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, Nos. 17-485 & 17-574 (Orrick, J.)

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF DONALD J. TRUMP, AND FOR REVERSAL

FOUNDATION FOR MORAL LAW
John Eidsmoe
One Dexter Avenue
Montgomery, AL 36104
Tel: (214) 262-1245
eidsmoeja@juno.com

Counsel for Amicus Curiae

The Foundation for Moral Law ("the Foundation") obtained the consent of all parties to the filing of an amicus brief in two companion appeals of the preliminary injunction in this case. See Exhibit A. At the time of the filing that brief, a motion was pending to consolidate those appeals, Nos. 17-16886 and 17-16888, with the permanent injunction appeals, Nos. 17-17478 and 17-17480. On January 4, 2018, rather than consolidate the preliminary injunction appeal with the permanent injunction appeal, the Court dismissed the preliminary injunction appeal as moot. No. 17-16886 (Doc. # 32). As a result, the Foundation's amicus brief was no longer before the Court.

The Foundation hereby moves for leave to file its amicus brief in the permanent injunction cases on the basis that the brief was timely filed in the preliminary injunction cases and that it is filed within seven days of the appellants' opening brief being accepted for filing in the permanent injunction cases. *See* No. 17-17480 (Doc. # 22).

The substance of the brief has not changed. Section I provides the Court with a distinctive perspective on the District Court's improvident issuance of a nationwide injunction. Without duplicating the Attorney General's arguments, the Foundation enlarges and supplements his presentation on the proper scope of injunctions and the limitations that Article III of the Constitution places on a trial court's capacity to enjoin a defendant for the benefit of non-parties. The remaining

sections of the brief discuss other constitutional errors in the District Court's opinion, including treating a municipality as a "person" for Fifth Amendment purposes, not applying the constitutional avoidance canon, and making an overbroad application of the commandeering doctrine.

WHEREFORE, the Foundation for Moral Law moves for leave to file the attached proposed amicus brief.

Respectfully submitted this 12th day of January, 2018.

/s/ John Eidsmoe
John Eidsmoe
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EXHIBIT A

Gmail

Martin Wishnatsky <goodmorals2@gmail.com>

Re: San Francisco v. Trump, Nos. 17-16886, 17-16887 (9th Cir.)

1 message

eidsmoeja@juno.com <eidsmoeja@juno.com> Tue, Dec 19, 2017 at 4:48 PM
To: Daniel.Tenny@usdoj.gov
Cc: goodmorals2@gmail.com

Thank you!

John A. Eidsmoe, Colonel(MS), Mississippi State Guard
Senior Counsel, Foundation for Moral Law
Pastor, Association of Free Lutheran Congregations

Office: One Dexter Avenue
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Ph. (334) 262-1245
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Pike Road, AL 36064
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-------- Original Message --------
From: "Tenny, Daniel (CIV)" <Daniel.Tenny@usdoj.gov>
To: "eidsmoeja@juno.com" <eidsmoeja@juno.com>
Cc: "Hinshelwood, Bradley A. (CIV)" <Bradley.A.Hinshelwood@usdoj.gov>
Subject: San Francisco v. Trump, Nos. 17-16886, 17-16887 (9th Cir.)
Date: Tue, 19 Dec 2017 22:47:25 +0000

I'm writing in response to your inquiry about filing an amicus brief in this case. The United States consents to your filing a timely amicus brief.

Daniel

Daniel Tenny

U.S. Department of Justice

Civil Division, Appellate Staff

950 Pennsylvania Avenue, NW, Room 7215

Washington, DC 20530

(202) 514-1838

fax (202) 514-9405

daniel.tenny@usdoj.gov

Gmail by Google

Martin Wishnatsky <martin@morallaw.org>

Consent to file amicus brief in Santa Clara County v.

1 message

Wilensky, Julie <julie.wilensky@cco.sccgov.org> Thu, Dec 21, 2017 at 7:19 PM
To: "martin@morallaw.org" <martin@morallaw.org>
Cc: "Williams, James" <james.williams@cco.sccgov.org>, "Serrano, Javier" <javier.serrano@cco.sccgov.org>, "Goldstein, Danielle" <Danielle.Goldstein@cco.sccgov.org>, "Hansen, Greta" <Greta.Hansen@cco.sccgov.org>, "Cody S. Harris" <CHarris@keker.com>

Dear Mr. Wishnatsky,

I was not able to reach you when I called you this morning, and unfortunately, I was in meetings and missed your voicemail asking for consent to file an amicus brief in *Santa Clara County v. Donald Trump*.

I saw that you just filed your brief, but I wanted to let you know that the County of Santa Clara consents to the Moral Law Foundation filing an amicus brief.

I'm sorry for not being able to respond earlier today.

Sincerely,

Julie Wilensky

Julie Wilensky | Deputy County Counsel

Office of the County Counsel, County of Santa Clara

70 West Hedding Street, East Wing, 9th Floor | San José, CA 95110

Office: (408) 299-5955 | Facsimile: (408) 292-7240

julie.wilensky@cco.sccgov.org

Gmail

Martin Wishnatsky <goodmorals2@gmail.com>

Fw: Amicus Brief --We have San Francisco's consent, message attached

1 message

eidsmoeja@juno.com <eidsmoeja@juno.com> Thu, Dec 21, 2017 at 11:46 AM
To: goodmorals2@gmail.com

John A. Eidsmoe, Colonel(MS), Mississippi State Guard
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Please note: forwarded message attached

From: "Eisenberg, Sara (CAT)" <Sara.Eisenberg@sfcityatty.org>
To: "'eidsmoeja@juno.com'" <eidsmoeja@juno.com>
Subject: Amicus Brief
Date: Thu, 21 Dec 2017 17:41:16 +0000

-------- Forwarded message --------
From: "Eisenberg, Sara (CAT)" <Sara.Eisenberg@sfcityatty.org>
To: "'eidsmoeja@juno.com'" <eidsmoeja@juno.com>
Cc:
Bcc:
Date: Thu, 21 Dec 2017 17:41:16 +0000
Subject: Amicus Brief

The City and County of San Francisco consents to the filing of an amicus brief by the Foundation for Moral Law in Case No. 17-17478.

Regards,

Sara J. Eisenberg

Deputy City Attorney
City and County of San Francisco

Fox Plaza 1390 Market Street, Seventh Floor
San Francisco, CA 94102
Phone: (415) 554-3857
Fax: (415) 554-3985

CERTIFICATE OF SERVICE

I certify that on the 12th day of January, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

/s/ John Eidsmoe
John Eidsmoe

Counsel for *Amicus Curiae*

Nos. 17-17478 & 17-17480

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CITY AND COUNTY OF SAN FRANCISCO
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BRIEF OF THE FOUNDATION FOR MORAL LAW AS *AMICUS CURIAE* IN SUPPORT OF DONALD J. TRUMP, AND FOR REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, and Regulations

Other Authority

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because the District Court exceeded its Article III jurisdiction in issuing a nationwide injunction. The Foundation is also concerned about other constitutional errors made by the District Court including faulty vagueness and commandeering analyses and a failure to employ the constitutional avoidance ("duty to save") canon.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P., the Foundation hereby discloses that it is a nonprofit corporation and that it has no parent corporations. Because the Foundation is a nonprofit corporation, no corporation holds 10% or more of an ownership interest in the Foundation.

---

[1] The Department of Justice and the City and County of San Francisco have consented to the filing of this brief. The County of Santa Clara has not consented. Therefore, a *Motion for Leave to File Amicus Brief* has been submitted. Rule 29(a)(2), Fed. R. App. P. No party or party's counsel authored this brief in whole or in part, and no party or person other than *amicus* Foundation for Moral Law contributed money towards its preparation or submission. Rule 29(c)(5), Fed. R. App. P.

SUMMARY OF ARGUMENT

Section I of this brief provides the Court with a distinctive perspective on the District Court's improvident issuance of a nationwide injunction. Without duplicating the Defendants' arguments in Section II of their opening brief, the Foundation enlarges and supplements their presentation on the scope of injunctions. In Section II, the Foundation explains that the Due Process Clause of the Fifth Amendment does not apply to municipalities. Because a municipality is not a constitutional "person," the District Court's vagueness analysis is erroneous. Section III discusses how the District Court's rejection of the reasonable limiting interpretation stated in the AG's Memorandum violates the constitutional avoidance canon. Section IV explains that Executive Order 13768, rather than commandeering state and local governments to administer a federal program, offers permissible incentives to respect federal detainers.

ARGUMENT

I. The Universal Injunction Issued in This Case Violates Article III of the Constitution.

A. This case is not a class action.

The only plaintiffs in this case are the City and County of San Francisco and the County of Santa Clara. No other entities or individuals are parties to the case. Nonetheless, declining to limit its relief to redressing the grievances of the parties before it, the District Court issued a national injunction for the benefit of every

jurisdiction in the United States that might be affected by the challenged grant conditions.

The District Court offered only a single sentence and two citations to justify its decision to grant relief for the benefit of parties who were not before the court:

> Because Section 9(a) is unconstitutional on its face, and not simply in its application to the plaintiffs here, a nationwide injunction against the defendants other than President Trump is appropriate. *See California* (*sic*) [*Califano*] *v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he 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, 1161-67 (9th Cir. 2017) (affirming nationwide injunction against executive travel ban order).

Slip opinion of Nov. 20, 2017, at 28. *Califano*, unlike the present case, was a class action. The District Court's parenthetical disguises that fact by truncating the last word of the quoted phrase. The last word is "class." The last phrase thus properly reads: "the geographical extent of the plaintiff *class*." *Califano*, 442 U.S. at 702 (emphasis added). The discussion of the rationale for issuing a nationwide injunction in the cited Ninth Circuit case, contrary to the District Court's pincite, does not cover six pages of that opinion but only one paragraph. *See Washington v. Trump*, 847 F.3d at 1166-67. That paragraph adopts a cursory rationale from a Fifth Circuit case that fails to discuss the constitutional limits on the scope of injunctive relief and is unrelated to the issues in this case. Because the District Court did not confine its relief to the plaintiffs before it, as the contours of judicial power require in the absence of a class action, affirmation by this Court may

compel premature Supreme Court review without the benefit of insight from other circuits.

B. A court has no power to issue a decree for the benefit of a nonparty.

Laws by their nature apply to everyone but the judgments of courts apply only to the parties in the action.[2] "Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them." *Additive Controls & Measurement Sys. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996). Thus, in the absence of a plaintiff who is suffering an actual or imminent injury traceable to the actions of a defendant and that is redressable by a judicial decree, a court has no authority to act. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A judgment binds the defendant for the benefit of the plaintiff but extends no further.

The necessity for standing separates judicial from executive or legislative power. "[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[T]he core component of standing is an essential and unchanging part of the case-or-

[2] Judgments also bind those "in privity" with a defendant. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *See* Rule 65(d)(2), Fed. R. Civ. P.

controversy requirement of Article III." *Lujan*, 504 U.S. 560. Nonparties by definition have no standing to participate in a case.

Persons not parties to a case can argue the persuasiveness of the ruling for adoption as a precedent in cases to which they are a party but cannot themselves enforce that judgment by contempt proceedings against the defendant in the original case. If a party who is found to lack standing is not entitled to have its legal rights adjudicated by a court, neither may a nonparty who never sought standing at all enjoy the benefit of a judgment to which it was not a party. "'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

C. The practice of issuing universal injunctions violates the limits on judicial power stated in Article III.

"The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. What is the nature of that "judicial power"? "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority[.]" *Id.* § 2, cl. 1. The Constitution lists additional

"cases" to which the judicial power extends and also certain "controversies." *Id.* Hence arises the familiar phrase "cases and controversies" as a constitutional limitation on the exercise of federal judicial power.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (quoting *Liverpool S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). A court may constitutionally decide only "the legal rights of litigants." It has no authority to determine the legal rights of nonlitigants. A nationwide injunction that purports to control the actions of a defendant not merely against the plaintiffs but against anyone in the world is flatly unconstitutional.

Federal courts have no general mandate to repeal laws or nullify executive actions that they find repugnant to the Constitution. The only power they possess is to enforce judgments upon the parties before the Court and no one else.

> [T]he philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor ... has no place in our constitutional scheme.

Valley Forge, 454 U.S. at 489. As envisioned by the Constitution, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution' ... *because the binding effect of its acts was limited to particular cases and controversies*." *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 223 (1995) (emphasis added) (quoting *The Federalist No. 78* (Alexander Hamilton)).

D. The meager reasoning offered by the District Court to justify its universal injunction is unpersuasive.

Because the judgment of a court against a defendant does not operate for the benefit of a nonparty, the order of the District Court that its judgment bound the defendants against the world is completely unconstitutional. The District Court justified its universal injunction on the ground that Section 9(a) of Executive Order 13768 is facially unconstitutional. That rationale, however, does not negate the Article III requirement that a judgment only binds the parties to a case. That is especially true of novel and controversial cases such as this one. "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). *See* Sup. Ct. R. 10 (listing a conflict between courts as a reason for granting a petition for a writ of certiorari).

Other jurisdictions may file suit for their own benefit and argue that the reasoning in a similar case in another district court should be adopted in their own case. They may not, however, receive the judicial gift of a judgment without an adjudication.[3] Although this Court has stated that "[t]here is no general requirement that an injunction affect only the parties in the suit," *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987), that statement did not grant a broad license to issue nationwide injunctions at will but instead referred to the limited situation in which "*such breadth is necessary to give prevailing parties the relief to which they are entitled*." *Id.* at 1170-71 (emphasis in original). *See Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1084 (9th Cir. 2004) (recognizing that extending relief to non-parties is the exception to the rule). Contrary to the reasoning in *Bresgal*, the District Court's nationwide injunction that purportedly benefits every city and county in the country provides no additional relief to the plaintiffs in this case and thus is overbroad. Other cities and counties may certainly file their own actions should they deem it necessary.

E. Collateral damage: the nullification of Rule 23, Fed. R. Civ. P.

The loose use of the universal injunction remedy in the absence of a class action has become so prevalent as to have found its way into the leading treatise on

[3] District court opinions are not binding precedent in any other court and, indeed, not even in the district court itself. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

federal practice as early as 1972. *See Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (identifying the "settled rule" that "[w]hether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (quoting 7 Wright & Miller, *Federal Practice and Procedure*, § 1771, at 663-664 (1972)). Nonetheless, the fact remains: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

The practice of issuing injunctions for the benefit of non-plaintiffs without drawing those persons into the case through the class-action mechanism of Rule 23, Fed. R. Civ. P., may be the most widespread systematic violation of the Constitution by the lower federal courts today. Class actions at least provide notice to the general public and the opportunity to join, opt out of, or contest the action; all of these are absent in lawsuits like the present one. Rule 23, adopted in 1966, is not a mere cosmetic formality that courts may use or not use as they desire, but which does not affect the scope of their powers. In a typical statement the *Sandford* court said: "Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary ...." 573 F.2d at 178 (footnote omitted). This

Circuit's position is different: "[W]e can not hold ... that Rule 23 is a meaningless formality which this court should disregard." *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633 n.4 (9th Cir. 1972).

> "[I]ndividual plaintiffs ... are not entitled to relief for people whom they do not represent.
>
> If this elementary principle were not true, there would be no need for class actions. Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

Zepeda v. United States INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983).

The widespread failure to heed Rule 23 in ideologically charged cases is a further reason to rein in the undisciplined use of equitable power by the lower courts. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, at 15 n.67, 131 Harv. L. Rev. (forthcoming 2017)[4] (stating that "Rule 23(b)(2) makes a class-wide injunctive remedy available if certain conditions are met; by implication, this remedy is available only if those conditions are met").[5]

---

[4] *Available at* https://goo.gl/v1WqFw.

[5] Even in the context of class actions, the Supreme Court has urged courts to exercise caution in granting national injunctions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979). *See generally* Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615 (2017).

F. The practice of deliberately selecting venues perceived as amenable to the issuance of universal injunctions undermines the reputation of the federal judiciary for fair and neutral adjudication.

The practice of issuing universal rather than party-specific injunctions has proliferated in recent years as a way of nullifying presidential actions. Alert lawyers identify jurisdictions, conservative or liberal as the case may be, that are attuned to their cause and file for a national injunction that, if successful, preempts every other court except the supervising appellate court from ruling differently. To complete the coup, district judges are selected in circuits that are likely to provide favorable review. Thus, under President George W. Bush environmentalists filed for national injunctions in the Ninth Circuit. Under President Obama, opponents of his more grandiose executive actions sought nationwide relief in Texas courts in the Fifth Circuit. Now that a Republican president is again in the White House, liberals have sought to stymie his executive actions by filing for universal injunctions, for example, in the Ninth Circuit (Washington and Hawaii) and in the newly liberal Fourth Circuit.[6]

The embarrassing spectacle of agenda-driven lawyers successfully filing for national decrees before handpicked judges in carefully selected venues may

[6] For a survey of the relevant cases, *see* Bray, *Multiple Chancellors*, at 8-10; Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1069-71 (2017), *available at* https://goo.gl/xe5JkC.

eventually bring the federal judiciary into disrepute.[7] *Compare Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76-77 (1938). This Court has instructed trial judges to respect the parallel authority of sister circuits. "Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of ... sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008).

G. This case offers the Court the opportunity for a long overdue course correction in the use of equitable power by trial courts.

The Supreme Court has had two recent opportunities to rein in the improper practice of issuing injunctions for the benefit of nonparties. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (resolving case on grounds of standing and therefore not reaching "the question whether, if respondents prevailed, a nationwide injunction would be appropriate"); *United States v. Texas*, 136 S. Ct. 2271 (2016) (affirming Fifth Circuit decision upholding a nationwide injunction "by an equally divided Court" with no written opinions). This case presents the Ninth Circuit with the opportunity to curtail the unconstitutional use of equitable judicial power by federal trial courts in its jurisdiction and thus to provide a useful

[7] That Judge Orrick truncated a quotation to eliminate its class action reference raises the possibility that plaintiffs may have identified a judge disposed not only to rule in their favor but also to exercise his authority beyond constitutional limits.

precedent for the Supreme Court on the important subject of the boundaries of judicial power. The Foundation encourages this Court to remind trial judges that an injunction constrains the defendant's conduct against the plaintiff and no one else.[8]

II. By Invoking the Due Process Clause of the Fifth Amendment to Conduct a Vagueness Analysis, the District Court Failed to Recognize That a Municipality is not a Constitutional "Person."

The District Court stated in its order:

> A law is unconstitutionally vague and void under the Fifth Amendment if it fails to make clear what conduct it prohibits and if it fails to lay out clear standards for enforcement. ... Section 9(a) is void for vagueness under the Fifth Amendment. ... This complete lack of process violates the Fifth Amendment's due process requirements.

Slip opinion, at 24-27. A governmental entity, however, is not a "person" in contemplation of the Fifth Amendment Due Process Clause.

Over 50 years ago the Supreme Court rejected the contention that a state may assert due process rights against the federal government. Responding to South Carolina's argument that portions of the Voting Rights Act of 1965 violated its due process rights, the Court stated: "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and, to our

[8] Ample and recent scholarship now exists plumbing this issue in depth and surfacing multiple problems with the current practices in the lower courts. In addition to Berger and Bray, *supra* n.6, *see also* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J.L. & Pub. Pol'y 487 (2016).

knowledge, this has never been done by any court." *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966). *See also Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) (stating that "the State is not a 'person' for the purposes of the Fifth Amendment"). Although private corporations may be "persons" for constitutional purposes, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), that status does not extend to municipalities, who are creatures of the state. The very purpose of the Due Process Clause is to protect persons against injustices committed by governmental entities.

Accordingly, the District Court's due-process vagueness argument for the unconstitutionality of Executive Order 13768 is misplaced and erroneous. The municipal plaintiffs in this case have no Fifth Amendment rights to assert against the federal government.

III. The District Court Did Not Employ the Constitutional Avoidance Canon, Thereby Failing to Exercise its "Duty To Save" the Executive Order by Construing it to Avoid Unconstitutionality.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). *See also Crowell v. Benson,* 285 U.S. 22, 62 (1932) (holding as "a cardinal principle that this Court will first ascertain whether a

construction of the statute is fairly possible by which the question [of unconstitutionality] may be avoided". Similarly, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379 (1933). However, the courts must not usurp the legislative function and stretch the law to the point of "disingenuous evasion" to uphold its constitutionality. *Id.*

In *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Court considered whether the National Labor Relations Board had jurisdiction over lay faculty members employed at church schools. The Court noted that the National Labor Relations Act could reasonably be interpreted either way, but that a construction of the Act that gave the Board jurisdiction over lay faculty in church schools would raise Establishment and Free Exercise Clause issues. To avoid the constitutional question, the Court ruled that the Act did not give the Board jurisdiction. Because either interpretation was reasonable, the Court exercised its "duty to save" the statute by interpreting it to avoid the First Amendment issues.[9]

The District Court failed to apply this well settled canon of construction.[10] Although it did note that the Department of Justice had issued a two-page

[9] *See NLRB Has No Jurisdiction Over Lay Teachers in Parochial Schools*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), 58 Washington Univ. L. Rev. 173 (1980).

[10] In an earlier order on April 25, 2017, the District Court stated that "[t]he

memorandum suggesting a narrower interpretation, the Court dismissed the AG's proposal.

> Because the AG's Memorandum does not amend the Executive Order, is not binding on the Executive Branch and suggests an implausible interpretation of Section 9(a) [of the Executive Order], I denied the federal government's motion on July 20, 2017.

Slip opinion, at 1-2.

The District Court's consideration of the AG's Memorandum did not satisfy its duty to save for three reasons:

1. Although the AG's construction does not amend the Order and is not binding, it would be binding on the Executive Branch if the Court were to give the Executive Order that interpretation.

2. The Court must consider "whether a construction of the statute is fairly possible" by which the constitutional difficulty may be avoided. *Crowell* at 62. That analysis is not limited to narrowing interpretations suggested by the AG's Memorandum but should extend to *any* possible construction. The failure of the District Court to engage in that wider analysis falls far short of the "duty to save" requirement.

Supreme Court has declined to apply this canon of construction to agency actions and it is unclear that it would apply to an Executive Order" (citing *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502 (2009)). *Order*, Case Nos. 17-485 & 17-574, at 13, n.3. Because an executive order is to the Executive Branch what a statute is to the Legislative Branch, the Foundation suggests that the avoidance canon would apply in both circumstances.

3. In *Catholic Bishop of Chicago,* the majority reasoned that they could adopt the more restrictive and possibly unconstitutional interpretation of the statute only if the "affirmative intention of the Congress clearly expressed" mandated that conclusion. 440 U.S. at 504. By analogy, because the AG's Memorandum offered an interpretation of the Executive Order that would be consistent with the Constitution, the Administration has not "clearly expressed" an intention to adopt an interpretation that would raise constitutional issues. Indeed, the AG's Memorandum expressed the opposite intention.

The District Court's failure to conduct a proper "duty to save" analysis may be reversible error. *See Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016) (noting that "one of the primary justifications for the constitutional avoidance doctrine is to avoid unnecessary constitutional decisions").

IV. The District Court Erred by Considering the Executive Order a Regulatory Program Comparable to That Invalidated by *Printz v. United States.*

In *Printz v. United States,* 521 U.S. 898 (1997), the Supreme Court invalidated a provision of the Brady Handgun Violence Prevention Act that required the chief law enforcement officer of each local jurisdiction to perform background checks on prospective handgun purchasers. The Court reasoned that the challenged provision violated the principle of dual sovereignty by commandeering state and local officials to perform functions of the federal government.

That is not what is happening here. Executive Order 13768 does not require state and local officials to do anything. It simply requires them to allow their law enforcement officers to cooperate with federal officials concerning the detention of illegal aliens who are suspected of federal crimes. If local law enforcement officers choose of their own accord not to cooperate, they are free to refuse, and the provisions of the Executive Order are not affected by their refusal.

Furthermore, the Executive Order does not require local governments to compel their officials to cooperate with the federal government. It provides only that local governments that prohibit their officers from cooperating will lose certain federal funds. Withholding federal funds does not of itself establish coercion. In *Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947), the Supreme Court considered the constitutionality of a provision of the Hatch Act that authorized the federal government to withhold certain federal funds unless a state official (who was in part federally funded) was removed from office. Upholding the challenged provision, the Court stated that the Federal Government "does have power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143. Further, "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Id.* at 143-44. *See also Seward Machine Co. v. Davis,* 301 U.S. 548, 589 (1937) (stating that "every rebate from a tax when conditioned upon conduct is

in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.").

In *South Dakota v. Dole,* 483 U.S. 203 (1987), the Supreme Court considered a federal program that withheld a percentage of federal highway funds from States that did not raise the legal drinking age to age twenty-one. Noting that the state would only lose five percent of its federal highway funds the first year (but more thereafter), the Court said that South Dakota's "argument as to coercion is shown to be more rhetoric than fact." *Id.* at 211.

Executive Order 13768 does not "commandeer" local government officials and force them to perform federal functions. It provides only that cities and counties that prohibit their officials from freely cooperating with federal officials to detain illegal aliens suspected of committing federal crimes will lose certain federal funding. Like South Dakota's argument in *Dole,* plaintiffs' arguments as to coercion are more rhetoric than fact. EO 13798 does not require "the forced participation of the States' executive in the actual administration of a federal program." *Printz*, 521 U.S. at 918.

CONCLUSION

The scope of the injunction in this case should be limited to the City and County of San Francisco and the County of Santa Clara. The District Court's vagueness analysis overlooked the principle that a municipality is not a

constitutional "person" in contemplation of the Due Process Clause of the Fifth Amendment. Far from applying the constitutional avoidance canon, the District Court rejected the reasonable limiting interpretation embodied in the AG's Memorandum. Finally, Executive Order 13768, rather than commandeering state and local governments to administer a federal program, offers permissible incentives to respect federal detainers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., because it contains 4,819 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii), Fed. R. App. P.

2. This brief complies with Circuit Rule 32(b), the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word using Times Roman 14-point type.

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CERTIFICATE OF SERVICE

I certify that on the 12th day of January, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

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