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ATTORNEYS FOR PLAINTIFF COUNTY OF SANTA CLARA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COUNTY OF SANTA CLARA,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50,

Defendants.

Case No. 17-cv-00574-WHO

PLAINTIFF COUNTY OF SANTA CLARA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: July 12, 2017
Time: 2:00 p.m.
Dept.: Courtroom 2, 17th Floor
Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2018

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I. INTRODUCTION

On April 25, 2017, this Court issued a preliminary injunction enjoining enforcement of Section 9(a) of Executive Order 13768 nationwide. *See County of Santa Clara v. Trump*, --- F. Supp. 3d ---, 2017 WL 1459081, at *29 (N.D. Cal. Apr. 25, 2017). In opposing the County of Santa Clara's motion for preliminary injunctive relief, defendants made the same arguments they now repeat regarding the Executive Order's purportedly limited scope and force. *See* Tr. of Oral Arg. (Apr. 14, 2017) at 21:1–4, 24:4–6, 25:4–6, 35:2–9, 36:25–37:6. The Court carefully considered and correctly rejected those arguments, because they relied on a legally implausible reading of the Executive Order. The Court went on to conclude that the County is ***likely to succeed*** on the merits of its claims, a standard far more demanding than Federal Rule of Civil Procedure 12(b)(6)'s requirement that the County plead a plausible claim for relief.

Despite this Court's well-reasoned holdings, defendants filed a baseless motion for reconsideration advancing the same interpretation of the Executive Order the Court has already rejected. They now repackage that same interpretation for the third time in the context of a motion to dismiss. Their interpretation fares no better this time around.

Defendants' motion to dismiss, like their motion for reconsideration, rests on a slender reed: a two-page guidance memorandum issued by the Attorney General—a named defendant in this case. *See* Dkt. 108-1, Attach. 1 (Mem. from Att'y General Jefferson B. Sessions, "Implementation of Executive Order 13768, 'Enhancing Public Safety in the Interior of the United States'" (May 22, 2017)) ("AG Memorandum"). The AG Memorandum cannot support the weight defendants place on it. As defendants concede, this Court owes no deference to the Attorney General's Memorandum when interpreting the Executive Order. That is especially true given that the AG Memorandum is nothing more than a litigation-driven fig leaf that repeats a reading of the Executive Order so implausible that it deprives the Executive Order of "any legal meaning." *Santa Clara*, 2017 WL 1459081, at *10. Moreover, unlike the Executive Order, the AG Memorandum both lacks the force of law and can be withdrawn or altered by the Attorney General at will. In the meantime, a facially unconstitutional Executive Order would remain on the books, hanging like Damocles' sword over the heads of targeted jurisdictions, including the

County of Santa Clara. Targeted jurisdictions would continue to face unlawful coercion as they waited to see whether the Administration would follow constitutional requirements or enforce the Executive Order the President actually promulgated.

Because the Court was right to reject defendants' implausible narrowing construction of the Executive Order, the Court's prior rulings, both on the justiciability and the merits of the County's claims, remain sound. Contrary to defendants' arguments, the Court correctly concluded that the County is likely to succeed on its claims that the Executive Order is facially unconstitutional, and the AG Memorandum has no bearing on the County's facial challenges. Further, even if the Court were to credit the AG Memorandum's implausible interpretation of the Executive Order for the sake of argument, it would still violate fundamental constitutional principles, and the County would still have valid and justiciable claims against its enforcement.

In the end, defendants' arguments cannot be reconciled with the relief they seek. If defendants truly intend to enforce the Executive Order only as provided in the AG Memorandum, then the preliminary injunction does them no harm and they should have no objection to its remaining in place, as the Court's existing order expressly permits defendants to do everything authorized under existing law.

For all these reasons, the Court should deny defendants' motion.

II. FACTUAL BACKGROUND

A. Executive Order 13768

Because the Court is well-versed in the relevant facts, the County will not repeat them here. *See Santa Clara*, 2017 WL 1459081, at *2–6 (setting forth factual findings). Instead, for the Court's convenience, the key portions of Executive Order 13768 are set forth below:

> **Sec. 2**. *Policy*. It is the policy of the executive branch to: . . .
>
> (c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;
>
> **Sec. 3**. *Definitions*. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.
>
> **Sec. 9**. *Sanctuary Jurisdictions*. It 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.

> (a) In furtherance of this policy, the Attorney General and the Secretary, 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.
>
> (b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.
>
> (c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order" or "EO").

B. Defendants' Statements Regarding Executive Order 13768

Also relevant are the President's own statements regarding the Executive Order's purpose and scope, as well as those of his subordinates, including the current Attorney General. *See Hawaii v. Trump*, --- F.3d ---, 2017 WL 2529640, at *15 n.14 (9th Cir. June 12, 2017) (taking judicial notice of the President's statements when interpreting executive order); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 595 (4th Cir. 2017) ("We need not probe anyone's heart of hearts to discover the purpose of [the executive order], for President Trump and his aides have explained it on numerous occasions and in no uncertain terms."). President Trump repeatedly pledged, both on the campaign trail and after taking the oath of office, to deny ***all*** federal funding to jurisdictions he believes are hindering his immigration enforcement agenda, thereby "ending" such jurisdictions altogether. *See* Dkt. 1 ("Compl.") ¶ 93 (listing statements). After issuing the Executive Order, the President characterized defunding as a "weapon" he could wield to deprive jurisdictions of "the money they need to properly operate as a city or state." Dkt. 36, Harris Decl. ¶ 3 & Dkt. 36-2, Ex. B at 4. The President's press secretary confirmed that the President's goal was to ensure that "counties and other institutions that remain sanctuary cities

don't get federal government funding." Dkt. 36, Harris Decl. ¶ 4 & Dkt. 36-3, Ex. C at 4–5. These threats continued even after the County moved to enjoin the Executive Order. On March 27, 2017, Defendant Sessions stated that any jurisdiction the Department of Justice deems noncompliant with Section 1373 will suffer "withholding [of] grants, termination of grants, and disbarment or ineligibility for future grants," as well as the "claw back" of "any funds" previously awarded. Dkt. 82-1, Req. for Court Approval to Supp. R., Ex. A at 2.

C. The Court's Order Granting the County's Request for a Nationwide Preliminary Injunction of Section 9(a) of Executive Order 13768

The County filed the instant lawsuit on February 3, 2017, seeking a judicial declaration that Section 9 of the Executive Order is unconstitutional, and a permanent injunction of that provision. The County asserted four separate causes of action: (1) violation of the separation of powers; (2) violation of the Tenth Amendment; (3) violation of the Fifth Amendment (vagueness); and (4) violation of the Fifth Amendment (procedural due process). *See* Compl. ¶¶ 118–52. On February 23, 2017, the County moved for a nationwide preliminary injunction of Section 9 of the Executive Order on each of those grounds. *See* Dkt. 26.

On April 25, 2017, the Court granted the County's motion and issued an order enjoining enforcement of Section 9(a) of the Executive Order. *Santa Clara*, 2017 WL 1459081, at *29. In its analysis, the Court considered and rejected many of the same arguments Defendants advance in the instant motion.

First, the Court rejected as "not legally plausible" the last-minute re-interpretation of the Executive Order that defendants offered at the April 14, 2017 hearing on the County's preliminary injunction motion, concluding that "'[t]o read [the Order] as the Government desires requires rewriting, not just reinterpretation.'" *Id*. at *8 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). Specifically, the Court rejected the argument that Section 9(a) could be construed to apply only to a small number of federal grants administered by the Departments of Justice and Homeland Security. *Id.* at *2 ("Section 9(a), by its plain language, attempts to reach all federal grants, not merely the three mentioned at the hearing."). The Court grounded that conclusion on the Executive Order's plain text, which the Court held "is not reasonably

susceptible to the new, narrow interpretation offered at the hearing." *Id.* The Court reinforced its reading with defendants' public statements, which characterized the Executive Order as a means of stripping sanctuary jurisdictions of ***all*** federal funding. *See id.* ("[I]f there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments.").

Second, the Court considered and rejected the argument that the Executive Order could withstand constitutional scrutiny because it stated, in places, that it was to be applied "consistent with law." *Id.* at *9 ("Effectively, the Government argues that Section 9(a) is 'valid' and does not raise constitutional issues as long as it does nothing at all.").

Third, the Court considered and rejected the argument that "the Order carries no legal force." *Id.* at *14. Instead, the Court concluded that the Executive Order "carries the force of law" and that "[a]dopting the Government's proposed reading would transform an Order that purports to create real legal obligations into a mere policy statement and would work to mislead individuals who are not able to conclude, by reading Section 9(a) itself, that it is fully self-cancelling and carries no legal weight." *Id*. at *9. In particular, the Court found that the Executive Order purports "'to give the Secretary or Attorney General the unilateral authority' to impose new conditions on federal grants," without a constitutional or statutory basis for doing so. *Id*. at *8 (quoting Defs.' Opp. to Mot. for Prelim. Inj.).

Fourth, the Court thoroughly considered and rejected defendants' justiciability arguments, concluding that the County had Article III standing and that its claims were ripe for adjudication. *See id.* at *7–21. The Court further concluded that "the Government's proposed narrow construction does not destroy justiciability" under controlling Supreme Court precedent. *Id*. at *8 (citing *Virginia v. Am. Booksellers Ass'n*, *Inc.*, 484 U.S. 383, 392 (1988)).

Because of the Executive Order's "facially unconstitutional directives and its coercive effects," the Court issued a nationwide injunction of Section 9(a). *Id.* at *28. Narrowly tailoring its order, the Court declined to enjoin the President himself, and also made clear that the injunction "does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373, nor does it restrict the Secretary from developing

regulations or preparing guidance on designating a jurisdiction as a 'sanctuary jurisdiction.'" *Id.* at *29.

D. The Attorney General's Memorandum and Defendants' Motion for Reconsideration

On May 22, 2017, the Attorney General released a two-page Memorandum entitled "Implementation of Executive Order 13768." Dkt. 108-1. The AG Memorandum reduces to writing the same interpretation of the Executive Order that defendants adopted at oral argument, and the Court rejected in granting the preliminary injunction.

The same day that Attorney General Sessions issued the AG Memorandum, defendants moved for leave to file a motion for reconsideration of the Court's preliminary injunction order, claiming that the AG Memorandum "constitutes new authority." Dkt. 108 at 2 (Defs.' Mot. for Recons.). Defendants' motion for reconsideration makes many of the same arguments presented here under the guise of a motion to dismiss. Opposing defendants' motion for reconsideration, the County explained why the AG Memorandum changed nothing, and why the preliminary injunction must remain in place. *See* Dkt. 114 at 11–22. The motion remains pending.

III. LEGAL STANDARD

Defendants move to dismiss the County's lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) concerns Article III standing and ripeness. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067–68 (9th Cir. 2011). The Court recited the law on Article III standing in its preliminary injunction order:

> Article III, section 2 of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); *see* U.S. Const. art. III, §, cl. 1. "Standing is an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing a plaintiff must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517, 127 S. Ct. 1438 (citing *Lujan*, 504 U.S. at 560–61, 112 S. Ct. 2130).

Santa Clara, 2017 WL 1459081, at *7. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," to establish justiciability because on a

motion to dismiss courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotations and alterations omitted).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. A claim can be dismissed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (internal quotation marks omitted). A motion to dismiss must be denied if an alleged claim is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The issue is not whether the plaintiff will ultimately prevail, but solely whether it has stated a claim upon which relief could be granted. *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003). The Court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014).

IV. ARGUMENT

A. The AG Memorandum offers no basis for dismissal.

Virtually all of the arguments defendants advance in the instant motion rely upon a premise this Court has already rejected: that the Court should ignore the Executive Order's plain text and express purpose—as well as defendants' public statements confirming that it means what it says—and instead credit the implausible reading set forth in the AG Memorandum as controlling. *See, e.g.*, Dkt. 115, Defs.' Mot. to Dismiss ("Mot.") at 2 (arguing that the AG Memorandum renders the County's claims non-justiciable and/or subject to dismissal), 12 (arguing that the AG Memorandum makes clear that the Executive Order lacks "the independent force of law"), 13–14 (arguing that the AG Memorandum confirms that Section 9(a) does not offend separation of powers principles), 21–22 (arguing that the AG Memorandum defeats the County's procedural due process claim). The AG Memorandum provides no basis for dismissing the County's complaint both because the memorandum in no way binds the Court, and because, even if credited, it fails to cure the Executive Order's inherent unconstitutionality.

1. Unlike the Executive Order, the AG Memorandum is not binding law.

Defendants' arguments consist of sleight-of-hand, asking the Court to ignore the Executive Order's legally binding text and instead focus on a non-binding two-page guidance memorandum. The Court should reject that approach for several reasons.

First, it is this Court's interpretation of the Executive Order that controls, not the Attorney General's. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999) (resolving a dispute over the correct interpretation of an executive order); *Marbury v. Madison*, 5 U.S. 137, 26 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Hawaii*, 2017 WL 2529640, at *12 (reviewing a challenge to an executive order where plaintiff asserted that the order "exceed[ed] the statutory authority delegated by Congress and constitutional boundaries"). Indeed, defendants concede that the AG Memorandum cannot and does not control this Court's interpretation of the Executive Order, arguing that "the rules of judicial deference are inapplicable" here, and that this Court is ***not*** "bound by the Attorney General's determination as to the scope and meaning of the grant eligibility provision." *See* Dkt. 117, Defs.' Reply in Supp. of Defs.' Mot. for Recons. at 5 n.6. That is especially true where, as here, the AG Memorandum's implausible interpretation of the Executive Order is nothing more than a convenient litigation position taken by a named defendant to evade a valid and binding Court order. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (deference is inappropriate "when the agency's interpretation is plainly erroneous or inconsistent with the regulation," "when it appears that the interpretation is nothing more than a convenient litigating position," or when it is a "*post hoc* rationalization[n] advanced by an agency seeking to defend past agency action against attack" (internal citations and quotations omitted)); *see also Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1077–78 (9th Cir. 2016) (same); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1099 (9th Cir. 2007) (same). Accordingly, the Court's interpretation of the Executive Order remains fundamentally sound.

Second, it is impossible to square the AG Memorandum's interpretation of the Executive Order with the Executive Order's text and stated purpose. Any purportedly lawful interpretation of a statute or order must be a "reasonable construction" of the law at issue. *Skilling v. United*

States, 561 U.S. 358, 406 (2010). In this instance, as this Court has held, defendants' interpretation of the Executive Order is implausible. *Santa Clara*, 2017 WL 1459081, at *3. The Court was correct: "[T]he interpretation of an Executive Order begins with its text" and "[t]he text must be construed consistently with the Order's 'object and policy.'" *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005); *see also United States v. Stevens*, 559 U.S. 460, 481 (2010) (courts do not adopt interpretations that "require[] rewriting, not just reinterpretation"); *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (holding that it is not the courts' job "to insert missing terms into the statute or adopt an interpretation precluded by [its] plain language"). Employing a textual analysis, this Court correctly rejected the notion that the Executive Order was not intended to change existing law and affects only a narrow subset DOJ and DHS grants. *See Santa Clara*, 2017 WL 1459081, at *8–9 ("Nothing in Section 9(a) limits the 'Federal grants' affected to those only given though the Departments of Justice and Homeland Security.").

The AG Memorandum merely reduces that same discredited argument to writing, asserting that, for the time being, the Executive Order applies only to three DOJ grants (the same three grants defendants' counsel raised during oral argument), and potentially some unspecified DHS grants. As the Court has already concluded, this interpretation cannot withstand scrutiny. By its terms, the Executive Order reaches all federal funds. Section 2(c) confirms that the Executive Order targets "Federal funds" in general; Section 9(a) refers to all "Federal grants," not just DOJ and DHS funds; and Section 9(c) directs 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." *See* EO §§ 2(c), 9(a), 9(c) (emphasis added). As this Court put it in rejecting this argument previously, "a construction so narrow that it renders a legal action legally meaningless cannot possibly be reasonable and is clearly inconsistent with the Order's broad intent." *Santa Clara*, 2017 WL 1459081, at *9.[1]

Third, nothing in the AG Memorandum suggests that it is or must be the last word on implementation. On the contrary, the memorandum fails to mention affected DHS grants, or to

[1] In addition, as the Court pointed out, "if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments." *Santa Clara*, 2017 WL 1549081, at *2.

clarify the Executive Order's application to ICE civil detainer requests. And it contradicts both the President, who has called defunding a "weapon" he can use to deprive local governments of their ability to function, *see* Dkt. 36, Harris Decl. ¶ 3 & Dkt. 36-2, Ex. B at 4, and the Attorney General, who has promised to "claw back" funds previously awarded, Dkt. 82-1 at 2 (Tr. of Att'y General's March 27, 2017 White House press briefing). Accordingly, notwithstanding defendants' assurances that the AG Memorandum is "conclusive," "authoritative," and "binding," the Attorney General could revise, revoke, or supplement the memorandum at any time.

Fourth, defendants mischaracterize the AG Memorandum's supposedly "authoritative" legal effect, even within the executive branch. Mot. at 2. Contrary to defendants' suggestion, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1103(a)(1), provides the Attorney General with no authority to rewrite an executive order, or undo a federal court's reasoned interpretation by fiat. The Attorney General is neither interpreting the INA nor issuing any determination or ruling "relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1).[2] And even according to the law review article defendants rely upon, "the question of whether (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are legally binding within the executive branch remains somewhat unsettled." Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318 (2000). Indeed, the AG Memorandum is neither signed by nor addressed to DHS Secretary Kelly, and does not purport to bind or guide DHS's implementation of the Executive Order. *See* AG Memorandum at 2 (limiting the memorandum's application to grants administered by the DOJ's Office of Justice Programs and the Office of Community Oriented Policing Services, as well as unspecified "future grants" issued by DOJ).

For all these reasons, the County, and this Court, must focus on the Executive Order itself when assessing its legality and impact, rather than a belatedly produced litigation-driven memorandum.

[2] Nor does 28 U.S.C. § 512, which permits a department head to request and obtain an Attorney General opinion on "questions of law arising in the administration of his department," support defendants' position. Defendants nowhere claim that the AG Memorandum was issued in response to any such request, and that statute says nothing about whether Attorney General opinions are binding or authoritative.

2. Even if credited, the AG Memorandum fails to cure the Executive Order's constitutional defects.

Even if the Court were inclined to credit the AG Memorandum for purposes of deciding defendants' motion, that memorandum fails to cure the Executive Order's inherent unconstitutionality. To state the obvious, the AG Memorandum neither points to nor provides any independent statutory or constitutional authorization for the President's action. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952). In addition, the AG Memorandum says nothing about which DHS grants come within the Executive Order's ambit, and many of them—such as the pre-disaster mitigation and emergency preparedness grants the County receives and relies upon—have no connection whatsoever to immigration enforcement. *See* Compl. ¶¶ 41–42. Tying such funds to compliance with 8 U.S.C. § 1373 would therefore violate the spending clause, even if *Congress* had attempted to do so. *See National Fed. of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2602–04 (2012); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Santa Clara*, 2017 WL 1459081, at *23 (noting there is no nexus between section 1373 and "emergency preparedness" grants).[3]

Nor does the AG Memorandum alleviate the Executive Order's coercive effects. Defendants have never disputed that the Executive Order, even as reimagined by the AG Memorandum, is designed to coerce the County and other jurisdictions into changing their local policies. In fact, the Attorney General made the threat plain in his March 27, 2017 press conference, urging "our nation's states and cities and counties to carefully consider" and "rethink" their local policies, or else "risk [] losing federal dollars." Dkt. 82-1 at 2. As the County has alleged, such coercion is "'contrary to our system of federalism.'" Compl. ¶ 84 (quoting *NFIB*, 132 S. Ct. at 2604).

The AG Memorandum likewise does nothing to cure the Executive Order's Tenth Amendment violations. The AG Memorandum artfully omits any reference to ICE civil detainer

[3] The AG Memorandum also wrongly assumes that DOJ may constitutionally deny SCAAP, JAG, and COPS grants for failure to comply with 8 U.S.C. § 1373. *See* Dkt. 114 at 20. The County in no way concedes that point. Nothing in those grants' authorizing statutes expressly links receipt of funds with section 1373 compliance, and Congress has repeatedly declined to impose such a link.

requests, even though the Executive Order expressly links compliance with section 1373 to honoring such requests. *See Santa Clara*, 2017 WL 1459081, at *13 (noting that, under the Executive Order's plain terms, "a state or local government may be designated a sanctuary jurisdiction, and subject to defunding, if it fails to honor ICE detainer requests"); Compl. ¶ 151. With the AG Memorandum conspicuously silent on the question of civil detainer requests, this Court's holding remains applicable: "To the extent the Executive Order seeks to condition all federal grants on honoring civil detainer requests, it is likely unconstitutional under the Tenth Amendment because it seeks to compel the states and local jurisdictions to enforce a federal regulatory program through coercion." *Santa Clara*, 2017 WL 1459081, at *24.

The AG Memorandum also omits any reference whatsoever to Executive Order Section 9(a)'s separate enforcement provision, which empowers the Attorney General to take unspecified enforcement action against any jurisdiction he deems is hindering federal law enforcement. EO § 9(a). As the County alleged, and as the Court has previously held, this provision violates the Tenth Amendment. *Santa Clara*, 2017 WL 1459081, at *24; Compl. ¶ 152.

Finally, even with the thin gloss the AG Memorandum provides, the Executive Order remains vague and subject to arbitrary enforcement, since no one (including defendants) knows what willful refusal to comply with Section 1373 means in practice. *Santa Clara*, 2017 WL 1459081 at *25. By adding nothing to the Executive Order's definition of "sanctuary jurisdiction," the AG Memorandum merely doubles down on a definition that this Court has already ruled is too vague to pass constitutional muster.

In sum, the AG Memorandum constitutes nothing more than a *post hoc* litigation position rather than a plausible interpretation of the President's Executive Order. It has no effect on the Court's prior justiciability or merits analyses, and provides no basis for dismissal.

B. The Court has subject matter jurisdiction over the County's claims.

In granting the County's motion for preliminary injunction and finding irreparable harm, the Court expressly held that the County "demonstrated Article III standing to challenge the Order" and that the case is ripe for review. *Id.* at *11. That holding settles the question, both because "[a] district court may not grant a preliminary injunction if it lacks subject matter

jurisdiction over the claim before it," *Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 842 (D. Alaska 2012), *aff'd*, 709 F.3d 1281 (9th Cir. 2013), and because "general factual allegations of injury resulting from the defendant's conduct" suffice at the pleading stage to allow a claim to proceed, *Lujan*, 504 U.S. at 561 (internal quotations and alterations omitted).

The AG Memorandum has no effect on the Court's prior justiciability analysis. Indeed, the Court has already ruled that defendants' proposed "narrow construction"—now reduced to writing in the AG Memorandum— "does not destroy justiciability." *Santa Clara*, 2017 WL 1459081, at *8 (citing *American Booksellers*, 484 U.S. at 392 (noting that plaintiff's standing may be based on its interpretation of a statute even when a narrower interpretation is offered)). Because the AG Memorandum contains the same unreasonable interpretation the Court already considered and rejected—and because, as explained above, the memorandum in no way binds this Court—the Court's prior holdings on justiciability apply.

Even if the Court were inclined to credit the AG Memorandum, that document does nothing to deprive the County of its standing to sue. To begin with, it defines "sanctuary jurisdictions" as state and local governments that willfully refuse to comply with 8 U.S.C. 1373. To the extent this definition does anything more than repeat a vague directive, *see* Part IV.E.3, *infra*, it confirms that the County is in defendants' crosshairs. Pursuant to Section 9(b) of the Executive Order, defendants have identified the County as maintaining policies that they believe violate Section 1373. *See, e.g.*, Dkt. 90 (Pl.'s Second Req. for Court Approval to Supp. R.), Ex. B at 8, 22 (listing the County as a jurisdiction that has "[e]nacted [p]olicies which [li]mit [c]ooperation with ICE"). Moreover, the AG Memorandum pointedly omits any reference to ICE civil detainer requests. The Executive Order therefore continues to threaten the County with defunding or other unspecified enforcement actions due to the County's refusal to honor those requests.

The Court should reject defendants' justiciability arguments for another reason: they amount to a second motion for reconsideration on the Court's justiciability ruling. Defendants previously told this Court that they would not repeat their unsuccessful justiciability arguments in a motion to dismiss. *See* Tr. of CMC Hr'g (May 2, 2017) at 12:23–13:4 ("THE COURT: . . . I

understand why you would want to file a motion to dismiss. Do you think there's much more that you need to know from the Court about what I think about subject matter jurisdiction? MR. SIMPSON: No, your Honor. It would be other matters. It would be 12(b)(6) matters primarily that we'd be addressing."). Notwithstanding that assertion, defendants have rehashed their justiciability arguments not once, but twice. Indeed, defendants' motion to dismiss includes a perfunctory argument on Article III standing and ripeness, instead referring the Court to the justiciability arguments in defendants' motion for reconsideration. *See* Mot. at 11. The motion to dismiss is therefore, "in substance, a motion for reconsideration," and "can be denied on that basis alone." *Semiconductor Energy Lab. Co. v. Chi Mei Optoelectronics Corp.*, 2006 WL 2130866, at *1 (N.D. Cal. July 27, 2006); *see also Lam Research Corp. v. Schunk Semiconductor*, 65 F. Supp. 3d 863, 869 (N.D. Cal. 2014) ("The Court will not exalt form over substance and permit a party to circumvent the applicability of Local Rule 7–9 merely by avoiding the 'motion for reconsideration' label. Courts routinely look to the *substance* of the motion rather than how it is styled in determining the standard to apply.").

In any event, the Court's previous justiciability analysis was correct. The Executive Order's plain text, the President's repeated statements threatening to deprive state and local governments of all federal funds, and the County's policies regarding non-participation in federal immigration enforcement and ICE civil detainer requests, all support the same conclusion: the County has a "credible threat" of being targeted for defunding and enforcement actions under Section 9(a). *See* Compl. ¶¶ 50–65, 107–117. This establishes both Article III standing and ripeness. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *accord California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). Indeed, after this Court issued its preliminary injunction order, both the Ninth and Fourth Circuits issued opinions echoing the Court's conclusion in their separate analyses of the President's "travel ban" executive order. *See Hawaii*, 2017 WL 2529640, at *6–12 (finding Article III standing to challenge the legality of revised travel ban order, and holding that pre-enforcement challenge was ripe for review); *Int'l Refugee Assistance Project*, 857 F.3d at 586 (same).

C. The Executive Order has the force of law and directly affects the County.

Relying on another premise this Court has already rejected, defendants contend that the Court should dismiss the County's lawsuit because the Executive Order "only directs internal Executive branch policy and does not directly affect the [County]." Mot. at 11. This argument fails for three reasons.

First, as the Court properly held in its preliminary injunction order, the Executive Order "purports to delegate to the Attorney General and the Secretary [of Homeland Security] the authority to place a new condition on federal grants" and it "carries the force of law." *Santa Clara*, 2017 WL 1459081, at *8–9. Purportedly promulgated pursuant to the President's constitutional and statutory authority to remedy harm "to the very fabric of our Republic," EO § 1, nothing in the Executive Order suggests that it was "issued as a housekeeping measure." *Legal Aid Soc'y. of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1329 n.14 (9th Cir. 1979). Instead, the text, purpose and structure of the Executive Order confirm its intent to carry the force of law, particularly with respect to Section 9(a). Placing new conditions on federal funding received by states and localities is not an inward-looking interagency directive. *See Hawaii*, 2017 WL 2529640, at *26 (distinguishing between unlawful provisions of executive order that "burden individuals outside of the executive branch of the federal government" and those that solely pertain to "internal government operations and procedures"). In issuing the Executive Order, the President made plain that the Order's purpose was to create real obligations on state and local jurisdictions, or else face denial of all federal funds, unspecified enforcement actions, and other violations and penalties. Compl. ¶ 93. The Attorney General said the same thing during a March press conference. *See* Dkt. 82-1, Req. for Court Approval to Supp. R., Ex. A at 2; *see also Santa Clara*, 2017 WL 1459081, at *15 ("The statements of the President, his press secretary and the Attorney General belie the Government's argument . . . that the Order does not change the law."). The Executive Order cannot be both an internal directive and a tool for enforcement of new grant conditions and civil penalties at the same time.

Second, the Executive Order directly affects the County by attempting to coerce it to change its policies regarding cooperation with federal immigration enforcement. *See* Compl. ¶¶

66–90 (discussing coercive structure and impact of Defunding and Enforcement Provisions). Indeed, as the Court held in the irreparable harm analysis portion of its preliminary injunction order, "the Executive Order seeks to undermine [the County's local policy] judgment by attempting to compel [jurisdictions] to change their policies and enforce the Federal government's immigration laws" under threat of defunding and unspecified enforcement action. *Santa Clara*, 2017 WL 1459081, at *17. This directly harms the County by impairing its sovereign interest in crafting its "own local policies and enforcement priorities," *id.* at *16 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)), and by creating budgetary uncertainty that impacts the County's ability to budget and plan for the future. *Id.* at *17–19. The Executive Order's coercive effects therefore belie the claim that it is merely "an internal Executive Branch directive" devoid of legal force. Mot. at 12.

Third, none of the cases upon which defendants rely supports their argument that the Executive Order lacks the force of law. In *Chen v. Schiltgen*, the district court held that that the executive order at issue provided no private right of action for an immigrant seeking asylum to *enforce* the executive order. 1995 WL 317023, at *2 (N.D. Cal. May 19, 1995), *aff'd sub nom. Chen v. I.N.S.*, 95 F.3d 801 (9th Cir. 1996). Here, the County is *challenging*—not seeking to enforce—the Executive Order, and an executive order need contain no private right of action to be challenged and held unconstitutional. Defendants also cite *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), but that case supports the County. There, the court held that an executive order requiring federal contractors to maintain adequate affirmative action programs "ha[d] the force of law" and was subject to judicial review. *Id.* at 1329–30. Finally, *United States v. Pickard*, 100 F. Supp. 3d 981 (E.D. Cal. 2015), did not involve an executive order at all, but instead a policy memorandum issued by the Deputy Attorney General setting out "eight enforcement priorities to guide" enforcement of the Controlled Substances Act. *Id.* at 1010. Unlike the Executive Order at issue here, the policy memorandum was "intended solely as a guide for prosecutors in their exercise of discretion" and federal prosecutors "retain[ed] exclusive authority and absolute discretion to decide whether to prosecute a case." *Id.* at 1011 (internal quotations omitted). *Pickard* has no bearing on the County's constitutional

challenges to the Executive Order, which the Court correctly concluded carries the force of law. Indeed, *Pickard* reinforces the County's argument that DOJ memoranda carry no such weight.

In any case, defendants' remarkable assertion that the Executive Order "does not carry the independent force of law," Mot. at 12, hardly supports dismissal of the County's lawsuit. On the contrary, if defendants are correct that the Executive Order is a toothless paper tiger, despite the President's assertion that it is not, *see* Dkt. 36-2 at 4, then the proper outcome to this litigation is a stipulated judgment making permanent the Court's preliminary injunction. If, as defendants now claim, the Executive Order does nothing, then there can be no harm to leaving the Court's order in place. Defendants would remain able to enforce whatever constitutionally acceptable grant restrictions Congress has authorized, and state and local governments could go about their business free from the uncertainty and coercion the Executive Order creates.

D. The Executive Order is facially unconstitutional.

Defendants next argue that three of the County's causes of action should be dismissed under Rule 12(b)(6) because they raise improper facial challenges.[4] Defendants are wrong: the Executive Order is facially unconstitutional, the County properly challenged it on that basis, and the Court correctly concluded that the County is likely to succeed on the merits of those facial challenges. Defendants misunderstand the law on facial challenges in at least three ways.

First, defendants contend that, so long as the Executive Order can lawfully be applied in any single instance, it stands immune from facial challenge. *See* Mot. at 10–11. But defendants' argument "reflects a misunderstanding of the Supreme Court's [facial challenge] jurisprudence." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014). In *Jackson*, a challenge to a "flat prohibition on keeping unsecured handguns in the home," the City of San Francisco argued that a facial challenge could not succeed, because the challenger had conceded that locked storage could be required in some circumstances. Thus, according to San Francisco, the statute had a "plainly legitimate sweep," rendering a facial challenge inappropriate. *Id.* The Ninth Circuit rejected that argument because the statute "[o]n its face . . . does not give courts the opportunity to construe the prohibition narrowly or accord the prohibition 'a limiting construction

[4] Defendants make no facial challenge argument to the County's Tenth Amendment claim.

to avoid constitutional questions.'" *Id.* The same is true here. As this Court has held, the categorical commands of the Executive Order are likely unconstitutional and "not readily susceptible to the Government's narrow interpretation." *Santa Clara*, 2017 WL 1459081, at *8.[5]

Second, defendants can hardly sidestep the Executive Order's inherent constitutional infirmities merely by vowing to implement it lawfully. As this Court correctly ruled in granting preliminary injunctive relief, the Attorney General's current inclination "to enforce [the Executive Order] sparingly cannot impact whether it is unconstitutional on its face." *Id.* at *20. The constitution "protects against the Government; it does not leave [the County] at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. Courts will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.*; *see also Doe v. Harris*, 772 F.3d 563, 580–81 (9th Cir. 2014) ("[T]he promise from the State that it will use the power [granted it by unconstitutional statute] appropriately is not sufficient"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946–47 (9th Cir. 2011) ("We cannot simply presume the City will act in good faith and adhere to standards absent from the ordinance's face.") (internal quotations and alterations omitted). The concerns animating this prohibition are particularly acute where, as here, defendants' assertion that they will implement the Executive Order narrowly contradicts the President's and Attorney General's own past statements, along with the DOJ's prior positions.

Third, defendants cannot defeat a facial challenge merely by pointing to actions that they could take under separate statutes regulating grant eligibility and funding, which exist independently of the Executive Order. *See* Mot. at 13–14. As the Supreme Court has explained, when analyzing facial challenges, courts consider "only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451

[5] *See also Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454 (2008) (contrasting a challenge based on what is required by a law with a hypothetical possible approach to implementation of that statute); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (en banc) (holding a statute facially unconstitutional where "the *entire statute* fails [the relevant] decision rule and would thus be invalid in all of its applications") (emphasis in original); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123–27 (10th Cir. 2012) (rejecting approach that "divorces review of the constitutionality of a statute from the terms of the statute itself, and instead improperly requires a court to engage in hypothetical musings about potentially valid *applications* of the statute.") (emphasis in original).

(2015). In other words, the "proper focus of the constitutional inquiry is [activity] that the law actually authorizes, not those for which it is irrelevant." *Id.*

The Supreme Court's decision in *Patel* illustrates this principle. In that case, motel operators brought a facial challenge to Los Angeles's municipal ordinance authorizing warrantless searches of hotel guest registries. Los Angeles argued that the motel operators could not prevail on a facial challenge "because such [warrantless] searches will never be unconstitutional in all applications," such as where exigency or consent would render the searches valid. *Id.* at 2450–51. The Court rejected that argument as "misunderstand[ing] how courts analyze facial challenges." *Id.* at 2451. In Los Angeles's postulated constitutional applications, the warrantless search statute "do[es] no work" and cannot itself authorize searches already authorized by other law. *Id.* The Court thus concluded that those supposed applications were "irrelevant to [the] analysis because they do not involve actual applications of the statute." *Id.*; *see also Lopez-Valenzuela*, 770 F.3d at 789 (declaring state laws denying bail to undocumented immigrants facially unconstitutional even if some persons "could be detained consistent with due process under a different categorical statute," or after an "individualized determination").

The same analysis applies to defendants' purportedly lawful applications of the Executive Order. Defendants argue that the Executive Order can be lawfully implemented because certain appropriations statutes authorize the executive branch to impose the grant conditions that the Executive Order purports to impose. *See* Mot. at 14 ("[T]he 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.'"). But even if defendants' proposed actions were authorized by the appropriations statutes (which the County does not concede), that is "irrelevant" to the Court's analysis because those actions "do not involve actual applications" of the Executive Order. *Patel*, 135 S. Ct. at 2451. To approach facial challenges in any other way would be to adopt "[a] construction so narrow that it reads out any legal force," which "does not save the [Executive Order] and obviates the entire purpose of adopting a narrow reading." *Santa Clara*, 2017 WL 1459081, at *9.

E. The County's causes of action satisfy Rule 12(b)(6).

The Court has already concluded that the County is likely to succeed on the merits of its constitutional claims under a standard more exacting than the one set forth in Rule 12. It follows "[*a*] *fortiori*" that because the County has "passed muster under the likelihood of success standard, it has also stated a claim sufficient to survive a motion to dismiss under Rule 12(b)(6)." *United States v. Arizona*, 2010 WL 11405085, at *6 (D. Ariz. Dec. 10, 2010) ("On account of the more exacting standard required to demonstrate a likelihood of success on the merits, the Court will not reexamine in this Order the claims with regard to which the Court previously found that Plaintiff had demonstrated a likelihood of success."). In any event, for the reasons that follow, each of the County's causes of action states a claim for relief.[6]

1. The County has adequately pled its separation of powers claim.

The Executive Order's most glaring constitutional defect is that it usurps the spending power, which belongs exclusively to Congress, and empowers executive branch officials to deem state and local entities ineligible to receive *any* federal grants, except as necessary for law enforcement purposes. As this Court previously held, this facially unconstitutional directive violates structural separation of powers principles articulated since the founding of the Republic. *See Santa Clara*, 2017 WL 1459081, at *20–22.

This unconstitutional power-grab is all the more problematic because the President took the action with neither statutory nor constitutional authority to do so. *See Youngstown*, 343 U.S. at 585 (holding that the president's power to issue executive orders "must stem either from an act of Congress or from the Constitution itself."). The only time Congress has spoken regarding the president's ability to impound allocated funds was when it enacted the Impoundment Control Act of 1974. 2 U.S.C. § 683. The President has made no attempt to follow the procedures outlined in that Act, and defendants have never even mentioned it. Nor do they address the many times Congress has expressly declined to provide the President with the very powers he has now

[6] If the Court finds a pleading defect, the County respectfully requests leave to amend its complaint under Federal Rule of Civil Procedure 15(a). Because defendants have provided no reason why leave to amend would be inappropriate here, dismissal with prejudice would constitute an abuse of discretion. *See Doe v. United States*, 58 F.3d 494, 496–97 (9th Cir. 1995); *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc*, 806 F.2d 1393, 1401 (9th Cir. 1986).

claimed for himself. *See Santa Clara*, 2017 WL 1459081, at *22 (listing legislation). "This puts the President's power 'at its lowest ebb.'" *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

Rather than addressing these issues, defendants' motion spends a good deal of time challenging a cause of action the County never asserted, namely a claimed violation of the Spending Clause. Mot. at 14–19. Defendants' argument misses the mark entirely: the County has alleged no independent spending clause violation because *Congress* has not acted—the President has. The County's complaint merely points out that *if* the Executive Order had been an Act of Congress rather than a presidential edict, it would violate the spending clause. *See* Compl. ¶¶ 82–83, 121–32. That remains the case. The Executive Order still contains a categorical command to strip "sanctuary jurisdictions" of their eligibility for all federal grants. That command would be facially unconstitutional, even if Congress had issued it.

For example, defendants continue to get the nexus requirement established in *South Dakota v. Dole* exactly backwards: the AG Memorandum limits the application of the Executive Order to law-enforcement related grants, even though such grants are the only ones potentially exempted from the Executive Order. *See* EO § 9(a) (exempting from the defunding provision funds "deemed necessary for law enforcement"). Nor is the new condition unambiguous, as *Dole* requires. 483 U.S. at 207. To avoid defunding and enforcement action, state and local governments must certify compliance with section 1373, even though—as this Court has held—the federal government is unsure what that statute demands. *See Santa Clara*, 2017 WL 1459081, at *25. Nor does the AG Memorandum alleviate the Executive Order's coercive effects. *See Dole*, 483 U.S. at 210 (holding that spending conditions may not be so coercive as to compel compliance). The AG Memorandum fails to identify which DHS grants are at issue, and the County relies on DHS grants for two-thirds of its Office of Emergency Services budget. *See* Compl. ¶¶ 41–43; *Santa Clara*, 2017 WL 1459081, at *6. And the Executive Order's sweeping enforcement provision remains in place. Finally, the AG Memorandum's silence on civil detainer requests means that, to avoid punishment, state and local governments may be forced to violate its residents Fourth Amendment rights by incarcerating individuals without probable cause. *See*

Dole, 483 U.S. at 213 (holding that a condition on spending may not violate "any independent constitutional prohibition"); *Morales v. Chadbourne*, 793 F.3d 208, 215–217 (1st Cir. 2015) (holding that honoring civil detainer requests violate the Fourth Amendment); *Santoyo v. United States*, No. 5:16-CV-855-OLG, Dkt. 36, at 11 (W.D. Tex. June 5, 2017) (same); *Miranda–Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *9–11 (D. Or. Apr. 11, 2014) (same). The County has adequately pled its separation of powers claim.

2. The County has adequately pled its Tenth Amendment claim.

As this Court correctly found, the Executive Order likely violates the Tenth Amendment by seeking to condition federal grants on compliance with ICE civil detainer requests, and by commanding to the Attorney General to "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." *Santa Clara*, 2017 WL 1459081, at *23–24. Defendants do not challenge this finding or the constitutional merits of the County's Tenth Amendment claim. Instead, defendants' motion rehashes their argument that this claim is non-justiciable. Mot. at 22–25. As discussed in Section IV.B *supra*, that argument lacks merit and the Court correctly rejected it in its preliminary injunction order. Furthermore, the AG Memorandum completely sidesteps the issue of compliance with civil detainer requests and Section 9(a)'s enforcement provision. Thus, even if the AG Memorandum were credited for purposes of this motion, nothing in it would change the Court's conclusion that "[t]he Executive Order's threat to pull federal grants from jurisdictions that refuse to honor detainer requests or to bring 'enforcement action' against them violates the Tenth Amendment's prohibitions against commandeering." *Santa Clara*, 2017 WL 1459081, at *24.

3. The County has adequately pled its Fifth Amendment vagueness claim.

The Court has also found that the County is likely to prevail on its claim that the Executive Order is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. *Id.* at *24–25. Ignoring the plain language of the Executive Order and the Court's conclusions in the preliminary injunction order, defendants yet again pin their hopes on the AG Memorandum. *See* Mot. at 10, 19–21. Defendants' argument fails as a matter of law and fact.

As a legal matter, defendants contend that because the AG Memorandum "clarifies the meaning and scope" of some (but not all) of the terms in Section 9, the Executive Order cannot be considered vague in all of its applications. Mot. at 10. In support of this argument, defendants rely on *Humanitarian Law Project v. U.S. Treasury Department*, 578 F.3d 1133 (9th Cir. 2009). But there, all parties agreed that the federal government's interpretation of the challenged statutory term, "service," was reasonable. *See id.* at 1146. This case, by contrast, is governed by *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021–22 (9th Cir. 2013), which flatly rejected the argument that a defendant can cure a facially unconstitutional statute by adopting an *unreasonable* narrowing interpretation. In *Valle del Sol*, the Ninth Circuit affirmed a trial court's order preliminarily enjoining an Arizona immigration statute because it was facially void for vagueness. *Id.* Like defendants, Arizona made no attempt to defend the statute "as written" but instead argued that the court should adopt "a possible limiting construction that would save the statute." *Id.* at 1021. The Ninth Circuit declined to do so because "[a]s currently drafted, the statute [was] incomprehensible to a person of ordinary intelligence," and Arizona's proposed narrowing construction was "not a readily apparent gloss on the statute's language." *Id.* at 1022 (internal quotations omitted).

The same is true here. Defendants' implausible interpretation of the Executive Order—first adopted at oral argument on the preliminary injunction motion and later memorialized in the AG Memorandum—fails to remedy the Executive Order's facial vagueness. The Court has already concluded that the Executive Order is "not reasonably susceptible to the new, narrow interpretation" defendants offer, which "'requires rewriting, not just reinterpretation.'" *Santa Clara*, 2017 WL 1540981, at *2, 8 (quoting *Stevens*, 559 U.S. at 481).[7]

As a factual matter, the AG Memorandum, even if credited, offers defendants no aid. The AG Memorandum defines "sanctuary jurisdictions" as "jurisdictions that 'willfully refuse to

[7] Defendants cite *Washington State Grange*, 552 U.S. 442 (2008), but "*Grange* merely supports the approach to facial challenges which involves an examination of whether the terms of the statute itself 'measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contain[ ] a constitutional infirmity that invalidates the statute in its entirety.'" *Albuquerque*, 667 F.3d at 1127. As the Court has already concluded, the Executive Order flunks that test.

comply with 8 U.S.C. 1373.'" AG Memorandum at 2. This clarifies nothing. As the Court found in granting the preliminary injunction, defendants themselves "do[] not know what it means to 'willfully refuse to comply' with Section 1373." *Santa Clara*, 2017 WL 1540891, at *25. The Secretary of Homeland Security is on record saying he "do[esn't] have a clue" how to define a "sanctuary city," Dkt. 36-4, and the AG Memorandum provides no guidance beyond the Executive Order's vague text. Therefore, there is—and remains—"no clear standard from the [federal] Government" that would allow jurisdictions to "avoid the Order's defunding penalty." *Santa Clara*, 2017 WL 1540891, at *12.

Likewise, Section 9(a)'s Enforcement Provision, which the AG Memorandum entirely ignores, remains as unconstitutionally vague as it was the day the Court ruled. "This expansive, standardless language creates huge potential for arbitrary and discriminatory enforcement, leaving the Attorney General to figure out what 'appropriate enforcement action' might entail and what policies and practices might 'hinder[] the enforcement of Federal law.'" *Id.* at *25. Because the Administration remains unable to explain what sorts of punishments the Attorney General may mete out, or what state and local governments would have to do to avoid such unspecified punishment, the Enforcement Provision (still) violates the Fifth Amendment and must be struck down. *See United States v. Williams*, 553 U.S. 285, 304 (2008).[8]

4. The County has adequately pled its Fifth Amendment procedural due process claim.

In attempting to defeat the County's procedural due process claim, defendants offer the same "'consistent with law' bandage" that this Court rejected in its preliminary injunction order. *Santa Clara*, 2017 WL 1459081, at *26; Mot. at 22. As this Court correctly recognized, Section 9(a) provides no process at all. Instead, the Attorney General and Secretary of Homeland Security determine whether a state or local government is a "sanctuary jurisdiction" or "hinders the enforcement of Federal law." EO § 9(a). And after making either such finding, those

[8] Defendants suggest that "[t]here is no indication that the Attorney General will take any *unauthorized* or *inappropriate* actions pursuant to [the Enforcement Provision] in Section 9(a)." Mot. at 21 (emphases added). But that is exactly the point—neither the Executive Order nor the AG Memorandum provides any clear standards for what "appropriate enforcement action" the Attorney General could take, EO§ 9(a), leaving jurisdictions subject to the broadest possible threat of reprisals and "seriously discriminatory enforcement." *Williams*, 553 U.S. at 304.

officials "shall" declare the jurisdiction "not eligible" for federal funds, and "shall" take enforcement action. *Id*. A targeted state or local government receives no notice, no opportunity to be heard before its fate is decided, and no right to appeal any adverse finding.

Defendants also argue that the County lacks a constitutionally protectable interest in the federal funding threatened by the Executive Order because, under the AG Memorandum's implausible interpretation, the Order applies only to three DOJ grants. Mot. at 22. But, as discussed in Section IV.A *supra*, the Court has already rejected that interpretation. In any event, the County has a legitimate claim of entitlement to federal funds that Congress has already appropriated and directed to local entities. *See Doran v. Houle*, 721 F.2d 1182, 1184–85 (9th Cir. 1983). Defendants fail to cite any authority supporting their argument that a party's constitutionally protected interest depends on the magnitude of the federal funding at stake.

V. CONCLUSION

Defendants—including the President, the Attorney General, and the Secretary of Homeland Security—have made vastly different statements regarding the Executive Order's scope, intent, and application. These shifting statements reaffirm why this lawsuit must proceed and why the Court's preliminary injunction must be made permanent. The County relies on more than $1 billion annually in federal and federally dependent funds to provide essential services to 1.9 million residents. Compl. ¶¶ 25, 27–45. On its face, the Executive Order puts those funds at risk. The County cannot rely—and should not be forced to rely—on defendants' malleable interpretations of an unconstitutional Executive Order that is designed to coerce and ultimately bludgeon the County into submission. To budget and govern, the County requires a definitive judicial interpretation of the Executive Order and an order enjoining it on that basis. Having already demonstrated its standing and likelihood of success on its claims, the County has perforce demonstrated it has alleged facts sufficient to state a claim for relief. The Court should deny defendants' motion in its entirety.

Dated: June 21, 2017

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