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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CITY OF LOS ANGELES,

Plaintiff,

v.

JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Acting Assistant Attorney General of the Office of Justice Programs; RUSSELL WASHINGTON, in his official capacity as Acting Director of the Office of Community Oriented Policing Services; UNITED STATES DEPARTMENT OF JUSTICE,

Defendants

Case No. 2:17-cv-07215-R-JCx

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

Date: February 20, 2018
Time: 10:00 a.m.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Immigration Reform Law Institute ("IRLI") is a 501(c)(3) not for profit charitable organization incorporated in the District of Columbia. IRLI has no parent corporation. It does not issue stock.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

IRLI submits this *amicus curiae* brief to assist the Court in understanding how plaintiff City of Los Angeles, in its claim of injury, relies on policies that violate federal law, and thus defeat its claims for standing and injunctive relief. The illegality of plaintiff's policies is not addressed by either party.

The parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Plaintiff Los Angeles ("the City") asks this Court to protect certain of its policies with an injunction. But because these policies, in a variety of ways, are unlawful, the City lacks standing to seek such an injunction, and it also cannot meet the standards for injunctive relief.

The City claims standing to bring its action on the ground that it is not on a level playing field with other cities seeking funding. By its own admission, however, it is not on a level playing field because it chooses to adopt certain policies that prevent it from meeting various factors that go into the decision by the Department of Justice ("DOJ") to award funds. Indeed, an executive order issued by the mayor of Los Angeles makes these policies explicit, and they preclude the City from meeting these factors.

The policies set forth in this executive order are unlawful. By standing as obstacles to congressional purposes behind a number of federal laws, and also by interfering with federal officers in the performance of their duties under federal law, they violate the Supremacy Clause of the United States Constitution. These policies also violate anti-harboring provisions, and appear to violate information-sharing requirements, of federal statutory law.

Because the City has brought its situation on itself by having these illegal policies, it cannot show injury, necessary for standing, to a legally protected

interest. For the same reason, it cannot show the irreparable harm necessary to support injunctive relief.

ARGUMENT

I. THE CITY'S OWN POLICIES PRECLUDE IT FROM MEETING DOJ'S FACTORS.

In September, 2017, the DOJ added several weighting factors for ranking Community Oriented Policing Services ("COPS") grant applicants. One new consideration, referred to herein as "the Access Consideration," was whether cities gave ICE access to jails; another new consideration, referred to herein as "the Notice Consideration," was whether, upon request, cities gave ICE notice of detainee release dates. Complaint ¶ 29. Some focus on cooperation with federal immigration enforcement was also added as a factor. Complaint ¶ 27. In Counts Four, Five, and Six of the Complaint in this case, and in the City's motion for summary judgment, the City seeks to enjoin the use of all three factors. Complaint ¶¶ 115-128, p. 39-40; City's Brief in Support of its Motion for Summary Judgement ("City's Brief") at 23-24.

It is the City's own policies, however, that preclude it from certifying compliance with any of these considerations. On March 21, 2017, six months before the DOJ added the notice and access considerations, Mayor Eric Garcetti

issued Executive Directive No. 20 ("ED 20"),[1] attached hereto as Exhibit 1. The directive includes two orders, which will be referred to herein, respectively, as "the Noncooperation Order" and "the No Access Order" (collectively, "the Orders"). The Noncooperation Order reads:

> No person acting in his or her capacity as a City employee shall assist or cooperate with, or allow any City monies or resources to be used to assist or cooperate with, any federal agent or agency in any action where the primary purpose is federal civil immigration enforcement.

ED 20 at 3. The No Access Order reads:

> No City employee shall grant any federal immigration agent access to any City facility not open to the general public unless such access is legally required.

Id.

The Orders preclude the City from meeting DOJ's factors. First, the Noncooperation Order prevents notice to ICE of detained alien release dates; providing such notice would constitute assistance and cooperation, and involve some expenditure of resources. Second, unless the phrase "legally required" is

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[1] *available at* https://www.lamayor.org/sites/g/files/wph446/f/page/file/Exec.%20Dir.%20No.%2020--Standing%20with%20Immigrants.pdf

meant to reference the requirements of the Supremacy Clause, as seems most unlikely, the No Access Order expressly precludes the City, in the absence of a court order, from allowing ICE access jails to arrest illegal alien detainees or to interview them to determine whether their presence in the U.S. is unlawful. Third, the Orders, by commanding noncooperation and denying access to jails, preclude the City from having any immigration focus.

II. THE CITY'S POLICIES ARE UNLAWFUL.

The policies reflected in the Orders are unconstitutional. They also violate federal statutory law. By standing as obstacles to the accomplishment of congressional purposes behind the Immigration and Nationality Act ("INA"), and by commanding that local officials impede federal officers in the pursuance of their official business—namely, the enforcement of federal immigration law—these policies violate the Supremacy Clause. These policies also violate the INA directly, by violating the anti-harboring provisions of 8 U.S.C. § 1324.[2]

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[2] In addition, the City fails to meet a condition for the submission of a COPS application: compliance with § 1373. According to the doctrine of constitutional avoidance, the Court should rule on whether the City can comply with § 1373. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014). If the City cannot comply, then its certification and current application are both void. It is reasonable to assume that DOJ will continue to include § 1373 certification for COPS into the indefinite

A. *The City's policies stand as an obstacle to the purposes of Congress.*

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under this clause, Congress has the power to preempt state and local

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future, as it has under both the Obama and Trump administrations. A finding that the City cannot comply would dispose of this case. The City has not contested the § 1373 certification requirement, and if it cannot meet it, it is precluded from applying for COPS, and consequently both lacks standing to sue and can show no irreparable harm.

The City's City Attorney has issued a guidance report, attached hereto as Exhibit 2 and available at http://clkrep.lacity.org/onlinedocs/2016/16-1320_rpt_ATTY_05-18-2017.pdf, interpreting the ED 20 information sharing order: "Under 8 U.S.C. Section 1373 ('Section 1373'), the City may not restrict a City employee from providing ICE with existing City records specifically responsive to such a request. However, before an employee responds in any way to an ICE request for citizenship and immigration status of an individual, the employee and his or her supervisor are asked to seek legal guidance from this Office." No reason is given in the letter for the need to seek legal guidance in responding to an ICE request. Clearly, getting case-by-case legal opinions on such requests will act as a restriction on information sharing, and restrictions are banned in the text of § 1373. In any case, in a similar context, the Northern District of California has ruled that a guidance memorandum from the Attorney General of the United States was of no effect in determining the legality of portions of Executive Order 13768. *Cty. of Santa Clara v. Trump***,** 2017 U.S. Dist. LEXIS 191840, at *15 (N.D. Cal. Nov. 20, 2017) (holding that an interpretive document that runs counter to the executive order it attempts to narrow does not amend the order). This holding clearly applies here.

laws. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)); *see Hillsborough Cty. v. Automated Med. Labs., Inc.* 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.").

Preemption may be either express or implied, and implied preemption includes both field preemption and conflict preemption. *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3rd Cir. 2013) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption can occur in one of two ways: where "compliance with both federal and state regulations is a physical impossibility," or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lozano*, 724 F.3d at 303 (citing *Arizona*, 567 U.S. at 399) (internal quotation marks and citations omitted). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912), *quoted in Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941). The judgment of courts about what constitutes an unconstitutional

impediment to federal law is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Underlying the doctrine of obstacle preemption is the necessity of cooperation between state and federal sovereignties for our federal system to function properly. As the Second Circuit has explained:

> A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes.

City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (internal citations omitted) (holding 8 U.S.C. § 1373 constitutional).

By design, the Orders frustrate the INA in one of its central purposes—the federal-state cooperation Congress intended to foster in immigration enforcement.

As the Supreme Court has recognized, "consultation between federal and state officials is an important feature of the immigration system." *Arizona v. United States*, 567 U.S. 387, 411 (2012). For example, in passing the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), which includes 8 U.S.C. § 1373, Congress intended unimpeded communication among federal, state, and local governments in sharing immigration status information, as well as unobstructed cooperation in ascertaining the whereabouts of illegal aliens. The Senate Judiciary Committee Report accompanying IIRAIRA makes this general intent clear:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and Local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, at 19-20 (1996) (emphasis added), *quoted in City of New York*, 179 F.3d at 32-33. Thus, in drafting § 1373, Congress intended a cooperative effort among local, state, and federal law enforcement to enforce immigration law.

A review of additional federal immigration provisions further underscores this intent. Shortly before enacting IIRAIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Entitled "Communication between State and local government agencies and Immigration and Naturalization Service," Section 434 of this law, now 8 U.S.C. § 1644, is nearly identical to § 1373. This provision of PRWORA forbids any prohibitions or restrictions on the ability of state or local governments to send to or receive from the federal government information about the immigration status, lawful or unlawful, of an alien in the United States. Going further than the Senate Judiciary Committee Report accompanying IIRAIRA, in the Conference Report accompanying PRWORA, Congress made clear its intent in passing Section 434: to bar *any* restriction on local police in their communications with ICE. The scope includes the *whereabouts* of illegal aliens, which obviously includes notice of their release from detention.

> The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien or *the presence, whereabouts, or activities of illegal aliens*. It does not require, in and of itself, any

> government agency or law enforcement official to communicate with the INS.
>
> The conferees intend to give State and local officials the authority to communicate with the INS regarding *the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.* The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that *illegal aliens do not have the right to remain in the United States undetected and unapprehended*.

H.R. Rep. No. 104-725 (1996) (Conf. Rep.) at 383 (1996) (emphases added), *quoted in City of New York*, 179 F.3d at 32.

Another federal statute also has the purpose of fostering cooperation in immigration enforcement. In 8 U.S.C. § 1357(g), Congress made clear that no agreement is needed for state and local officers or employees "to communicate with [federal immigration authorities] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." § 1357(g)(10)(A). Likewise, Congress has refused

to require any formal agreement for state and local officers or employees to "cooperate with [federal immigration authorities] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." § 1357(g)(10)(B).

Because the Orders, as a refusal to cooperate, are preempted by all of these laws, they violate the Supremacy Clause.

And it is not as though the City were within its rights, under the Tenth Amendment, to deny its cooperation. The seminal cases delimiting such rights are *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Court took up a statute that required states to enact legislation to take possession and dispose of nuclear waste produced in their state. In *Printz*, the Court considered the Brady Act, which required state employees to do background checks of firearm purchasers. The Court ruled that both of these two kinds of federal imperatives constituted commandeering in violation of the Tenth Amendment. *New York*, 505 U.S. at 158; *Printz*, 521 U.S. at 935.

Relevantly here, however, the Supreme Court has carved out a safe harbor for federal law controlling state activity when such law regulates information flow in or affecting a domain of federal authority. In this realm, the Court has ruled favorably for federal law both mandating state actions and prohibiting state

actions. *See also City of New York*, 179 F.3d at 33-35 (distinguishing *New York* and *Printz* and rejecting a Tenth Amendment challenge to § 1373).

In *Reno v. Condon*, 528 U.S. 141 (2000), the Court considered a suit by the State of South Carolina enjoining enforcement of the Driver's Privacy Protection Act of 1994 ("the DPPA"), 18 U.S.C. §§ 2721-25. The DPPA forbade state department of motor vehicles personnel from disclosing the personal information of drivers for most purposes, though in some circumstances it mandated such disclosure. 18 U.S.C. § 2721. In a unanimous decision, the Court held that the DPPA was consistent with the federalism required by the Tenth Amendment, despite the heavy resource expenditure states needed to make to enforce the Act, and even states' need to pass laws to comply with it. *Condon*, 528 U.S. at 150-151.

The Court distinguished the federal legislation in *Condon* from that in *Printz* and *New York*. The statute in *Condon* regulated state activities, and the legislation required and man hours employed were a byproduct. *Condon*, 528 U.S. at 150-151. By contrast, the statute in *Printz* directly required state employers to fulfill a federal law enforcement function, and the statute in *New York* directly commanded state legislative initiatives and expenditures to dispose of property (waste). As the Court held:

> [T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 151.

In affirming the validity of the DPPA, the Court noted that the statute *requires* the disclosure of certain information:

> The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions. For example, the DPPA requires disclosure of personal information for use in connection with matters of motor vehicle or driver safety and theft, to carry out the purposes of [federal statutes].

Id. at 145 (internal quotation marks and ellipses omitted). The Court explained: "'That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'" *Id.* at 150-51 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). *Cf. Arizona v.*

United States, 567 U.S. 387, 412-13 (holding that an Arizona law making verification of immigration status by local officials mandatory was not preempted by federal immigration law because 8 U.S.C. § 1644 (a provision with wording almost identical to that of § 1373), the constitutionality of which the Court did not question, encouraged the sharing of such information).

Indeed, finding the Orders protected under the Tenth Amendment would mark something of a revolution in Tenth Amendment jurisprudence. For example, the Crime Control Act of 1990 compels states to report missing children and prohibits them from allowing their state law enforcement agencies to delay or delete missing child reports:

> **State requirements**
>
> Each State reporting under the provisions of this title shall—
>
> (1) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the observance of any waiting period before accepting a missing child or unidentified person report;
>
> (2) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the removal of a missing person entry from its State law enforcement system or

> the National Crime Information Center computer database based solely on the age of the person;
>
> (3) provide that each such report and all necessary and available information, which, with respect to each missing child report, shall include—(A) the name, date of birth, sex, race, height, weight, and eye and hair color of the child; (B) a recent photograph of the child, if available; (C) the date and location of the last known contact with the child; and (D) the category under which the child is reported missing; is entered within 2 hours of receipt into the State law enforcement system and the National Crime Information Center computer networks and made available to the Missing Children Information Clearinghouse within the State or other agency designated within the State to receive such reports ….

42 U.S.C. § 5780.

If the Orders are protected by the Tenth Amendment, so too would be local ordinances mandating the withholding of federally-required information about missing children, or any other state or local refusal to adhere to federal information-sharing requirements.

In short, by requiring non-cooperation in immigration enforcement, the Orders stand as an obstacle to the congressional purpose of fostering such cooperation, and thus violate the Supremacy Clause.

B. *The City's policies impede federal officers in the performance of their duties.*

Under the Orders, if a federal immigration officers asks when an alien in City custody will be released, City officials may not tell him. If a federal immigration officer seeks access to a City jail to interview an alien and, if appropriate, take custody in a controlled environment, City officials may not let him in. By thus shutting its jails to federal officers and refusing to provide information very germane to the federal enforcement mission, the Orders patently interfere with federal officers in their enforcement of federal immigration law, and were designed to do just that.

Such interference violates the Supremacy Clause at a very basic level; the supremacy of federal law would be meaningless if states could block its enforcement within their territories. Especially egregious is the denial of access to jails, as if the federal government were a hostile foreign power. One wonders if officials of the City would attempt to prevent federal entry into its jails by force, or to arrest federal officers who attempted entry. Such a shocking course would, of course, violate the Supremacy Clause, as the Supreme Court decided well over a

century ago in a case in which state marshals arrested a federal officer in the performance of his federal duties:

> "If, when thus acting, and within the scope of their authority, [federal] officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. *The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government.* And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, *and the exercise of acknowledged federal power arrested*. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority

> extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; *obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.*"

In re Neagle, 135 U.S. 1, 61-62 (1890) (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)) (emphases added). *See generally* Seth P. Waxman and Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2236-37 (2003) (discussing *Neagle*).

But if, under the Supremacy Clause, the City may not use force or legal process to block federal officers performing their federal law enforcement duties from its jails, it has no legitimate authority, under that clause, to "deny" them access to its jails by law. In this very basic way, the Orders violate the Supremacy Clause.

C. *The City's policies violate 8 U.S.C. § 1324.*

The City also is in clear violation of the anti-harboring provisions of the INA's Title II, Chapter 8, § 274, codified at 8 U.S.C. § 1324, which reads in pertinent part:

Bringing in and harboring certain aliens

(a) Criminal penalties.

(1) (A) Any person who—

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation …

(v)

(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both ….

The INA defines "person" when used in Title II as "an individual or an organization." 8 U.S.C. § 1101(b)(3).

> The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

8 U.S.C. § 1101(a)(28). Thus, § 1324 applies to municipal corporations, which, under the INA's sweeping definition, are organizations, and thus persons.

The DOJ's Notice Consideration seeks notice *after* the detention facility has received the said request from ICE. Even if the City argues that receiving the request does not give it the requisite knowledge of the alien's unlawful presence, its noncompliance is in "reckless disregard" of the likelihood of the alien's unlawful presence, and constitutes an attempt to "shield [the alien] from detection" in a "building," and thus violates 8 U.S.C. § 1324(a)(1)(a)(iii). The No Access Order prevents both an interview and an arrest. The City is not merely shielding likely illegal aliens, but it is systematically doing so.

Even if City officers or the City itself may escape criminal prosecution via sovereign immunity, this does not alter the conclusion that they are continuously violating the statute, by complying with the Orders. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998) (recognizing

that sovereign immunity is "immunity from trial and the attendant burdens of litigation") (internal quotation marks omitted).

III. BECAUSE OF ITS POLICIES, THE CITY IS INCAPABLE OF MEETING THE REQUIREMENTS FOR EITHER STANDING OR INJUNCTIVE RELIEF.

The City's only claim of "harm" is that the DOJ created an "uneven playing field by favoring or disfavoring applicants on the basis of improper immigration-related considerations." City's Brief at 10, n. 4. In support of its claim of harm, it only cites cases in which a private actor had suffered a competitive disadvantage from an allegedly illegal action by a government actor. Needless to say, in none of these cases was the plaintiff a government actor seeking to keep in place a policy that violated federal law. *Id.* (citing *Bullfrog Films, Inc. v. Wick*, 847F.2d 502, 507 (9th Cir. 1988) (finding that filmmakers had standing to bring a First Amendment claim); *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) (finding that an Athabascan Indian deprived of a government job opportunity had standing); *Ne. Fla. Chapter of Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 664-669 (1993) (finding that private parties had standing to challenge preferential contracting); *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (same); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (finding that a university applicant had standing to challenge a preferential admissions system).

The elements for standing in the federal courts are first, injury in fact, second, a causal connection between the injury and the conduct complained of, and third, a likelihood that the conduct complained of be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

An injury in fact is "an invasion of a legally protected interest." *Id. at* 560. The City has no legally protected interest in occupying a level playing field that it does not occupy only because of its unlawful policies. Indeed, it is well-established that litigants lack standing to seek prospective relief if they will only be injured if they engage in illegal conduct. *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (finding that a victim of an illegal police chokehold lacked standing where his likelihood of further injury was premised on a repetition of his unlawful traffic violation); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (finding that plaintiffs lacked standing because they planned to induce future injury by unlawful civil disobedience); *Spencer v. Kemna*, 523 U.S. 1, 13 (1998) (finding that plaintiff lacked standing where his injury would only arise if he were punished for future unlawful conduct).

If the City will occupy an uneven playing field, it will be due to its policies, which, as shown above, are unlawful. Any injury arising from an interest it might have in lawful policies that might also put it on an uneven playing field, by making it difficult for it to meet DOJ's factors—for example, a policy of allowing its

officers and facilities to decide for themselves whether to cooperate with ICE—even if asserted by the City, would be entirely hypothetical. The City has put forward no facts to suggest that it will adopt such legal policies; on the contrary, it has disclaimed such policies, by making it clear that it regards its current, unlawful policies as necessary to improve its community policing efforts. *See* City's Brief at 9, 16-17, 23-24 (arguing that its policies are necessary to make the City's residents, including its "most vulnerable" ones, trust the police); *see, e.g.*, *Lujan*, 405 U.S. at 560 (holding that an injury must not be "hypothetical"); *Alto Eldorado Ptnrs v. City of Santa Fe*, U.S. Dist. LEXIS 47158, *71-73 (D.N.M. 2009) (holding that plaintiffs' asserted injury from a city ordinance was too hypothetical for standing purposes where plaintiffs "did not put forward any facts identifying particular projects they wished to pursue and showing that the City Ordinance is impacting their ability to proceed with those projects").

For the same reason the City cannot show injury requisite for standing, it cannot show irreparable harm requisite for injunctive relief: its harm will only occur because of its own unlawful policies. *See Lyons*, 461 U.S. at 111 (holding that irreparable harm was not shown for the same reasons injury for standing purposes was not shown). Indeed, it is a maxim of equity, especially important in cases, such as this one, involving the public interest, that "he who comes into equity must come with clean hands." *Precision Inst. Mfg. Co. v. Automotive*

Maintenance Mach. Co., 324 U.S. 806, 814 (1945). Here, the City's hands are decidedly unclean, for it maintains, and seeks an injunction by this Court to protect, policies that are unlawful and unconstitutional.

CONCLUSION

For the foregoing reasons, the City's motion for partial summary judgment should be denied.

Dated: January 26, 2018

Respectfully submitted,
/s/ *Julie B. Axelrod*

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing brief will be delivered electronically on January 26, 2017, to counsel for Plaintiff and Defendants through the District's Electronic Case Filing System.

/s/ *Julie B. Axelrod*
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