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OPEN LETTER TO FRESNO CITY COUNCIL

May 5, 2020

Fresno City Council
2600 Fresno St., Rm. 2097
Fresno, CA 93721

**Re: Legal Challenges to COVID-19 Consumer Grant Program Approved by
Resolution on April 23, 2020**

Dear Councilmembers:

We write this letter today on behalf of our client, the Center for American Liberty. The Center for American Liberty has been made aware that you intend to vote tomorrow, Wednesday, May 6, 2020 on the COVID-19 Consumer Grant Program (the “Program”) for the City of Fresno. This program may not be implemented for at least three reasons.

I. Cash Payments to Undocumented Immigrants Violate Federal Law

First, any cash payments by a local government to undocumented immigrants for rent assistance violates federal law. 8 U.S.C. § 1621(a). Economic relief may be given to undocumented immigrants if it is “short-term, non-cash, in-kind emergency disaster relief.” 8 U.S.C. § 1621(b)(2). But giving cash is not the only prohibited conduct. Grants, contracts, loans, food or housing assistance, unemployment benefits, and any “similar benefit for which payments or assistance are provided to an individual, household, or family” by a local government are all prohibited. 8 U.S.C. § 1621(c)(1).

The Program proposes to give cash grants directly to applicants with priority being given to “Fresno City residents that meet the program criteria and are otherwise ineligible for Federal stimulus funding.” Resolution, para. 5(g). It is clear from the history of this measure and the eligibility criteria, that the Program will result in cash payments being made directly to undocumented immigrants. This directly violates federal law.

An exception to the federal ban on cash grants to undocumented immigrants is if a state were to pass a specific law “after August 22, 1996, which affirmatively provides for such eligibility[.]” to undocumented immigrants. 8 U.S.C. § 1621(d). A local government may not do so—this must be done by the state legislature. *Id.* Since 1996, the California has authorized several exceptions to the ban, including granting a law license (*In re Garcia* (2014) 58 Cal.4th 440) and receiving in-state tuition benefits (*Martinez v. Regents of the Univ. of California* (2010) 50 Cal.4th 1277). In each case, a specific *state* law was passed that

authorized an undocumented immigrant to receive the particular state benefit. Also in each case, such relief came after extensive debate in the legislature and indeed throughout the state regarding these public policy issues.

A thorough search of the California codes reveals that no such law exists authorizing cash payments to undocumented immigrants. To the contrary, state law specifically proscribes such payments. Cal. Welfare and Inst. Code § 11104.

The Program also violates immigration law by encouraging undocumented immigrants to continue residing in the United States. 8 U.S.C. § 1324(a)(1)(A)(iv). The following conduct has been held to violate this statute:

- Helping undocumented immigrants to obtain a Social Security number. *United States v. Ndiaye*, 434 F.3d 1270, 1298 (11th Cir. 2006) (quoted approvingly by *United States v. Thum*, 749 F.3d 1143, 1148 (9th Cir. 2014) (holding that providing transportation within the United States was not enough).
- Falsifying documents for illegal immigrants to allow them to stay in America. *United States v. Oloyede*, 982 F.2d 133, 135 (4th Cir. 1992).

Giving money directly to undocumented immigrants to help them avoid losing their rental homes would also come within the strictures of 8 U.S.C. § 1324(a)(1)(A)(iv).¹

As written, the Program violates at least two separate federal laws, possibly more. Fresno City Council, simply put, is not in a position in our constitutional scheme of government, to override federal law on a matter of national immigration policy.

II. Cash Payments to Undocumented Immigrants Violates State Law

Second, any cash payments to undocumented immigrants for rent assistance violates state law. According to California Welfare and Institutions Code § 11104, “[a]liens shall be eligible for aid only to the extent permitted by federal law.” The statute further provides that “[n]o aid shall be paid” to any individual unless she can prove that she is a lawful permanent resident. *Id.*

Because cash payments to undocumented immigrants violate federal law, such payments also violate state law.

¹ A recent Ninth Circuit case held that 8 U.S.C. § 1324(a)(1)(A)(iv) was overbroad. *United States v. Sineneng-Smith*, 910 F.3d 461, 483 (9th Cir. 2018), *cert. granted* 140 S.Ct. 36, No. 19-67. That decision has been appealed to the United States Supreme Court and is awaiting decision. *Id.* Unless and until the Supreme Court affirms this decision, the current language of 8 U.S.C. § 1324(a)(1)(A)(iv) is still good law.

III. Federal Reimbursement is Impossible

Third, although the Resolution directs the Fresno City Administration to seek reimbursement of funds expended by the Program from the federal government (Resolution, para. 4), such reimbursement is not permitted.

First, the deadline has passed. The CARES Act was passed on March 27, 2020.² It specifically required that all relief payments to state, territorial, local, and tribal governments be paid no later than 30 days after the CARES Act passed. H.R. 748 § 5001, *codified at* 42 U.S.C. § 801(b)(1)³. That date was Monday, April 27, 2020.⁴ If the City of Fresno had applied prior to April 27, 2020, a percentage of the state's portion of the relief funds could have been diverted directly to the City, if there were no other legal impediments (there are many).⁵

Even if the City of Fresno could apply for such funds, its stated purpose would not be allowed. The CARES Act requires the grants to be used for:

1. Necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
2. That were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
3. were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

The first prong presents an insurmountable requirement on the City of Fresno. The U.S. Department of the Treasury provided guidance on the categories of eligible expenditures that would be deemed "necessary" under the CARES Act.⁶ Eligible expenses fall into six categories:

- 1) Funding for medical expenses, such as for hospitals related to the treatment of COVID-19;
- 2) Funding for public health expenses, such as for acquisition and distribution of personal protective equipment;
- 3) Payroll expenses for public employees mitigating COVID-19;
- 4) Compliance with public health measures such as distance learning for schools and telework capabilities for public employees;

² See <https://www.congress.gov/bill/116th-congress/house-bill/748/text?loclr=bloglaw#toc-HC046FE005624457B9FFAD21FDD55C5E4> (last visited on April 30, 2020).

³ Available at <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title42&saved=%7CKHRpdGxlOjQyIHNIY3Rpb246MzAxIGVkaXRpb246cHJlbGltKQ%3D%3D%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim> and <https://www.congress.gov/bill/116th-congress/house-bill/748/text?loclr=bloglaw#toc-HC046FE005624457B9FFAD21FDD55C5E4> (last visited on April 30, 2020).

⁴ The 30th day was Sunday, April 26, 2020, but that date would be extended to April 27. See, e.g., Fed. R. App. P. 26(a)(1).

⁵ See <https://home.treasury.gov/system/files/136/Census-Data-and-Methodology-Final.pdf> (last visited on April 30, 2020).

⁶ See <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf> (last visited April 30, 2020).

- 5) Economic support such as grants to small businesses for interruptions caused by required closures; and
- 6) Expenses necessary to the function of government.⁷

The only possible category the Program could fall into would be Category 5, regarding economic support. But the only three examples given are grants to small businesses for interruptions caused by required closures, a payroll support program, or an unemployment insurance program.⁸ Rent payments or eviction protection has nothing to do with any of these categories.

While the list above is a “non-exhaustive” list, it is worth noting that a list of *ineligible* expenditures immediately follows. The Program is remarkably similar to two of these examples: 1) payroll or benefits expenses for employees who are not “substantially dedicated to mitigating or responding to the COVID-19 public health emergency” and 2) “[w]orkforce bonuses other than hazard pay or overtime.”⁹

Further, any aid program administered by a state or local government that includes any federal money is considered a “federally-funded benefit.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1099 n.4 (9th Cir. 2012). Such a program may not administer funds in violation of federal law.

The City of Fresno will not be reimbursed for the Program from the federal government.

For these reasons, we respectfully request that the City of Fresno reconsider its April 23, 2020 Resolution by not implementing the Program in any form.

Regards,



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⁷ *Id.*
⁸ *Id.*
⁹ *Id.*