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 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION
 13

14	CITY AND COUNTY OF SAN FRANCISCO,	)	Case No. 3:17-CV-00485-WHO
15	Plaintiff,)	
16	v.	)	THE STATE SUPERINTENDENT OF
17	DONALD J. TRUMP, <i>et al.</i>,	)	PUBLIC INSTRUCTION'S
18	Defendants.	)	ADMINISTRATIVE MOTION FOR
19		)	LEAVE TO FILE BRIEF AS AMICUS
20		)	CURIAE IN SUPPORT OF PLAINTIFF'S
21		)	MOTION FOR PRELIMINARY
22		)	INJUNCTION
23		)	Date: April 14, 2017
24		)	Time: 2:00 p.m.
25		)	Judge: Honorable William H. Orrick
26		)	Ctrm: Courtroom 2
27)	
28)	

1 Pursuant to this Court’s Order Regarding Amicus Briefing (Dkt. No. 31), California State
2 Superintendent of Public Instruction, Tom Torlakson (“Torlakson”), respectfully moves this Court for
3 leave to file the accompanying amicus brief in support of Plaintiff City and County of San Francisco’s
4 Motion for Preliminary Injunction.

5 Recognizing that education is “essential to the preservation of the rights and liberties of the
6 people,” California’s Constitution provides for the office of Superintendent of Public Instruction
7 (“SPI”). Cal. Const. art. IX, §§1-2. In November 2014, Torlakson was reelected on a nonpartisan
8 statewide ballot to his second four-year term as SPI. As SPI, Torlakson is chief executive of
9 California’s Department of Education (“CDE”), as well as the secretary and executive officer of the
10 State Board of Education, CDE’s policy-making body. Educ. Code §§ 33300-33303. Among the many
11 other more specific duties assigned to him by law, the SPI is required to execute the state’s education
12 policies (Educ. Code § 33111), superintend the state’s public schools (Educ. Code § 33112(a)), and
13 prescribe regulations governing the making of contracts or arrangements with federal agencies for the
14 state’s public schools to receive federal funds, services or equipment (Educ. Code § 33113-33114).
15 Among other things, Torlakson is also a former high school coach and science teacher.

16 As SPI, Torlakson must, and does, have a strong interest in the administration of the state’s
17 public schools, and the education, safety and welfare of their students, as well as California’s eligibility
18 for and receipt of education-related federal funding. Each of these things is hindered by the Executive
19 Order at issue in this action and Plaintiff’s pending motion for preliminary injunction.

20 The accompanying amicus brief should be considered because it: (a) provides Torlakson’s
21 unique perspective as the state’s elected SPI regarding the Executive Order’s impact in the discrete, but
22 fundamentally important, area of public education; (b) strives to be concise (only four pages) and not
23 repetitious of the parties’ arguments; and (c) all while discussing matters relevant to the pending
24 controversy, including how the Executive Order undermines school districts’ efforts to create the safe
25 and stable environment necessary for optimum pupil achievement, and unconstitutionally coerces
26 school districts to abandon desirable policies or risk losing vital federal funding for running afoul of
27 vague commands. Loss of such funding would have an enormous detrimental effect on California’s
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1 students and public school system – California receives more than \$8 billion for K-12 education each
2 year from the federal government.

3 For these reasons, the California State Superintendent of Public Instruction, Tom Torlakson,
4 respectfully requests that the Court grant this administrative motion, deem the accompanying amicus
5 brief filed, and consider the brief in connection with Plaintiff’s pending motion.

6 Dated: March 29, 2017

Respectfully submitted,

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I. INTRODUCTION

1 California State Superintendent of Public Instruction, Tom Torlakson (“Torlakson”),
2 respectfully submits this *amicus curiae* brief in support of Plaintiff City and County of San Francisco’s
3 Motion for a Preliminary Injunction (Dkt. 21) seeking, among other things, to enjoin nationwide
4 enforcement of Section 9(a) of Executive Order 13768, entitled “Enhancing Public Safety in the
5 Interior of the United States” (the “Executive Order”).
6

7 As Superintendent of Public Instruction (“SPI”), a constitutionally-created and publicly-elected
8 office, Torlakson serves as the chief executive of California’s Department of Education (“CDE”), as
9 well as the secretary and executive officer of the State Board of Education, CDE’s policy-making
10 body. Educ. Code §§ 33300-33303. Among other things, the SPI is required to execute the state’s
11 education policies, superintend the state’s public schools, and prescribe regulations governing the
12 making of contracts with federal agencies for the state’s public schools to receive federal funds,
13 services or equipment. Educ. Code § 33111-33114. Naturally, as SPI, Torlakson has a strong interest
14 in the administration of the state’s more than 9000 public schools; the education, safety and welfare of
15 the more than 6 million K-12 public school students; and California’s eligibility for the more than \$8
16 billion in education-related federal funding that California receives annually. Unfortunately, the
17 Executive Order jeopardizes each of these things.

18 As they must, and should, California schools provide the fundamental right of an education to
19 all children, regardless of immigration status. Creating an environment where all students feel safe
20 and secure, and where parents feel secure to participate and engage in their child’s education, is critical
21 to individual and collective pupil achievement. Even before the Executive Order was issued, many
22 public school districts adopted policies to assure families and students that their schools were safe and
23 secure places for learning and engagement. This was largely in response to reports of increased
24 uncertainty, anxiety and fear, and of bullying on the basis of ethnicity, race and country of origin. The
25 Executive Order now seeks to force state and local educational agencies to eliminate such productive
26 policies or risk losing vitally important federal funding, thereby undermining public schools’ ability to
27 protect, foster and educate children.

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1 The Executive Order, however, is unconstitutional and should be enjoined. The Executive
 2 Order impermissibly coerces state and local jurisdictions, including schools, school districts, and
 3 county offices of education, to take an active role in enforcing federal immigration laws. In addition,
 4 the Executive Order contains no clear definition of “sanctuary jurisdiction” yet threatens any state or
 5 local jurisdiction that the Secretary of Homeland Security declares to be a “sanctuary jurisdiction” with
 6 the withholding of much needed federal funds.

7 II. ARGUMENT

8 A. The Executive Order Undermines Schools’ Efforts to Create Environments 9 Necessary for Effective Education

10 California serves more than 6 million students in over 9,000 public schools. Those schools are
 11 dependent on federal funds – California receives more than \$8 billion annually for K-12 education
 12 from the federal government, which is then largely redirected to local districts and schools to support a
 13 variety of services, from instructional support programs for at-risk students, to providing nutrition to
 14 low-income students.

15 Education has been deemed a fundamental right under the California Constitution. Cal. Const.,
 16 art. IX, §1; *Butt v. State of California*, 4 Cal 4th 668, 679 (1992). Education is so fundamental that the
 17 United States Supreme Court has held that all children, regardless of immigration status, are “entitled
 18 to equal access to public education.” *Plyler v. Doe*, 457 U.S. 202, 219-30 (1982).

19 California education officials recognize that a key part of optimizing student success is creating
 20 a safe and secure place for students to focus on learning and for parents to feel comfortable engaging
 21 in their child’s education. The Executive Order, particularly Section 9, undermines districts’ and
 22 schools’ ability to do that by threatening to withhold funds from jurisdictions that have identified
 23 themselves as safe havens for all students. And in doing so, in a very real sense, the Executive Order
 24 threatens the very access to education guaranteed to all children by *Plyler*.

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1 **B. The Executive Order Seeks to Compel Schools, School Districts and County**
2 **Offices of Education to Participate in Immigration Enforcement**

3 It is an essential tenet of the Tenth Amendment that states and local governments cannot be
4 commandeered to act as an arm of the federal government. Meaning, the United States government
5 cannot direct state and local jurisdictions to enforce federal law. *Printz v. United States*, 521 U.S. 898,
6 931 n.17 (1997); *New York v. U.S.*, 505 U.S. 144, 160 (1992). Though the Executive Order pays lip
7 service to the Federal-State partnership in the area of immigration, it in fact ignores a fundamental
8 aspect of the federal statutes which rely on voluntary agreements with state and local officials for
9 enforcement of federal immigration laws. 8 U.S.C. 1357(g). In the case of jurisdictions which the
10 Attorney General or Secretary may deem to be “sanctuary jurisdictions” based upon unknown criteria,
11 the Executive Order seeks to compel local jurisdictions to abandon legitimate policies aimed at
12 improving the quality of and access to education for all. The United States government imposes a
13 coercive choice on districts by directing them to do what is asked, or risk losing all federal funds. The
14 coercive nature of the Executive Order is specifically highlighted in section 9(a) which states that “the
15 Attorney General shall take appropriate action against any entity that violates 8 U.S.C. 1373, or which
16 has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal Law.”
17 Executive Order, at 8801.

18 **C. The Executive Order Lacks Clear Definitions and Standards**

19 A federal law is unconstitutionally vague if it (1) “fails to provide a person of ordinary
20 intelligence fair notice of what is prohibited,” or (2) “is so standardless that it authorizes or encourages
21 seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The
22 Executive Order fails both tests. It permits the Attorney General and the Secretary of Homeland
23 Security to withhold federal funds from any district that they deem to be a “sanctuary jurisdiction” or
24 that they declare is preventing or hindering the enforcement of federal law. However, the Executive
25 Order lacks a clear definition of “sanctuary jurisdiction” or any standards to put a district on fair notice
26 as to what conduct is allowed or prohibited. The Attorney General and Secretary of Homeland
27 Security essentially have unfettered discretion to determine which jurisdictions fall within the Order’s
28 ambit, whether they have “willfully refuse[d] to comply” with Section 1373, and whether “appropriate

1 enforcement action” is required. Executive Order at §9(a). Consequently, the Executive Order is
 2 unconstitutionally vague.

3 **D. Maintaining the Status Quo Will Avoid Irreparable Harm to California’s**
 4 **Students and Public School System and Serve the Public Interest**

5 The status quo is that local jurisdictions do not have an obligation to enforce federal
 6 immigration rules. Further, the United States government has a long standing policy in place that
 7 identifies schools as “sensitive locations” where undocumented aliens will ordinarily not be swept up
 8 by Immigration and Customs Enforcement “(ICE)”. [https://www.ice.gov/doclib/ero-](https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf)
 9 [outreach/pdf/10029.2-policy.pdf](https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf). ICE has confirmed that this policy is still in place.
 10 <https://www.ice.gov/ero/enforcement/sensitive-loc> (webpage last visited March 29, 2017).

11 Altering the status quo would subject state and local educational agencies to significant risks of
 12 irreparable harm. As noted, California receives more than \$8 billion/year in federal funds for K-12
 13 education, which is necessary to provide critical educational programs. The Executive Order places
 14 schools, schools districts and county offices of education, who have merely identified themselves as
 15 safe havens for all students, in the precarious position of losing necessary federal funds without
 16 warning, notice or clear guidance about what is meant by the order, while they also seek to comply
 17 with the constitutional requirements set forth in *Plyer*.

18 **III. CONCLUSION**

19 For the foregoing reasons, California State Superintendent of Public Instruction, Tom
 20 Torlakson, respectfully requests that this Court grant Plaintiff’s motion for preliminary injunction.

21 Dated: March 29, 2017

Respectfully submitted,

22 AMY BISSON HOLLOWAY
 General Counsel
 23 EDMUNDO R. AGUILAR
 Assistant General Counsel
 24 TODD M. SMITH
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 11 NORTHERN DISTRICT OF CALIFORNIA
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14	CITY AND COUNTY OF SAN FRANCISCO,)	Case No. 3:17-CV-00485-WHO
15	Plaintiff,)	[PROPOSED] ORDER GRANTING THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION'S ADMINISTRATIVE MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
16	v.)	
17	DONALD J. TRUMP, <i>et al.</i> ,)	
18	Defendants.)	
19)	
20		)	Date: April 14, 2017
21		)	Time: 2:00 p.m.
22		)	Judge: Honorable William H. Orrick
23		)	Crtm: Courtroom 2

1 Upon consideration of the Administrative Motion for Leave to File an Amicus Brief (“Motion”)
2 filed by California State Superintendent of Public Instruction, Tom Torlakson (“Torlakson”), and for
3 good cause shown, IT IS HEREBY ORDERED that the Motion is granted, and Torlakson’s proposed
4 *amicus* brief that accompanied the Motion is deemed filed.

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6 Dated: _____, 2017

HON. WILLIAM H. ORRICK
United States District Judge