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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	**REPLY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS** Date: July 12, 2017 Time: 2:00 p.m. No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 3:17-cv-00574-WHO
CITY OF RICHMOND, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 3:17-cv-01535-WHO

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INTRODUCTION

Plaintiffs devote much of their opposition briefs to attempting to undermine the Attorney General's Memorandum of May 22, 2017 ("AG Memorandum"). This is perhaps unsurprising given the Memorandum's conclusive effect. As an authoritative statement on the key provisions of Executive Order 13,768, the AG Memorandum eliminates the supposed "budgetary uncertainty" on which Plaintiffs primarily base their assertions of standing and ripeness. The AG Memorandum also bolsters the conclusion that the Executive Order is consistent with the Constitution.

Indeed, the AG Memorandum is authoritative because it is a formal statement by the Cabinet official responsible for "[f]urnish[ing] advice and opinions . . . on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the Government."[1] Every aspect of the AG Memorandum is supported by language in the Executive Order, the goal of which is to establish a policy of faithful enforcement of federal immigration law. Consistent with that purpose, the AG Memorandum clarifies that the grant eligibility provision in Section 9(a) of the Order will be applied only where the Department of Justice and the Department of Homeland Security are statutorily authorized to do so. In short, the Executive Order and the AG Memorandum simply apply existing law.

Especially in light of the AG Memorandum, the Executive Order is consistent with the constitutional Separation of Powers, the Spending Clause, the Tenth Amendment, and the other constitutional provisions cited in Plaintiffs' complaints. This is especially true given that Plaintiffs challenge the Order on its face, "the most difficult challenge to mount successfully." In this context, plaintiffs "must establish that no set of circumstances exists under which the [challenged enactment] would be valid."[2] Plaintiffs cannot, however, show that the grant eligibility provision would violate the Constitution in all of its applications. Nor have San Francisco or Richmond identified a right of action to seek a judicial declaration that they comply with 8 U.S.C. § 1373. Finally, there is no live controversy regarding whether they comply with that statute.

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[1] 28 C.F.R. § 0.5(c).

[2] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Accordingly, Plaintiffs' claims should be dismissed.

ARGUMENT

I. The AG Memorandum Is an Authoritative Statement on the Executive Order within the Executive Branch

A. The AG Memorandum Is a Formal, Authoritative Statement

Plaintiffs attempt to equate the AG Memorandum with the representations of Defendants' counsel at oral argument on the motions for preliminary injunction, asserting that the Memorandum "merely reduces that same . . . argument to writing" (SC Opp. at 9; *see* Richmond Opp. at 9; SF Opp. at 16). They also argue that the Court has already rejected the "reading" of the Executive Order conveyed in the AG Memorandum (SF Opp. at 16; Richmond Opp. at 8).

Plaintiffs fail to acknowledge, however, that the AG Memorandum and the representations of counsel are fundamentally different. Counsel for Santa Clara County made this very point at oral argument: "[W]ith all deference, what a Justice Department lawyer down the food chain says, without a declaration, without an affidavit, without any binding effect, is not something that you should consider . . . . I didn't hear that Attorney General Sessions had signed off to this new interpretation." Tr. of Oral Arg. at 11:9-12, 46:1-3, *City & Cnty. of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Apr. 14, 2017).

The AG Memorandum is far more than the representation of "a Justice Department lawyer down the food chain." Nor does it merely "repeat" counsel's representations "in a written form," as might a letter from counsel (SC Opp. at 1; Richmond Opp. at 9).[3] Rather, the AG Memorandum is a formal, authoritative statement by a member of the President's Cabinet, and the single official ultimately responsible for "[f]urnish[ing] advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the Government." 28 C.F.R. § 0.5(c); *see* 28 U.S.C. § 512 (Attorney General's duty

[3] Even if the AG Memorandum adopted the arguments of counsel in their entirety, its independent legal authority would be unaffected. The fact that counsel have interpreted the Executive Order consistent with subsequent formal guidance from the Attorney General does not in any way undermine the legitimacy or authority of that guidance. In other words, the fact that the Department of Justice has spoken consistently about the meaning and effect of Executive Order 13,768 is not a credible argument against the AG Memorandum.

to advise executive department heads on "questions of law"). The Attorney General is the "chief legal advisor" to the President, *United States v. Ehrlichman*, 546 F.2d 910, 925 (D.C. Cir. 1976), and one of the two officials charged with implementing Section 9 of the Executive Order. Moreover, the statute that sets forth the "powers and duties" of the Secretary of Homeland Security – the other official charged with implementing Section 9 – provides that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).[4] Finally, the Attorney General is responsible for representing almost all federal agencies in litigation, 28 U.S.C. § 516, such that any position taken by an agency contrary to the Attorney General's guidance may not be defended in litigation.

Plaintiffs argue that 28 U.S.C. § 512 and 28 C.F.R. § 0.5(c) cannot apply here because the Attorney General has delegated his authority thereunder to the Office of Legal Counsel (SF Opp. at 18; Richmond Opp. at 11). But "it is well established that the head of an agency retains the authority to make final decisions for the agency even if he or she delegates the authority to make these decisions to his or her subordinates." *Heggestad v. Dep't of Justice*, 182 F. Supp. 2d 1, 9 (D.D.C. 2000). Plaintiffs also argue that these statutory and regulatory provisions do not apply here because the AG Memorandum does not contain "legal analysis" (SF Opp. at 17; Richmond Opp. at 11), but there is no indication in 28 U.S.C. § 512 or 28 C.F.R. § 0.5(c) that an opinion thereunder must contain any particular kind of "analysis."

B. The AG Memorandum Is Consistent With the Executive Order

Next, Plaintiffs argue that the AG Memorandum sets forth an "implausible interpretation" or "reading" of the Executive Order (SC Opp. at 8; SF Opp. at 16) that "contradicts" the Order's "plain language" (Richmond Opp. at 2). To the contrary, the Attorney General's statements on the meaning and implementation of Section 9(a) are fully supported by the language of the Order.

[4] The fact that 8 U.S.C. § 1103 is the statute that generally sets forth the Secretary's powers and duties belies plaintiffs' assertion that the Attorney General's authority relates only to "interpreting the INA" or ruling on "a question of immigration law" (SC Opp. at 10; SF Opp. at 18).

First, the AG Memorandum provides that the grant eligibility provision applies "solely to 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. This is based on the President's instruction that "*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." Exec. Order No. 13,768, § 9(a), 82 Fed. Reg. 8,799 (Jan. 30, 2017) (emphasis added). If the President had intended to apply that provision to all federal agencies or to all federal grants, he would have said "*all federal agencies*, in their discretion and to the extent consistent with law," or "not eligible to receive *any* Federal grants," respectively. Nor can it be assumed that the President intended the Attorney General to enforce such a prohibition across all federal agencies; if that had been the intent, there would have been no need to include the Secretary in the same sentence.

Further, the fact that Section 2(c) of the Order refers more generally to "Federal funds," whereas Section 9(a) refers to "Federal grants," *supports* the Attorney General's conclusion that the grant eligibility provision applies only to the latter (SC Opp. at 9; Richmond Opp. at 16). If the President had intended Section 9(a) to apply to all types of federal funding rather than only grants, he would have repeated the term "Federal funds" in Section 9 rather than changing it to "grants." *Cf. Lindsey v. Tacoma-Pierce Cty. Health Dep't*, 195 F.3d 1065, 1074 (9th Cir. 1999) (referring to "basic principle of statutory construction that different words in the same statute must be given different meanings").

Second, the AG Memorandum provides 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," but only where the agency is "statutorily authorized to impose such a condition." AG Mem. at 2. This is based on the President's instruction that compliance with Section 1373 be imposed as a grant condition "to the extent consistent with law." Exec. Order No. 13,768, § 9(a). That phrase would have been unnecessary – and self-defeating – if the President had intended to impose a grant condition without regard to existing law. Moreover, although the Order does not expressly authorize the Attorney General and the

Secretary to require certification of compliance, that method of "ensuring" non-payment of grant funds to non-compliant jurisdictions is logical and certainly within the "discretion" conferred by the Order.[5]

Third, the AG Memorandum states that "[a]ll grantees will receive notice of their obligation to comply with section 1373." AG Mem. at 2. This language, too, is based on the instruction to impose this grant condition "to the extent consistent with law." Exec. Order No. 13,768, § 9(a). That phrase would have been superfluous if the President had wanted the Attorney General and the Secretary to disregard the well-established procedures of federal grant-making.[6]

C. The AG Memorandum Carries Out Rather than Detracts from the Order's Intended Effect

Further, Plaintiffs contend that the Court must not credit the AG Memorandum because a directive "merely . . . to exercise authority conferred by other laws" would be without "legal force" (SF Opp. at 1, 17; *see* Richmond Opp. at 8). In Plaintiffs' view, an Executive Order that instructs federal agencies to carry out their responsibilities under existing law would be "meaningless" (SC Opp. at 9).

Far from it. Executive Order 13,768 was necessary precisely because the Federal Government previously had failed to "exercise authority conferred by other laws." As stated in the Order itself, federal agencies had "failed to discharge" their responsibilities under the immigration laws "to ensure the removal of aliens who have no right to be in the United States." Exec. Order No. 13,768, § 1. Thus, the express purpose of the Order is to "direct executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the

[5] Santa Clara County asserts that the AG Memorandum is contradicted by the Attorney General's statement that DOJ will "take all lawful steps to claw back any funds awarded to a jurisdiction that willfully violates 1373" (SC Opp. at 10; SF Dkt. No. 116-3 at 3). But a grantee's false certification of compliance with Section 1373 would constitute violation of the grant conditions, potentially requiring a return of funds.

[6] Nor does the AG Memorandum contradict Section 9(c) of the Order (SC Opp. at 9). The President can direct the Office of Management and Budget to gather and disseminate information regarding recipients of all federal grants for possible later attention or to affect public perception and opinion, while directing specific agencies to use their discretion to impose conditions on certain federal grants, where statutorily authorized.

United States." *Id*. In other words, the Order reversed the policy of prior administrations and, among other things, established a policy of "ensur[ing], 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" and other federal statutes. *Id*. § 9; *see Arizona v. United States*, 567 U.S. 387, 446 (2012) (noting that "immigration enforcement priorities . . . change from administration to administration").

Accordingly, the AG Memorandum effectuates the intent of the Executive Order – that is, to direct agencies to exercise existing legal authorities – rather than "abandon[ing]" the Order (SF Opp. at 1).

D. The Timing of the AG Memorandum Does Not Undermine Its Authoritativeness

Lastly, Plaintiffs attack the authoritativeness of the AG Memorandum on the basis that it was issued in the course of litigation and allegedly at the "last minute" (SF Opp. at 4, 19; SC Opp. at 4, 12). But the timing of the Memorandum is irrelevant. The fact that it was issued during the course of litigation is attributable to the premature timing of this litigation, not to the Attorney General's timing. The President signed the Executive Order on January 25, 2017, and the first plaintiff – San Francisco – filed its original complaint six days later, on January 31. The Order required the Attorney General to take various actions to implement Section 9(a), and, as Defendants indicated in response to Plaintiffs' motions for preliminary injunctions and in the hearing on those motions, those actions had not yet been completed at the time of the hearing. The fact that the Attorney General took action during the course of this ongoing litigation, in the form of the AG Memorandum, does nothing to detract from the authoritativeness of the Memorandum.

II. Plaintiffs Lack Standing and Their Claims Are Unripe

Especially in light of the AG Memorandum, Plaintiffs have not satisfied their burden to establish the justiciability of their claims.[7] *See Planned Parenthood Ariz., Inc. v. Brnovich*, 172

[7] San Francisco faults the Defendants (SF Opp. at 5 n.1) for incorporating arguments made in Defendants' Motion for Reconsideration or, in the Alternative, Clarification of the Court's Order of April 25, 2017, which is currently pending before the Court (SF Dkt. No. 107). The authority on which the City relies, which criticizes the incorporation of arguments made in connection with "a motion that is not before the Court," *Williams v. Cty. of Alameda*, 26

F. Supp. 3d 1075, 1085 (D. Ariz. 2016) ("The plaintiff bears the burden of establishing the existence of a justiciable case or controversy, and must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.") (internal quotation marks omitted). As San Francisco concedes, "Defendants have not . . . officially declared San Francisco a 'sanctuary jurisdiction,' withheld any funds pursuant to the [grant eligibility provision], or initiated other enforcement action against San Francisco" (SF Opp. at 6). Those concessions are fatal, and they are true of all three plaintiffs in these cases.

The AG Memorandum confirms that Plaintiffs' claims are non-justiciable under these circumstances. The alleged "budgetary uncertainty" on which Plaintiffs primarily base their assertions of present concrete injury, *Cty. of Santa Clara v. Trump*, ___ F. Supp. 3d ___, No. 17-CV-00485-WHO, 2017 WL 1459081, at *17-19 (N.D. Cal. Apr. 25, 2017), evaporates because (1) the grant eligibility provision will be applied only to grants administered by DOJ and the Department of Homeland Security ("DHS") where the agency has authority to require compliance with 8 U.S.C. § 1373, and (2) grant applicants will receive notice of their obligation to comply with the statute. *See* AG Mem. at 1-2. These facts also eliminate any concern that Plaintiffs will be "force[d] to change [their] policies" (Richmond Opp. at 6; *see* SC Opp. at 11, 15; SF Opp. at 6).[8]

Further, the Executive Order – especially as elucidated by the AG Memorandum – does not "require jurisdictions to comply with detainer requests or face loss of federal funds and other

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F. Supp. 3d 925, 947 (N.D. Cal. 2014), does not apply here, since the motion for reconsideration is "before the Court."

[8] Although Richmond implies that the Court need only consider the allegations in its complaint (Richmond Opp. at 14-20), the AG Memorandum should be considered in relation to both lack of jurisdiction and failure to state a claim. For example, since 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), the Court should consider outside legal authorities, such as case law, regulations, and the AG Memorandum, that bear upon that issue. The Court should also consider the AG Memorandum under judicial notice, if necessary. *See La. Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016) ("The Supreme Court has instructed that courts ruling on a motion to dismiss 'must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'") (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

enforcement action" (SF Opp. at 7). The AG Memorandum specifies that application of the grant eligibility provision will turn on compliance with 8 U.S.C. § 1373, which relates only to the sharing of information. *See* AG Mem. at 2. In any event, the Government recently confirmed its position that immigration detainer requests are "voluntary." *See* Br. of the United States as Amicus Curiae at 22, *Mass. v. Lunn*, No. SJC-12276, 2017 WL 1240651, at *22 (D. Mass. Mar. 27, 2017); *see also Galarza v. Szalczyk*, 745 F.3d 634, 639-42 (3d Cir. 2014) (rejecting contention that immigration detainers are mandatory). San Francisco and San Clara County argue that that confirmation is contradicted by a statement in which they claim the Attorney General said that "failure to comply with detainer requests violates federal law and will render jurisdictions ineligible for DOJ grants under Section 1373" (SF Opp. at 7 n.3). But that is an inaccurate characterization of the Attorney General's remarks. Although he said that refusing to comply with detainer requests "frustrate[s] [the] enforcement of immigration laws" and that "jurisdictions seeking or applying for Department of Justice grants [would be required] to certify compliance with 1373," he did not say that non-compliance with detainer requests would constitute non-compliance with Section 1373 (Dkt. 116-3, Ex. C).

Finally, San Francisco and Santa Clara County have not established the justiciability of their challenge to the "appropriate enforcement action" provision in Section 9(a). The Defendants have taken no enforcement action against the Plaintiffs under that provision, and there is no indication that any such action is imminent. In response, San Francisco cites a few general statements about sanctuary policies in general and the City's policies in particular – including a statement by a member of Congress (SF Opp. at 8-9). But those statements do not indicate that any "enforcement action" against the City under Section 9(a) is imminent. In any event, if the United States were to initiate any judicial action against one of the Plaintiffs outside of Section 9(a), the defendant municipality would have an opportunity at that time to challenge the propriety and merits of the action.

III. Plaintiffs Fail to State Any Viable Claim Regarding the Executive Order, Which Is an Internal Directive and Does Not Necessarily Directly Affect the Plaintiffs

Assuming Plaintiffs could show the justiciability of their claims, all of the claims challenging Executive Order 13,768 should be dismissed because the Order only directs internal Executive Branch policy and does not directly affect the Plaintiffs absent a finding that they have violated Section 1373. *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 Cty. v. Brennan*, 608 F.2d 1319, 1330 n.14 (9th Cir. 1979); *see also United States v. Pickard*, 100 F. Supp. 3d 981, 1011 (E.D. Cal. 2015). San Francisco and Santa Clara County attempt to distinguish *Chen* and *Legal Aid Society of Alameda County* on the basis that those cases dealt with whether certain executive orders "create[d] [a] private right of action that can be *enforced* in court," whereas the Plaintiffs here *challenge* an executive order (SF Opp. at 13-14; *see* SC Opp. at 16). But both conclusions proceed from the same rationale: In each situation, the order is "merely an internal directive from the President to [certain Cabinet officials], instructing them to exercise their statutory authority." *Chen*, 1995 WL 317023, at *6. If there is no private right of action to enforce an internal directive, then there cannot possibly be a private right of action to challenge it, either.[9]

Richmond argues that Executive Order 13,768 "contains no language suggesting it was intended to be merely an internal directive" (Richmond Opp. at 11). Yet all of the Order's mandates are directed at federal officials. Section 4 – the first section after the provisions on policy and definitions – "direct[s] agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens." Section 9 sets forth instructions to the Attorney General, the Secretary of Homeland Security, and the Director of the Office of Management and Budget. Except for statements of purpose, policy, and the general construction of the Order (Sections 3 and 18), every section and subsection sets forth

[9] San Francisco also seeks to distinguish *United States v. Pickard*, 100 F. Supp. 3d 981 (E.D. Cal. 2015). Plaintiff recognizes, however, that the court in *Pickard* rejected a challenge to an internal memorandum that "described . . . enforcement priorities" (SF Opp. at 14 n.5). Like that memorandum, the Executive Order here sets forth "enforcement priorities."

instructions to one or more federal officials. In sharp contrast to Executive Order 13,768, other orders have contained more than internal directives. One example is Executive Order 13,129, which prohibited "any transaction or dealing by United States persons . . . in property or interests in property" of the Taliban. 64 Fed. Reg. 36,759, § 2(a) (1999). Another example is Executive Order 13,466, which provided that "United States persons may not register a vessel in North Korea . . . or own, lease, operate, or insure any vessel flagged by North Korea." 73 Fed. Reg. 36,787, § 2 (2008). Unlike the Executive Order involved here, those Orders were not merely internal directives.

Finally, San Francisco argues that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), supports this challenge to Executive Order 13,768 because the order struck down there "was similarly framed as a directive to an Executive Branch official" (SF Opp. at 13). But the executive order involved in *Youngstown* necessarily affected the plaintiffs in that case very directly, in contrast to the Order involved here. There, the President directed the Secretary of Commerce to seize the facilities of certain named companies, including those of the plaintiffs. *See* Exec. Order No. 10,340, § 1, 17 Fed. Reg. 3139 (1952). Here, in contrast, the Order only directs the Attorney General and the Secretary to focus on certain aspects of their existing authorities.

IV. Plaintiffs Fail to State Any Viable Claim Regarding the Grant Eligibility Provision, as Elucidated by the AG Memorandum

All three of the Plaintiffs challenge the grant eligibility provision under the Separation of Powers and the Spending Clause (although Santa Clara County argues Spending Clause principles only in the context of its Separation of Powers claim). San Francisco and Richmond allege that the grant eligibility provision violates the Tenth Amendment. Santa Clara County and Richmond allege that the provision is unconstitutionally vague under the Due Process Clause. Finally, the County also makes a procedural due process claim, and Richmond also makes a Fourth Amendment claim. All of these challenges are without merit, especially in light of the AG Memorandum and the high standard for facial challenges.

A. Plaintiffs Must Establish that the Grant Eligibility Provision Is Unconstitutional in All Applications

All of Plaintiffs' claims against the grant eligibility provision challenge its facial constitutionality. As the Supreme Court has said, a facial challenge is "the most difficult challenge to mount successfully"; in this context, "the challenger must establish that no set of circumstances exists under which the [challenged enactment] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs argue that the *Salerno* principle does not apply here (SF Opp. at 20-21; SC Opp. at 18-19), but this case fits comfortably within *Salerno*.

In *Salerno* itself, for example, the plaintiffs alleged, among other things, that the Bail Reform Act's procedures for determining whether to impose pretrial detention violated the Due Process Clause on their face. 481 U.S. at 742, 751-52. The Court rejected that challenge, noting that "to sustain [the procedures] against such a challenge, we need only find them adequate to authorize the pretrial detention of at least some persons charged with crimes, whether or not they might be insufficient in some particular circumstances." *Id*. at 751 (citation and internal quotation marks omitted). Applying that standard here, this Court should reject Plaintiffs' facial challenges because the grant eligibility provision can be applied constitutionally to "at least some [jurisdictions]" that "willfully refuse to comply with 8 U.S.C. 1373," Exec. Order No. 13,768, § 9(a). For example, especially in light of the AG Memorandum, there will be "at least some" instances in which the agency has statutory authority to require certification of compliance with Section 1373, the applicant or grantee is aware of the certification requirement beforehand, compliance with Section 1373 is germane to the purposes of the particular grant, and requiring such certification does not violate any "independent [constitutional] bar." *See S. Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

The Court of Appeals applied *Salerno* to reject a facial challenge in *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008). There, an applicant for a position at a public library alleged that defendant's policy requiring pre-employment drug testing violated the Fourth Amendment on its face. *Id*. at 1149. Plaintiff argued "that there [was] no set of circumstances under which the City's policy would be constitutional as applied to *every* applicant for *all* jobs."

Id. at 1150. The court rejected that argument, holding that "a policy of general applicability is facially valid unless it can *never* be applied in a constitutional manner. . . . As [there is] no concrete reason why [defendant's] policy could not constitutionally be applied to jobs that, for example, require the operation of dangerous equipment," the court continued, "we cannot say that the policy is invalid on its face." *Id*. *Lanier* reflects that *Salerno* means exactly what it says: A plaintiff challenging the facial constitutionality of an enactment must establish that no set of circumstances exists under which the enactment could be applied constitutionally.

San Francisco and Santa Clara County argue that *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), forecloses applying *Salerno* here (SF Opp. at 21; SC Opp. at 19). *Patel*, however, involved a situation different from this case. The plaintiffs there brought a facial Fourth Amendment challenge to a city ordinance that required hotel operators to allow law enforcement officers to examine information about their guests on demand. 135 S. Ct. at 2447-48. The City argued that plaintiffs' challenge necessarily failed *Salerno* because some of the examinations (*i.e.*, Fourth Amendment searches) would be supported by consent, presentation of a warrant, or exigent circumstances. *Id*. at 2450-51. The Court rejected that argument, holding that *Salerno* asks whether the challenged enactment "'is unconstitutional in all of *its applications*'" – that is, in those situations where the enactment must actually be applied. *Id*. at 2451 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)) (emphasis added).

The Plaintiffs here argue that *Patel* forecloses applying *Salerno* given "the existence of other laws that might allow Defendants to condition specific grants on compliance with Section 1373" (SF Opp. at 21; *see* SC Opp. at 19). But this is fundamentally different from the facts in *Patel*. Here, the challenged Order, especially as elucidated by the AG Memorandum, directs the Attorney General and the Secretary to condition grants on compliance with Section 1373 only where authorized by statute. In *Patel*, however, the ordinance required hotel operators to make their records available under all circumstances, not only where independent legal bases existed to require their availability. Plaintiffs' argument would foreclose applying *Salerno* to any enactment directing officials to apply existing law.

Santa Clara County also argues that applying *Salerno* here would be inconsistent with the Court of Appeals' decision in *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014). *Jackson*, also, is readily distinguishable from this case. There, plaintiffs brought a facial Second Amendment challenge to an ordinance that required handguns in a residence to be either stored in a locked container, disabled with a trigger lock, or carried by an adult. *Id*. at 958. Defendant argued that the facial challenge was inappropriate because plaintiffs had conceded that "locked storage is appropriate in some circumstances, such as when it is foreseeable that a child would otherwise gain possession of a firearm." *Id*. at 961. The court rejected that argument because the case did not fall within the rationales for the Supreme Court's jurisprudence on facial challenges: Specifically, the challenged ordinance was "not an example of 'complex and comprehensive legislation' which may be constitutional in a broad swath of cases"; and the constitutionality of the ordinance would not "turn on how San Francisco chooses to enforce it." *Id*. at 962 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007)).

In contrast, Executive Order 13,768 does fall within those rationales. The Order requires DOJ and DHS to require certification of compliance with Section 1373 where it has authority to do so. Such authority may exist in relation to a "broad swath" of grant programs, and any disappointed applicant or grantee could bring an as-applied challenge in any particular case where one of the agencies applies the grant eligibility provision. Thus, the Ninth Circuit's decision in *Jackson* does not undercut the application of *Salerno* here.

B. Plaintiffs Fail to State a Viable Claim that the Grant Eligibility Provision Violates the Separation of Powers

As noted earlier, all three plaintiffs allege that the grant eligibility provision violates the constitutional Separation of Powers. However, the Executive Order requires the Attorney General and the Secretary to condition grant eligibility on compliance with 8 U.S.C. § 1373 "to the extent consistent with law," Exec. Order No. 13,768, § 9(a), and the AG 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." AG Mem. at 2. This should eliminate any facial Separation of Powers concerns, especially under *Salerno*.

In response to these points, Santa Clara County asserts that the AG Memorandum does not apply to the Department of Homeland Security's application of the grant eligibility provision (SC Opp. at 22).[10] As discussed above, however, the Attorney General is responsible for "[f]urnish-[ing] advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the Government" – including the Secretary of Homeland Security. 28 C.F.R. § 0.5(c). Also, the statute establishing the Secretary's "powers and duties" related to immigration enforcement provides that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1). In any event, the Executive Order itself provides that compliance with Section 1373 shall be imposed as a grant condition only "to the extent consistent with law," and an action taken without authority would not be "consistent with law."

C. Plaintiffs Fail to State a Viable Claim that the Grant Eligibility Provision Exceeds the Spending Power

All three plaintiffs also allege that the grant eligibility provision violates the Spending Clause, or that it would violate the Spending Clause if enacted by Congress. Especially in light of the AG Memorandum, the grant eligibility provision states its requirements "unambiguously"; applicants and grantees will "exercise their choice knowingly, cognizant of the consequences of their participation" by choosing whether to certify compliance with Section 1373, which is related to at least some grant programs; the provision's "financial inducement" is not "so coercive" as to constitute "compulsion"; and "other constitutional provisions" do not provide an "independent bar." *S. Dakota v. Dole*, 483 U.S. 203, 207-8, 211 (1987). The fact that these are facial challenges is especially relevant to this claim, as Plaintiffs cannot show that the condition imposed pursuant to the grant eligibility provision is unrelated to *all* DOJ and DHS grants, that imposition

[10] Richmond quotes at length from this Court's discussion of the Separation of Powers claims in ruling on the motions for preliminary injunction (Richmond Opp. a 16-17). But that ruling was made before issuance of the AG Memorandum, and, in any event, a court's finding on the probability of success under a motion for preliminary injunction is not a final ruling on the merits. Also, Defendants have asked the Court to reconsider its ruling on the motions for preliminary injunction.

of that condition will necessarily constitute compulsion, or that all potential applications of the condition will be constitutionally barred.

In response, San Francisco argues that the AG Memorandum does not settle the meaning of "sanctuary jurisdictions" because "the Executive Order gives the Secretary – not the Attorney General – the authority and discretion to designate sanctuary jurisdictions" (SF Opp. at 23). However, this argument confuses the elucidation of that term with the responsibility to *designate* individual jurisdictions. The Order gives the Secretary "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction." Exec. Order No. 13,768, § 9(a). But the AG Memorandum does not "designate" any sanctuary jurisdictions; it only clarifies what the Order says about the meaning of the term – that is, that it "will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" AG Mem. at 2. And the Memorandum makes clear that the Secretary was consulted on that issue.

San Francisco also argues that the AG Memorandum "does not limit application of the Executive Order to funds related to immigration enforcement, as required to satisfy the nexus requirement" (SF Opp. at 24). The "relatedness" factor of *Dole* cannot fairly be called a nexus "requirement," however. As the Court of Appeals has said, "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).[11] Thus, conditions on federal funding must only "bear some relationship to the purpose of the federal spending." *Id.* (quoting *New York v. United States*, 505 U.S. 144, 167 (1992)). Especially in light of *Salerno* and the AG Memorandum, the grant eligibility provision easily meets this standard. The provision will be applied, "to the extent consistent with law," only to certain grants administered by DOJ and DHS, which are, respectively, the primary federal law enforcement agency and the agency responsible for the admission and removal of non-citizens (and the very agency whose communication with state and local government

[11] Defendants' motions to dismiss quoted *Mayweathers*, but the parties' opposition briefs ignore it.

officials is protected by Section 1373). Any alleged departure from this aspect of *Dole* could be raised in an as-applied challenge.

Lastly, Santa Clara County argues that the AG Memorandum does not eliminate coerciveness concerns because it "fails to identify which DHS grants are at issue, and the County relies on DHS grants for [almost] two-thirds of its Office of Emergency Services budget," amounting to "more than $5 million" for Fiscal Year 2016 (SC Opp. at 21; SC Complaint ¶ 42). This, however, does not state a viable claim for violation of the Spending Clause, especially on a facial challenge. The County alleges that its annual budget is approximately $6 billion (*id*. ¶ 27), so the alleged DHS grants for the Office of Emergency Services amount to approximately .083 percent of the County's overall budget. By contrast, the Eighth Circuit has held that a State's potential loss of "approximately $250 million or 12 per cent. of the annual state education budget" would not constitute coercion under *Dole*, *see Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000), and the D.C. Circuit has held that a State's risk of losing something less than 4% of its overall budget in the form of federal highway funds would not be unconstitutionally coercive, *see Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 178 (D.C. Cir. 2015). Either of those potential losses may have amounted to a large proportion of one office's budget.

D. Richmond and San Francisco Fail to State a Viable Claim that the Grant Eligibility Provision Violates the Tenth Amendment

San Francisco and Richmond allege that the grant eligibility provision violates the Tenth Amendment. This provision should cause no concern under the Tenth Amendment, since a grantee's obligation to comply with Section 1373 would arise only because of its voluntary acceptance of a grant that includes the condition, and a jurisdiction can simply decline to apply for such a grant. San Francisco argues that the AG Memorandum does not eliminate this concern because there is still a threat that the grant eligibility provision might be used to require jurisdictions to comply with immigration detainer requests (SF Opp. at 24-25). As noted earlier, however, the AG Memorandum makes clear that application of the grant eligibility provision will turn on compliance with 8 U.S.C. § 1373, which relates only to the sharing of information. *See*

AG Mem. at 2. Even if that were not the case, a jurisdiction could avoid any concern about being "commandeered" by declining to apply for a covered grant.

Moreover, even if the grant eligibility provision were somehow seen as related to detainer requests, the claim would also fail under *Salerno*. Some jurisdictions believe that federal detainer requests are appropriate and voluntarily choose to comply with them. Those jurisdictions are obviously not being "commandeered" in violation of the Tenth Amendment. Therefore, if the potential for being compelled to comply with such requests is the basis of Plaintiffs' facial Tenth Amendment claim, the claim must be dismissed because they cannot establish that the grant eligibility provision would violate the Tenth Amendment 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").

E. Richmond and Santa Clara County Fail to State a Viable Claim of Unconstitutional Vagueness under the Due Process Clause

Richmond and Santa Clara County allege that the grant eligibility provision is unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[12] This is an especially difficult challenge to mount facially. "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). The plaintiff "'must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Put another way, [the challenger] must demonstrate that the 'provision simply has *no* core.'" *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982)). The AG Memorandum should eliminate any concern under these standards. Furthermore, as discussed in Part III above, the

[12] Santa Clara County's complaint also alleges that Section 6 of the Executive Order is unconstitutionally vague (SC Dkt. No. 1 ¶ 141). For the reasons stated in Defendants' motion, any such claim should be dismissed (SC Dkt. No. 115 at 19-21 & n.6). The County's opposition does not mention Section 6.

Executive Order is an internal directive to Executive Branch officials; thus, there can be no legitimate question as to whether it provides a "standard of conduct" for the plaintiffs.

Relying on *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013), Plaintiffs argue that Defendants cannot "cure a facially unconstitutional statute by adopting an *unreasonable* narrowing interpretation" (SC Opp. at 23; *see* Richmond Opp. at 20). As discussed above, however, the AG Memorandum is fully consistent with the Executive Order. For example, the limitation to federal grants rather than other types of funding is reflected in the President's use of "Federal funds" in Section 2 of the Order but "Federal grants" in Section 9(a); the limitation to DOJ and DHS grants is reflected in the President's references to the Attorney General and the Secretary in Section 9(a); and implementing Section 9(a) by requiring grantees to certify compliance with Section 1373 is based on the President's conferral of "discretion" on the Attorney General and Secretary regarding the means of implementing the grant eligibility provision and his instruction to do so "consistent with law."

Further, in any event, *Valle del Sol* is very different from this case. There, a state criminal law prohibited anyone "who is in violation of a criminal offense" from taking certain action, and plaintiffs brought a vagueness challenge focused on the phrase "in violation of a criminal offense." 732 F.3d at 1019. The State asserted that the phrase should be understood as meaning "in violation of a law or statute," but the court rejected that assertion, finding that the State was proposing "not to adopt a narrowing construction, but rather to replace a nonsensical statutory element with a different element." *Id*. at 1021. That is far from the situation here. No one could argue that the grant eligibility provision is "nonsensical." The AG Memorandum merely clarifies certain elements that could be understood variously – and in ways that perfectly accord with the Order itself, as discussed above. Thus, *Valle del Sol* does not support Plaintiffs' vagueness claim.

F. Santa Clara County Fails to State a Viable Claim Regarding Procedural Due Process

Santa Clara County also alleges that the grant eligibility provision violates procedural due process under the Fifth Amendment. Especially in light of the AG Memorandum, the County does not have a protectable property interest in any grant funds to which the eligibility provision

might apply, and, in any event, the applicable grant-making procedures would provide any "process" that is due. Aside from whether the County might have a "legitimate claim of entitlement" to certain kinds of federal funding, such as Medicaid reimbursements, the County certainly does not have such a claim to discretionary grant funds provided by DOJ and DHS. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). In any event, by specifying that the grant eligibility provision be implemented "consistent with law," Section 9(a) incorporates the applicable procedural requirements for making or revoking federal grants. *See*, *e.g.*, 2 C.F.R. § 200.341 (hearings and appeals in federal grant-making); 28 C.F.R. pt. 18 (DOJ Office of Justice Programs Hearing and Appeal Procedures).

In response, the County relies primarily on this Court's ruling on Plaintiff's motion for preliminary injunction (SC Opp. at 24-25). But that ruling was made without the benefit of the AG Memorandum, and Defendants have asked the Court to reconsider it. The County also cites *Doran v. Houle*, 721 F.2d 1182 (9th Cir. 1983), for the proposition that it has a legitimate claim of entitlement to "federal funds that Congress has already appropriated and directed to local entities" (SC Opp. at 25). But that case addressed whether veterinarians had a property interest in permits to perform a certain diagnostic test, 721 F.2d at 1183-84, not whether a jurisdiction might have a property interest in "federal funds that Congress has already appropriated and directed to local entities."

G. Richmond Fails to State a Viable Claim under the Fourth Amendment

The final claim regarding the grant eligibility provision is Richmond's claim that the provision violates the Fourth Amendment. Again, however, application of the grant eligibility provision will turn on compliance with 8 U.S.C. § 1373, which involves the sharing of information and thus does not create any issue under the Fourth Amendment. *See* AG Mem. at 2. Moreover, the AG Memorandum also states that the grant eligibility provision "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation." *Id*. at 1-2.

Further, even aside from those considerations, this claim fails the *Salerno* test. First, as of April 2, 2017, every detainer request issued by U.S. Immigration and Customs Enforcement

("ICE") is supported not only by a probable cause finding as to removability in the detainer form itself, but also by an administrative warrant issued pursuant to 8 U.S.C. §§ 1226 or 1231, which contains a probable cause finding made by ICE. *See* ICE, "Detainer Policy" (Mar. 24, 2017), *available at* https://www.ice.gov/ detainer-policy. By definition, then, all such detainer requests will satisfy the Fourth Amendment, *see, e.g.*, *Abel v. United States*, 362 U.S. 217, 233 (1960), such that a facial challenge cannot succeed. *See Salerno*, 481 U.S. at 745. And even without this policy, because detainer requests are generally supported by probable cause findings, Richmond cannot establish that complying with such requests would always violate the Fourth Amendment, as necessary to sustain a facial challenge. *See id*. Richmond contends that the Court must accept as true its allegation that the Order "requires Richmond to keep people in custody who would otherwise be released" (Richmond Opp. at 19), but the Plaintiff does not – and cannot – allege that such detention would always violate the Fourth Amendment.

V. Richmond and San Francisco Fail to State a Viable Claim for Declaratory Relief Regarding Their Compliance with Section 1373

Aside from Plaintiffs' challenges to the grant eligibility provision in Section 9(a), Richmond and San Francisco seek a judicial declaration that they comply with 8 U.S.C. § 1373. Plaintiffs do not, however, identify a right of action to seek such a declaration, and there is no live controversy regarding whether they comply with Section 1373.

Plaintiffs argue that the Declaratory Judgment Act allows them to seek this relief (Richmond Opp. at 21; SF Opp. at 10). "It is well-settled, however, that the Declaratory Judgment Act does not create a stand-alone cause of action." *Fox-Quamme v. Health Net Health Plan of Or., Inc*., No. 3:15-CV-01248-BR, 2016 WL 1724358, at *1 (D. Or. Apr. 29, 2016); *see 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."). Plaintiffs have not pointed to any statute that provides a right of action to seek a declaration regarding their compliance with Section 1373.

Nevertheless, San Francisco asserts that it can seek such a declaration because the United States "could bring civil preemption actions against jurisdictions to enforce Section 1373" (SF

Opp. at 10). The right of the United States to bring a preemption suit, however, is based on the Supremacy Clause of the Constitution. San Francisco has no such right. Furthermore, the issue involved in a federal preemption suit is fundamentally different from the cause of action that Plaintiffs seek to assert: In a federal preemption action brought by the United States, the issue is whether a State or local government's law or action is constitutionally preempted by federal law. If the court finds that the law or action is preempted, it is enjoined. In Plaintiff's proposed action, by contrast, the issue would be whether a local government's law violates a federal law. The Constitution requires the existence of the first kind of action, but not the second.

Lastly, there is no live controversy regarding whether Richmond or San Francisco complies with Section 1373. Plaintiffs allege that they do not comply with immigration detainer requests or otherwise cooperate with federal immigration authorities. But the Defendants have not taken a position on whether Richmond or San Francisco complies with Section 1373.

CONCLUSION

For the reasons discussed above and in Defendants' motions to dismiss, all of Plaintiffs' claims should be dismissed.

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Respectfully submitted,

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