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13

14
15 IN THE UNITED STATES DISTRICT COURT

16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 SAN FRANCISCO DIVISION

18 CITY OF RICHMOND,

19 Plaintiff,

20 v.

21 DONALD J. TRUMP, *et al.*,

22 Defendants.
23
24
25
26
27
28

No. 3:17-cv-01535-WHO

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: May 10, 2017

Time: 2:00 p.m.

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INTRODUCTION

On January 25, 2017, the President signed Executive Order 13,768 for the declared purpose of “direct[ing] executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States.” *See* Exec. Order No. 13,768, § 1, 82 Fed. Reg. 8,799 (Jan. 30, 2017). As explained in the Order, aliens who enter the United States illegally and those who overstay or otherwise violate the terms of their admission and engage in criminal conduct present a particularly “significant threat to national security and public safety.” *Id.* Those threats are heightened when jurisdictions choose to violate federal law to shield illegal aliens – many of whom have been incarcerated by federal, state, or local authorities – from federal immigration authorities. *See id.*

To address this threat, the Executive Order states that the Executive Branch’s policy is to ensure that States and their political subdivisions comply with existing federal laws. For example, Section 9 of the Order establishes a policy of ensuring that state and local jurisdictions comply with 8 U.S.C. § 1373, which provides that no government entity or official may prohibit or restrict, among other things, the sending or receiving of information regarding the citizenship or immigration status of any individual to federal immigration authorities. *Id.* § 9, 82 Fed. Reg. at 8,801. The Order is a presidential directive, directed to the Attorney General, the Secretary of Homeland Security, and other federal officials. It does not purport to alter the existing requirements of Section 1373 (or any other federal law), impose new burdens on state or local jurisdictions, or expand the legal authority of the Secretary or the Attorney General. Rather, it simply announces the policy of the Executive Branch and directs the Secretary and Attorney General, in their discretion and consistent with their existing legal authority, to ensure that jurisdictions that willfully refuse to comply with Section 1373 not be eligible to receive federal grants, except as deemed necessary for law enforcement purposes. *Id.* The Order also instructs the Secretary and the Attorney General to take “appropriate enforcements action,” and directs them to report to the President on their progress in implementing this and other directives in the Order, first within 90 days and then again within 180 days. *Id.* § 15, 82 Fed. Reg. at 8,802.

1 Executive Order 13,768 is not self-executing, however, and the Secretary and Attorney General
2 have not yet taken the several steps necessary to implement the directives of Section 9.¹

3 Yet, before such steps or other action have been taken under the Executive Order, the City
4 of Richmond (“City” or “Richmond”) has moved for immediate, emergency injunctive relief to
5 prevent defendants from taking hypothetical future actions against it pursuant to Section 9 of the
6 Order. The City’s lawsuit is premature. Richmond does not claim the loss of any federal funds
7 or, for that matter, contend that *any* action has been taken against it under the Order. The City
8 does not even allege that such action has been threatened. Indeed, the Secretary has not
9 designated (or even indicated an intent to designate) Richmond as a “sanctuary jurisdiction” in
10 accordance with the process contemplated in Section 9.

11 Further, plaintiff interprets the Order beyond any reasonable construction, insisting that
12 the City could lose “all federal funding,” including reimbursements for mandatory entitlement
13 programs (Doc. 21 at 4, 9). Nevertheless, based on the plain language of the Order, the Attorney
14 General and the Secretary of Homeland Security have determined, among other things, that
15 Section 9(a) will be applied only to “Federal grants” – as stated in the Order – and not to
16 reimbursements under entitlement programs or other types of federal financial assistance; that
17 Section 9(a) will be applied only to grants administered by the Department of Justice and the
18 Department of Homeland Security; and that “appropriate enforcement action” under Section 9(a)
19 would take the form of civil litigation asserting that a jurisdiction’s law or policy is preempted by
20 federal law.

21 For all these reasons, the City cannot show the likelihood of “immediate” irreparable
22 harm, an “essential element” of the standard required to obtain emergency injunctive relief. *See*
23 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Arcsoft, Inc. v.*
24 *Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1071 (N.D. Cal. 2015); *see also Painsolvers, Inc. v. State*
25

26 ¹ In this regard, the Department of Justice sent a letter to members of Congress, on March
27 7, 2017, stating that the Department was “in the process of identifying, in its discretion, what
28 actions, if any, can lawfully be taken in order to encourage state and local jurisdictions to comply
with federal law.” *See* Ltr. from Samuel R. Ramer, Acting Ass’t Att’y Gen., Office of Legis.
Affairs, to Sens. Elizabeth Warren and Edward J. Markey (Mar. 7, 2017) (Attachment 1 hereto).
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1 *Farm Mut. Auto. Ins. Co.*, 685 F. Supp. 2d 1123, 1139 (D. Haw. 2010). Rather than meet this
2 standard, the City instead bases its motion on nothing more than speculation concerning the
3 Order's scope and how the Secretary and Attorney General might interpret and implement it,
4 along with speculation that Richmond will be a subject of enforcement and might lose federal
5 funds. Such speculative assertions fall far short of demonstrating immediate irreparable harm,
6 which by itself requires that plaintiff's requested emergency relief be denied.

7 In addition, the City also fails to establish a substantial likelihood of success on the merits
8 of its claims, which are subject to dismissal under the justiciability doctrines of ripeness and
9 standing. Article III of the Constitution requires that a plaintiff have standing and that its claims
10 be ripe for judicial consideration. Because a series of steps remain to implement Section 9, the
11 City cannot show the "concrete," "palpable" injury needed for standing, *see Whitmore v.*
12 *Arkansas*, 495 U.S. 149, 155 (1990), and the Executive Order has not been "formalized and its
13 effects felt in a concrete way" as needed for ripeness. *See Abbott Labs. v. Gardner*, 387 U.S. 136,
14 148-49 (1967). Similarly, the City cannot show any concrete injury attributable to Section 1373
15 itself, which has been in effect since 1996. Moreover, in light of a reasonable construction of the
16 Order, Section 9 does not constitute "coercion" under the Tenth Amendment or otherwise violate
17 the constitutional provisions on which the plaintiff relies.

18 Notably, the Executive Order does not alter or expand the existing law that governs when
19 the Federal Government may revoke a federal grant where the grantee violates legal
20 requirements. Instead, the President – pursuant to his express constitutional authority to ensure
21 that federal agencies "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3 –
22 has directed agency heads to utilize their existing legal authorities "to the extent consistent with
23 law," *see* Exec. Order No. 13,768, § 9, in connection with local violations of Section 1373. In
24 other words, the Executive Order does nothing more than direct enforcement of preexisting duties
25 under federal law. Richmond's conjecture to the contrary does not satisfy its burden of justifying
26 the extraordinary relief it seeks, and the Court should accordingly deny plaintiff's motion for
27 preliminary injunction.
28

ISSUES PRESENTED

1. Whether the plaintiff has established that it will suffer immediate, concrete irreparable harm in absence of a preliminary injunction.

2. Whether the plaintiff has established that it can satisfy the requirements of justiciability, including standing and ripeness.

3. Whether the public interest and the balance of equities militate against the preliminary injunction sought.

4. Whether the plaintiff can seek a nationwide preliminary injunction or only an injunction limited to the plaintiff itself.

BACKGROUND

I. Broad Executive Discretion in Enforcement of Immigration Law

“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 2497 (2012). Through the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101 *et seq.*, Congress has granted the Executive Branch significant authority to control the entry, movement, and other conduct of foreign nationals in the United States.

Under the INA, the Department of Homeland Security (“DHS”), the Department of Justice, and other agencies of the Executive Branch administer and enforce the immigration laws. Likewise, the INA permits the Executive Branch to exercise considerable executive discretion to direct enforcement pursuant to federal policy objectives. *See Arizona Dream Act Coal. v. Brewer*, ___ F.3d ___, No. 15-15307, 2017 WL 461503, at *9-10 (9th Cir. Feb. 2, 2017) (“By necessity, the federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.”). Several Presidents have exercised this discretion by Executive Order. And they have done so in differing ways, reflecting their individual judgments as to how best to take care that the laws of the United States be faithfully executed. *See, e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (2016) (“Suspending Entry Into the United States of Persons Contributing to the Situation in Libya”); Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (2012) (“Suspending Entry Into the United States of Opposition Prelim. Inj.

Foreign Sanctions Evaders With Respect to Iran and Syria”); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (interdiction of undocumented aliens on oceangoing vessels). Following the President’s lead, the Secretary of Homeland Security has also consistently exercised similar executive discretion in the enforcement of federal immigration law. *See, e.g.*, Mem. from John Kelly, Sec’y of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Protection, et al., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

The INA contains a number of provisions regarding the involvement of state and local authorities in the enforcement of immigration law. For example, Section 287(g) of the INA authorizes the Secretary to enter into written agreements with a state or local government under which officers of such government may “perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.” 8 U.S.C. § 1357(g)(1). Likewise, the INA provides for cooperation with DHS in the “identification, apprehension, detention, or removal of aliens not lawfully present in the United States[.]” even without a formal cooperation agreement. *Id.* § 1357(g)(10)(B). Another provision, 8 U.S.C. § 1373, ensures the sharing of immigration information between federal and state actors:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Id. § 1373(a);² *see* Pub. L. No. 104-208, Div. C, Title VI, § 642, 110 Stat. 3009, 3009-707 (1996). Section 1373 also proscribes prohibiting or restricting any government entity from “maintaining” information regarding the immigration status of any individual. 8 U.S.C. § 1373(b).

² *Cf. Steinle v. City & Cty. of San Francisco*, No. 16-CV-02859-JCS, 2017 WL 67064, at *12 (N.D. Cal. Jan. 6, 2017) (holding, on motions to dismiss, that Section 1373 did not require defendant to notify federal officials of alien’s date of release from local custody). The Federal Government had no occasion to address the scope of Section 1373 on the motions to dismiss in *Steinle*.

Well before the issuance of Executive Order 13,768, the compliance of state and local governments with Section 1373 has been of interest to federal agencies because such governments are recipients of federal grants. For example, the Inspector General of the Department of Justice issued a memorandum on May 31, 2016, as plaintiff notes (Doc. 1 ¶¶ 31, 43), describing a concern that several state and local governments receiving federal grants were not complying with 8 U.S.C. § 1373. *See* Mem. from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att’y Gen., Office of Justice Programs, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients* (May 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf>. After reviewing a sample of local ordinances regarding communication with federal immigration officials, the Inspector General observed that some applications of the ordinances appeared to be inconsistent with Section 1373. *Id.* at 4-8. Nevertheless, the report noted, “[N]o one at DHS or [Immigration and Customs Enforcement] has made a formal legal determination whether certain state and local laws or policies violate Section 1373, and we are unaware of any Department of Justice decision in that regard.” *Id.* at 8 n.12.

II. Executive Order 13,768

The President signed Executive Order 13,768, *Enhancing Public Safety in the Interior of the United States*, on January 25, 2017. 82 Fed. Reg. 8,799 (Jan. 30, 2017). The Order seeks to “[e]nsure the faithful execution of the immigration laws,” including the INA. *See id.* § 2(a), 82 Fed. Reg. at 8,799. It sets forth several policies and priorities regarding enforcement of federal immigration law within the United States. The Order likewise instructs federal officials, including the Secretary of Homeland Security, the Attorney General, and the Director of the Office of Management and Budget (“OMB”), to use “all lawful means” to enforce those laws. *See id.* §§ 1, 4, 82 Fed. Reg. at 8,799-800.

As permitted by the INA, Executive Order 13,768 establishes priorities regarding aliens who are subject to removal from the United States under the immigration laws. *Id.* § 5, 82 Fed. Reg. at 8,800. Several provisions of the Order instruct officials to take actions directing future conduct, including instructions to promulgate certain regulations within one year, to take “all appropriate action” to hire additional immigration officers, to seek agreements with state and

1 local officials under Section 287(g) of the INA (referred to above), to develop a program to
 2 ensure adequate prosecution of criminal immigration offenses, and to establish an office to
 3 provide certain services to victims of crimes committed by removable aliens. *Id.* §§ 6, 7, 8, 11,
 4 13, 82 Fed. Reg. at 8,799-802. Throughout, the Order specifies that federal officials are to take
 5 these actions as “permitted by law” or as “consistent with law.” *Id.* §§ 7, 8, 9(a), 10(b), 12, 14,
 6 17, 18(b), 82 Fed. Reg. at 8,799-802.

7 Section 9 of the Executive Order establishes “the policy of the executive branch to ensure,
 8 to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with
 9 8 U.S.C. 1373.” Section 9(a) directs federal agencies to achieve that policy:

10 In furtherance of this policy, the Attorney General and the Secretary [of Homeland
 11 Security], in their discretion and to the extent consistent with law, shall ensure that
 12 jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary juris-
 13 dictions) are not eligible to receive Federal grants, except as deemed necessary for
 14 law enforcement purposes by the Attorney General or the Secretary. The Secre-
 15 tary has the authority to designate, in his discretion and to the extent consistent
 16 with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall
 17 take appropriate enforcement action against any entity that violates 8 U.S.C. 1373,
 18 or which has in effect a statute, policy, or practice that prevents or hinders the
 19 enforcement of Federal law.

20 *Id.* § 9(a), 82 Fed. Reg. at 8,801. Section 9 further directs the Secretary to publicize, each week,
 21 “a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or
 22 otherwise failed to honor any detainers with respect to such aliens.” *Id.* § 9(b), 82 Fed. Reg. at
 23 8,801.³ It also instructs the Director of OMB to “obtain and provide relevant and responsive

24 ³ U.S. Immigration and Customs Enforcement, a component of DHS, published the first
 25 weekly reports pursuant to this directive. *See Declined Detainer Outcome Report*,
 26 <https://www.ice.gov/declined-detainer-outcome-report>. The reports and accompanying materials
 27 make clear that their publication does not constitute a designation of any “sanctuary jurisdiction”
 28 under Section 9. *See id.*, FAQs, *How does the report inform the decision on whether a location is*
a sanctuary jurisdiction?, *My jurisdiction is on the Declined Detainer Outcome Report. Will we*
lose our federal funding? (“As set forth in the Executive Order, the Secretary has the authority to
 designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary
 jurisdiction. DHS continues to evaluate the appropriate criteria for such designation. . . . ICE
 does not administer grants, and inclusion on the DDOR will not automatically result in
 ineligibility for grants. . . . DHS is currently working to develop a process, in coordination with
 the Department of Justice and other interagency partners, to address this requirement of the
 EO.”); *see also* Weekly Declined Detainer Outcome Report (Jan. 28 - Feb. 3, 2017), at 34,
https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf (“This report should not be
 considered an exclusive factor in determining a jurisdiction’s level of cooperation with and
 support of ICE or the law enforcement community”).

1 information on all Federal grant money that currently is received by any sanctuary jurisdiction.”

2 *Id.* § 9(c), 82 Fed. Reg. at 8,801.

3 Finally, the Executive Order directs the Secretary of Homeland Security and the Attorney
4 General to report on their progress in implementing the Order, first “within 90 days of the date of
5 [the] order and again within 180 days of the date of [the] order.” *Id.* § 15, 82 Fed. Reg. at 8,802.

6 Certain decisions regarding implementation of the Executive Order have been made since
7 the defendants filed their responses to the preliminary injunction motions in *City and County of*
8 *San Francisco v. Trump, et al.*, Case No. 3:17-cv-00485-WHO (N.D. Cal.) and *County of Santa*
9 *Clara v. Trump, et al.*, Case No. 5:17-cv-00574-LHK (N.D. Cal.). Specifically, relying on the
10 plain text of the Executive Order and in the exercise of their “discretion” to carry out the
11 President’s directives in Section 9, the Attorney General and the Secretary of Homeland Security
12 have determined (1) that Section 9(a) will be applied only to “Federal grants” – as expressly
13 stated in the Order – and not more broadly to other types of federal financial assistance, such as
14 reimbursements under mandatory entitlement programs; (2) that Section 9(a) will be applied only
15 to grants administered by the Department of Justice and the Department of Homeland Security, as
16 reflected in that provision’s references to the Attorney General and the Secretary and not to other
17 federal officials or agencies; (3) that grant funding may be suspended, revoked, or terminated for
18 non-compliance with 8 U.S.C. § 1373 only where compliance with this statute is included as a
19 condition in the grant documents (which first occurred for Department of Justice grants as of the
20 2016-2017 grant year);⁴ and (4) that the Secretary’s designation of “sanctuary jurisdictions” under
21 Section 9(a) will be based on willful non-compliance with 8 U.S.C. § 1373 and will not be based
22 solely on any refusal to comply with requests by federal immigration officials to detain aliens.
23 Additionally, in the exercise of his authority to “take appropriate enforcement action” under
24 Section 9(a), the Attorney General has determined that any such action would take the form of
25 civil litigation asserting that a jurisdiction’s law or policy is preempted by federal law. *See, e.g.*,

26
27 ⁴ These determinations are reflected in a recent public statement by the Attorney General,
28 in which he referred to grant programs administered by the Department of Justice. *See* Press
Briefing by Press Secretary Sean Spicer, 3/27/2017, <https://www.whitehouse.gov/the-press-office/2017/03/27/press-briefing-press-secretary-sean-spicer-3272017-29>.

1 *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691
 2 F.3d 1269 (11th Cir. 2012). Other issues regarding implementation of the Order remain pending,
 3 as noted below.

4 III. Richmond's Claims for Emergency Relief

5 Richmond seeks a preliminary injunction prohibiting the defendants from “enforcing”
 6 Section 9(a), “from taking any action pursuant to the Executive Order that would withhold or
 7 ‘claw-back’ federal funds,” and “from taking any action pursuant to the Executive Order that
 8 would declare or render *any* jurisdiction ineligible for federal funds” (Doc. 12 at 1, emphasis
 9 added). Plaintiff acknowledges, however, that the Order does not clearly delineate the term
 10 “sanctuary jurisdiction” (*id.* at 2), and that the City’s enactment of “legislation about immigration
 11 policies” does not make it a “sanctuary jurisdiction” under the Order (Doc. 1 ¶ 110). Richmond
 12 also does not claim that the Secretary of Homeland Security has designated it as a “sanctuary
 13 jurisdiction” in accordance with the process contemplated in Section 9, and, indeed, the City
 14 acknowledges that “[i]t is unclear if [the City] will be considered a ‘sanctuary jurisdiction’” under
 15 the Order (*id.* ¶ 4). Nevertheless, the plaintiff variously alleges that it “believes it may be swept
 16 up as a sanctuary jurisdiction under the Executive Order” (*id.*) and that “there is a substantial
 17 probability” that the Order will be “enforce[d]” against it (*id.* ¶ 67).

18 Similarly, the City quotes Section 9(a) of the Order to the effect that “the Attorney
 19 General and the Secretary [of Homeland Security] . . . shall ensure that jurisdictions that willfully
 20 refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive *Federal*
 21 *grants*” (Doc. 12 at 5, emphasis added), and it quotes the Attorney General to the effect that “the
 22 Department of Justice will require jurisdictions seeking or applying for *Department grants* to
 23 certify compliance with Section 1373 as a condition for receiving these awards” (*id.* at 2,
 24 emphasis added). Nevertheless, the City also speculates that the Order “seeks to give two Cabinet
 25 members the unfettered discretion to take away *all* federal funding from Richmond” (*id.* at 4,
 26 emphasis added). Thus, even though Section 9(a) refers only to “Federal grants” and to the
 27 Secretary and Attorney General, the City alleges that it stands to lose all of its federal funding –
 28 both grants and reimbursements – in areas such as social services, housing, and emergency

1 services, including “mandatory entitlement services” (*id.* at 7-10, 17-19). The City does not
 2 allege, however, that any of its federal funding has been withheld or revoked, or that any federal
 3 agency has threatened such action.

4 ARGUMENT

5 A preliminary injunction is “an extraordinary and drastic remedy” that should not be
 6 granted “unless the movant, *by a clear showing*, carries the burden of persuasion.” *Lopez v.*
 7 *Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972
 8 (1997) (per curiam)). The Supreme Court has clarified the requirements for a preliminary
 9 injunction in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Under *Winter*,
 10 “[a] plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the
 11 merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the
 12 balance of equities tips in his favor, *and* that an injunction is in the public interest.” *Id.* at 20
 13 (emphasis added). Critically, this is “a four-part conjunctive test, not . . . a four-factor balancing
 14 test”; thus, *Winter* “reject[ed] the sliding-scale test as to the irreparable-injury prong” previously
 15 used by some courts. *U.S. Bank, N.A. v. SFR Invs. Pool I, LLC*, 124 F. Supp. 3d 1063, 1070 (D.
 16 Nev. 2015); *see Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
 17 (“To the extent that our cases have suggested a lesser standard, they are no longer controlling, or
 18 even viable.”) (footnote omitted). Further, “[t]he party seeking the injunction bears the burden of
 19 proving these elements.” *Campbell v. Feld Entm’t Inc.*, No. 12-CV-4233-LHK, 2013 WL
 20 4510629, at *4 (N.D. Cal. Aug. 22, 2013).

21 Plaintiff’s motion fails for at least three reasons. First, the Executive Order does not
 22 change existing law, but merely instructs the Attorney General and the Secretary of Homeland
 23 Security to “employ all lawful means to ensure the faithful execution” of federal law, including
 24 8 U.S.C. § 1373. *See* Exec. Order No. 13,768, §§ 4, 9, 82 Fed. Reg. at 8,800, 8,801. Second,
 25 Richmond cannot show the imminent irreparable harm necessary for emergency relief because
 26 the Secretary and the Attorney General must take a series of steps before Section 9 of Executive
 27 Order 13,768 could have any tangible effect on the City. Finally, and relatedly, plaintiff lacks a
 28 “likelihood of success” given the justiciability flaws in its complaint. Among them, Richmond

has failed to establish that (1) it has suffered “concrete” injury, as it must under the standing doctrine; (2) it has suffered the kind of substantial harm that the Supreme Court has identified as necessary to overcome ripeness concerns in cases asserting pre-enforcement challenges to agency action; and (3) its claims satisfy the “fitness” element of the ripeness inquiry because unimplemented directives contained in an Executive Order are not fit for judicial review under binding precedent. Thus, because plaintiff’s claims are subject to dismissal on several grounds, it necessarily cannot show a “likelihood of success” on the merits of those claims.

For these reasons, the motion for preliminary injunction must be denied.

I. Plaintiff Cannot Show Irreparable Harm

A. The Supreme Court Requires a Likelihood of Immediate, Concrete Irreparable Harm Before an Injunction May Issue

As reflected in *Winter*, which focused on irreparable harm, *see* 555 U.S. at 22, satisfying the requirement of immediate and irreparable harm is “crucial” to securing a preliminary injunction. *Miller ex rel. NLRB v. California Pac. Med. Ctr.*, 991 F.2d 536, 543 (9th Cir. 1993). The district court in *Winter* had granted a preliminary injunction, relying on a “‘sliding scale’ whereby the required degree of harm increases as the likelihood of success decreases,” and vice versa. *Winter v. Natural Res. Def. Council*, 530 F. Supp. 2d 1110, 1113 n.4 (C.D. Cal. 2008). Preliminary relief was appropriate, the court held, because plaintiffs had demonstrated “a strong likelihood of prevailing on the merits . . . and there [was] a possibility of irreparable harm.” *Id.* at 1118. The Ninth Circuit affirmed on the same basis. *Winter v. Natural Res. Def. Council*, 518 F.3d 658, 697 (9th Cir. 2008).

The Supreme Court reversed. In doing so, the Court noted that its “frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.” 555 U.S. at 22. “Issuing a preliminary injunction based only on a possibility of irreparable harm,” the Supreme Court said, “is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* Thus, a party seeking a preliminary injunction must establish both that “he is *likely* to succeed on the merits [and] that he is *likely* to

1 suffer irreparable harm in the absence of preliminary relief” – as well as “that the balance of
 2 equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20 (emphasis
 3 added); *see Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (plaintiff “must demon-
 4 strate that irreparable injury is likely . . . not merely . . . possible”).

5 Further, “[t]he threat of irreparable harm must . . . be ‘immediate.’” *Arcsoft, Inc. v.*
 6 *Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1071 (N.D. Cal. 2015) (quoting *Caribbean Marine Servs.*
 7 *Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). “A plaintiff must do more than merely allege
 8 imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened
 9 injury as a prerequisite to preliminary injunctive relief.” *Boardman v. Pac. Seafood Grp.*, 822
 10 F.3d 1011, 1022 (9th Cir. 2016). That injury, moreover, must be “real and concrete” rather than
 11 merely “abstract.” *See Los Angeles Mem’l Coliseum Comm’n v. NFL*, 634 F.2d 1197, 1201 (9th
 12 Cir. 1980); *Native Ecosystems Council v. Krueger*, 40 F. Supp. 3d 1344, 1349 (D. Mont. 2014).

13 Finally, where the plaintiff “has failed to establish a likelihood of irreparable harm,” a
 14 court need not even consider the other requirements. *Painsolvers, Inc. v. State Farm Mut. Auto.*
 15 *Ins. Co.*, 685 F. Supp. 2d 1123, 1139 (D. Haw. 2010); *see RasterOps v. Radius, Inc.*, 861 F. Supp.
 16 1479, 1498 (N.D. Cal. 1994).

17 B. The City Cannot Demonstrate a Likelihood of Immediate,
 18 Concrete Irreparable Harm Given the Absence of Any Action
 19 under Section 9 or 8 U.S.C. § 1373

20 Measured against this legal backdrop, Richmond has not established the threat of
 21 “immediate” and “concrete” irreparable harm necessary to secure a preliminary injunction. The
 22 Executive Order subjects the City not to new law, but only to the bounds of existing law. Section
 23 9 directs the Secretary and Attorney General to use their existing legal authority to ensure that
 24 jurisdictions that “willfully refuse to comply with 8 U.S.C. 1373” will not be eligible to receive
 25 Federal grants “to the extent consistent with law.” By its terms, that provision incorporates the
 26 body of law that governs federal grants and defines when they can be declined for failing to
 27 satisfy a condition – here, compliance with Section 1373. By specifying that the authority under
 28 Section 9 be exercised “to the extent consistent with law,” the President has directed the Secretary

1 and the Attorney General to follow the governing legal limitations, such as their existing authority
2 to enforce conditions on grant eligibility and the procedural requirements for making or revoking
3 grants. *See, e.g.*, 28 C.F.R. pt. 18 (Office of Justice Programs Hearing and Appeal Procedures);
4 44 C.F.R. § 206.440 (appeals in Hazard Mitigation Grant Program). There is no indication that
5 the Order will be implemented inconsistent with those limitations or with any other applicable
6 laws.

7 Furthermore, Executive Order 13,768 is not self-executing. Rather, the Order sets forth
8 policies and priorities, and directs the Departments of Justice and Homeland Security to take
9 additional discretionary actions going forward to enforce federal immigration laws more fully.
10 Many of the Order's provisions thus merely direct these agencies to begin internal preparations to
11 fully enforce federal law. For example, the Order directs the Secretary of Homeland Security to
12 promulgate certain regulations within a year, and it directs the Secretary and the Attorney General
13 to develop a program to ensure adequate prosecution of criminal immigration offenses. *See* Exec.
14 Order No. 13,768, §§ 6, 11, 82 Fed. Reg. at 8,800, 8,801. In several other respects, the Order is a
15 presidential directive to the Secretary and Attorney General guiding their future exercise of
16 discretion in the enforcement of immigration law. *See Arizona Dream Act Coal.*, ___ F.3d at ___,
17 2017 WL 461503, at *10 ("By necessity, the federal statutory and regulatory scheme, as well as
18 federal case law, vest the Executive with very broad discretion to determine enforcement
19 priorities."). Similarly, 8 U.S.C. § 1373 sets forth a federal policy and several prohibitions, but
20 does not provide a concrete enforcement mechanism.

21 Section 9 of the Order directs the Secretary to designate, in his discretion and to the extent
22 consistent with law, whether a state or local government constitutes a "sanctuary jurisdiction."
23 Section 9 likewise directs the Secretary and the Attorney General to ensure that such jurisdictions
24 are ineligible to receive federal grants, "except as deemed necessary for law enforcement
25 purposes." By expressly directing that such future discretionary agency actions be exercised
26 "consistent with law," *see* Exec. Order No. 13,768, § 9, the Order incorporates, among other
27 things, the law regarding grant conditions and procedures.
28

1 The same is true of the Order’s direction that the Attorney General “take appropriate
 2 enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute,
 3 policy, or practice that prevents or hinders the enforcement of Federal law.” *Id.* § 9(a), 82 Fed.
 4 Reg. at 8,801. The City fails to acknowledge that existing law and practice already contemplate
 5 certain federal actions against state and local laws that frustrate the federal regulation of
 6 immigration. For example, the Federal Government may seek to enjoin a state or local statute
 7 that impermissibly conflicts with the government’s “broad, undoubted power over the subject of
 8 immigration and the status of aliens.” *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492,
 9 2497 (2012); *see, e.g., United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United*
 10 *States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). As noted above, in fact, the Attorney General
 11 has determined that any “appropriate enforcement action” under Section 9 will take that form.

12 As a result, a series of future actions must occur before implementation of Section 9 or 8
 13 U.S.C. § 1373 could have any concrete effect on Richmond: Among other things, (1) the
 14 Attorney General and the Secretary of Homeland Security must determine exactly what
 15 constitutes “willful refusal to comply with 8 U.S.C. § 1373”; (2) the Secretary must identify any
 16 state or local governments that constitute “sanctuary jurisdictions” and make formal designations
 17 to that effect; (3) the Secretary and the Attorney General must decide which of their agencies’
 18 grants are “necessary for law enforcement purposes”; (4) the Secretary and the Attorney General
 19 must determine how to “ensure” that sanctuary jurisdictions are ineligible to receive the relevant
 20 grant funds; and (5) the Secretary and the Attorney General must determine how to implement
 21 those actions “consistent with law.” The Order thus explicitly contemplates that some time will
 22 be required for implementation.⁵

23
 24 ⁵ *See, e.g.,* Exec. Order No. 13,768, § 6 (requiring Secretary to promulgate regulations “to
 25 ensure the assessment and collection of all fines and penalties that the Secretary is authorized
 26 under the law to assess and collect from aliens unlawfully present in the United States and from
 27 those who facilitate their presence in the United States”); § 8 (requiring Secretary to enter into
 28 agreements with state and local officials under Section 287(g) of INA); § 11 (requiring Secretary
 and Attorney General “to develop and implement a program that ensures that adequate resources
 are devoted to the prosecution of criminal immigration offenses”); § 15 (requiring Secretary and
 Attorney General to “report on the progress of the directives contained in this order within 90
 days . . . and again within 180 days.”); *see also* Ltr. from Samuel R. Ramer, Acting Ass’t Att’y
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1 Richmond does not allege that the Federal Government has taken any of these actions.
 2 Nor does the City claim that it has been designated as a “sanctuary jurisdiction” or that it has been
 3 denied any federal funds. The City likewise does not allege that it has been notified that any
 4 funds will be denied. None of those actions has occurred, and those events may never occur. The
 5 City’s conjecture about the possibility of future harm does not justify preliminary injunctive
 6 relief. *See Winter*, 555 U.S. at 22; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674
 7 (1931) (An injunction “will not be granted against something merely feared as liable to occur at
 8 some indefinite time in the future.”).

9 In arguing irreparable harm, plaintiff asserts, “*If* federal funds are withdrawn, the result
 10 will be catastrophic” (Doc. 12 at 17, emphasis added). But that begs the question of whether the
 11 City has shown a threat of “immediate” irreparable harm, which it has not. *See Arcsoft, Inc.*, 153
 12 F. Supp. 3d at 1071. First, plaintiff argues that it provides certain services whose costs the federal
 13 government later reimburses and that it must choose, therefore, either to provide the services
 14 without an assurance of reimbursement or to discontinue the services (Doc. 12 at 18). But far
 15 from irreparable harm, this is instead a risk that grant recipients always face: If the terms of the
 16 grant require compliance with certain federal laws, such as Section 1373, and those terms are not
 17 followed, then the recipient is in violation of the grant conditions, and there is a risk that the
 18 Federal Government may enforce those terms to the detriment of the grantee and its financial
 19 planning. On the other hand, if the terms of the grant do not require compliance with Section
 20 1373, the Executive Order does not purport to give the Secretary or Attorney General the
 21 unilateral authority to alter those terms. This is underscored by the fact that Executive Order
 22 13,768 does not change the law, but only instructs the Attorney General and the Secretary of
 23 Homeland Security to enforce existing law. Moreover, the City’s claimed harm is economic in
 24 nature, and “[i]t is well established that mere economic injury does not constitute irreparable
 25 harm.” *Kitazato v. Black Diamond Hosp. Invs., LLC*, 655 F. Supp. 2d 1139, 1147 (D. Haw.
 26

27 Gen., Office of Legis. Affairs, to Sens. Elizabeth Warren and Edward J. Markey (Mar. 7, 2017)
 28 (Attachment 1 hereto); Declined Detainer Outcome Report, FAQs, [https://www.ice.gov/declined-](https://www.ice.gov/declined-detainer-outcome-report)
 declined-detainer-outcome-report.

1 2009); *see Sampson v. Murray*, 415 U.S. 61, 89 (1974) (“Mere injuries, however substantial, in
2 terms of money, time and energy necessarily expended in the absence of a[n] [injunction], are not
3 enough. The possibility that adequate compensatory or other corrective relief will be available at
4 a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable
5 harm.”); *Ali v. United States*, 932 F. Supp. 1206, 1210 (N.D. Cal. 1996) (“Economic injury alone
6 does not support a finding of irreparable harm.”).

7 Second, the City asserts that the Executive Order subjects Richmond to “uncertainty”
8 regarding its budgetary decision-making (Doc. 12 at 18). Budgetary “uncertainty,” however, is
9 not the “real and concrete injury” sufficient to justify a preliminary injunction. *See Los Angeles*
10 *Mem’l Coliseum Comm’n*, 634 F.2d at 1201. Further, governmental budgeting always suffers
11 from some degree of uncertainty, in relation to both costs (which are based on services provided)
12 and income (which is based in part on tax revenues). In other words, the plaintiff cannot
13 accurately claim that an otherwise certain endeavor is now less certain. Legal restrictions,
14 moreover, always create some risk, whether the likelihood of enforcement is low or high.

15 Additionally, even if any hypothetical “uncertainty” regarding the City’s future receipt of
16 federal grants constituted irreparable harm (which it does not), an injunction setting aside the
17 Order would not remedy any such harm. As noted already, the Order does not alter or expand
18 existing law governing the Federal Government’s discretion to revoke or deny a grant where the
19 grantee violates legal requirements. Thus, any uncertainty the plaintiff might hypothetically face
20 would exist regardless of whether the Court were to enjoin the Order itself. Additionally, the
21 terms and conditions of an existing grant are governed by the grant documents, and any forced
22 return of grant funds already provided could occur only pursuant to those terms and conditions.

23 Third, the City asserts that it will suffer irreparable harm in absence of an injunction
24 because the Executive Order has “eroded” the trust of Richmond residents in law enforcement
25 and made residents “reluctant to cooperate out of fear and concern about [the City’s] relationship”
26 with federal immigration authorities (Doc. 12 at 18). As noted earlier, however, the irreparable
27 harm needed to secure a preliminary injunction must be “real and concrete” rather than merely
28 “abstract.” *See Los Angeles Mem’l Coliseum Comm’n*, 634 F.2d at 1201; *Native Ecosystems*

1 *Council*, 40 F. Supp. 3d at 1349. “Fear and concern” are far from “concrete” in themselves, and
 2 any concrete effects of a “reluctance to cooperate” would be far from “immediate.”

3 Fourth, the City asserts that “the deprivation of constitutional rights unquestionably
 4 constitutes irreparable injury” (Doc. 12 at 17). The City, however, does not allege a “depriva-
 5 tion” of its “constitutional rights.” Instead, Richmond primarily points to a claimed violation of
 6 the constitutional *structures* that govern relationships among the branches of the Federal
 7 Government and between the federal and state governments, which is insufficient to establish
 8 irreparable injury. “[W]hile a violation of constitutional rights can constitute *per se* irreparable
 9 harm . . . *per se* irreparable harm is caused only by violations of ‘personal’ constitutional rights . .
 10 . to be distinguished from provisions of the Constitution that serve ‘structural’ purposes, like the
 11 Supremacy Clause.” *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 367
 12 (S.D.N.Y. 2008) (internal quotation marks omitted), *rev’d on other grounds*, 556 F.3d 114 (2d
 13 Cir. 2009); *accord Prof’l Towing & Recovery Operators of Ill. v. Box*, No. 08 C 4096, 2008 WL
 14 5211192, at *13 (N.D. Ill. Dec. 11, 2008) (“[T]he Court concludes that Plaintiffs are not entitled
 15 to a presumption of irreparable harm because the constitutional rights at stake here are not
 16 ‘personal’ in nature.”); *see Am. Trucking Ass’ns v. City of Los Angeles*, 577 F. Supp. 2d 1110,
 17 1127 (C.D. Cal. 2008) (noting that “[i]n the case of Supremacy Clause violations,” the
 18 presumption of irreparable harm “is not necessarily warranted”), *rev’d on other grounds*, 559
 19 F.3d 1046 (9th Cir. 2009). Not surprisingly, therefore, the cases on which plaintiff relies address
 20 alleged violations of *individual* constitutional rights, none of which are involved here (Doc. 12 at
 21 17). *See de Jesús Ortega Melendres v. Arpaio*, 695 F.3d 990, 994-95, 1002 (9th Cir. 2012)
 22 (alleging that local law enforcement officers had engaged in racial profiling in violation of
 23 plaintiffs’ individual Fourth and Fourteenth Amendment rights); *see also Elrod v. Burns*, 427
 24 U.S. 347, 373 (1976) (holding that “[t]he loss of *First Amendment* freedoms, for even minimal
 25 periods of time, unquestionably constitutes irreparable injury”) (emphasis added).⁶

27 ⁶ Besides *Elrod* and *de Jesús Ortega Melendres*, the City relies on *Washington v. Trump*,
 28 847 F.3d 1151 (9th Cir. 2017), in relation to irreparable harm (Doc. 12 at 17). *Washington* did
 not, however, address whether the deprivation of constitutional rights alone constitutes irreparable
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1 In sum, the plaintiff has not demonstrated, and cannot “demonstrate[,] that irreparable
2 injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22.

3 II. The City Cannot Establish a Likelihood of Success on the Merits
4 Because, Among Other Things, Its Claims Are Non-Justiciable

5 A party seeking a preliminary injunction must also “establish that [it] is *likely* to succeed
6 on the merits.” *Winter*, 555 U.S. at 20 (emphasis added). Richmond cannot establish such a
7 likelihood in this case because its claims are non-justiciable under principles of ripeness and
8 standing. *See Pollara v. Radiant Logistics Inc.*, No. CV 12-0344 GAF (SPX), 2012 WL
9 12887095, at *5 (C.D. Cal. Sept. 13, 2012) (noting that “standing to bring a claim . . . is a
10 necessary predicate to demonstrate a likelihood of success on the merits”); *Timbisha Shoshone*
11 *Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (E.D. Cal. 2010) (“Because [Defendant] raises
12 serious questions as to the Court’s subject matter jurisdiction over Plaintiffs’ claim, Plaintiffs fail
13 to establish the likelihood of success on the merits of their claims.”). For the same reasons that
14 plaintiff cannot establish the “irreparable injury” needed for a preliminary injunction, it also
15 cannot show a likelihood of success on the merits because its claims are subject to dismissal.
16 *Winter*, 555 U.S. at 20.

17 Under Article III of the Constitution, the jurisdiction of the federal courts extends only to
18 “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. Matters outside this rubric are “non-
19 justiciable.” *Ore. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc’ns, Inc.*, 288
20 F.3d 414, 416 (9th Cir. 2002). Two principles of justiciability are involved here: standing and
21 ripeness. “While standing is concerned with *who* is a proper party to litigate a particular matter,
22 the doctrines of mootness and ripeness determine *when* that litigation may occur.” *Haw. Cty.*
23 *Green Party v. Clinton*, 14 F. Supp. 2d 1198, 1201 (D. Haw. 1998). Where a plaintiff lacks
24 standing or its claims are unripe, the court lacks jurisdiction. *See Nat’l Inst. of Family & Life*
25 *Advocates v. Harris*, 839 F.3d 823, 832 (9th Cir. 2016).

26
27
28 harm. Rather, the decision discussed the sources of actual harm due to the challenged action. *See*
847 F.3d at 1169.

1 To satisfy the “irreducible constitutional minimum” of standing, a plaintiff must
 2 demonstrate an “injury in fact,” a “fairly traceable” causal connection between the injury and
 3 defendant’s conduct, and redressability. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
 4 102-03 (1998). The injury needed for constitutional standing must be “concrete,” “objective,”
 5 and “palpable,” not merely “abstract” or “subjective.” See *Whitmore v. Arkansas*, 495 U.S. 149,
 6 155 (1990); *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975). Additionally, the injury must be
 7 “certainly impending” rather than “speculative.” *Whitmore*, 495 U.S. at 157, 158. “[S]tanding is
 8 perhaps the most important of [the jurisdictional] doctrines.” *FW/PBS, Inc. v. City of Dallas*, 493
 9 U.S. 215, 231 (1990) (internal quotation marks omitted).

10 Constitutional justiciability also requires that a dispute be ripe for judicial consideration –
 11 that is, that the challenged action “has been formalized and its effects felt in a concrete way by the
 12 challenging parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In other words, “[a]
 13 claim is not ripe for adjudication [under the Constitution] if it rests upon contingent future events
 14 that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523
 15 U.S. 296, 300 (1998) (internal quotation marks omitted).

16 In assessing constitutional ripeness in the context of a “pre-enforcement challenge” to a
 17 statutory or administrative enactment, the courts consider “both the fitness of the issues for
 18 judicial decision and the hardship to the parties of withholding court consideration.” *Abbott*
 19 *Labs.*, 387 U.S. at 149. “A claim is fit for decision if the issues raised are primarily legal, do not
 20 require further factual development, and the challenged action is final.” *Standard Alaska Prod.*
 21 *Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). In other words, a court considers whether the
 22 court and the parties would “benefit from deferring review until the agency’s policies have
 23 crystallized and the question arises in some more concrete and final form.” *Eagle-Picher Indus.,*
 24 *Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985) (internal quotation marks omitted); see *U.S. W.*
 25 *Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1119 (9th Cir. 1999) (finding that claim was not
 26 fit for decision where administrative proceedings had not concluded and court would “benefit”
 27 from outcome of those proceedings). Finally, “[t]o meet the hardship requirement, a litigant must
 28 show that withholding review would result in direct and immediate hardship and would entail

1 more than possible financial loss.” *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325
 2 (9th Cir. 1989) (internal quotation marks omitted).

3 Applying these standards here, the plaintiff cannot show the “injury in fact” needed for
 4 constitutional standing, *Steel Co.*, 523 U.S. at 102-03, and its claims are not constitutionally ripe
 5 for judicial review, *Abbott Labs.*, 387 U.S. at 148-49. Given the many steps that must be taken
 6 before any federal funds might be withheld under Section 9 of the Executive Order and 8 U.S.C.
 7 § 1373, *see supra* at 14, the City has not suffered any “concrete,” “objective,” and “palpable”
 8 injury. *See Whitmore*, 495 U.S. at 155; *Bigelow*, 421 U.S. at 816-17. Although plaintiff alleges
 9 that the Order has created “uncertainty” regarding its budgetary decision-making (Doc. 12 at 18),
 10 any such “uncertainty” would be “abstract” and “subjective” rather than “concrete.” *See*
 11 *Whitmore*, 495 U.S. at 155; *Bigelow*, 421 U.S. at 816-17.⁷

12 The same is true of the City’s assertion that the Order has “eroded” the trust of residents in
 13 local law enforcement and made residents “reluctant to cooperate out of fear and concern about
 14 [law enforcement’s] relationship” with federal immigration authorities (Doc. 12 at 18): “fear and
 15 concern” are obviously “abstract” and “subjective” rather than “concrete.” The City also asserts
 16 that this alleged “reluctance” “threatens the safety and welfare of Richmond’s residents” (*id.*).
 17 The Order, however, reflects a judgment that public safety is best served by identifying and
 18 removing aliens who are unlawfully present, and the City’s contrary assertion is speculative.

19 Further, plaintiff’s claims are not constitutionally ripe because Section 9 of the Order “has
 20 [not] been formalized and its effects felt in a concrete way.” *Abbott Labs.*, 387 U.S. at 148-49.
 21 Implementation of Section 9 “rests upon [several] contingent future events” – including
 22 clarification of some of its terms – and those terms may ultimately be defined to exclude the City
 23 or its grants or otherwise to greatly diminish the Order’s “anticipated” impact. *See Texas*, 523
 24 U.S. at 300. Because Section 9 has not yet been implemented and the Secretary of Homeland
 25 Security and Attorney General must take several actions before that can occur, this Court would

26
 27 ⁷ The City clearly lacks standing to seek an order against “declar[ing] or render[ing] any
 28 jurisdiction ineligible for federal funds” (Doc. 12 at 1, emphasis added), in that plaintiff cannot
 show an “injury in fact” in relation to the eligibility or ineligibility of every jurisdiction in the
 country.

1 greatly “benefit from deferring review” until the parameters of its implementation “have
2 crystallized and the question arises in some more concrete and final form” that is “fit” for judicial
3 decision. *Eagle-Picher Indus., Inc.*, 759 F.2d at 915; *see U.S. W. Commc’ns*, 193 F.3d at 1119;
4 *see also Abbott Labs.*, 387 U.S. at 149.

5 For the same reason, plaintiff cannot rely on case law regarding pre-enforcement
6 challenges to statutes or other government actions under a “threat of prosecution” (Doc. 12 at 20
7 n.4). *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (noting that “plaintiff
8 could bring a preenforcement suit when he has alleged an intention to engage in a course of
9 conduct arguably affected with a constitutional interest, but proscribed by a statute, and there
10 exists a credible threat of prosecution thereunder”) (internal quotation marks omitted); *see also*
11 *MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 128-129 (2007). Until the Attorney General
12 and Secretary of Homeland Security resolve pending questions regarding implementation of the
13 Executive Order, it is unknown what could prompt the Secretary and Attorney General to take
14 action against any jurisdiction under Section 9, much less whether they might take action against
15 Richmond specifically.

16 Finally, the uncertainties surrounding the implementation of Section 9 and the need for
17 “factual development” greatly outweigh any “hardship” to the City from awaiting those
18 developments. *Standard Alaska Prod. Co.*, 874 F.2d at 627. As noted already, several steps must
19 be taken before Section 9 can be implemented, including a determination as to what constitutes a
20 “sanctuary jurisdiction,” the specific grants covered, and how to limit those grants “consistent
21 with law.” Those determinations will have a bearing on whether Section 9 is eventually applied
22 to the plaintiff or some federal grants that currently benefit the plaintiff. Thus, any “hardship” to
23 the City is far from “immediate,” and its protestation of budgetary “uncertainty” does not
24 constitute actual “financial loss” – which, even where it occurs, does not qualify as “hardship”
25 under this analysis. *See Winter*, 900 F.2d at 1325.

26 Aside from the lack of justiciability of the City’s claims, the decisions recently made
27 regarding implementation of the Executive Order greatly diminish any likelihood of success on
28 the merits. *See supra* at 8. For example, Richmond cannot possibly argue that the potential to

lose grants from the Department of Justice and the Department of Homeland Security constitutes “coercion” (Doc. 12 at 13) akin to a State’s potential loss of all Medicaid funding. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2602 (2012). Similarly, since the designation of “sanctuary jurisdictions” under the Order will not be based solely on any refusal to comply with requests by federal immigration officials to detain aliens, the plaintiff cannot argue that the Order violates the Tenth Amendment by “demanding that state and local governments detain individuals who may be subject to removal at the request of federal officials” (Doc. 12 at 14).⁸ And Richmond officials and employees would not be unconstitutionally “commandeered” (*id.*) if the Attorney General took “appropriate enforcement action” by filing a civil action asserting that the City’s law or policy is preempted by federal law. *See, e.g., United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). The same is true of plaintiff’s claims under the Separation of Powers, the Spending Clause, and the Due Process Clause. Moreover, the constitutionality of 8 U.S.C. § 1373 itself is well-established. *See City of N.Y. v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

III. The Public Interest and the Balance of Equities Militate Against the Injunction Sought

Lastly, a party seeking a preliminary injunction must “establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Where the Federal Government is the defendant, these factors “merge” into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The most pertinent and concretely expressed public interest in relation to this case is contained in 8 U.S.C. § 1373, which expresses the public interest in supporting the enforcement of federal immigration law. Section 9 of the Order is meant simply to “ensure” compliance with that statute. *See* Exec. Order No. 13,768, § 9(a), 82 Fed. Reg. at 8,801. Therefore, the public interest lies in allowing the Executive Branch to pursue the necessary steps to implement this Order. *See N.D. v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010) (noting that “it is obvious that compliance with the law is in the public interest”); *Rubin ex rel.*

⁸ For the same reason, the Order does not “expos[e] the [City] to liability under the Fourth Amendment” (Doc. 12 at 15).
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1 *NLRB v. Vista del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1108 (C.D. Cal. 2015) (stating
 2 that “the public interest favors ensuring compliance with federal law”). Additionally, the public
 3 interest prohibits judicial “advisory opinions,” which the City’s motion would require this Court
 4 to render in relation to an Executive Order that has not yet been implemented. *See Coal. for a*
 5 *Healthy Cal. v. FCC*, 87 F.3d 383, 386 (9th Cir. 1996).

6 IV. No Injunction Should Issue Against the President

7 Even if an injunction were otherwise appropriate, it should not be issued against the
 8 President of the United States, whom the City has chosen to name as a defendant. A request to
 9 enjoin the President “draws the Court into serious separation-of-powers issues. . . . [T]he
 10 Supreme Court has sent a clear message that an injunction should not be issued against the
 11 President for official acts.” *Newdow v. Bush*, 391 F. Supp. 2d 95, 105, 106 (D.D.C. 2005); *see*
 12 *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir.
 13 1996) (noting that the Supreme Court has issued a “stern admonition” that injunctive relief
 14 against the President personally is an “extraordinary measure not lightly to be undertaken”).

15 V. Any Preliminary Injunction Herein Should Be
 16 Limited to the Plaintiff

17 Even if the Court were to conclude that plaintiff has satisfied the requirements for a
 18 preliminary injunction, the Court should not enter the “nationwide” injunction that the City seeks
 19 (Doc. 12 at 1). “[A]n injunction must be narrowly tailored to affect only those persons over
 20 which [the court] has power, and to remedy only the specific harms shown by the plaintiffs, rather
 21 than to enjoin all possible breaches of the law.” *Price v. City of Stockton*, 390 F.3d 1105, 1117
 22 (9th Cir. 2004) (internal quotation marks omitted). Thus, courts routinely deny requests for
 23 nationwide injunctive relief. *See Dep’t of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying
 24 nationwide injunction insofar as it “grants relief to persons other than” named plaintiff); *Skydive*
 25 *Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1116 (9th Cir. 2012) (affirming district court’s
 26 refusal to grant nationwide relief).

27 Here, the preliminary injunction is sought by the City of Richmond, which has no
 28 legitimate interest in the Executive Order’s effect on other jurisdictions. Thus, the Court should

1 not enter an injunction that is broader than necessary to prevent any irreparable harm to the
 2 plaintiff (although, as discussed above, there is none). Any injunction should not extend to other
 3 state or local governments. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163
 4 (2010) (narrowing injunction in part because the plaintiffs “do not represent a class, so they could
 5 not seek to enjoin such an order on the ground that it might cause harm to other parties”); *see also*
 6 *Envil. Def. Fund v. Marsh*, 651 F.2d 983, 1006 (5th Cir. 1981) (court must take into account “the
 7 larger interests of society that might be adversely affected by an overly broad injunction”). A
 8 nationwide injunction would not only be overbroad; it also would effectively enable one district
 9 judge to prevent the government from defending the constitutionality of the Executive Order in
 10 any other court, and interfere with the development of the law in other circuits. *See United States*
 11 *v. AMC Entm’t, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008).

12 Furthermore, a nationwide injunction would be especially inappropriate here because
 13 Section 9 of the Order would impact different jurisdictions differently, once steps are taken to
 14 implement it “consistent with law.” The way in which the Order might eventually apply to any
 15 individual jurisdiction will depend on that jurisdiction’s policies and practices and the specific
 16 federal grant terms and procedures that are at issue with respect to the grants received or applied
 17 for by the jurisdiction.⁹ No nationwide, universal injunction could possibly account for that
 18 diversity.

19 CONCLUSION

20 Accordingly, plaintiff’s motion for preliminary injunction should be denied.

21 Dated: April 18, 2017

22
23 Respectfully submitted,

24 CHAD A. READLER
 25 Acting Assistant Attorney General

26 ⁹ Thus, this case is distinguishable from *Washington v. Trump*, 847 F.3d 1151 (9th Cir.
 27 2017), on which the plaintiff relies (Doc. 12 at 10). There, the plaintiffs sought a nationwide
 28 injunction regarding an Executive Order that applied to individuals, whose circumstances would
 not depend on their geographical locations. Here, in contrast, the challenged Order will be
 applied, if at all, on a geographical basis, to each jurisdiction according to its circumstances.
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