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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, ELAINE DUKE, in her official capacity as Acting 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

COUNTY OF SANTA CLARA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Date: October 4, 2017
Time: 2:00 pm
Dept.: Courtroom 2, 17th Floor
Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2018

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 4, 2017 at 2:00 p.m., or as soon thereafter as counsel may be heard, at the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable William H. Orrick, plaintiff County of Santa Clara (the "County") will and hereby does move the Court for summary judgment on each of the four causes of actions set forth in the County's Complaint.

This Motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the declarations of Sara H. Cody, M.D. (County Public Health Officer), Paul Lorenz (Chief Executive Officer of Santa Clara Valley Medical Center), Miguel Márquez (County Chief Operating Officer), Robert Menicocci (Director of the County's Social Services Agency), Carl Neusel (Undersheriff of the County), Dana Reed (Director of the County's Office of Emergency Services), Jeffrey F. Rosen (District Attorney of the County), Jeffrey V. Smith (County Executive), and Laurie Smith (Sheriff of the County), filed concurrently herewith, and the record and files of this Court, and all other matters of which the Court may take judicial notice.

STATEMENT OF RELIEF REQUESTED

1. A declaration pursuant to 28 U.S.C. §§ 2201–02 that Section 9(a) of Executive Order 13768 is unconstitutional;
2. A permanent injunction enjoining defendants from implementing Section 9(a) of Executive Order 13768.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Section 9(a) of Executive Order 13768 (the "Executive Order") is unconstitutional. It purports to seize for the President spending powers that belong solely to Congress, then distorts and expands those powers beyond constitutional limitations. It baldly attempts to compel state and local governments to become agents of the federal government's immigration enforcement agenda, violating core principles of federalism. The Executive Order's plain text establishes its unlawfulness. Section 9(a) purports to render state and local governments deemed "sanctuary jurisdictions" ineligible for any federal funds, and subject to unspecified enforcement actions, unless they knuckle under to vague and standardless demands in a manner the Attorney General and Secretary of Homeland Security, in their unbounded discretion, deem sufficient. Because section 9(a) violates the separation of powers inherent in the Constitution, the Tenth Amendment, and the Fifth Amendment's due process clause, the Court should declare it unconstitutional and permanently enjoin its implementation.

Although defendants have recently taken the position that the Executive Order is a legally meaningless internal directive that they claim they will implement narrowly, the Court has rightly rejected that argument as incompatible with the Executive Order itself. And the County of Santa Clara (the "County") cannot depend on such an illusory promise, particularly when executive branch officials persist in making public declarations demonstrating that the Executive Order means exactly what it says. To effectively govern, meet its state-mandated duties to protect the health and safety of all its residents, and avoid drastic and widespread cuts in essential services, the County—and state and local governments across the nation—require a clear and enforceable judicial order stopping this unconstitutional power grab. Because the material facts are undisputed and the law is clear, the County moves for summary judgment and requests that the Court make its preliminary injunction permanent.

II. FACTUAL BACKGROUND

As the Court explained during the hearing on the County's preliminary injunction motion, "[t]here are a number of facts that aren't in dispute, [and] that don't need further explication."

Request for Judicial Notice ("RJN") ¶ 1, Ex. A (Apr. 14, 2017 Hr'g Tr.) at 5:18–19. Having reviewed the factual record in its preliminary injunction order—and having revisited those facts when denying defendants' motion for reconsideration of that order—the Court is well-versed in the relevant facts. *See County of Santa Clara v. Trump* ("*Santa Clara*"), -- F. Supp. 3d --, 2017 WL 1459081, at *2–6 (N.D. Cal. Apr. 25, 2017), *reconsideration denied*, -- F. Supp. 3d --, 2017 WL 3086064 (N.D. Cal. July 20, 2017). The material facts supporting the County's claims remain largely unchanged and are undisputed.

A. The President issues Executive Order 13768.

On January 25, 2017, President Donald J. Trump issued Executive Order 13768. Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order" or "EO"). The Executive Order declares that "[i]t is the policy of the executive branch to . . . "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive ***Federal funds***, except as mandated by law." *Id.* § 2(c) (emphasis added). Section 9 implements that policy by authorizing federal officials to take punitive actions against any state and local governments that the Trump Administration deems to be "Sanctuary Jurisdictions." *Id.* § 9. Specifically, Section 9(a) gives the Secretary of Homeland Security (the "Secretary") the authority to designate state and local governments as "sanctuary jurisdictions." *Id.* § 9(a). Although the Executive Order nowhere defines that key term, section 9(a) uses "sanctuary jurisdiction" synonymously with state and local governments that "willfully refuse to comply with 8 U.S.C. § 1373,"[1] *id.* § 9(a), or that decline to honor Immigration and Customs Enforcement ("ICE") civil detainer requests. *Id.* § 9(b) (equating "sanctuary jurisdictions" with jurisdictions "that ignored or otherwise failed to honor any detainers with respect to such aliens").

Section 9(a) contains two distinct penalty provisions, each mandatory in application. The first—the **Defunding Provision**—commands executive branch officials to strip state and local governments deemed to be "sanctuary jurisdictions" of their eligibility "to receive Federal

[1] Section 1373 is a federal statute that "prohibits local governments from restricting government officials or entities from communicating immigration status information to ICE." *Santa Clara*, 2017 WL 1459081, at *3.

grants." EO § 9(a). The second—the **Enforcement Provision**—orders 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." *Id.* § 9(a). The Executive Order neither defines what it means to "prevent[] or hinder[]" federal law enforcement nor cabins or defines the phrase "Federal law" in any way.

B. The President and his subordinates have repeatedly confirmed the Executive Order's sweeping intended scope.

As this Court has noted, "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 1459081, at *2. The record contains numerous judicially noticeable statements from the President, the Attorney General, and other executive branch officials, all of which confirm that the Executive Order is intended to, and does, have the broad scope its plain language reveals.

1. The Executive Order is designed to strip all federal funding from state and local governments deemed "sanctuary jurisdictions."

President Trump has repeatedly pledged, both on the campaign trail and after taking the oath of office, not just to punish "sanctuary jurisdictions," but to fully and finally "end" them by denying federal funding. *See* RJN ¶¶ 2, 7, Exs. B at 8, G. As a candidate, Mr. Trump issued a "Contract with the American Voter," which was (and remains) accessible on his campaign website. *See id.* ¶ 3, Ex. C. One promise on Mr. Trump's very short list of actions that the administration pledged to "immediately pursue" was to "cancel ***all federal funding*** to sanctuary cities." *Id.* (emphasis added).

After taking office, the President confirmed his intent in issuing the Executive Order was exactly that: to deny all federal funds to targeted jurisdictions. Speaking to former Fox News personality Bill O'Reilly on February 5, 2017, the President frankly described defunding as a "weapon" that he could wield to deprive jurisdictions of "the money they need to properly operate as a city or state." RJN ¶ 4, Ex. D at 4. With the Executive Order freshly issued, the President's then-press secretary confirmed that the Administration's policy, and the Executive Order's goal,

was to ensure that "counties and other institutions that remain sanctuary cities don't get federal government funding." *Id.* ¶ 5, Ex. E at 4–5.

These threats have continued during this litigation and even *after* the Court entered the preliminary injunction on April 25, 2017. On March 27, 2017, Attorney General Sessions stated that any jurisdiction the Department of Justice deems noncompliant with Section 1373 will suffer not only "withholding [of] grants, termination of grants, and disbarment or ineligibility for future grants," but also the "claw back" of "any funds" previously awarded. *Id.* ¶ 6, Ex. F at 3. And on June 28, 2017, the White House issued a press release asserting that the President "is keeping his promise[]" to "end the sanctuary cities" and to ensure that "[c]ities that refuse to cooperate with Federal authorities will not receive taxpayer dollars." *Id.* ¶ 7, Ex. G.

2. The Executive Order targets jurisdictions that refuse to comply with ICE civil detainer requests.

Defendants have likewise made clear that, for purposes of the Executive Order, "sanctuary jurisdictions" includes local jurisdictions that refuse to comply with ICE civil detainer requests. Although defendants have taken the position—in this litigation, at least—that ICE civil detainer requests are "voluntary" and that "compliance with 8 U.S.C. § 1373 . . . relates only to the sharing of information," Dkt. 136 at 8, the Administration's public statements tell a different story.

On January 26, 2017, President Trump lauded the mayor of Miami, Florida, tweeting, "Miami-Dade Mayor drops sanctuary policy. Right decision. Strong!" RJN ¶ 8, Ex. H. The President's tweet cited a Miami Herald article reporting that Miami's mayor had directed his corrections department "to honor all immigration detainer requests received form the Department of Homeland Security." *Id.* ¶ 9, Ex. I; *see also id.* ¶ 10, Ex. J. In light of this policy change, the Department of Justice recently certified that Miami-Dade County is in compliance with Section 1373. *Id.* ¶ 11, Ex. K. Indeed, during a speech in Miami on August 16, 2017, Attorney General Sessions confirmed that Miami-Dade's decision to begin honoring ICE civil detainer requests had persuaded him that Miami-Dade was now "in full compliance and eligible for federal law enforcement grant dollars." *Id.* ¶ 12, Ex. L. The implication is clear: to avoid being labeled a sanctuary jurisdiction under the Executive Order, a local government must comply with ICE civil

detainer requests.

The Attorney General has likewise continued to link sanctuary jurisdictions with ICE detainers—even after his counsel disclaimed the argument that Section 1373 requires compliance with ICE civil detainer requests, and after issuing a supposedly clarifying Memorandum on the Executive Order that nowhere mentions such requests. *See infra* at Part II.F (discussing May 22, 2017 Attorney General Memorandum). On July 12, 2017, after this Court rejected defendants' motion for reconsideration of its preliminary injunction order, Attorney General Sessions publicly lambasted "sanctuary cities" and "counties" for refusing to honor civil detainer requests, stating "I urge them to review what they're doing, to rethink those policies," and to "detain someone so the next jurisdiction can prosecute the case[.]" *See* RJN ¶ 13 (video of Att'y Gen. Sessions Remarks of July 12, 2017, at 32:40–33:00). Acting ICE Director Thomas Homan has made the same link, testifying in a congressional hearing that, at a minimum, DHS believes that Section 1373 requires "not only sharing the information, but allow[ing] us access to the jails." *Id.* ¶ 14, Ex. M at 45. These remarks echo previous comments Mr. Homan made after meeting with President Trump on June 28, 2017. Referencing the "executive orders signed by the President earlier this year," Mr. Homan expressly equated "sanctuary jurisdictions" with those that "fail to honor detainers." *Id.* ¶ 15, Ex. N at 2.

3. The Administration intends to enforce the Executive Order against the County of Santa Clara.

In addition to its general admissions about the Executive Order's purpose and scope, the Administration has made clear that it is targeting the County specifically. In the weeks after the Executive Order was issued, ICE issued three "Weekly Declined Detainer Outcome Reports" ("DDORs") pursuant to Section 9(b) of the Executive Order, identifying counties deemed to be "sanctuary jurisdictions." RJN ¶¶ 16–18, Exs. O–Q. ICE called out the County by name in all three DDORs. *Id.*, Ex. O at 4; Ex. P at 8, 22; Ex. Q at 2, 22.[2] The Administration has not

[2] The DDORs for February 4–10, 2017 and February 11–17, 2017 list the entire State of California as a "non-cooperative jurisdiction." RJN, Ex. P at 8, 20; Ex. Q at 10, 21. This is consistent with President Trump's public statement that California is, in his view, "out of control" and a potential target for his defunding "weapon." *Id.*, Ex. D at 4.

wavered since then, despite arguing before this Court that the County lacks standing. Further, the number of requests ICE has sent to the County in 2017 has already surpassed all of those received in 2016. Decl. of Carl Neusel ("Neusel Decl.") ¶ 6. Pursuant to the County's policies, the County has denied all such requests. *See infra* Part II.C.

Defendants have made no secret that they consider California in general, and many of the state's larger counties in particular, sanctuary jurisdictions that hinder the President's immigration enforcement agenda. On March 29, 2017, Attorney General Sessions and then-Secretary of Homeland Security Kelly sent a letter to the Chief Justice of the California Supreme Court, asserting that "the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests." RJN ¶ 19, Ex. R at 2.

C. To enhance public safety, the County has enacted policies and practices that fall squarely within the Executive Order's ambit.

It is undisputed that the County's policies and practices regarding federal immigration enforcement stand at odds with the Executive Order. To protect public safety and provide services to all its residents, the County has adopted policies and practices that prioritize local law enforcement and public safety over participating in federal immigration enforcement. *See* Decl. of Laurie Smith ("L. Smith Decl.") ¶¶ 4–11; Neusel Decl. ¶¶ 4–11; Decl. of Jeffrey F. Rosen ("Rosen Decl.") ¶¶ 5–12; Decl. of Miguel Márquez ("Márquez Decl.") ¶¶ 22–29. In 2010, the County Board of Supervisors passed a Resolution barring County employees from using County resources to transmit to ICE information collected by the County in the course of providing critical services or benefits, as well as initiating an inquiry or enforcement action based solely on an individual's actual or suspected immigration status. Márquez Decl. ¶ 28 & Ex. H; Neusel Decl. ¶ 8; L. Smith Decl. ¶ 7. The Resolution further prohibits the use of County resources to pursue an individual solely because of an actual or suspected civil violation of federal immigration law. *Id.*

The County also has adopted a policy that limits compliance with ICE civil detainer requests.[3] Before late 2011, the County regularly responded to such requests, straining its resources by housing an average of 135 additional inmates each day at a daily cost of $159 per inmate (the cost would be $200 per inmate today). Neusel Decl. ¶ 4. ICE refused to reimburse detention costs or indemnify the County for liability. Márquez Decl. ¶¶ 22–26 & Exs. C–E. A County task force, which included the County Sheriff and other top law enforcement officials, recommended that the County comply with ICE detainer requests only for individuals with serious or violent felony convictions, as defined by California law, and the County's final policy honors such requests only if ICE agrees to reimburse the County for the costs of complying. L. Smith Decl. ¶¶ 5–6; Neusel Decl. ¶¶ 5–6; Márquez Decl. ¶ 27 & Ex. G. Because ICE refuses to reimburse costs associated with detainer requests, the County has declined to honor such requests since the policy's implementation in November 2011. *Id.*

The County's core mission and mandate is to protect and promote public health and safety. The County adopted policies and practices regarding federal immigration enforcement to advance this core mission. As the County's District Attorney, Sheriff, and Chief of Correction all attest, enforcement of federal immigration law by the County has a toxic effect on the County's ability to fight crime and makes the entire community less safe. Rosen Decl. ¶¶ 3–12; L. Smith Decl. ¶¶ 4–11; Neusel Decl. ¶¶ 5–11. Immigrants are no more likely to commit crimes than U.S. citizens, *see* Rosen Decl. ¶ 7, and County law enforcement officials rely on all members of the local community—including undocumented individuals—to assist with criminal investigations and prosecutions. *Id*. ¶¶ 8–11; L. Smith Decl. ¶¶ 8–9; Neusel Decl. ¶ 9. When residents perceive local law enforcement officers as cooperating with ICE, they are less willing to report crimes, offer testimony, or seek basic medical care and other critical services. Rosen Decl. ¶¶ 8–11; L. Smith Decl. ¶ 10; Neusel Decl. ¶ 9; Cody Decl. ¶ 13.

[3] An ICE civil detainer request asks a local law enforcement agency voluntarily to continue to hold an immigrant inmate—who is in a local jail because of actual or suspected violations of state criminal laws—for up to 48 hours after his or her scheduled release date so that ICE can decide whether to take the individual into custody and initiate removal proceedings. Neusel Decl. ¶ 10; Márquez Decl., Ex. C at 3.

It is not the County's role to enforce federal immigration law, and, in any event, the County cannot change its local policies without suffering significant harms. First, as a local government accountable to its residents, the County is responsible for identifying and implementing policies that enhance and protect public health, welfare, and safety. The County has determined that its current policies, rather than those the Executive Order would force upon it, serve those objectives. *See generally* Rosen Decl.; L. Smith Decl.; Neusel Decl. Second, forcing the County to comply with ICE civil detainer requests would impose significant costs that would strain the County's already severely impacted jail system. Neusel Decl. ¶¶ 10–11; Márquez Decl. ¶ 29. Third, complying with civil detainer requests would force the County to violate the constitutional rights of its residents and expose the County to substantial liability. Márquez Decl. ¶¶ 22, 29.[4] Finally, even if the County decided that it must change its local policies to avoid loss of federal funds, it must still comply with state law that limits or prohibits its participation in federal immigration enforcement activities. *See, e.g.*, Transparency and Responsibility Using State Tools (TRUST) Act, Cal. Gov't Code § 7282.5.

D. The County relies on federal funding to provide critical health and safety services to its 1.9 million residents.

It is undisputed that the County heavily relies upon federal funds to provide a wide array of essential services to its residents. In fiscal year 2015–2016, the County received approximately $1.7 billion in federal and federally dependent funds, representing roughly 35% of the County's revenue during that fiscal year.[5] Decl. of Jeffrey V. Smith ("J. Smith Decl.") ¶ 6; Márquez Decl. ¶ 8. The County uses the vast majority of this federal funding to provide essential safety-net programs and social services to its residents. Márquez Decl. ¶¶ 5–8. Without these

[4] *See, e.g.*, *Santa Clara*, 2017 WL 1459081, at *4 (noting that several courts have held that complying with civil detainer requests violate the Fourth Amendment); *Morales v. Chadbourne*, 793 F.3d 208, 215–16 (1st Cir. 2015); *Orellana v. Nobles Cnty.*, 230 F. Supp. 3d 934, 943–44 (D. Minn. 2017); *Mendia v. Garcia*, 2016 WL 2654327, at *6–7 (N.D. Cal. May 10, 2016); *Miranda-Olivares v. Clackamas Cnty.*, 2014 WL 1414305, at *11–12 (D. Or. Apr. 11, 2014).

[5] The County received roughly $1 billion in federal funds not commingled with other funding sources. Márquez Decl. ¶ 8. It received an additional approximately $680 million in revenues which included a significant federal funding component and was dependent upon the receipt of federal funds through a matching requirement or other mechanism. *Id*. These two funding streams are referred to herein, collectively, as the County's "federal funding" or "federal funds."

funds, the County would be forced to make extraordinary cuts to critical services—or even eliminate key services and functions altogether. *Id.* ¶¶ 16–19; J. Smith Decl. ¶¶ 6–10. If not permanently enjoined, the Executive Order's threat to withdraw federal funding from the County "would decimate the County budget and cause immediate and devastating injury to the 1.9 million residents who rely on the essential services that the County provides." J. Smith Decl. ¶ 6.

In support of this motion, the County has submitted declarations from the County Executive, Chief Operating Officer, Director of Emergency Management, Public Health Officer, Director of the Social Services Agency, and CEO of Santa Clara Valley Medical Center detailing the Executive Order's potentially devastating impact on the County and its residents absent injunctive relief. This undisputed evidence demonstrates that the Executive Order's threat to strip the County of federal funding would gut the County's ability to provide basic services to its residents.[6] *See, e.g.*, Decl. of Paul E. Lorenz ("Lorenz Decl.") ¶ 6 (detailing how Valley Medical Center relies on roughly $1 billion in federal funds, comprising 70% of its annual expenses); Decl. of Robert Menicocci ("Menicocci Decl.") ¶ 6 (explaining that the County's Social Services Agency receives more than $300 million in federal funding annually); Decl. of Sara H. Cody, M.D. ("Cody Decl.") ¶ 5 (explaining that the County's Public Health Department receives more than $38 million in federal funding annually—nearly 40% of its expenditures—for public health services provided to residents); Decl. of Dana Reed ("Reed Decl.") ¶ 8 (explaining that the County's Office of Emergency Services relies on federal funding for more than two-thirds of its budget and "could not perform its current functions without it").

E. The Court's Preliminary Injunction Order

On April 25, 2017, the Court entered a nationwide preliminary injunction against section 9(a) of the Executive Order. *See Santa Clara*, 2017 WL 1459081, at *29. In its order, the Court analyzed and rejected an argument that defendants had made for the first time at oral argument:

[6] As discussed above, the phrase "Federal grants" in Section 9(a) of the Executive Order applies to all federal funds, whatever their source. But even if that phrase were limited to federal funds that are *not* provided through entitlement programs, the County still received more than $338 million in non-entitlement federal grant awards in fiscal year 2014-2015 and more than $400 million in federal grant awards in fiscal year 2015-2016. Márquez Decl. ¶ 21 & Exs. A & B.

that, despite its plain language, the Executive Order does not actually declare "sanctuary jurisdictions" ineligible for "Federal funds." *Id.* at *7–10; EO § 2(c). Instead, defendants asserted, the Executive Order applies only to "federal grants issued by [two] specific agencies"—DOJ and DHS—and only those DOJ and DHS grants that Congress had expressly conditioned on compliance with section 1373. RJN, Ex. A at 34:24–35:9. The Administration further represented that DHS had not yet identified any DHS grants that Congress had expressly conditioned on compliance with section 1373. *Id.* at 35:3–4. Meanwhile, DOJ had identified only three grant programs that it contended were expressly conditioned on compliance with section 1373: the State Criminal Alien Assistance Program ("SCAAP"), the Justice Assistance Grant ("JAG") program, and the Community Oriented Policing Assistance ("COPS") initiative. *Id.* at 35:4–9. According to DOJ, the only federal funds subject to the Executive Order were grants from these three programs.

The Court rejected that re-interpretation of the Executive Order as "not legally plausible." *Santa Clara*, 2017 WL 1459081 at *2. The Court based its ruling primarily on the Executive Order's plain language, while also taking notice of repeated public comments by the President and the Attorney General, both of whom have consistently characterized the order as a means of stripping "sanctuary jurisdictions" of ***all*** federal dollars. *Id.* at *14–15.

F. The Court's Order Denying Defendants' Motions for Reconsideration and Dismissal

On May 23, 2017, defendants filed a motion for reconsideration, asking the Court to revisit its preliminary injunction order. Dkt. 113. Defendants based their motion on a two-page memorandum issued by the Attorney General on May 22, 2017, which merely reduced to writing the same implausible interpretation of the Executive Order that the Court had considered and rejected in its preliminary injunction order. *See* Dkt. 108-2 ("AG Memorandum"). On June 7, 2017, defendants moved to dismiss, also advancing the same implausible interpretation of the Executive Order, as well as the same arguments regarding justiciability that the Court had already considered and rejected. Dkt. 115.

The Court denied both of defendants' motions on July 20, 2017. *See Santa Clara*, 2017 WL 3086064, at *1. Confirming its preliminary injunction order, the Court again rejected defendants' interpretation of the Executive Order as "not legally plausible," and concluded that the AG Memorandum amounted to "nothing more than an illusory promise to enforce the Executive Order narrowly." *Id.* at *4–6. Turning to the motion to dismiss, the Court reiterated its earlier ruling that the County's claims are justiciable, concluding that the County had not only stated valid causes of action challenging Section 9(a) of the Executive Order, but also had shown that it is "likely to succeed on all of [its] claims." *Id.* at *9.

G. Defendants' Continuing Efforts to Punish and Coerce Targeted Jurisdictions

With the preliminary injunction in place, the County could continue providing its 1.9 million residents with core health and safety services, preserve the local policies targeted by the Executive Order, and proceed with its annual budget process based upon the expectation that it would continue to receive roughly $1.7 billion in federal funds. Márquez Decl. ¶ 20; J. Smith Decl. ¶ 10.

But the danger inherent in the Executive Order remains. Even after this Court issued its preliminary injunction, defendants have continued their attempts to coerce state and local governments into changing their local policies to suit the federal government's wishes. On July 25, 2017, DOJ issued new grant conditions designed to deny JAG funding to jurisdictions that decline to (a) offer ICE access to local jails, and (b) provide DHS with 48 hours' notice before releasing certain individuals from local custody. RJN ¶¶ 20–21, Exs. S–T. The White House has expressly tied these new conditions to the Executive Order. *See id.* ¶ 22, Ex. U. The cities of Chicago, San Francisco, and Los Angeles, as well as the State of California, have challenged these new conditions as unconstitutional. *See id.* ¶¶ 23–26, Exs. V–Y. What is clear is that defendants are probing the outer limits of this Court's preliminary injunction in order to continue enforcing Section 9(a), including by aggressively over-reading statutory authorizations for their grants. Defendants' actions demonstrate why the Court must make its preliminary injunction permanent.

III. LEGAL STANDARD

A. Rule 56 Summary Judgment Standard

A party may move for summary judgment on any "claim or defense" or "part of [a] claim or defense," Fed. R. Civ. P. 56(a), and a district court should enter summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A dispute as to a material fact is only genuine "if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. This requires evidence, not speculation." *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, 74 F. Supp. 3d 1134, 1139 (N.D. Cal. 2014) (quotations omitted).

The primary issue presented by this motion is the interpretation and constitutionality of the Executive Order. Where, as here, a "case involves interpretation of the EO as a matter of law, . . . summary judgment is appropriate." *Wong v. Ilchert*, 785 F. Supp. 822, 823–24 (N.D. Cal. 1991), *aff'd*, 998 F.2d 661 (9th Cir. 1993) (Orrick, J.); *see also Dalzin v. Belshe*, 993 F. Supp. 732, 734 (N.D. Cal. 1997) ("It is axiomatic that questions of statutory interpretation are questions of law. Summary judgment is therefore the appropriate means for resolving this case" (citation omitted)).

B. Standard for Interpretation of Executive Orders

Courts called upon to interpret executive orders begin with the order's text. *See Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). "The text must be construed consistently with the Order's 'object and policy.'" *Id.* Courts may not adopt interpretations that "require[] rewriting, not just reinterpretation" of an order. *United States v. Stevens*, 559 U.S. 460, 481 (2010); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (holding that courts may not "insert missing terms into the statute or adopt an interpretation precluded by [its] plain language").

As the Court has already concluded—and defendants have conceded—the Court is in no way bound by the Attorney General's interpretation of the Executive Order. *See Santa Clara*, 2017 WL 3086064, at *4. Nor does the Court owe any deference to an agency interpretation that is neither an accurate nor a credible reading of an executive order. *See id.*; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (stating that

courts need not "adopt an interpretation precluded by the plain language of the ordinance"). In addition, when construing statutes and ordinances, courts consistently reject government officials' promises or commitments to enforce an order more narrowly than it is written. *See, e.g.*, *Stevens*, 559 U.S. at 480; *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *Doe v. Harris*, 772 F.3d 563, 580–81 (9th Cir. 2014); *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir. 2012); *Santa Clara*, 2017 WL 3086064, at *5.

IV. ARGUMENT

In granting the County's motion for a preliminary injunction, the Court concluded that the County is likely to succeed on the merits of its four constitutional claims. *Santa Clara*, 2017 WL 1459081, at *21–26. Because neither the material facts nor the governing law have changed, the Court's analysis remains sound and the County is entitled to summary judgment.

A. Section 9(a) of the Executive Order violates the separation of powers inherent in the Constitution.

Section 9(a) of the Executive Order seeks to grant the executive branch spending powers that belong exclusively to Congress. Because neither the Constitution nor an act of Congress grants the President the coercive spending powers he now claims, the Executive Order is unconstitutional.

1. Congress, not the President, may place conditions on federal funds.

Article I of the Constitution vests the federal spending power exclusively in Congress. *See* U.S. Const. art. I, § 8, cl. 1. The President may neither dictate federal spending nor place conditions or limits on such spending. Rather, incident to its spending power, "***Congress*** may attach conditions on the receipt of federal funds," and may "condition[] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (emphasis added and internal quotation marks omitted). In our tripartite system of government, the President's role is limited to approving a spending bill or vetoing it; he may not amend or discard certain parts of it to further his own policy objectives. *See Clinton v. City of New York*, 524 U.S. 417, 439 (1998). As this Court previously recognized, "[t]his is true even if Congress has attempted to expressly delegate such

power to the President." *Santa Clara*, 2017 WL 1459081, at *21; *see also City of New York*, 524 U.S. at 439 (striking down the Line Item Veto Act, which sought to grant the President the power to cancel certain spending and tax provisions on a line-by-line basis).

Once a law is in place, the President must faithfully execute that law. *See* U.S. Const. art. II § 3, cl. 5. "Where Congress has failed to give the President discretion in allocating funds, the President has no constitutional authority to withhold such funds and violates his obligation to faithfully execute the laws duly enacted by Congress if he does so." *Santa Clara*, 2017 WL 1459081, at *21 (citing *City of New York*, 524 U.S. at 439). Nor can the President simply withhold or "impound" allocated funds—Congress has expressly limited his authority to do so by passing the Impoundment Control Act of 1974. 2 U.S.C. §§ 683 *et seq*.

As this Court previously concluded, Section 9(a) of the Executive Order "runs afoul of these basic and fundamental constitutional structures" by vesting authority in the President and his subordinates to enact new spending conditions or to deny previously allocated funds. *Santa Clara*, 2017 WL 1459081, at *22. The Court reasoned that "Section 9 purports to give the Attorney General and the Secretary the power to place a new condition on federal funds (compliance with Section 1373) not provided for by Congress. But the President does not have the power to place conditions on federal funds and so cannot delegate this power." *Id.* Section 9's text has not changed. This analysis is correct and entitles the County to summary judgment.

What's more, by linking eligibility for federal funds to compliance with 8 U.S.C. § 1373, civil detainer requests, and other assistance enforcing immigration laws, Section 9(a) of the Executive Order contravenes Congress's repeated refusals to pass legislation doing exactly that. *Santa Clara*, 2017 WL 1459081, at *22 (listing failed federal legislation that would have conditioned federal funds on compliance with immigration laws). It is well-settled that the President's power, "if any," to issue executive orders "must stem either from an act of Congress or from the Constitution itself," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), and that "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," *id.* at 637 (Jackson, J., concurring). Such is the case here: the President may not enact spending conditions that Congress has expressly rejected.

Nor is there any argument that the Constitution itself grants the President the spending power he now claims. Although "a President sometimes has policy reasons . . . for wanting to spend less than the full amount appropriated by Congress for a particular project or program," "even the President does not have unilateral authority to refuse to spend the funds." *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013).

2. Section 9(a) of the Executive Order purports to grant the President spending powers that even Congress lacks.

The Executive Order not only attempts to seize Congress's spending power, but it also expands that power beyond constitutional limits. Indeed, the Court has already recognized that Section 9(a) of the Executive Order violates "at least three" of the limitations the Supreme Court has recognized cabin Congress's spending power. *Santa Clara*, 2017 WL 1459081, at *22.

First, "Congress cannot use the spending power in a way that compels local jurisdictions to adopt certain policies." *Santa Clara*, 2017 WL 1459081, at *23; *see also Dole*, 483 U.S. at 211 (holding that Congress may not offer "financial inducement . . . so coercive as to pass the point at which pressure turns to compulsion" (internal quotation marks omitted)). This requirement is rooted in fundamental notions of federalism; Congress may not use the power of the purse to "coerce[] a State to adopt a federal regulatory system as its own." *Nat'l Fed. of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 578 (2012). The Constitution forbids Congress from imposing spending conditions so draconian that they amount to "a gun to the head," leaving the state or local government no realistic choice but to buckle to the federal government's demands. *Id.* at 581.

The Executive Order fails this test. If the Affordable Care Act's threat to deny Medicaid funds was an unconstitutional "gun to the head," *id.*, then the Executive Order is a fiscal nuclear weapon, threatening not only the County's Medicaid funding, but every federal dollar the County receives, including funding for core County programs ranging from childhood nutrition to emergency preparedness training. *See* J. Smith Decl. ¶¶ 6–7; Márquez Decl. ¶ 8. "The threat is unconstitutionally coercive." *Santa Clara*, 2017 WL 1459081, at *23.

Although the Court did not reach the issue in entering its preliminary injunction, the Executive Order also violates the Constitution's rule against imposing a spending condition that requires the recipient to take unconstitutional actions in order to receive the money. *Dole*, 483 U.S. at 208. Here, Sections 9(a) and 9(b) make clear that any jurisdiction that fails to honor ICE civil detainer requests will find itself ineligible for federal funding. But state and federal courts in this District and across the country have held that detaining individuals who would otherwise be released from custody, at ICE's request, violates the Fourth Amendment. *See, e.g.*, *Morales*, 793 F.3d at 215–16; *Orellana*, 230 F. Supp. 3d at 943–44; *Mendia*, 2016 WL 2654327, at *6–7; *Miranda-Olivares*, 2014 WL 1414305, at *11–12; *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1153–54 (Mass. 2017). Thus, by conditioning federal funds on honoring ICE civil detainer requests, the Executive Order is threatening to withhold promised money unless the County agrees to violate its residents' constitutional rights. Such an approach would be unconstitutional even if ***Congress*** attempted it.

Second, Congress may only constitutionally impose spending conditions that bear some relation to the funds appropriated—this is the "nexus" requirement. *See Dole*, 483 U.S. at 213. Accordingly, the federal "funds conditioned on compliance with Section 1373 must have some nexus to immigration enforcement." *Santa Clara*, 2017 WL 1459081, at *23. Here, Section 9(a)'s "attempt to condition all federal grants on compliance with Section 1373 clearly runs afoul of the nexus requirement: there is no nexus between Section 1373 and most categories of federal funding, including without limitation funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness." *Id.* The County's declarations make clear that virtually all of the County programs threatened by the Executive Order have absolutely nothing to do with immigration. *See* J. Smith Decl. ¶ 5; Márquez Decl. ¶¶ 10, 17–19; Lorenz Decl. ¶ 6; Cody Decl. ¶¶ 13–15; Menicocci Decl. ¶¶ 19–28; Reed Decl. ¶¶ 8, 10–17.[7]

[7] Although defendants now contend that the Executive Order targets only a subset of federal grants, that is an "illusory promise" that fails to bind agencies other than DOJ, the executive branch as a whole, the Attorney General himself, or whoever his successor might be. *See Santa Clara*, 2017 WL 3086064, at *4–9.

Third, any condition Congress places on spending must be unambiguous and made in advance. *See Dole*, 483 U.S. at 207. "The legitimacy of Congress's exercise of the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract" at the time Congress offers the money. *NFIB*, 567 U.S. at 577 (internal quotation marks omitted). By placing ambiguous, retroactive conditions on all "federal grants," Section 9(a) of the Executive Order fails this constitutional requirement. *Santa Clara*, 2017 WL 1459081, at *22. The Enforcement Provision suffers from an even more glaring lack of clarity. No one can say what conduct the executive branch might decide "hinders the enforcement of Federal law"—a vast category that may include statutes, regulations, and international treaties. EO § 9(a).

Furthermore, the Executive Order's directives are themselves unclear and ambiguous: defendants have never clarified or explained what it means to willfully refuse to comply with Section 1373. Department of Homeland Security officials' congressional testimony on that question was that ICE was "struggling" along with DOJ to settle on an "operational meaning" of a sanctuary jurisdiction, and what Section 1373 requires. *See* RJN ¶ 14, Ex. M at 45. Former DHS Secretary and current White House Chief of Staff John Kelly testified that, with respect to "the Sanctuary Cities thing . . . Frankly, I don't really know what it means." *Id.* ¶ 27, Ex. Z at 16–17. If ***defendants*** aren't clear on what a state or local government must do to avoid being classified as a sanctuary jurisdiction subject to defunding under the Executive Order, it follows that the Order itself is unconstitutionally ambiguous.

In sum, Section 9(a) of the Executive Order tramples over ground on which even Congress may not tread. Because it violates the Constitution's separation of powers, the County is entitled to summary judgment on this claim.

B. The Executive Order violates the Tenth Amendment.

Section 9(a) of the Executive Order violates the Tenth Amendment's anti-commandeering principle "because it attempts to conscript states and local jurisdictions into carrying out federal immigration law." *Santa Clara*, 2017 WL 1459081, at *23. Consequently, the Court should grant summary judgment on the County's second cause of action as well.

The Supreme Court has "made clear that the Federal Government may not compel the States to implement, by legislative or ***executive*** action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997) (emphasis added); *see also New York v. United States*, 505 U.S. 144, 175–76, 188 (1992). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578.

That is exactly what the Executive Order is designed to accomplish. "[T]he Order equates 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers' and therefore places such jurisdictions at risk of losing all federal grants." *Santa Clara*, 2017 WL 1459081, at *24 (citing EO § 9(b)). By strong-arming state and local governments into becoming federal immigration agents, the Executive Order violates the Tenth Amendment.

Executive branch officials in the Departments of Justice and Homeland Security have repeatedly confirmed their intent to coerce state and local governments into becoming federal immigration enforcers. On March 27, 2017, Attorney General Sessions stated, "I strongly urge our nation's states and cities and counties to . . . to rethink these policies. Such policies . . . put them at risk of losing federal dollars." RJN ¶ 6, Ex. F at 3. The message is clear: enforce federal immigration law, or risk insolvency. On July 12, 2017, Attorney General Sessions reiterated this message, urging state and local governments to "rethink" their policies and to "detain" suspected undocumented persons "so the next jurisdiction"—namely ICE—"can prosecute the case." *See id.* ¶ 13 (video of Att'y Gen. Sessions Remarks of July 12, 2017, at 32:40–33:00). In other words, participate in federal immigration enforcement activities and transform your jails into local ICE holding cells, or risk loss of federal funds and enforcement action. Acting ICE Director Thomas Homan has likewise confirmed the link between "sanctuary jurisdiction" status under the Executive Order and compliance with civil detainer requests. On July 12, 2017, he appeared on Fox News and demanded federal access to local jails, adding, "We have to ***make*** these people"—meaning local law enforcement officials—"cooperate with us." *Id.* ¶ 28 (video of Fox News interview with Acting Director of ICE Thomas Homan at 4:00–4:30) (emphasis added).

The Tenth Amendment, however, forbids the federal government from making state and local officials implement a federal regulatory program, by coercion or otherwise. Here, the County's elected leaders and law enforcement officials have determined that the County is best served when its officials decline to act as federal immigration enforcers. Accordingly, the County has declined to honor ICE civil detainer requests since November 2011. Because the Executive Order threatens to withhold all federal funds from "sanctuary jurisdictions" that refuse to administer the Administration's immigration enforcement agenda, the County can only avoid draconian penalties by requiring its officers to act as arms of the federal immigration enforcement apparatus. Such coercion violates the Tenth Amendment.

Moreover, the Enforcement Provision also seeks to compel state and local governments to comply with civil detainer requests by directing the Attorney General to "take appropriate enforcement action against any entity that . . . has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." EO § 9(a). As defendants' statements make clear, the Administration views a refusal to comply with civil detainer requests as a hindrance to the enforcement of federal immigration law. *See supra,* Part II.B.2. Conversely, jurisdictions that do change their policies to get in line with the Administration's immigration enforcement agenda, such as Miami-Dade, are deemed compliant and eligible to receive federal funds. *See* RJN ¶¶ 8–11, Exs. H–K. Accordingly, Section 9(a)'s Enforcement Provision seeks to conscript local officials in violation of the Tenth Amendment.

C. The Executive Order is void for vagueness in violation of the Fifth Amendment's Due Process Clause.

The Executive Order is also unconstitutionally vague under the Fifth Amendment's Due Process Clause. A federal law is unconstitutionally vague if it (1) "fails to provide a person of ordinary intelligence fair notice of what is prohibited," or (2) "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). These constitutional vagueness standards apply with full force to executive orders. *See United States v. Soussi*, 316 F.3d 1095, 1101 (10th Cir. 2002). As the Court concluded when

granting the preliminary injunction, the Executive Order fails both of these tests. *See Santa Clara*, 2017 WL 1459081, at *24–25.

First, the Executive Order fails to provide the County with fair notice of what conduct is required or prohibited. Indeed, the Executive Order is "so vague and standardless" that the officials charged with designating "sanctuary jurisdictions" have expressed utter befuddlement as to what the term "sanctuary jurisdiction" means, even after the DOJ issued its supposedly conclusive AG Memorandum. *See* RJN ¶ 29, Ex. AA at 3 ("I don't have a clue."); *id.* ¶ 27, Ex. Z at 16–17 ("Frankly, I don't really know what it means."). On June 13, 2017—22 days after the AG Memorandum's release—acting ICE Director Homan reported to Congress that his agency and the DOJ were still "struggling" to define the term, and to determine what, exactly, Section 1373 requires. *See id.* ¶ 14, Ex. M at 45. If the officials charged with implementing the Executive Order are so baffled, then there is no way that state and local officials have "fair notice of what is prohibited." *Williams*, 553 U.S. at 304.[8] Nor is it clear what the County must do (or stop doing) to persuade defendants that it has no "practice that prevents or hinders the enforcement of Federal law." EO § 9(a). Such broad and sweeping text is beyond salvaging.

Second, the Executive Order lacks any clear standards or criteria, vesting the Attorney General and Secretary with unfettered discretion to determine which jurisdictions fall within the Executive Order's ambit, whether they have "willfully refuse[d] to comply" with Section 1373, and whether "appropriate enforcement action" is required. *Id.*. These "standardless guidance and enforcement provisions" are therefore "likely to result in arbitrary and discriminatory enforcement." *Santa Clara*, 2017 WL 1459081, at *25. Because Section 9(a) of the Executive Order is unconstitutionally vague, the Court should grant summary judgment on the County's void-for-vagueness claim.

[8] The AG Memorandum does nothing to clarify matters. In fact, it merely repeats verbatim the definition of "sanctuary jurisdictions" offered in the Executive Order: jurisdictions that "willfully refuse to comply with Section 1373." EO § 9(a); AG Memorandum at 2. That is the same text the Court found too vague to pass muster, especially in light of the fact that the federal government has conceded that "it does not know what it means to 'willfully refuse to comply' with Section 1373." *Santa Clara*, 2017 WL 1459081, at *25.

D. The Executive Order deprives the County of procedural due process.

Finally, the Executive Order violates the Fifth Amendment because it fails to provide the County with procedural due process. The undisputed facts establish that the County (1) has a protectable liberty or property interest, and (2) will suffer a denial of adequate process unless Section 9(a) of the Executive Order is permanently enjoined. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

The County has "a legitimate property interest in federal funds that Congress has already appropriated and that the Count[y] ha[s] accepted." *Santa Clara*, 2017 WL 1459081, at *26; *see also NFIB*, 132 S. Ct. at 2602*; Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Doran v. Houle*, 721 F.2d 1182, 1184–85 (9th Cir. 1983).[9] The undisputed facts demonstrate that the County developed its budget based on "the expectation that the County would receive the federal funds to which it is entitled under its agreements with a number of federal and state agencies." Márquez Decl. ¶¶ 13–16. In doing so, the County accepted the terms of a congressional contract and began performing under it. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 n.13 (1981). Accordingly, the County has a protectable property interest in federal appropriations previously authorized by Congress.

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (internal alterations and quotations omitted). In this case, "[t]he Executive Order purports to make the Counties ineligible to receive these funds through a discretionary and undefined process," that fails to provide any notice, opportunity to be heard, adjudicatory procedure, or appellate rights. *Santa Clara*, 2017 WL 1459081, at *26. "This complete lack of process violates the Fifth Amendment's due process requirements." *Id.*

E. The Court should enter a nationwide permanent injunction.

A party seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to

[9] Counties are "persons" for the purpose of asserting due process claims related to payment of federal funds. *County of Santa Cruz v. Sebelius*, 399 Fed. App'x 174, 176 (9th Cir. 2010).

compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013) (internal quotation marks omitted). The County meets these requirements.

1. The County will suffer irreparable harm without a permanent injunction.

The undisputed material facts demonstrate that, without an order enjoining Section 9(a), the County faces both unconstitutional coercion to change its policies and extreme budgetary uncertainty. Defendants' illusory promise that they will exercise their discretion to implement the Executive Order as set forth in the AG Memorandum—for now—leaves the Executive Order untouched and fails to allay the County's "reasonabl[e] fear [of] enforcement under the Order." *Santa Clara*, 2017 WL 1459081, at *27.

The constitutional harms the Executive Order inflicts constitute irreparable injury sufficient to justify injunctive relief as a matter of law. *See, e.g., Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Most fundamentally, the order attempts to "coerce the Count[y] into changing [its] local policies by imposing overwhelming financial penalties without due process." *Santa Clara*, 2017 WL 1459081, at *27. The County has enacted its policies governing local participation in immigration enforcement for sound reasons that enhance—not subvert—public safety. *See* Rosen Decl. ¶ 12; Neusel Decl. ¶ 9. The Executive Order's attempt to strong-arm the County into undoing these local policies constitutes irreparable harm. *See Texas v. United States*, 201 F. Supp. 3d 810, 834–35 (N.D. Tex. 2016); *Texas v. United States*, 86 F. Supp. 3d 591, 673–74 (S.D. Tex. 2015). Similarly, the County "must choose either to attempt to comply" with an order that violates the separation of powers and other constitutional limitations, or else "defy the Order and risk losing hundreds of millions of dollars in federal grants." *Santa Clara*, 2017 WL 1459081, at *27–28. Those structural constitutional injuries also establish irreparable harm. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009).

Moreover, absent a permanent injunction, the County would be "obligated to take steps to mitigate the risk of losing millions of dollars in federal funding, which will include placing funds in reserve and making cuts to services." *Santa Clara*, 2017 WL 1459081, at *27. It will be forced to choose between slashing services and staff, or else bowing to unconstitutional directives. For example, Valley Medical Center ("VMC") relies on roughly $1 billion in federal funding, mostly through Medi-Cal and Medicare programs. Lorenz Decl. ¶ 6. As VMC's Chief Executive Officer has stated under oath, "The Court's April 25, 2017 preliminary injunction order preserved [VMC's] federal funding, thus preventing a massive and untenable public health crisis in the County, for now." *Id.* ¶ 7. But with the injunction lifted, and defendants free to implement Section 9(a) according to its terms, VMC's "ability to provide a broad range of quality services to thousands of patients – including infants and children, those with chronic diseases, and the elderly – would be greatly diminished, or at worst, potentially eliminated." *Id.* Similarly, the County's Director of Emergency Management has explained that the Office of Emergency Service ("OES") relies on several DHS grants to fund roughly two-thirds of OES' annual budget, with more than $1.3 million in expenditures awaiting federal reimbursement. Reed Decl. ¶¶ 8–9. Without a permanent injunction, OES would again face the prospect of slashing programs that help communities prepare for terrorist acts, natural disasters, and facilitate emergency preparedness. *Id.* ¶¶ 10–15. The County's Social Services Agency ("SSA") would likely face catastrophic fiscal consequences, absent a permanent injunction. *See* Menicocci Decl. ¶¶ 9–28. SSA's director has declared that the preliminary injunction "allowed the Agency to continue providing critical services" to County residents, and that permanent relief will allow the Agency "to continue to perform its core safety net functions without the devastating impact of the loss of federal funds." *Id.* ¶¶ 29–30. Importantly, ***none*** of these programs concerns federal immigration enforcement. Yet all of them fall within the Executive Order's broad and unconstitutional sweep.

Defendants' recent statements and actions—several of which have come after the Court's preliminary injunction order—reinforce why the County requires permanent injunctive relief. *See supra*, Part II.G. Defendants' shifting and confusing statements regarding the Executive Order's meaning and reach—coupled with their ongoing attempts to deny federal funds to state and local

governments around the country—demonstrate why the County needs the certainty that only a clear and enforceable judicial order can provide.

2. The County has no adequate remedy at law.

No remedy at law can compensate the injuries the Executive Order imposes. The County cannot continue to spend millions of dollars per day on core health and safety programs in the hopes of receiving federal reimbursement in the future, and seek redress later. *See* Márquez Decl. ¶¶ 11–20; J. Smith Decl. ¶¶ 6–11. Such an approach not only courts fiscal calamity for the County, but it would also likely face a sovereign immunity defense. *See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Cedar-Riverside People's Ctr. v. Minn. Dep't of Human Servs.*, 2009 WL 1955440, *2 (D. Minn. July 6, 2009). Even in the unlikely event that the County could somehow later recover unlawfully withheld funds, the irreparable harm would have been done: the County would have been forced to change its local policies, or lay off employees and slash critical services. No after-the-fact monetary award could compensate for those injuries.

3. The balance of harms and public interest support a permanent injunction.

When the federal government is a party, the balance of harms and the public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Both favor a permanent injunction here. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F. 3d 1127, 1145 (9th Cir. 2013). Given that defendants claim the Executive Order in no way changes existing law, an injunction limiting its implementation can work no harm on defendants. *See Santa Clara*, 2017 WL 1459081, at *28. The public, however, greatly benefits from an injunction alleviating the Executive Order's "facially unconstitutional directives" and "coercive effects." *Id.*

F. The County has standing and its claims are ripe.

The Court has twice held that the County's claims are justiciable. *See Santa Clara*, 2017 WL 3086064, at *9; *Santa Clara*, 2017 WL 1459081, at *7–21. Those decisions remain sound. Defendants have repeatedly singled out the County for prospective enforcement under the

Executive Order, establishing "a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Accordingly, the County has standing and its claims are ripe.

V. CONCLUSION

The constitutional flaws inherent in Section 9(a) of the Executive Order are fatal. The material facts, controlling law, and the Executive Order's text remain unchanged since the Court issued and reaffirmed its preliminary injunction order, and denied defendants' motion to dismiss the case. The Court should grant summary judgment, declare Section 9(a) of the Executive Order unconstitutional, and make permanent the preliminary injunction issued on April 25, 2017.

Respectfully submitted,

Dated: August 30, 2017

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FILER'S ATTESTATION

I, John W. Keker, am the ECF user whose identification and password are being used to file this Notice of Motion and Motion for Summary Judgment. Pursuant to Rule 5-1(i)(3), I hereby attest that the other above named signatories concur in this filing.

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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, ELAINE DUKE, in her official capacity as Acting 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

[PROPOSED] ORDER GRANTING COUNTY OF SANTA CLARA'S MOTION FOR SUMMARY JUDGMENT

Dept.: Courtroom 2, 17th Floor
Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2018

Before the Court is Plaintiff County of Santa Clara's (the "County") Motion for Summary Judgment. Having considered the County's moving and reply papers, defendants' opposition papers, all evidence submitted in connection therewith, the case record, and the arguments of counsel, the Court hereby GRANTS the County's Motion for Summary Judgment in its entirety.

IT IS FURTHER ORDERED THAT:

1. Section 9(a) of Executive Order 13768 is declared unconstitutional;

2. Defendants are permanently enjoined from implementing Section 9(a) of Executive Order 13768.

IT IS SO ORDERED.

Dated: _____

_____
HON. WILLIAM H. ORRICK