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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF RICHMOND, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 3:17-cv-01535-WHO **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** Date: July 19, 2017 Time: 2:00 p.m.

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on Wednesday, July 19, 2017, at 2:00 p.m., or as soon thereafter as counsel may be heard, before The Honorable William H. Orrick, in Courtroom 2, 17th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the defendants will move, and hereby do move, for dismissal of this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the following Memorandum of Points and Authorities, the evidence and records on file in this action, and any other written or oral evidence or argument that may be presented at or before the time this motion is heard by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

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). Section 9 of the Order, which is the subject of this litigation, directs the Attorney General and the Secretary of Homeland Security ("Secretary"), "in their discretion and to the extent consistent with law, [to] ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 . . . are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes . . . ." *Id.* § 9(a). Section 9 also instructs the Attorney General to take "appropriate enforcement action" against any entity that violates Section 1373 or has a statute or policy that "prevents or hinders the enforcement of Federal law." *Id.* Section 1373 provides, among other things, that no government entity or official may prohibit or restrict the sending or receiving of information regarding the citizenship or immigration status of any individual to federal immigration authorities. 8 U.S.C. § 1373(a).

The Order is a presidential directive, directed to the Attorney General, the Secretary, and other federal officials. It does not purport to alter the existing requirements of Section 1373 (or any other federal law), to impose new burdens on state or local jurisdictions, or to expand the legal authority of the Attorney General or the Secretary. Rather, it simply announces the policy of the Executive Branch and directs the Attorney General and the Secretary, 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 and to take enforcement action as appropriate. *See* Exec. Order No. 13,768, § 9(a).

The Attorney General, in the exercise of his discretion under Section 9(a) of the Order and his overall responsibility to advise executive department heads, *see* 28 U.S.C. § 512; 28 C.F.R. § 0.5(c), has issued authoritative, binding guidance regarding the implementation of Section 9(a). *See* Mem. from Att'y Gen. for All Dep't Grant-Making Components (May 22, 2017) (Attachment 1 hereto) (hereinafter AG Mem.).[1] Among other things, the AG Memorandum provides (1) that the grant eligibility provision in Section 9(a) applies "solely to federal grants administered by the Department of Justice or the Department of Homeland Security ["DHS"], and not to other sources of federal funding[,]" (2) that the Department of Justice ("DOJ") will require jurisdictions applying for certain DOJ-administered grants "to certify their compliance with federal law, including 8 U.S.C. § 1373," (3) that the certification will be required only where the agency is "statutorily authorized to impose such a condition," (4) that "[a]ll grantees will receive notice of their obligation to comply with section 1373," and (5) that only "jurisdiction[s] that fail[] to certify compliance with section 1373 will be ineligible to receive [an] award[]." AG Mem. at 1-2.

The AG Memorandum further establishes that Richmond lacks standing in this case and that its claims are unripe; thus, all of plaintiff's claims herein should be dismissed for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Further, to the extent the Court addresses plaintiff's individual claims, each claim must be dismissed under either Rule

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[1] This Court can freely consider the AG Memorandum on this motion to dismiss without affecting the nature of the motion. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) ("[I]t is proper for the district court to take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss.") (internal quotation marks omitted); *Aguiar v. Wells Fargo Bank, N.A.*, No. 12-CV-03653 YGR, 2012 WL 5915124, at *2 (N.D. Cal. Nov. 26, 2012) (stating that court "may consider matter that is properly the subject of judicial notice, such as court filings and other public records, without converting a motion to dismiss into one for summary judgment").

12(b)(6), particularly in light of the AG Memorandum. Given that the grant eligibility provision in Section 9(a) will apply only to certain grants administered by DOJ and DHS and only where the imposition of such a condition is statutorily authorized, and given that grantees will be asked to certify their compliance with 8 U.S.C. § 1373 as part of the grant process, the City cannot state viable claims that the grant eligibility provision violates the Tenth Amendment, the Separation of Powers, or the Spending Clause (Doc. 1 ¶¶ 88-101). Similarly, the AG Memorandum makes clear that Section 9(a) violates neither the Fourth Amendment nor the vagueness principles of the Due Process Clause (*id.* ¶¶ 102-113). This is especially true given that these claims are facial challenges to an Executive Order, and plaintiff cannot show that "no set of circumstances exists under which the [Order] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

And finally, Richmond has also failed to state a claim on which relief can be granted regarding its compliance with Section 1373 (Doc. 1 ¶¶ 114-117) because the City identifies no cause of action authorizing such relief and a ruling on that subject would constitute a prohibited advisory opinion.

Accordingly, the Court should dismiss plaintiff's Complaint for failure to state a claim on which relief can be granted and for lack of subject matter jurisdiction.

ISSUES PRESENTED

1. Whether the plaintiff has established its standing and the ripeness of its claims.

2. Whether the plaintiff can challenge an Executive Order that constitutes only an internal Executive Branch directive and has no direct effect on the plaintiff.

3. Whether the plaintiff has stated a viable claim that Section 9(a) of the Executive Order violates the Tenth Amendment.

4. Whether the plaintiff has stated a viable claim that Section 9(a) of the Executive Order violates the Separation of Powers.

5. Whether the plaintiff has stated a viable claim that Section 9(a) of the Executive Order exceeds the Spending Power.

6. Whether the plaintiff has stated a viable claim that Section 9(a) of the Executive Order violates the Fourth Amendment.

7. Whether the plaintiff has stated a viable claim that Section 9(a) of the Executive Order is unconstitutionally vague in violation of the Due Process Clause.

8. Whether the plaintiff has stated a viable claim for declaratory relief regarding its compliance with 8 U.S.C. § 1373.

STATUTORY AND ADMINISTRATIVE 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 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, 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*, 855 F.3d 957, 967 (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 Foreign Sanctions Evaders With Respect to Iran and Syria"). The Secretary 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).[2]

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 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); *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).

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), 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), *available at*

[2] This memorandum is available at https://www.dhs.gov/ sites/ default/ files/ publications/ 17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

https://oig.justice.gov/reports/2016/1607.pdf. Although the Inspector General observed that some applications of certain local ordinances might be inconsistent with Section 1373, *id*. at 4-8, the report nevertheless noted that "no one at DHS . . . 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, and it instructs certain federal officials 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 local officials under Section 287(g) of the INA (referred to above), to develop a program to ensure adequate prosecution of criminal immigration offenses, and to establish an office to provide certain services to victims of crimes committed by removable aliens. *Id*. §§ 6, 7, 8, 11, 13, 82 Fed. Reg. at 8,799-802. Throughout, the Order specifies that federal officials are to take these actions as "permitted by law" or as "consistent with law." *Id*. §§ 7, 8, 9(a), 10(b), 12, 14, 17, 18(b), 82 Fed. Reg. at 8,799-802.

Section 9 of the Executive Order provides that "[i]t is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373." Section 9(a) directs federal agencies to achieve that policy:

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

Id. § 9(a), 82 Fed. Reg. at 8,801. Section 9 also instructs the Director of the Office of Management and Budget to "obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction." *Id.* § 9(c), 82 Fed. Reg. at 8,801.

III. <u>The AG Memorandum</u>

On May 22, 2017, the Attorney General issued a Memorandum regarding the implementation of Executive Order 13,768. *See* AG Mem. at 1. The Attorney General has a statutory duty to advise executive department heads on "questions of law," 28 U.S.C. § 512, and to furnish formal legal opinions to executive agencies, 28 C.F.R. § 0.5(c). Also, although the Secretary principally administers the immigration laws, the INA provides that "the determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(c)(1). By longstanding tradition and practice, the Attorney General's legal opinions are treated as authoritative by the heads of executive agencies. *See, e.g.*, *Tenaska Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 439 (1995); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1319-20 (2000).

The AG Memorandum sets forth in a formal, conclusive manner the administration's interpretation of Section 9(a) of the Executive Order. The Memorandum specifies that the Order does not "purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect," but rather instructs those officials to take certain action, "to the extent consistent with the law." AG Mem. at 2; *see Bldg.*

& Const. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 33 (D.C. Cir. 2002) (noting that the President is merely wielding his "supervisory authority over the Executive Branch" where he "directs his subordinates" to take certain action "but only '[t]o the extent permitted by law'"). The AG Memorandum further clarifies that the grant eligibility provision in Section 9(a) is limited "solely to federal grants administered by [DOJ] or [DHS]," and to grants requiring the applicant to "certify . . . compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award." AG Mem. at 1, 2. Only "jurisdiction[s] that fail[] to certify compliance with [8 U.S.C. § 1373] will be ineligible to receive [an] award[]" pursuant to the grant eligibility provision. *Id.* In other words, the provision applies only where an applicant or grant recipient has had the choice either to certify compliance with 8 U.S.C. § 1373 as an express condition of eligibility to participate in a certain grant program, or to refuse to certify compliance and thereby render itself ineligible to participate in the program. The AG Memorandum also makes clear that, with respect to Section 1373 compliance conditions, DOJ and DHS may impose such conditions only pursuant to the exercise of "existing statutory or constitutional authority," and only where "grantees will receive notice of their obligation to comply with section 1373." AG Mem. at 2. Lastly, the Attorney General states that, "[a]fter consultation with the Secretary of Homeland Security, [he has] determined that, for purposes of enforcing the Executive Order, the term 'sanctuary jurisdiction' will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" *Id.*

PROCEDURAL BACKGROUND

Richmond filed this action on March 21, 2017 (Doc. 1). Plaintiff filed a motion for preliminary injunction against the implementation of Section 9 of the Executive Order (Doc. 12), which the Court denied as moot after granting similar motions in the related cases of *City & County of San Francisco v. Trump*, No. 17-cv-00485-WHO, and *County of Santa Clara v. Trump*, No. 17-cv-00574-WHO, on April 25, 2017 (Doc. 25). Defendants filed a motion for reconsideration or clarification of the preliminary injunction on May 23, 2017 (No. 17-cv-00485-WHO Doc. 107), which remains pending.

ARGUMENT

A claim should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure if the court lacks subject matter jurisdiction to consider it. The jurisdiction of the federal courts is limited to "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and "the party asserting subject matter jurisdiction has the burden of proving its existence," *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Additionally, a claim should be dismissed under Rule 12(b)(6) if it "fail[s] to state a claim upon which relief can be granted." A motion under Rule 12(b)(6) "tests the legal sufficiency" of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On such a motion, the district court accepts all "plausible," "well-pleaded" factual allegations as true, *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 315 (9th Cir. 2017); *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016), but need not accept "a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint is subject to dismissal if it fails to "state a claim to relief that is plausible on its face." *Id.* "A complaint may be dismissed for failure to state a claim where the factual allegations do not raise the right to relief above the speculative level." *In re ATM Fee Antitrust Litig.*, No. C 04-2676 CRB, 2010 WL 2557519, at *4 (N.D. Cal. June 21, 2010).

Plaintiff's Complaint contains six claims: The first through fourth Claims for Relief allege that the Executive Order, especially Section 9(a),[3] violates the Tenth Amendment, the constitutional Separation of Powers, the Spending Clause, and the Fourth Amendment, and that it

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[3] Although Richmond purports to direct its claims against the Executive Order generally and to seek relief regarding "the Executive Order," the only language of the Order described in the Complaint relates to the grant eligibility provision in Section 9(a).

is unconstitutionally vague in violation of the Due Process Clause. The Fifth Claim for Relief alleges that Richmond's policies comply with 8 U.S.C. § 1373. All of these claims should be dismissed for lack of standing and ripeness under Rule 12(b)(1), as made even clearer by the AG Memorandum. Also, all of plaintiff's claims against the Executive Order should be dismissed under Rule 12(b)(6) because the Order is only an internal Executive Branch directive with no direct effect on the City.

Assuming the Court reaches the merits, all of plaintiff's claims should be dismissed for failure to state a claim on which relief can be granted under Rule 12(b)(6). In relation to the Tenth Amendment, Separation of Powers, and Spending Clause claims, the AG Memorandum makes clear that the grant eligibility provision in Section 9 will not be used to "compel the States to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf," *see N.Y. v. United States*, 505 U.S. 144, 188 (1992); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2627 (2012); that the grant eligibility provision will be applied only where authorized by statute; and that the limitations on the spending power described in *South Dakota v. Dole*, 483 U.S. 203 (1987), will be followed.

In relation to plaintiff's Fourth Amendment claim, the AG Memorandum says nothing about detentions, but specifies that jurisdictions applying for certain grants will have to certify compliance with 8 U.S.C. § 1373, which, the Memorandum says, prevents state and local jurisdictions from prohibiting or restricting the provision of certain information to federal immigration officials.

Further, Section 9(a), as elucidated by the AG Memorandum, easily meets the judicial standards for vagueness claims, especially in relation to a facial challenge, under which the plaintiff must show that the enactment is "impermissibly vague in all its applications." *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (internal quotation marks omitted).

Finally, in relation to plaintiff's Fifth Claim for Relief, Section 1373 contains no right of action to seek a declaration regarding a jurisdiction's compliance with the statute, and plaintiff has cited no other source for such a cause of action. Also, since the Secretary of Homeland Security has not designated or threatened to designate Richmond as a "sanctuary jurisdiction" under Section 9(a), any judicial ruling on the City's compliance with Section 1373 would be an advisory opinion.

I. <u>Plaintiff Lacks Standing and Its Claims Are Unripe</u>

Article III of the Constitution requires that a plaintiff have standing and that its claims be ripe for judicial consideration. To have standing, the plaintiff must show that it has suffered "concrete," "palpable" injury, *see Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), and, for the claims to be ripe, the challenged enactment must have been "formalized and its effects felt in a concrete way." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). As discussed in Defendants' Motion for Reconsideration or, in the Alternative, Clarification of the Court's Order of April 25, 2017, in the related case of *City & County of San Francisco v. Trump*, No. 17-cv-00485-WHO, the AG Memorandum makes even clearer that these requirements are not satisfied here and that, therefore, all of plaintiff's claims must be dismissed for lack of standing and ripeness (No. 17-cv-00485-WHO, Doc. 107 at 8-12).

II. Plaintiff Fails to State Any Viable Claim Regarding the Executive Order, <u>Which Is an Internal Directive and Does Not Directly Affect the Plaintiff</u>

The Court should dismiss all of Richmond's challenges to Executive Order 13,768 – the first through fourth Claims for Relief in the Complaint – because the Order only directs internal Executive Branch policy and does not directly affect the plaintiff. Courts in this Circuit have distinguished between Executive Orders that only "implement policy as a product of executive authority," and those that effectuate an authority explicitly vested in the President through an act of Congress. *See Chen v. Schiltgen*, No. C-94-4094 MHP, 1995 WL 317023, at *5 (N.D. Cal. May 19, 1995), *aff'd sub nom. Chen v. INS*, 95 F.3d 801 (9th Cir. 1996); *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1330 n.14 (9th Cir. 1979).

The former type of Executive Order does not carry the independent force of law; rather, it serves only as an internal Executive Branch directive. The Executive Order in this action falls into that category. This is even clearer in light of the AG Memorandum, which indicates that the challenged provisions of the Order are directives to the Attorney General and the Secretary of Homeland Security regarding their exercise of *existing* statutory and constitutional authority. AG Mem. at 1-2. Because the Order is an internal Executive Branch policy directive, Richmond cannot plead viable challenges against it. *Cf. United States v. Pickard*, 100 F. Supp. 3d 981, 1011 (E.D. Cal. 2015) (rejecting a Tenth Amendment challenge to a statement of agency policy on the grounds that a policy statement "is a very different creature from a statute" in that it does not bind States as would a statute).

Moreover, consistent with its internal nature, the Executive Order does not directly affect the plaintiff. It does not impose conditions on federal grants or any requirements on state or local jurisdictions. Rather, the Order "establish[es] immigration enforcement as a priority for this Administration," AG Mem. at 1, in an effort to "ensure that our Nation's immigration laws are faithfully executed." Exec. Order 13,768 at 1. It directs the appropriate executive officials to prioritize means for achieving that priority.

At no point, however, does the Order purport to directly impose affirmative obligations on state or local jurisdictions. Rather, the Attorney General and the Secretary are to enforce the Order's directives "to the extent permitted by law." *Id.* § 9(a). Consistent with that directive, the Executive Order "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation . . . [n]or does the Executive Order purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary . . . in any respect." AG Mem. at 1-2. Rather, in the event the Secretary or the Attorney General determines to impose obligations on a grant program pursuant to the directives contained the Order, such as certification of compliance with 8 U.S.C. § 1373, that obligation may be imposed only where existing legal authority allows, and only where grantees are given "notice of their obligation[s]." *Id.* at 2.

III. Plaintiff Fails to State Any Viable Claim Regarding the Executive Order, as Elucidated by the AG Memorandum

Especially as elucidated by the AG Memorandum, Section 9(a) of the Order is consistent with the Tenth Amendment, the Separation of Powers, the Spending Clause, and the Fourth Amendment, and it is not unconstitutionally vague under the Due Process Clause. Plaintiff's claims are all the more difficult to sustain because these are facial challenges to an Executive Order. The Supreme Court has held that a facial challenge is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In this context, "the challenger must establish that no set of circumstances exists under which the [challenged enactment] would be valid." *Id*.

As the Supreme Court has observed, "[f]acial challenges are disfavored for several reasons." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). First, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of [enactments] on the basis of factually barebones records." *Id*. (internal quotation marks omitted). Additionally, such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." These rules apply to Executive Orders as much as to statutes and regulations. *See Am. Fed'n of State, Cty. & Mun. Employees v. Scott*, 717 F.3d 851, 862-63 (11th Cir. 2013); *NTEU v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989). As further discussed below, plaintiff's Complaint fails to establish that Section 9(a) of the Executive Order would be invalid under all circumstances.

A. Plaintiff Fails to State a Viable Claim under the Tenth Amendment

Plaintiff's First Claim for Relief alleges that the Executive Order violates the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment embodies the principle that the "pre-existing sovereign States" (and their subdivisions) retain their sovereignty under the Constitution and that the federal government may not encroach upon that sovereignty. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995); *N.Y. v. United States*, 505 U.S. 144, 156 (1992). Richmond alleges that the Order violates this principle by "compel[ing] state officials to execute federal law" (Doc. 1 ¶ 74).

Although "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf," *N.Y. v. United States*, 505 U.S. 144, 188 (1992); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2627 (2012), Richmond does not explain how Section 9(a) or any other provision of the Order could be said to violate this principle. Moreover, the circumstances here belie any such conclusion. As described above, Section 9(a) will be implemented by requiring applicants for certain grants to "certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award. *See* AG Mem. at 2. Thus, where, as here, Richmond's obligation would arise only because of its voluntary acceptance of grants that included the condition, the Federal Government is not "compel[ing] [City] officials to execute federal law" because the City may decline to apply for the specific DOJ or DHS grants to which this condition is attached. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) ("[A]s long as the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation.") (internal quotation marks omitted).

Accordingly, Richmond has not pled a viable claim that the Executive Order violates the Tenth Amendment.

B. <u>Plaintiff Fails to State a Viable Claim under the Separation of Powers</u>

Plaintiff's Second Claim for Relief alleges that the Executive Order violates the Separation of Powers because "Congress, not the President, has the authority to appropriate and spend federal monies" (Doc. 1 ¶ 68). Article I of the Constitution confers on Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. As this Court has said, Congress may, "[i]ncident to" its spending power, "attach conditions on the receipt of federal funds," *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (quoting *Dole*, 483 U.S. at 206), and "Congress can delegate some discretion to the President to decide how to spend appropriated funds" so long as "any delegation and discretion is cabined by [relevant] constitutional boundaries." 2017 WL 1459081, at *21; *see DKT Mem'l Fund Ltd. v. AID*, 887 F.2d 275, 280-81 (D.C. Cir. 1989) (upholding conditions on spending imposed by President where statute authorized President to set certain "terms and conditions as he may determine").

Especially as elucidated by the AG Memorandum, the grant eligibility provision in Section 9(a) of the Order is consistent with this division of constitutional responsibilities. Section 9(a) requires the Attorney General and Secretary of Homeland Security to condition grant eligibility on compliance with 8 U.S.C. § 1373 "to the extent consistent with law." The AG Memorandum makes clear that the Order does not "purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary . . . in any respect" and "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation." AG Mem. at 1-2. Even more specifically, the Memorandum confirms that compliance with Section 1373 will be imposed as a condition of grant eligibility only where the agency "is statutorily authorized to impose such a condition." *Id*.

In fact, Congress has frequently authorized agencies administering certain grant programs to impose discretionary conditions on the receipt of funds. Those statutory authorizations have taken a variety of forms, including authorizing an agency to ensure that a grant recipient complies "with all provisions of . . . applicable Federal laws," *see* 42 U.S.C. § 3752(a)(5)(D) (governing DOJ grant program), or allowing an agency to "plac[e] special conditions" on certain grants under appropriate circumstances. *See id*. § 3712(a)(6). Pursuant to these types of statutory authorizations, DOJ has already conditioned eligibility for participation in three DOJ-administered grant programs on the applicant's certification of compliance with Section 1373. *See generally* Tr. of Oral Arg. at 35:4-6, *City & Cnty. of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Apr. 14, 2017) (identifying the three programs); 2017 WL 1459081, at *4 (same).

Further, as noted above, a party challenging the facial constitutionality of an Executive Order must establish that the Order would be unconstitutional in all its applications. *See Salerno*, 481 U.S. at 745 (facial challenge must establish that "no set of circumstances exists under which [the enactment] would be valid"); *see also Am. Fed'n of State, Cty. & Mun. Employees*, 717 F.3d at 862-63; *NTEU v. Bush*, 891 F.2d at 101. That standard is necessarily impossible to meet in relation to plaintiff's Separation of Powers claim, since Congress frequently authorizes the Executive to impose discretionary conditions on the receipt of federal grants.

Therefore, especially in light of the AG Memorandum, plaintiff cannot state a viable claim for violation of the constitutional Separation of Powers.

C. Plaintiff Fails to State a Viable Claim under the Spending Clause

Plaintiff's Second Claim for Relief also alleges that the Executive Order exceeds the federal power under the Spending Clause (Doc. 1 ¶¶ 96-101). This Clause provides that Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. As the Supreme Court has held, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Dole*, 483 U.S. at 206 (internal quotation marks omitted).

The Court in *Dole* described certain limitations or potential limitations on the spending power. Most basically, "the exercise of the spending power must be in pursuit of 'the general welfare'" – as stated in the Spending Clause itself, *id*. at 207 – and conditions on the receipt of federal funds must be stated "unambiguously" so that recipients can "exercise their choice knowingly, cognizant of the consequences of their participation." *Id*. (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.") (citations omitted) (hereinafter

Pennhurst). Additionally, the Court observed in *Dole*, "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," and that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." 483 U.S. at 207-08, 211 (internal quotation marks omitted).

Although these are limitations on *congressional* power, the plaintiff herein alleges that the grant eligibility provision in Section 9(a) violates these limitations because "not even Congress would have the authority to enact the Executive Order as legislation" (Doc. 1 ¶ 70). Specifically, the City alleges that the provision imposes "new funding conditions on existing appropriations of federal funds" (*id.* ¶ 71); that it imposes "conditions [that] are unrelated to the purpose for which the funds are given" (*id.* ¶ 72); and that it "coerces Richmond to implement federal immigration policy" (*id.* ¶ 78). Particularly in light of the AG Memorandum, each of these assertions is without merit.

Focusing on the "knowing acceptance" aspect of *Dole* and *Pennhurst*, Richmond asserts, first, that the grant eligibility provision unconstitutionally imposes "new funding conditions on existing appropriations of federal funds" rather than imposing such conditions "in advance" (*id.* ¶ 71).[4] *See* 2017 WL 1459081, at *22 ("Because states must opt-in to a federal program willingly, fully aware of the associated conditions, Congress cannot implement new conditions after-the-fact."). As described above, however, the AG Memorandum makes clear that the grant eligibility provision will be implemented by "requiring jurisdictions applying for certain [DOJ] grants to certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award." AG Mem. at 2. Thus, the AG Memorandum continues, "[a]ll grantees will receive notice of their obligation to comply with section 1373" ahead of time, and the grant eligibility provision will be applied to "[a]ny jurisdiction that fails to certify compliance." *Id.*

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[4] Plaintiff does not allege that the grant eligibility provision violates the requirement that federal grant conditions be stated "unambiguously." *Dole*, 483 U.S. at 207. In any event, for the reasons stated herein, any such claim would be without merit in light of the AG Memorandum.

Necessarily, therefore, potential grantees will be able to "exercise their choice knowingly, cognizant of the consequences of their participation" in grant programs that include this condition. *Dole*, 483 U.S. at 207. The plaintiff cannot show that the grant eligibility provision will fail this aspect of *Dole* in all its applications, as necessary in this facial challenge. *See Salerno*, 481 U.S. at 745.

Second, plaintiff alleges that the grant eligibility provision imposes "conditions [that] are unrelated to the purpose for which the funds are given" (Doc. 1 ¶ 72). As the Court of Appeals has observed, however, this aspect of *Dole* suggests only a "possible ground" for invalidating an enactment, and does not impose an "exacting standard":

> The Supreme Court has suggested that federal grants conditioned on compliance with federal directives *might* be illegitimate if the conditions share no relationship to the federal interest in particular national projects or programs. This possible ground for invalidating a Spending Clause statute, which only suggests that the legislation *might* be illegitimate without demonstrating a nexus between the conditions and a specified national interest, is a far cry from imposing an exacting standard for relatedness.

Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (citing *Dole*, 483 U.S. at 207). Thus, conditions on federal funding must only "bear some relationship to the purpose of the federal spending." 314 F.3d at 1067 (quoting *New York*, 505 U.S. at 167); *see Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004) (noting that Supreme Court has never "overturned Spending Clause legislation on relatedness grounds").

Especially as implemented by the AG Memorandum, the grant eligibility provision easily meets this standard. The provision will be applied only to grants administered by the Department of Justice and the Department of Homeland Security – that is, the primary law enforcement agency of the United States and the agency responsible for the admission and removal of non-citizens. AG Mem. at 1. DHS is the very agency whose communication with state and local government officials is protected by Section 1373. Moreover, the grant eligibility provision will be applied only to "certain . . . grants" as to which the agency "is statutorily authorized to impose such a condition." *Id.* at 2. Plaintiff alleges that the grant eligibility provision threatens federal funding that the City uses "to fund vital services," mostly "housing and infrastructure improvements" (Doc. 1 ¶ 7). The AG Memorandum has eliminated any possibility that the grant eligibility provision could be applied in relation to any such categories of federal funding.

Third and finally, plaintiff alleges that the grant eligibility provision "coerces Richmond to implement federal immigration policy" (*id.* ¶ 78). As the Court of Appeals has observed, however, the Supreme Court in *Dole* concluded that it would find a violation of this potential limitation, "if ever, [only] in the most extraordinary circumstances." *State of Cal. v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (citing *Dole*, 483 U.S. at 210-11). Thus, for example, the Court in *Dole* found no constitutional violation where a State risked losing 5% of its highway funds for refusing to implement a federal minimum drinking age. *Dole*, 483 U.S. at 211. Conversely, the Court held more recently that Congress violated anti-coercion principles by subjecting States to a risk of losing "all federal Medicaid funding," which constituted "over 10 percent of a State's overall budget," if they declined to adopt certain Medicaid expansion actions. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2664 (2012) (hereinafter *NFIB*). In that case, "the sheer size of this federal spending program in relation to state expenditures" rendered the condition coercive. *Id.* at 2663. As the Court held, however, "courts should not conclude that [an enactment] is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear." *Id.* at 2662.

Under this precedent, plaintiff's "coerciveness" claim must fail, especially in light of the AG Memorandum. As noted already, the grant eligibility provision of the Executive Order "will be applied solely to [certain] federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding." AG Mem. at 1. Moreover, DOJ has so far identified only three grant programs whose eligibility will be conditioned on compliance with Section 1373. *See* Tr. of Oral Arg. at 35:2-9. In these circumstances, the City has fallen far short of stating a viable claim that the "coercive nature" of the grant eligibility provision is "unmistakably clear." *See NFIB*, 132 S. Ct. at 2662.

In short, particularly as elucidated by the AG Memorandum, the Executive Order constitutes only a "relatively mild encouragement" to comply with Section 1373. *Dole*, 483 U.S. at 211.

D. Plaintiff Fails to State a Viable Claim under the Fourth Amendment

Plaintiff's Third Claim for Relief is that the Executive Order violates the Fourth Amendment because it "forces jurisdictions to keep people in custody who otherwise would be released, thus potentially exposing the jurisdictions to liability under the Fourth Amendment" (Doc. 1 ¶ 76). However, the AG Memorandum says nothing about detentions, and, in any event, state or local law enforcement's decision to exercise their authority to cooperate with federal immigration detainer requests is fully consistent with the Fourth Amendment. Rather, the Memorandum states that 8 U.S.C. § 1373 prevents state and local jurisdictions from prohibiting or restricting the sending of certain information to federal immigration officials, and that jurisdictions applying for grants will have to certify compliance with that statute. AG Mem. at 1-2. Moreover, the Memorandum states affirmatively that the Order's grant eligibility provision "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation." *Id*. at 2. For this reason, also, Richmond cannot show that Section 9(a) would violate the Fourth Amendment in all potential applications, as it must in this facial challenge. See *Salerno*, 481 U.S. at 745.

Therefore, especially in light of the AG Memorandum, Richmond cannot state a viable claim for violation of the Fourth Amendment.

E. Plaintiff Fails to State a Viable Claim of Unconstitutional Vagueness under the Due Process Clause

Plaintiff's next claim, the Fourth Claim for Relief in the Complaint, is that Section 9(a) is unconstitutionally vague in violation of the Due Process Clause (Doc. 1 ¶¶ 107-113).[5] An enactment may be unconstitutionally vague if it "fails to provide a reasonable opportunity to

[5] Plaintiff alleges generally that "the Executive Order is unconstitutionally vague" (Doc. 1 ¶¶ 110-112), but all of the allegedly vague language cited in the Complaint relates to the grant eligibility provision.

know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004) (citation omitted). The Supreme Court, however, has cautioned against engaging in a vagueness analysis in the pre-enforcement context, particularly in matters that do not involve First Amendment rights. *See Wash. State Grange*, 552 U.S. at 450 (noting that facial vagueness challenges are "dis-favored for several reasons," including because such claims often "rest on speculation"). "Outside the First Amendment context, a plaintiff alleging facial vagueness must show that the enactment is impermissibly vague in all its applications." *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (internal quotation marks omitted). This is consistent with the rule that a party challenging an enactment on its face must show that "no set of circumstances exists under which the [enactment] would be valid." *Salerno*, 481 U.S. at 745. Moreover, courts will consider whether a provision is fairly "amenable to a limiting construction" before striking it down as vague. *Skilling v. United States*, 561 U.S. 358, 405 (2010). Thus, a plaintiff bringing a pre-enforcement facial vagueness challenge "bears a heavy burden." *SEIU, Local 82 v. D.C.*, 608 F. Supp. 1434, 1446-47 (D.D.C. 1985).

In this case, the City argues that the Executive Order "fails to define key terms, such as 'sanctuary jurisdiction,' . . . does not define what actions or inactions constitute 'willful refusal to comply with 8 U.S.C. § 1373' [and] does not define what is meant by the phrase: 'Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law'" (Doc. 1 ¶¶ 110-112). As discussed above, however, the Order is an internal directive to Executive Branch officials and does not have any direct effect on the plaintiff. Therefore, there can be no legitimate question as to whether the Order provides "reasonable" notice to the plaintiff. *See Tucson Woman's Clinic*, 379 F.3d at 554. In any event, the AG Memorandum authoritatively clarifies this aspect of the Order, specifying, for example, that "the term 'sanctuary jurisdiction' will refer only to jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373." AG Mem. at 2. Additionally, the Memorandum makes clear that the "applicable Federal law" referred to in Section 2 of the Order is 8 U.S.C. § 1373 and that Section 9(a) will be implemented by requiring certification of compliance with Section 1373 as a condition of certain grants and by rendering ineligible any jurisdiction that fails to certify such compliance. *Id*.

Accordingly, plaintiff's Fifth Amendment vagueness claim must be dismissed for failure to state a claim on which relief can be granted.

IV. Plaintiff Fails to State a Viable Claim for Declaratory Relief Regarding Its Compliance with Section 1373

Lastly, Richmond's Fifth Claim for Relief seeks a judicial declaration that the City's policies comply with 8 U.S.C. § 1373 (Doc. 1 ¶¶ 114-117). The plaintiff does not, however, identify a right of action, in Section 1373 or elsewhere, that would allow it to pursue such declaratory relief, and, in any event, a declaration along those lines would constitute a prohibited advisory opinion. Thus, the Fifth Claim for Relief does not plead a claim on which relief can be granted.

"To raise a claim in federal court, plaintiffs must demonstrate both that a federal court will have jurisdiction over their claim, and also that they (the plaintiffs) have a right of action to initiate that claim. In other words, establishing the court's jurisdiction and the litigants' right of action are two requirements that must be satisfied independently." *Harris Cty. Texas v. MERSCORP Inc*., 791 F.3d 545, 552 (5th Cir. 2015); *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (absent statutory intent to create a cause of action, one "does not exist and courts might not create one, no matter how desirable that may be as a policy matter"). The general jurisdictional statutes that plaintiff cites, 28 U.S.C. §§ 1331 and 1346 (Doc. 1 ¶ 13), do not create independent causes of action. *See Strong v. Ford*, 108 F.3d 1386 (9th Cir. 1997) (unpublished); *White v. Paulsen*, 997 F. Supp. 1380, 1382 (E.D. Wash. 1998). Similarly, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (Doc. 1 ¶ 13), creates a certain *remedy* that may be available to litigants, but does not itself create a cause of action. *See, e.g.*, *Muhammad v. Berreth*, No. C 12-02407 CRB, 2012 WL 4838427, at *5 (N.D. Cal. Oct. 10, 2012) ("Declaratory relief is not an independent cause of action or theory of recovery, only a remedy. The [Declaratory

Judgment Act] does not itself confer federal subject-matter jurisdiction.") (citation and internal quotation marks omitted).

Moreover, because there is no live, concrete controversy regarding whether Richmond complies with Section 1373, any judicial ruling on that subject would constitute a prohibited advisory opinion. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts . . . do not render advisory opinions. . . . This is as true of declaratory judgments as any other field."). Plaintiff's contention that an "actual controversy . . . presently exists between Richmond and Defendants about whether [the City] complies with 8 U.S.C. § 1373" (Doc. 1 ¶ 117) is conclusory and inaccurate. Plaintiff does not allege that the Secretary has designated it or threatened to designate it as a "sanctuary jurisdiction" pursuant to Section 9(a), nor that DOJ or DHS has deprived it or threatened to deprive it of any federal funds thereunder. "For a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (internal quotation marks omitted).

CONCLUSION

For the reasons discussed above, all of plaintiff's claims should be dismissed with prejudice.

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Respectfully submitted,

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