, the regulation provided no such command, only a time limit. 8 C.F.R. § 287.7(d); *see also Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (holding detainers are

¹⁶ Detainers are issued against U.S. citizens with alarming frequency. *See* TRAC, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, Feb. 20, 2013 (documenting 834 detainers on U.S. citizens), *available at* <http://trac.syr.edu/immigration/reports/311/>; Eyder Peralta, *You Say You’re an American, but What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016) (documenting “693 U.S. citizens [who] were held in local jails on federal detainers”), <http://www.npr.org/sections/thetwoway/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported>.

¹⁷ Detainer Form I-247 (Dec. 2011), *available at* <http://bit.ly/2yS50Qf>. ICE has changed the detainer form multiple times since 2010 due to repeated court defeats or conceded constitutional problems. For example, from 1997 through 2012, ICE’s detainer forms permitted an ICE agent to request detention based solely on the “initiation of an investigation” in clear violation of the Fourth Amendment. *Morales*, 996 F. Supp. 2d at 29 (“One needs to look no further than the detainer itself to determine that there was no probable cause to support its issuance. . . . The fact that an investigation had been initiated is not enough to establish probable cause because the Fourth Amendment does not permit seizures for mere investigations.”).

voluntary). Many sheriffs and police chiefs misunderstood the detainer to be a command, and ICE only belatedly conceded otherwise. *See Rios-Quiroz v. Williamson County, Tenn.*, Case No. 11-1168 (M.D. Tenn.), Dkt. No. 40 & 41 (federal judge requests ICE file an amicus brief regarding its position on whether detainers are mandatory; ICE declines the judge's request); *see* Defs.' Answer, *Jimenez Moreno v. Napolitano*, Case No. 11-5452, Dkt. 61, ¶ 24 (N.D. Ill. Dec. 27, 2012) (ICE concedes detainers are voluntary).

C. Federal Efforts to Conscript Local Assistance Have Proliferated Over the Last Year.

In the past year, the Executive Branch has stepped up its attempts to hector, threaten, and trick local jurisdictions to help it deport their residents.¹⁸ Within days of the denial of its motion for reconsideration of the preliminary injunction in this litigation, the government issued the Fiscal Year 2017 Byrne JAG grant funding program application materials, which added three new immigration conditions—including advance notice of certain immigrants' release dates, and free access to local jails to interrogate prisoners.¹⁹ Unless localities agree to these unrelated

¹⁸ See David Post, *The "Sanctuary Cities" Executive Order: Putting the Bully Back into "Bully Pulpit"*, WASH. POST (May 2, 2017), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/02/the-sanctuary-cities-executive-order-putting-the-bully-back-into-bully-pulpit/?utm_term=.844e58710403.

¹⁹ DOJ, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs* (July 25, 2017), available at <https://www.justice.gov/opa/pr/attorney-general->

policy concessions, the government threatens to strip them of law enforcement funds. These novel and troubling new conditions have been challenged and blocked. *See City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *appeal docketed*, No. 17-2991 (7th Cir. Sept. 26, 2017); *City of Philadelphia v. Sessions*, No. CV 17-3894, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017), *appeal docketed*, No. 18-1103 (3rd Cir. Jan. 16, 2018).

The government has also advanced an unprecedented, expansive, and implausible interpretation of 8 U.S.C. § 1373, a statute at issue in this case. While the plain text of that provision speaks only to “information regarding the citizenship or immigration status . . . of any individual,” the government now contends that it prohibits local policies that restrict the sharing of nearly *any* information about immigrants, including their home addresses, custody status, and release dates. Such an atextual reading is deeply flawed. *See Steinle v. San Francisco*, 230 F. Supp. 3d 994, 1015-16 (N.D. Cal. 2017), *appeal docketed*, No. 17-16283 (9th Cir. June 19, 2017) (holding “[n]othing in 8 U.S.C. § 1373[] addresses information concerning an inmate’s release date.”). Yet in recent months the Department of Justice (“DOJ”) has threatened to strip multiple

sessions-announces-immigration-compliance-requirements-edward-byrne-memorial; DOJ, Office of Justice Programs, *Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation*, at 29-30 (released Aug. 3, 2017), *available at* <https://www.bja.gov/Funding/JAGLocal17.pdf>.

jurisdictions of federal funding based on such specious claims of non-compliance with 8 U.S.C. § 1373.²⁰

Perhaps most alarmingly, the acting director of ICE and the Secretary of Homeland Security have indicated in recent weeks that DHS is seeking the prosecution of elected officials in jurisdictions that limit their participation in immigration enforcement.²¹ These threats open a new front in the federal government's assault on states' and local jurisdictions' efforts to build trust between law enforcement and the community. They also raise the frightening prospect of the federal government prosecuting those with whom it has policy disagreements. They are of a piece with the Executive Order and the rest of the federal government's campaign of coercion.

II. Local Entanglement with Federal Immigration Enforcement Has Devastating Impacts on Local Communities.

Many states and local jurisdictions, including Appellees Santa Clara and San Francisco, have resisted the federal government's years-long campaign to conscript

²⁰ See DOJ, *Justice Department Provides Last Chance for Cities to Show 1373 Compliance* (Oct. 12, 2017), available at <https://www.justice.gov/opa/pr/justice-department-provides-last-chance-cities-show-1373-compliance>; DOJ, *Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 8 U.S.C. 1373* (Nov. 15, 2017), available at <https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373>.

²¹ See Stephen Dinan, *Homeland Security pursues charges against leaders of sanctuary cities*, WASHINGTON TIMES, available at <https://www.washingtontimes.com/news/2018/jan/16/dhs-asks-prosecutors-charge-sanctuary-city-leaders/>.

their law enforcement agencies into immigration enforcement. They have done so, in part, because of the devastating impact such entanglement between local law enforcement and federal immigration enforcement has on the community. Most fundamentally, turning local police into federal immigration agents degrades and sometimes destroys any trust the police have managed to build with the immigrant community. Without trust, the police have a harder time learning about and solving crimes that have been committed, and the community becomes less safe. When local police are *de facto* immigration agents, it also empowers abusive employers and other private actors to use the police to threaten immigrants—which only further degrades trust between the police and the community. Finally, *amici* have seen too many examples of local police relying on racial profiling to enforce immigration law. States and local jurisdictions like Appellees should not be required to ruin the relationship between law enforcement and the community by acting as federal immigration agents.

A. Turning Local Police Into Federal Immigration Agents Degrades Trust Between the Police and the Community.

Effective law enforcement requires some degree of trust between police and the communities they serve. The necessary trust between police and the community is jeopardized when local police act as federal immigration agents. Many people are reluctant to interact with local police when the police are providing information to ICE to assist in deportations, holding local residents on

civil detainees for ICE, or otherwise enforcing an indiscriminate federal immigration policy.

A 2012 study found that 44% of Latinos were less likely to contact the police if they were victims of crime due to the fear that the police would ask about their immigration status or that of people they know.²² That number rose to 70% for undocumented immigrants surveyed.²³ Even ICE’s “Task Force on Secure Communities” warned that the federal-local collaboration ushered in by Secure Communities was “disrupting police-community relationships that are important to public safety and national security.”²⁴ The President’s Task Force on 21st Century Policing went further in recommending that, in the interest of community policing, “[t]he U.S. Department of Homeland Security should terminate the use of the state and local criminal justice system, including through detention, notification, and

²² Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (May 2013) (hereafter INSECURE COMMUNITIES) available at http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF; see also Advancement Project & Georgia Latino Alliance for Human Rights, *Manufacturing Felonies: How Driving Became a Felony for People of Color in Georgia* 3 (Mar. 2016) (“Immigrant communities are increasingly wary of local police officers during traffic stops, desperately seeking to avoid all possible interactions with police, even if and when they are in danger.”), available at http://b.3cdn.net/advancement/a23a889905f33b63a2_lim6bsbhf.pdf.

²³ INSECURE COMMUNITIES.

²⁴ Homeland Security Advisory Council, *Task Force on Secure Communities: Findings and Recommendations*, Ch. IV (Sept. 2011), available at <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf>.

transfer requests, to enforce civil immigration laws against civil and nonserious criminal offenders.”²⁵

This fear has daily consequences. For example, *amicus* Workers Defense Project had two Latino²⁶ non-citizen clients in the Dallas area decide not to pursue their claims for unpaid wages after Texas passed its “anti-sanctuary” law in 2017, mandating that state and local law enforcement agencies enforce federal immigration law.²⁷ (While some states and localities unwisely *choose* to enlist their law enforcement agencies in the federal government’s immigration enforcement efforts, the federal government cannot, by this Executive Order or otherwise, *require* states and localities to do so.) Both clients expressed fear that contact with local police or sheriffs would lead to deportation.

Similarly, cities across the country experienced dramatic drops in the

²⁵ DOJ, *The President’s Task Force on 21st Century Policing, Final Report, 1.9 Recommendation* (May 2015), available at <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf>.

²⁶ This brief uses the terms “Latino/a” and “Hispanic” interchangeably depending on the term used in the underlying source. Where ethnicity is not specified, the brief refers to immigrants of all ethnicities.

²⁷ Texas’ 2017 Senate Bill 4 requires local law enforcement officials to engage in federal immigration enforcement, including detaining immigrants in local jails pursuant to ICE detainer requests, under threat of steep monetary fines, removal from office, and even jail time. Act of May 3, 2017, 85th Leg., R.S., ch.4, 2017 Tex. Gen. Laws ____. Sections of SB 4 have been preliminarily enjoined. *See City of El Cenizo, Tex., et al. v. Texas, et al.*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sep. 25, 2017).

reporting of domestic violence and sexual abuse from the Latino community in 2017, while reporting rates stayed the same for non-Latinos.²⁸ These declines in reporting were due not to lower crime rates, but to fear that any interaction with law enforcement—even as the victim of rape or domestic violence—could lead to deportation.²⁹ In one Hispanic neighborhood in Arlington, Virginia, for example, there was an 85% drop in domestic assault reports during the first eight months of the Trump administration when compared with the same time period a year earlier.³⁰

This fear holds both for people who are concerned about their own immigration status and those concerned for their families or friends.³¹ Twenty nine percent of Latino citizens reported they are less likely to voluntarily offer information about crimes they know have been committed, and 26 percent said they are less likely to report a crime, due to fear that police will ask about their family or friends' immigration status.³² With more than nine million people living

²⁸ See James Queally, *Fearing deportation, many domestic violence victims are steering clear of police and courts*, L.A. TIMES (Oct. 9, 2017), available at <http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html>.

²⁹ *Id.*

³⁰ Sarah Stillman, *When Deportation Is a Death Sentence*, THE NEW YORKER (Jan. 15, 2018), available at <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

³¹ See, e.g., INSECURE COMMUNITIES at 6.

³² *Id.*

in mixed-status families that include documented and undocumented members,³³ it should be unsurprising that fear transcends documentation status when police refuse to draw clear boundaries between crime control and immigration enforcement.

The Executive Branch's own investigations have confirmed that this fear is widespread. A DOJ finding of discriminatory policing by the New Orleans Police Department ("NOPD") found that "members of the Latino immigrant worker community, who are frequently victimized . . . reported a deep reluctance to report crime—either as victims or witnesses . . . [because] NOPD officers questioned them about their immigration status."³⁴ Similarly, the National Council of La Raza and *amicus* Tennessee Immigrant and Refugee Rights Coalition surveyed community members' trust of police in Davidson County, Tennessee in 2008, a year after the sheriff there entered into a 287(g) agreement.³⁵ The survey compared the willingness of Latinos and Blacks to contact the sheriff's

³³ Pew Research Center, *A Nation of Immigrants* (2013) available at <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants>.

³⁴ DOJ, *Investigation of the New Orleans Police Department* 36 (Mar. 16, 2011) available at https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

³⁵ A. Elena Lacayo, National Council of La Raza, *The Impact of Section 287(G) of The Immigration And Nationality Act On The Latino Community* 13-14 (2010), available at http://publications.unidosus.org/bitstream/handle/123456789/1067/287g_issuebrief_pubstore.pdf?sequence=1.

office.³⁶ While both communities expressed deep discomfort with the police, 42% of Latinos knew of a crime that had not been reported to police, compared to only 4% of Blacks.³⁷ And frighteningly, 54% of Latinos said they would not report a future crime, compared to 27% of Blacks.³⁸

The story of Oscar and Jessica Ramirez³⁹ illustrates what happens when local police engage in immigration enforcement, leaving broken trust between the police and the immigrant communities they are supposed to serve. Jessica Ramirez is an undocumented immigrant who was born in Guatemala and has lived in the United States for a dozen years, since she was twelve. Oscar Ramirez is an undocumented immigrant who was born in Mexico, and Jessica's husband. Oscar and Jessica Ramirez and their four U.S. citizen children live in an area of Alabama where the local police have been acting as federal immigration agents.

On a foggy morning in October 2014, Oscar was involved in a minor car accident. Nobody was hurt, but Oscar was so afraid of interacting with the local police that he fled the scene of the accident. He was arrested at his home two days later. While Jessica attempted to secure her husband's release, Oscar was transferred to ICE custody, where he remained for three months. Oscar has now

³⁶ *Id.* at 17-18.

³⁷ *Id.* at 18.

³⁸ *Id.*

³⁹ Pseudonyms. Jessica is a member of *amicus* Alabama Coalition for Immigrant Justice. She shared this story with SPLC for purposes of this brief.

been released, but is on probation after being convicted of a felony for leaving the scene of the accident, and has an immigration court date next year where he fears deportation.

Because Oscar's fear of the police led him to flee, everyone is worse off. Most obviously, Oscar has suffered greatly and unnecessarily. Instead of sorting out the consequences of a minor car accident in which nobody was hurt, Oscar now has a felony conviction and risks deportation to Mexico. He lost his job as a carpenter because he was detained for three months; he now works as a landscaper, making much less. And to get out of detention, Oscar had to post a bond which he is still paying in monthly installments.⁴⁰ These financial consequences will continue to affect the Ramirez family even in the unlikely event that Oscar is not ultimately deported.

Jessica and the Ramirez children (none of whom were in the car at the time of the accident) have also been harmed. Jessica was five months pregnant at the

⁴⁰ This bond company, Libre by Nexus, has been sued for fraud by other immigrants who were required to sign documents in English that they did not understand and were not told of the company's requirement that they wear and pay for the cost of ankle monitors. See Michael E. Miller, *This company is making millions from America's broken immigration system*, WASHINGTON POST (Mar. 9, 2017), available at https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html?utm_term=.66e210c5c3fc.

time of the accident, and she was forced to care for her children and deal with her pregnancy on her own while her husband was held in ICE detention. Today, she and Oscar struggle to care for their children because Oscar's income has shrunk and the family has had to devote its scarce resources to Oscar's criminal and immigration issues.

It is not only the Ramirez family who has been harmed—local law enforcement has been harmed as well. Instead of making a routine stop to assist in resolving a minor car accident, the police were required to conduct an investigation, develop evidence, and make an arrest, wasting resources that could have been put to better use elsewhere. The local court system had to handle a case that never would have arisen in the first place if Oscar had felt that he could trust the police.

The lack of trust between local police and the communities they serve that results from local police acting as federal immigration agents undermines effective law enforcement, wastes community resources, and makes serious problems out of minor issues.⁴¹

⁴¹ See generally Immigrant Legal Resource Center, *Searching for Sanctuary: An Analysis of America's Counties and Their Voluntary Assistance with Deportations* (Dec. 2016), available at https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf.

B. Turning Local Police Into Federal Immigration Agents Can Result in Private Actors Exploiting and Abusing Immigrant Populations.

When local police are charged with enforcing immigration laws, unscrupulous private actors are provided with an opportunity to use the police to intimidate or exploit immigrant neighbors or employees. Anyone with a grievance against an immigrant can credibly wield the threat of a phone call to local police against her, with the potential deportation consequences such a call would necessarily bring. Putting local police in the position of being used by abusive private actors to threaten immigrants only further erodes trust between immigrant communities and local law enforcement.

One example of this abuse occurred at the Durrett Cheese plant (“Durrett”) in Coffee County, Tennessee.⁴² Durrett recruited a large number of undocumented and impoverished indigenous Mexican immigrants to work at the plant.⁴³ Durrett proceeded to mistreat them, referring to them as “stupid Indians” and “donkeys,” and often refusing to pay them minimum wage or even pay them at all. This abuse continued for over a year.

⁴² Southern Poverty Law Center, *Under Siege: Life for Low-Income Latinos in the South* 11 (Apr. 2009), available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/UnderSiege.pdf.

⁴³ SPLC later represented many of these workers in their lawsuit against Durrett. See *Montano-Pérez, et al. v. Durrett Cheese Sales, Inc., et al.*, Case No. 3:08-cv-1015 (M.D. Tenn.).

Eventually, the workers organized and demanded that Durrett pay them their overdue and withheld wages. In response, Durrett called the Coffee County Sheriff's Department and had these immigrant workers—its own employees—arrested for “trespassing” and turned over to ICE. Durrett even provided paperwork to assist the Sheriff in reporting its employees to ICE. The claimed ground for the arrests—“trespassing”—was entirely pretextual. Durrett's true motivation in having its employees arrested was to exploit local law enforcement's cooperation with federal immigration authorities. By turning its own workers over to ICE, Durrett sought to avoid paying them the wages they were fairly due, and to deter any other undocumented workers from defending their rights.

Although the state of California and many local jurisdictions in the state—including Appellees Santa Clara and San Francisco—have put clear legal barriers between their own law enforcement agencies and ICE, California-based *amici* nonetheless report similar worker intimidation and retaliation, especially in the past year. *Amicus* Legal Aid at Work has “witnessed a disturbing uptick in incidents of immigration-related retaliation against workers who are immigrants—or who are incorrectly perceived as immigrants” since 2016.⁴⁴ Some employers are

⁴⁴ California Rural Legal Assistance, Inc., *Press Release: CRLA and Legal Aid at Work Win Landmark Ninth Circuit Ruling* (June 22, 2017), available at http://www.crla.org/sites/all/files/u6/2017/pr/crla_workersrights_pr.html; see also *Arias v. Raimondo*, 860 F.3d 1185, 1187-88, 1192 (9th Cir. 2017) (defendant's

threatening to call ICE directly, as *amicus* Bet Tzedek Legal Services observed in at least two separate cases last year.⁴⁵ However, the Executive Order would allow abusive employers to rely instead on the local police or sheriffs, with whom they might have a closer relationship.

This dangerous silencing of immigrant workers will only worsen if local governments are conscripted into federal immigration enforcement, allowing employers to exploit their vulnerable immigrant employees with a simple threat to call the local cops. *Amici* fear that this exploitation will extend beyond the workplace to threaten the security of housing,⁴⁶ medical care,⁴⁷ and other major areas of life.

attorney reported plaintiff to ICE in June 2011 after plaintiff filed a lawsuit for violations of the Fair Labor Standards Act; defendant hoped to have plaintiff taken into custody at his deposition).

⁴⁵ Andrew Khouri, *More workers say their bosses are threatening to have them deported*, LOS ANGELES TIMES (Jan. 2, 2018), available at <http://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>.

⁴⁶ Brenda Gazzar, *California bill would bar landlords from reporting immigrant tenants to ICE*, THE MERCURY NEWS (Sept. 15, 2017), available at <https://www.mercurynews.com/2017/09/15/a-state-bill-bars-landlords-from-threatening-immigrant-tenants-with-deportation/> (describing threats to report undocumented tenants to ICE as retaliation for reporting habitability issues).

⁴⁷ Emily Bazar, *Fearing Deportation, Some Immigrants Forego Health Care*, KAISER HEALTH NEWS (Feb. 23, 2017), available at <http://www.governing.com/topics/health-human-services/khn-california-immigrants-health.html> (reporting that immigrant families are withdrawing from Medi-Cal health care program).

C. Turning Local Police Into Federal Immigration Agents Can Lead to Racial Profiling and Other Law Enforcement Abuses.

Amici recognize that police officers have a difficult job, and that most of them want to discharge their responsibilities appropriately and within the bounds of the law. Nevertheless, it is also true that, when immigration consequences are attached to normal policing, some police officers and departments have engaged in racial profiling and other racially discriminatory or abusive behavior. In *amici*'s experience, turning local police into federal immigration agents encourages such unlawful behavior, and can increase the difficulty of identifying and correcting such discriminatory or abusive conduct.

Local police who view the enforcement of immigration laws as their role sometimes use racial profiling to decide whom to target and how to treat those individuals.⁴⁸ For instance, local law enforcement officials may stop Latinos for purported traffic violations as a pretext for investigating their immigration paperwork or status. A study of arrest data in Davidson County, Tennessee shows that the arrest rates for Hispanic defendants driving without a license more than doubled in the year after the county entered a formal agreement with ICE to

⁴⁸ Racial profiling is obviously unconstitutional, *see, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”), and violates Title VI of the Civil Rights Act of 1964 if the entity receives federal funding.

enforce immigration law.⁴⁹ After the Irving, Texas police department agreed to partner with ICE, arrest data revealed an “immediate” and “dramatic” increase in “discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses” consistent with “racial profiling of Hispanics in order to filter them through the [federal immigration enforcement program’s] screening system.”⁵⁰ Similar conclusions resulted from analysis of data on individuals arrested nationwide under Secure Communities, showing that Latinos were 93% of individuals arrested through Secure Communities although they are only 77% of the undocumented population.⁵¹

When local police act as immigration agents, an arrest born of racial profiling can morph into something even more sinister—an attempt to cover up violent police abuse. Consider the experience of former SPLC client Angel Castro. One afternoon in 2010, Castro was riding his bicycle in Smyrna, Georgia, a place

⁴⁹ Tennessee Immigrant and Refugee Rights Coalition & Criminal Justice Planning, *Citations/Warrants for No Driver’s License by Ethnicity and Race: Comparing the Year Prior to 287(g) and the Year Following 287(g)* (2007), available at http://static1.1.sqspcdn.com/static/f/373699/7070512/1274810470237/No_Drivers_License_1_year_overview+6-2008.pdf?token=CjxGyjZITqFgFmsjkDf0vECPSk0%3D.

⁵⁰ Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Sept. 2009), available at https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf.

⁵¹ Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* 5 (Oct. 2011), available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

where local police participate in immigration enforcement. Two police officers began to follow Castro and signaled him to stop for no reason other than his being Latino. After demanding Castro's immigration documents, the officers beat him, breaking his eye socket and cheek bone. The officers then attempted to cover up their attack by taking Castro to the Cobb County Jail, which maintains an agreement with the Department of Homeland Security. The officers knew that from this jail, Castro could be placed into ICE detention and possibly deported, making it highly unlikely that their abusive behavior would ever come to light.

Racial profiling and police abuse of immigrants threaten the legitimacy of local police departments within their own communities—immigrant and citizen alike. A study of Latinos' perceptions of police involvement in immigration enforcement found that 62% of Latinos—including citizens and documented and undocumented immigrants—said that police officers stop Latinos without good reason or cause very or somewhat often.⁵² It is unsurprising that cooperation with the police drops when people fear that the police will treat them differently because of the color of their skin or their ethnic origin.⁵³ As discussed *supra* in Sections

⁵² INSECURE COMMUNITIES at 16.

⁵³ *See, e.g.*, INSECURE COMMUNITIES at 5-6; *see also U.S. v. East Haven*, No. 12-1652 (D. Conn. filed Nov. 20, 2012) (complaint and settlement agreement arising from East Haven Police Department engaging in discriminatory policing against Latinos, including targeting Latinos for discriminatory traffic enforcement, treating Latino drivers more harshly than non-Latino drivers after a traffic stop,

II.A and II.B, this erosion of trust between law enforcement and the public makes everyone less safe.

CONCLUSION

The Executive Order is part of a years-long effort to conscript local law enforcement into the federal deportation system. But many states and local jurisdictions, including Appellees Santa Clara and San Francisco, reject that kind of involvement because of the devastating effects it has on local communities. For the reasons set forth above, *amici* respectfully urge this Court to affirm.

and contacting ICE to investigate the immigration status of Latino drivers).

Respectfully submitted.

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DECHERT LLP

By: /s/ Nathan M. McClellan
Nathan M. McClellan

Attorneys for *Amici*
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

SOUTHERN POVERTY LAW CENTER
Sarah M. Rich

Attorney for *Amici*
Adelante Alabama Worker Center,
Alabama Coalition for Immigrant Justice,
American Civil Liberties Union of Northern
California,
American Civil Liberties Union of Southern
California,
American Civil Liberties Union of San
Diego and Imperial Counties,
American Federation of Teachers
Americans for Immigrant Justice,
Asian American Legal Defense and
Education Fund,
Asian Americans Advancing Justice (Los
Angeles and Atlanta),
Bet Tzedek Legal Services,
California Partnership to End Domestic
Violence,
Coalition for Humane Immigrant Rights,
Florida Legal Services, Inc.,
Greater Rochester Coalition for Immigration
Justice,
Illinois Coalition for Immigrant and Refugee
Rights,

Immigrant Legal Resource Center,
Impact Fund,
Jobs With Justice
Kids for College,
Latin American Legal Defense and
Education Fund,
LatinoJustice PRLDEF,
Legal Aid at Work,
National Employment Law Project,
National Immigration Law Center,
Northwest Forest Worker Center,
Southeast Immigrant Rights Network,
Tennessee Immigrant and Refugee Rights
Coalition
Wayne Action for Racial Equality,
We Belong Together,
Worker Justice Center of New York, Inc.,
Workers Defense Project,
Worksafe

ATTESTATION

This certifies that all *amici* joining in this document concur in its content and have authorized this filing.

/s/ Nathan M. McClellan
Nathan M. McClellan
Attorney for *Amici*
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 6,318 words, based on the “Word Count” feature of Microsoft Word 2013. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionately space typeface using 14-point Times New Roman in Microsoft Word.

Dated: February 12, 2018

By: /s/ Nathan M. McClellan
Nathan M. McClellan
Attorney for *Amici*
Southern Poverty Law Center,
National Immigrant Justice Center, and
American Civil Liberties Union

9th Circuit Case Number(s) 17-17478 and 17-17480

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on (date) February 12, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

/s/ Nathan M. McClellan

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