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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SANTA CLARA COUNTY DIVISION

COUNTY OF SANTA CLARA,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 3:17-cv-00574-WHO

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: October 18, 2017
Time: 2:00 p.m.

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INTRODUCTION

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Consistent with this federal power, Executive Order 13,768 establishes the enforcement of federal immigration law as a priority for the Executive Branch. *See* Exec. Order No. 13,768, § 2, 82 Fed. Reg. 8,799 (Jan. 30, 2017). Pertinent here, Section 9(a) of the Order directs the Attorney General and the Secretary of Homeland Security ("Secretary") to exercise their existing authority to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 . . . are not eligible to receive Federal grants" *Id*. § 9(a). Section 1373 provides that no government entity or official may "prohibit, or in any way restrict" the sending of information regarding the citizenship or immigration status of any individual to federal immigration authorities. 8 U.S.C. § 1373(a). Section 9(a) of the Executive Order also instructs the Attorney General to exercise his existing authority to take "appropriate enforcement action" against any entity that violates Section 1373 or has a statute or policy that "prevents or hinders the enforcement of Federal law." *Id*.

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

In its motion for summary judgment, plaintiff seeks a declaration that the grant eligibility provision in Section 9(a) of the Executive Order violates the constitutional Separation of Powers and the Due Process Clause (as void for vagueness and procedurally deficient); a declaration that the "appropriate enforcement action" provision in Section 9(a) violates the Tenth Amendment; and an injunction against implementation of Section 9(a). Plaintiff's claim under the Separation of Powers also asserts that the grant eligibility provision violates principles under the Spending Clause.

As discussed below, since plaintiff has not shown a concrete risk of harm from Section 9(a), the County lacks standing and its claims are unripe. Alternatively, assuming plaintiff's claims were justiciable, Section 9(a) and the AG Memorandum make clear that the grant eligibility provision will be applied only where the Attorney General or the Secretary is acting under statutory authority to condition grants on compliance with Section 1373, such that Section 9(a) is entirely consistent with the constitutional Separation of Powers.

Additionally, Section 1373 only addresses the sharing of information with federal immigration authorities, and the AG Memorandum makes clear that prospective grantees will receive notice of the Section 1373 condition in advance and that the condition will be applied only to grants administered by the Department of Justice and the Department of Homeland Security, which are, respectively, the primary law enforcement agency of the United States and the agency responsible for the admission and removal of non-citizens. Thus, this grant condition will not violate any of the Supreme Court's limitations on the Spending Power. *See S. Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987).

Further, the AG Memorandum clarifies Section 9(a) of the Executive Order to indicate not only that "[a]ll grantees will receive notice of their obligation to comply with section 1373," but also, among other things, that the process will be subject to the procedural requirements for making or revoking federal grants, AG Mem. at 2 – thus satisfying the substantive and procedural requirements of the Due Process Clause. Finally, the "appropriate enforcement action" provision

of Section 9(a) does not "commandeer" a state or local government in violation of the Tenth Amendment.

Thus, the plaintiff is not "entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), and its motion for summary judgment should be denied.

STATUTORY AND ADMINISTRATIVE BACKGROUND

I. Broad Executive Discretion in Enforcement of Immigration Law

Through the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., Congress granted the Executive Branch significant authority to control the entry, movement, and other conduct of foreign nationals in the United States. Under the INA, the Department of Homeland Security, the Department of Justice, and other agencies of the Executive Branch administer and enforce the immigration laws. Likewise, the INA permits the Executive Branch to exercise considerable executive discretion to direct enforcement pursuant to federal policy objectives. For example, the Secretary has consistently exercised executive discretion in the enforcement of federal immigration law. *See*, *e.g*., Mem. from John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Protection, et al., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).[1]

In emphasizing the federal government's leading role in immigration enforcement, the INA also envisions involvement from state and local authorities in the enforcement of immigration law. For example, Section 287(g) of the INA authorizes the Secretary to enter into written agreements with a state or local government under which officers of such government may "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1). Likewise, the INA provides for cooperation with DHS in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States," even without a formal cooperation agreement. *Id*.

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

§ 1357(g)(10)(B). Another provision, 8 U.S.C. § 1373, ensures the sharing of information between federal and state actors:

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

Id. § 1373(a); *see* Pub. L. No. 104-208, Div. C, Title VI, § 642, 110 Stat. 3009, 3009-707 (1996); *see also* 8 U.S.C. § 1644 (similar provision enacted in Pub. L. No. 104-193, Title IV, § 434, 110 Stat. 2275 (1996)). Section 1373 also proscribes prohibiting or restricting any government entity from "maintaining" information regarding the immigration status of any individual. 8 U.S.C. § 1373(b).

II. Executive Order 13,768

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

As permitted by the INA, Executive Order 13,768 establishes priorities regarding aliens who are subject to removal from the United States under the immigration laws. *Id*. § 5, 82 Fed. Reg. at 8,800. Section 9 of the Order provides that "[i]t is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373." Section 9(a) directs federal agencies to achieve that policy:

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

> or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

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

III. The AG Memorandum

On May 22, 2017, the Attorney General issued a Memorandum regarding the implementation of Executive Order 13,768. *See* AG Mem. at 1. The Attorney General has a statutory duty to advise executive department heads on "questions of law," 28 U.S.C. 512; to represent federal agencies in litigation, *id.* § 516; and to furnish formal legal opinions to executive agencies, 28 C.F.R. § 0.5(c). Also, although the Secretary principally administers the immigration laws, the INA provides that "the determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1); *see id.* § 1103(g). By longstanding tradition and practice, the Attorney General's legal opinions are treated as authoritative by the heads of executive agencies. *See, e.g., Tenaska Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 439 (1995); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1319-20 (2000) ("Few . . . dispute the proposition that whether for legal reasons, to promote uniformity and stability in executive branch legal interpretation, or to avoid the personal risk of being subject to the imputation of disregarding the law as officially pronounced, executive branch agencies have treated Attorney General . . . opinions as conclusive and binding since at least the time of Attorney General William Wirt [1817-1829]."") (footnotes and internal quotation marks omitted).

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

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

ARGUMENT

I. Plaintiff's Claims Are Non-Justiciable Under Principles of Standing and Ripeness

Under Article III of the Constitution, the jurisdiction of the federal courts extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Matters outside this rubric are "non-justiciable." *Ore. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414, 416 (9th Cir. 2002). Two principles of justiciability bar jurisdiction over plaintiff's claims: standing and ripeness. "While standing is concerned with *who* is a proper party to litigate a particular matter, the doctrines of mootness and ripeness determine *when* that litigation

may occur." *Haw. Cty. Green Party v. Clinton*, 14 F. Supp. 2d 1198, 1201 (D. Haw. 1998). Where a plaintiff lacks standing or its claims are unripe, the court lacks jurisdiction. *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 832 (9th Cir. 2016).

To satisfy the "irreducible constitutional minimum" of standing, a plaintiff must demonstrate an "injury in fact," a "fairly traceable" causal connection between the injury and defendant's conduct, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The injury needed for constitutional standing must be "concrete," "objective," and "palpable," not merely "abstract" or "subjective." *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975). Additionally, the injury must be "certainly impending" rather than "speculative." *Whitmore*, 495 U.S. at 157, 158. "The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007).

Constitutional justiciability also requires that a dispute be ripe for judicial consideration – that is, that the challenged action "has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In other words, "[a] claim is not ripe for adjudication [under the Constitution] if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Like standing, "ripeness is determined at the time of the filing of the complaint." *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001).

In assessing constitutional ripeness in the context of a "pre-enforcement challenge" to a statutory or administrative enactment, the courts consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). In other words, a court considers whether the court and the parties would "benefit from deferring review until the agency's policies have

crystallized and the question arises in some more concrete and final form." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985) (internal quotation marks omitted); *see U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1119 (9th Cir. 1999) (finding that claim was not fit for decision where administrative proceedings had not concluded and court would "benefit" from outcome of those proceedings). Finally, "[t]o meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989) (internal quotation marks omitted).

Under these principles, all of the claims in plaintiff's Complaint are non-justiciable, as discussed below. Aside from these standing and ripeness issues, plaintiff's challenges to the grant eligibility provision and the "appropriate enforcement action" provision in Section 9(a) of the Executive Order are non-justiciable for the additional reason that the Order is only an internal directive to certain Executive Branch officials and does not directly affect the plaintiff. *See Chen v. Schiltgen*, No. C-94-4094 MHP, 1995 WL 317023, at *5 (N.D. Cal. May 19, 1995) ("President Bush issued Executive Order 12,711 on the authority of his general constitutional powers to direct the exercise of powers statutorily delegated to executive branch officials. Such an executive order implementing policy as a product of executive authority rather than as a consequence of congressional lawmaking does not have the full force of law.") (citation omitted), *aff'd sub nom. Chen v. INS*, 95 F.3d 801 (9th Cir. 1996).[2]

A. Plaintiff's Claims Regarding the Grant Eligibility Provision of the Executive Order Are Non-Justiciable

Counts 1, 2, and 3 in plaintiff's Complaint allege that the grant eligibility provision violates the Separation of Powers and the Due Process Clause (Doc. 1 ¶¶ 118-148). Santa Clara County has not, however, established a concrete risk of losing any funds under that provision.

[2] Additionally, to the extent the issues that plaintiff now seeks to litigate may later be raised in a concrete, as-applied challenge regarding the County's laws or policies, the Court should exercise its discretion to decline jurisdiction under the Declaratory Judgment Act on that basis. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (noting that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites").

Indeed, eight months have now passed since promulgation of the Executive Order, and the County can still cite no concrete threat of loss under Section 9(a), even aside from this Court's preliminary injunction. The County alleges budgetary "uncertainty" (Doc. 151 at 22), but fails to acknowledge that the Attorney General's Memorandum of May 22, 2017, eliminates that uncertainty. The Memorandum provides (1) that the grant eligibility provision applies "solely to federal grants administered by the Department of Justice or the Department of Homeland Security ["DHS"]," (2) that the Department of Justice ("DOJ") will require jurisdictions applying for certain DOJ-administered grants "to certify their compliance with federal law, including 8 U.S.C. § 1373," and (3) that only "jurisdiction[s] that fail[] to certify compliance with section 1373 will be ineligible to receive [an] award[]." AG Mem. at 1-2. Although plaintiff argues that the AG Memorandum sets forth an "implausible interpretation" of the Executive Order (Doc. 151 at 10), every essential element of the Memorandum is, in fact, reflected in the Order, which instructs the Attorney General and the Secretary to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants," and to impose compliance with Section 1373 as a grant condition "to the extent consistent with law." Exec. Order No. 13,768, § 9(a). Thus, compliance with Section 1373 can be imposed as a grant condition only where there is independent authority to do so.

Even under the rationale of this Court's Order denying defendants' motion for reconsideration, plaintiff cannot establish the "concrete" injury needed for standing and the "concrete" impact needed for ripeness. *See Whitmore*, 495 U.S. at 155; *Abbott Labs.*, 387 U.S. at 148-49. The Court disagreed with defendants' contention that the AG Memorandum is a binding legal opinion, but held that the Memorandum sets forth a "plan" for implementation of the Executive Order – "a plan to apply section 9(a) only to DOJ and DHS grants" (Doc. 145 at 10). More than four months have now passed since promulgation of the AG Memorandum, which remains the only Federal Government statement regarding implementation of the grant eligibility provision. Neither the President nor the Secretary has indicated any disagreement with the Attorney General's "plan" – or, in defendants' view, the Attorney General's legal opinion – and

there is no suggestion that the grant eligibility provision might be implemented in any other way. "The burden of establishing ripeness and standing rests on the party asserting the claim." *Colwell v. HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009). Under these circumstances, Santa Clara County cannot establish any concrete threat of losing funds pursuant to the grant eligibility provision.

B. Plaintiff's Claim Regarding the "Appropriate Enforcement Action" Provision of the Executive Order Is Non-Justiciable

Count 4 in plaintiff's Complaint alleges that the Tenth Amendment is violated by the provision in Section 9(a) that instructs 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." Plaintiff's claim to standing and ripeness on this challenge is equally tenuous. The Federal Government has taken no enforcement action against Santa Clara County under Section 9(a), and there is no indication that any such action is imminent. Thus, the plaintiff has not suffered any "concrete" injury due to this provision, and no such injury is "certainly impending." *See Whitmore*, 495 U.S. at 155, 158. Similarly, since the defendants might never take enforcement action against the County under Section 9(a), this claim rests on "contingent future events that . . . may not occur at all," *see Texas*, 523 U.S. at 300, and the County cannot show any "direct and immediate hardship" from withholding review, *see Winter*, 900 F.2d at 1325.

Nor could the plaintiff assert that the mere possibility of an enforcement action under Section 9(a) of the Order has inflicted any cognizable injury. Indeed, there is always a possibility that the Federal Government may sue a State or local government alleging that the defendant's laws or policies are constitutionally preempted. *See Arizona v. United States*, 567 U.S. 387 (2012); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). This authority exists entirely independent of the Executive Order. *Id*. Further, if such action were to occur, the County would have an opportunity at that time to challenge its propriety and merits.

II. Plaintiff Is Not Entitled to Judgment Regarding the Grant Eligibility Provision of the Executive Order

As noted earlier, Counts 1, 2, and 3 of plaintiff's Complaint allege that the grant eligibility provision in Section 9(a) of the Executive Order violates the constitutional Separation of Powers and the Due Process Clause (as void for vagueness and procedurally deficient). The Separation-of-Powers claim includes an argument that the grant eligibility provision also violates principles under the Spending Clause. Assuming these claims were justiciable, this provision of the Order is consistent with all of those constitutional requirements, especially as elucidated by the AG Memorandum.

Plaintiff's claims regarding the grant eligibility provision are all the more difficult to sustain because these are facial challenges to an Executive Order. The Supreme Court has held that a facial challenge is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In this context, "the challenger must establish that no set of circumstances exists under which the [challenged enactment] would be valid." *Id*. As further discussed below, Santa Clara County has failed to establish that, even if Section 9 of the Executive Order had the force of law (which it does not, as it is only an internal executive directive), it would be invalid under all circumstances.

A. Plaintiff Is Not Entitled to Judgment Under the Separation of Powers

Count 1 alleges that the grant eligibility provision violates the Separation of Powers by "claim[ing] for the executive branch powers exclusively assigned to Congress" (Doc. 1 ¶ 129). Article I of the Constitution confers on Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. As this Court has said, Congress may, "[i]ncident to" its spending power, "attach conditions on the receipt of federal funds," *Cty. of Santa Clara v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (quoting *Dole*, 483 U.S. at 206), and "Congress can delegate some discretion to the President to decide how to spend appropriated funds" so long as "any delegation and discretion is cabined by [relevant] constitutional boundaries." 2017 WL 1459081, at *21; *see DKT Mem'l Fund Ltd. v.*

AID, 887 F.2d 275, 280-81 (D.C. Cir. 1989) (upholding conditions on spending imposed by President where statute authorized President to set certain "terms and conditions as he may determine").

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

Authority to impose at least some conditions is inherent in the statutory authority to administer a grant program. Moreover, beyond that inherent authority, Congress has frequently authorized agencies administering certain grant programs, in a variety of ways, to impose discretionary conditions on the receipt of funds. Pursuant to such authorizations, for example, DOJ has determined to condition eligibility for participation in three DOJ-administered programs on the applicant's certification of compliance with Section 1373. *See generally* Tr. of Oral Arg. at 35:4-6, *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Apr. 14, 2017) (identifying the three programs); 2017 WL 1459081, at *4 (same).

Further, as noted above, a party challenging the facial constitutionality of an Executive Order must establish that the Order would be unconstitutional in all its applications. *See Salerno*, 481 U.S. at 745 (facial challenge must establish that "no set of circumstances exists under which [the enactment] would be valid"). That standard is necessarily impossible to meet in relation to plaintiff's Separation of Powers claim, since Congress frequently authorizes the Executive to impose discretionary conditions on the receipt of federal grants.

B. Plaintiff Is Not Entitled to Judgment in Relation to the Limitations on the Spending Power

Plaintiff's Count 1 also alleges that the grant eligibility provision violates the limitations on the Spending Power (Doc. 1 ¶¶ 122-128). The Spending Clause of the Constitution provides that Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. As the Supreme Court has held, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks omitted).

The Court in *Dole* described certain limitations or potential limitations on the spending power. Most basically, "the exercise of the spending power must be in pursuit of 'the general welfare'" – as stated in the Spending Clause itself, *id*. at 207 – and conditions on the receipt of federal funds must be stated "unambiguously" so that recipients can "exercise their choice knowingly, cognizant of the consequences of their participation." *Id*. Additionally, the Court observed in *Dole*, "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," and that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *Id*. at 207-08, 211 (internal quotation marks omitted). And finally, the Court said that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id*. at 207-08. Especially in light of the AG Memorandum, the grant eligibility provision is fully consistent with these principles.

Plaintiff argues, first, that the grant eligibility provision will lead to the imposition of conditions that are "profoundly coercive" in relation to the County's overall budget (Doc. 1 ¶ 131(iv); *see* Doc. 151 at 15). As the Court of Appeals has observed, however, the Supreme Court in *Dole* concluded that it would find a violation of this potential limitation, "if ever, [only]

in the most extraordinary circumstances." *State of Cal. v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (citing *Dole*, 483 U.S. at 210-11). Thus, for example, the Court in *Dole* found no constitutional violation where a State risked losing 5% of its highway funds for refusing to implement a federal minimum drinking age. *Dole*, 483 U.S. at 211. Conversely, the Court held more recently that Congress violated anti-coercion principles by subjecting States to a risk of losing "all federal Medicaid funding," which constituted "over 10 percent of a State's overall budget," if they declined to adopt certain Medicaid expansion actions. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542 (2012) (hereinafter *NFIB*). In that case, "the sheer size of this federal spending program in relation to state expenditures" rendered the condition coercive. *Id*. at 683 (Scalia, J., dissenting). Courts should not conclude, however, that an enactment is unconstitutional on this ground "unless the coercive nature of an offer is unmistakably clear." *Id*. at 681.

Under this precedent, plaintiff's "coerciveness" claim must fail. As noted already, the grant eligibility provision "will be applied solely to [certain] federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding." AG Mem. at 1. Moreover, DOJ has so far identified only three programs whose eligibility will be conditioned on compliance with Section 1373. *See* Tr. of Oral Arg. at 35:2-9. According to its Complaint, Santa Clara County previously received funds under two of those programs, but has decided not to "apply for or accept future" funds under either program, in order to "retain its discretion" regarding the sharing of immigration status information (Doc. 1 at 14 n.3). In these circumstances, the County has fallen far short of stating a viable claim that the "coercive nature" of the grant eligibility provision is "unmistakably clear." *See NFIB*, 567 U.S. at 681 (Scalia, J., dissenting).

Next, plaintiff argues that the grant eligibility provision exceeds the spending power by requiring the County to "take unconstitutional actions in order to receive the money" (Doc. 151 at 16). The Court in *Dole* emphasized the narrowness of this limitation on the spending power, noting that "the 'independent constitutional bar' limitation . . . is not . . . a prohibition on the

indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210. Rather, the Court said, this limitation "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Id*. at 210-11.

The grant eligibility provision does not "induce" Santa Clara County to violate any such constitutional prohibition. As stated in the AG Memorandum, that provision merely requires prospective grantees to certify compliance with 8 U.S.C. § 1373, which proscribes prohibiting or restricting the sharing of information with federal immigration authorities. *See* AG Mem. at 2. That is not, however, the kind of "independent [constitutional] bar to the conditional grant of federal funds" that the Supreme Court contemplated in *Dole*. 483 U.S. at 207-08. Plaintiff asserts that the grant eligibility provision will require it to comply with federal immigration detainer requests in violation of the Fourth Amendment (Doc. 151 at 16), but the AG Memorandum says nothing about such requests, and, in any event, cooperating with them is fully consistent with the Fourth Amendment. *See El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, *2 (5th Cir. Sept. 25, 2017) (staying injunction of state law requiring cooperation with federal detainer requests and holding that State would likely succeed on its argument that mandatory cooperation with such requests does not violate Fourth Amendment). Moreover, the AG Memorandum states affirmatively that the provision "does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation." AG Mem. at 1-2. Santa Clara County cannot show that the grant eligibility provision will require the County to "take unconstitutional actions" in every application. *Cf. Salerno*, 481 U.S. at 745.

Plaintiff also argues that the grant eligibility provision imposes immigration-related conditions in programs that "have absolutely nothing to do with immigration" (Doc. 151 at 16). As the Court of Appeals has observed, however, this aspect of *Dole* suggests only a "possible ground" for invalidating an enactment, and does not impose an "exacting standard":

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

Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (citing *Dole*, 483 U.S. at 207). Thus, conditions on federal funding must only "bear some relationship to the purpose of the federal spending." 314 F.3d at 1067 (quoting *New York v. United States*, 505 U.S. 144, 167 (1992)); *see Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004) (noting that Supreme Court has never "overturned Spending Clause legislation on relatedness grounds").

Especially as implemented by the AG Memorandum, the grant eligibility provision easily meets this standard. The provision will be applied only to grants administered by the Department of Justice and the Department of Homeland Security – that is, the primary law enforcement agency of the United States and the agency responsible for the admission and removal of non-citizens. AG Mem. at 1. DHS is the very agency whose communication with state and local government officials is protected by Section 1373. Moreover, the provision will be applied only to "certain . . . grants" as to which the agency "is statutorily authorized to impose such a condition." *Id*. at 2. And federal law clearly favors state-federal cooperation on immigration matters. *See* 8 U.S.C. § 1357(g). Plaintiff continues to argue that the grant eligibility provision threatens funds that provide "essential safety-net services to its residents," including "Medicare, Medicaid, transportation, child welfare [and] immunization and vaccination" services (Doc. 1 ¶ 116; Doc. 151 at 16). But the AG Memorandum has eliminated any possibility that this provision could be applied in relation to any of those categories of federal funding.

Lastly, plaintiff argues that the grant eligibility provision imposes conditions that are "ambiguous" and not stated "in advance" (Doc. 151 at 17). As described above, however, the AG Memorandum makes clear that the provision will be implemented by "requir[ing] jurisdictions applying for certain [DOJ] grants to certify their compliance with federal law, including 8 U.S.C.

§ 1373, as a condition for receiving an award." AG Mem. at 2. Thus, "[a]ll grantees will receive notice of their obligation to comply with section 1373" ahead of time, and the grant eligibility provision will be applied to "[a]ny jurisdiction that fails to certify compliance." *Id*. Necessarily, therefore, by reviewing the applicable grant program solicitations and award documents presented to them for acceptance or refusal, potential grantees will be able to "exercise their choice knowingly, cognizant of the consequences of their participation" in grant programs that include this condition. *Dole*, 483 U.S. at 207. The plaintiff cannot show that the grant eligibility provision will fail this aspect of *Dole* in all its applications, as necessary in this facial challenge. *See Salerno*, 481 U.S. at 745.

C. Plaintiff Is Not Entitled to Judgment on its Claim that the Grant Eligibility Provision Is Unconstitutionally Vague

Plaintiff's next claim, in Count 2 of the Complaint, is that Section 9(a) is unconstitutionally vague in violation of the Due Process Clause (Doc. 1 ¶¶ 135-142). An enactment may be unconstitutionally vague if it "fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004) (citation omitted). The Supreme Court, however, has cautioned against engaging in a vagueness analysis in the pre-enforcement context, particularly in matters that do not involve First Amendment rights. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 50 (2008) (noting that facial vagueness challenges are "disfavored for several reasons," including because such claims often "rest on speculation"). "Outside the First Amendment context, a plaintiff alleging facial vagueness must show that the enactment is impermissibly vague in all its applications." *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (internal quotation marks omitted). This is consistent with the rule that a party challenging an enactment on its face must show that "no set of circumstances exists under which the [enactment] would be valid." *Salerno*, 481 U.S. at 745. Moreover, courts will consider whether a provision is fairly "amenable to a limiting construction" before striking it down as vague. *Skilling v. United States*, 561 U.S. 358,

405 (2010). Thus, a plaintiff bringing a pre-enforcement facial vagueness challenge "bears a heavy burden." *SEIU, Local 82 v. D.C.*, 608 F. Supp. 1434, 1446-47 (D.D.C. 1985).

In this case, the County argues that "Section 9(a) of the Executive Order fails to define key terms, such as 'sanctuary jurisdiction,' 'Federal grants,' 'law enforcement purposes,' 'appropriate enforcement action,' and 'entity,' as well as . . . 'statute, policy, or practice that prevents or hinders the enforcement of Federal law'" (Doc. 1 ¶ 139). As discussed above, however, the Order is an internal directive to Executive Branch officials and does not have any direct effect on the plaintiff. Therefore, there can be no legitimate question as to whether the Order provides "reasonable" notice to the plaintiff. *See Tucson Woman's Clinic*, 379 F.3d at 554. In any event, the AG Memorandum authoritatively clarifies the meaning of Section 9(a), specifying, for example, that the "the term 'sanctuary jurisdiction' will refer only to jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373." AG Mem. at 2. Additionally, the Memorandum makes clear that the "Federal grants" to which Section 9(a) will apply are only those "grants administered by the Department of Justice or the Department of Homeland Security" as to which the agency is "statutorily authorized" to impose the condition of compliance with 8 U.S.C. § 1373. *Id*. at 1-2.

Other aspects of plaintiff's vagueness challenge "rest [entirely] on speculation." *See Wash. State Grange*, 552 U.S. at 50. Undeniably and uncontroversially, the Attorney General is authorized to take certain "enforcement actions" against a State and local jurisdiction whose "statute, policy, or practice . . . prevents or hinders the enforcement of Federal law." *See Arizona v. United States*, 567 U.S. 387 (2012) (asserting that certain state laws regarding non-citizens are preempted by federal law); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) (same); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (same). There is no indication that the Attorney General will take any unauthorized or inappropriate actions pursuant to this provision in Section 9(a). Thus, the County cannot show that President's instruction to take "appropriate"

action against such statutes, policies, or practices is "impermissibly vague in all its applications." *See Humanitarian Law Project*, 578 F.3d at 1146.[3]

D. Plaintiff Is Not Entitled to Judgment on its Claim that the Grant Eligibility Provision Violates Procedural Due Process

Count 3 of plaintiff's Complaint alleges that Section 9(a) of the Order "deprives the County of its procedural due process rights under the Fifth Amendment because it grants the Attorney General and Secretary . . . unfettered discretion to deprive the County of all federal funds, with no opportunity to review, challenge, or even obtain notice that the deprivation is coming" (Doc. 1 ¶ 146). Under the Fifth Amendment, the government may not deprive anyone of "property" without "due process of law." Where a constitutionally protected property interest exists, what type of procedural protections are "due" depends on the circumstances, including "the risk of an erroneous deprivation," the "probable value" of procedural safeguards, and the government's interests. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiff asserts that it "has a constitutionally protectable property interest in the federal funds it relies on to provide essential services to 1.9 million residents" (Doc. 1 ¶ 145).

In light of the AG Memorandum, however, Section 9(a) does not apply to funding in which the County might have a constitutionally protectable interest, and, in any event, the applicable procedures will be provided. As discussed earlier, the grant eligibility provision will be applied only to certain grants administered by DOJ and DHS, *see* AG Mem. at 1, and DOJ has so far identified only three programs in which eligibility will depend on compliance with Section 1373. *See* Tr. of Oral Arg. at 35:2-9. The County does not allege – and cannot show – that these programs provide "federal funds it relies on to provide essential services to 1.9 million residents"

[3] The same is true of plaintiff's allegation (Doc. 1 ¶ 141) that vagueness principles are violated by Section 6 of the Executive Order, which instructs the Secretary of Homeland Security to "ensure the assessment and collection of all fines and penalties that the Secretary is *authorized under the law* to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States" (emphasis added). The INA provides for several such fines and penalties. *See*, e.*g.*, 8 U.S.C. §§ 1324 (penalties for bringing in and harboring certain aliens), 1324a (penalties for unlawful employment of aliens), 1325 (civil penalties for improper entry).

(Doc. 1 ¶ 145). Moreover, the AG Memorandum indicates that compliance with Section 1373 will be included as a grant condition only where the agency "is statutorily authorized to impose such a condition," and that "[a]ll grantees will receive notice of their obligation to comply with section 1373." AG Mem. at 2. Additionally, by specifying that this condition be exercised "to the extent consistent with law," Section 9(a) incorporates the governing legal limitations, such as the 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).

III. Plaintiff Is Not Entitled to Judgment Regarding the "Appropriate Enforcement Action" Provision of the Executive Order

Count 4 in plaintiff's Complaint alleges that the Tenth Amendment is violated by the last sentence of Section 9(a), which instructs 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" (Doc. 1 ¶¶ 149-152). Plaintiff alleges that this provision "commandeers state and local officials" by seeking to compel them "to comply with civil detainer requests" (Doc. 1 ¶ 151; Doc. 151 at 19).[4]

In this facial challenge, however, plaintiff must show that the "appropriate enforcement action" provision would violate the Tenth Amendment in all of 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"). The County does not – and could not – argue that there are never situations where the Federal Government may appropriately take action against a state or local government entity whose "statute, policy, or practice . . . prevents or hinders the enforcement of Federal law." For example, the United States, represented by the Attorney General, may bring a judicial action against such an entity to enjoin a statute or practice that is preempted by federal

[4] In its assertions regarding the intent of this provision, plaintiff cites press statements and media interviews (Doc. 151 at 18). But Executive Branch actions that "express federal policy but lack the force of law," such as press releases, are "merely precatory" and cannot render an otherwise valid action unconstitutional. *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329-30 (1994).

immigration law. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). Indeed, one of the tests for federal preemption is whether the state or local enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Arizona*, 567 U.S. at 399 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) – which is essentially another way of asking whether an enactment "prevents or hinders the enforcement of Federal law." If such a lawsuit were ever to overreach the bounds of constitutional preemption, the County (or any other defendant entity) could oppose the relief sought at that time on an as-applied basis.

IV. Any Injunction Herein Should Be Limited to the Plaintiff

Even if the Court were to conclude that plaintiff has satisfied the requirements for summary judgment, the Court should not enter a nationwide injunction herein (*contra* Doc. 151 at 21). "[A]n injunction must be narrowly tailored to affect only those persons over which [the court] has power, and to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law." *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotation marks omitted). Thus, courts routinely deny requests for nationwide injunctive relief. *See Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying nationwide injunction insofar as it "grants relief to persons other than" named plaintiff); *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1116 (9th Cir. 2012) (affirming district court's refusal to grant nationwide relief).

In support of its request for a nationwide injunction, plaintiff's preliminary injunction motion cited *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), where the court affirmed a nationwide injunction against programs allowing certain non-citizens to remain in the United States (Doc. 26 at 25). The County fails to acknowledge, however, that it vigorously *objected* to the nationwide injunction in that case.[5] In an amicus brief filed before the Supreme Court, Santa

[5] Moreover, the court in *Texas* entered a nationwide injunction in light of the "substantial likelihood that a geographically-limited injunction would be ineffective because [affected

Clara County and other jurisdictions urged the Court to vacate the injunction because the plaintiffs had failed "to establish injury sufficient to enjoin the [programs] *nationwide*." *See* Brief for Amici Curiae, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 891345, at *20 (Attachment 2 hereto). The County and its fellow amici argued that, to justify "an expansive nationwide injunction," the plaintiffs there would have to "establish standing to justify the scope of the injunction." *Id*. at *19, *30. In this case, Santa Clara County has not even attempted to establish standing to seek a nationwide injunction against Section 9(a). By its own arguments, therefore, any permanent injunction herein should be limited to Santa Clara County.[6]

CONCLUSION

For the reasons discussed above, plaintiff's motion for summary judgment should be denied.

Dated: September 27, 2017

Respectfully submitted,

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persons] would be free to move among states." 809 F.3d at 188. No analogous situation is presented here.

[6] Additionally, any permanent injunction in this action, like the existing preliminary injunction, should not include the President. *See Cty. of Santa Clara v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1459081, at *29 (N.D. Cal. Apr. 25, 2017) ("I conclude that an injunction against the President is not appropriate."); *see also Newdow v. Bush*, 391 F. Supp. 2d 95, 105, 106 (D.D.C. 2005) ("[T]he Supreme Court has sent a clear message that an injunction should not be issued against the President for official acts.").

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County of Santa Clara v. Donald J. Trump, et al.,
No. 3:17-cv-00574-WHO (N.D. Cal.)

Opposition to Plaintiff's Motion
for Summary Judgment

Attachment 1

Memorandum from the Attorney General
for All Department Grant-Making
Components (May 22, 2017)

Office of the Attorney General
Washington, D.C. 20530

May 22, 2017

MEMORANDUM FOR ALL DEPARTMENT GRANT-MAKING COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Implementation of Executive Order 13768, "Enhancing Public Safety in the Interior of the United States"

Federal law provides a process for foreign citizens to lawfully enter the country. Circumventing that process and crossing our borders unlawfully is a federal crime. It is the role of federal agencies, including the Department of Justice, to enforce our immigration laws, prosecute violations, and secure our borders.

The President has established immigration enforcement as a priority for this Administration and, in furtherance of that priority, issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," on January 25, 2017. The Executive Order makes clear that "[i]t is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373." To accomplish this policy, section 9(a) of the Executive Order provides, in part:

> [T]he Attorney General and the Secretary [of Homeland Security], in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.

Section 1373 provides in part that state and local jurisdictions "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration officers] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a).

In accordance with my duties as Attorney General, I have determined that section 9(a) of the Executive Order, which is directed to the Attorney General and the Secretary of Homeland Security, will be applied solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding. Section 9(a) expressly requires enforcement "to the extent consistent with law," and therefore does not call for the imposition of grant conditions that would violate any applicable constitutional or

statutory limitation. Nor does the Executive Order purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect. Indeed, apart from the Executive Order, the Department of Justice and the Department of Homeland Security, in certain circumstances, may lawfully exercise discretion over grants that they administer. Section 9(a) directs the Attorney General and the Secretary of Homeland Security to exercise, as appropriate, their lawful discretion to ensure that jurisdictions that willfully refuse to comply with section 1373 are not eligible to receive Department of Justice or Department of Homeland Security grants.

Consistent with the Executive Order, statutory authority, and past practice, the Department of Justice will require jurisdictions applying for certain Department grants to certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award. Any jurisdiction that fails to certify compliance with section 1373 will be ineligible to receive such awards. This certification requirement will apply to any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services that expressly contains this certification condition and to future grants for which the Department is statutorily authorized to impose such a condition. All grantees will receive notice of their obligation to comply with section 1373. The Department will administer this certification requirement in accordance with the law and will comply with any binding court order.

After consultation with the Secretary of Homeland Security, I have determined that, for purposes of enforcing the Executive Order, the term "sanctuary jurisdiction" will refer only to jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373." A jurisdiction that does not willfully refuse to comply with section 1373 is not a "sanctuary jurisdiction" as that term is used in section 9(a). While the Executive Order's definition of "sanctuary jurisdiction" is narrow, nothing in the Executive Order limits the Department's ability to point out ways that state and local jurisdictions are undermining our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions.

The provisions of the Executive Order quoted above address only 8 U.S.C. § 1373. Separate and apart from the Executive Order, statutes may authorize the Department to tailor grants or to impose additional conditions on grantees to advance the Department's law enforcement priorities. Consistent with this authority, over the years, the Department has tailored grants to focus on, among other things, homeland security, violent crime (including drug and gang activity), and domestic violence. Going forward, the Department, where authorized, may seek to tailor grants to promote a lawful system of immigration.

County of Santa Clara v. Donald J. Trump, et al.,
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Opposition to Plaintiff's Motion
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Attachment 2

Brief for Amici Curiae, *United States v. Texas*,
136 S. Ct. 2271 (2016) (No. 15-674),
2016 WL 891345

2016 WL 891345 (U.S.) (Appellate Brief)
Supreme Court of the United States.

UNITED STATES OF AMERICA, et al., Petitioners,
v.
STATE OF TEXAS, et al., Respondents.

No. 15-674.
March 7, 2016.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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***1** INTEREST OF AMICI CURIAE[1]

Amici represent a broad coalition of local governments. One hundred and eighteen cities, counties, and local government officials have joined this brief as well as The U.S. Conference of Mayors, a nonpartisan group representing mayors of over 1,400 cities, and the National League of Cities, which represents more than 19,000 municipal governments nationwide.

Amici are home to some of the largest immigrant communities in the United States. More than 1.5 million children and parents potentially eligible for relief under the enjoined executive guidance live in our cities and towns. Amici submit this brief to explain why the nationwide injunction in this case - and the novel theory of standing asserted to support it - improperly ignores the irreparable harm to our residents from denying humanitarian deferred action relief.

***2** As amici have explained at every stage of this litigation: because undocumented immigrants are integral members of our communities, the enjoined deferred action programs protect vital local interests. Without the guidance, millions of families in our cities and counties face the threat of deportation, destabilizing our communities and jeopardizing the welfare of families and children. The nationwide injunction also undermines the ability of amici's police departments to protect and serve all of our residents. Finally, the injunction imposes extensive economic harm on amici. Undocumented immigrants currently contribute hundreds of millions of dollars in tax revenues and other economic benefits to local communities every year. The deferred action programs will contribute over $800 million in additional economic benefits to state and local governments annually. New York City alone loses an estimated $100,000 in tax revenue each day the injunction remains in place.

Amici represent a diverse array of local interests, but are united in making one point: the impact of the injunction is most immediately and acutely felt on the local level. Yet the nationwide injunction in this case was issued without *any court* considering local harms or weighing local harms against the narrow standing "injury" established by plaintiffs: a claim by Texas, a single plaintiff state, of increased driver's license processing costs.

The courts below never considered local harms within plaintiff states, let alone local harms ***3** nationwide. Forty-four amici are located in plaintiff states or states that have joined amicus briefs supporting plaintiffs. For example, amici include Dallas County, Travis County, and El Paso County, as well as Austin, Houston, Brownsville, and Edinburg, local governments that collectively represent over twenty-six percent of Texas's population. Other amici located outside plaintiff states represent over 42 million local residents. The interests of *all* of amici's residents were ignored by the courts below in authorizing a nationwide injunction.

If the role of local governments is to be respected, courts must ensure that the core requirements of standing are satisfied before the issuance of a nationwide injunction harming longstanding local interests. Amici submit this brief to explain the local impact of federal immigration measures, and to point out the legal and practical problems in issuing a nationwide injunction without considering the nationwide harms to local governments and their residents.

***4** SUMMARY OF THE ARGUMENT

This brief addresses the first question in the petition: whether plaintiff states have standing to bring this action. Amici local governments focus on an important element of standing: plaintiffs' proof of standing for each form of relief sought. Here, several factors demonstrate why plaintiffs' claim of standing to obtain a nationwide injunction is overbroad.

1. Immigration measures, like the guidance in this case, directly implicate significant local interests. For this reason, local governments have been active for decades in supporting deferred action and taking other steps to protect immigrant residents and their families. Federal humanitarian actions to defer deportation for law-abiding local residents, particularly parents and children, have far-reaching social and financial benefits for localities. Withholding and delaying deferred action, by contrast, threatens irreparable local harms for all of amici's residents.

2. Despite the significant local impact, no court below considered local harms, including whether local harms vastly exceed the sole standing injury proven by Texas, before enjoining the guidance nationwide. No decision of this Court upholds such a sweeping standing theory. To the contrary, this Court has made clear that a party seeking a preliminary injunction must establish irreparable harm and "that an injunction is in the public ***5** interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Requiring plaintiffs to establish standing injury sufficient to justify the geographic scope of judicial relief honors this Court's warning that courts must weigh "competing claims of injury" and ensure that plaintiffs are not seeking overbroad relief before issuing an injunction. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

3. But here the lower courts did not weigh competing claims of harm, because they treated plaintiff states' projections about increased driver's license administration costs - solely in Texas - as overriding tens of millions of dollars of lost revenue and extensive social and law enforcement harms for local governments in Texas and in other states.

4. This Court should not authorize a standing rule for nationwide injunctions that effectively gives objecting parties the right to veto federal policies in every locality in the country, while disregarding the harm to thousands of local governments across the nation. That overbroad concept of standing would invite parties to litigate over political disputes and settle important public questions, as in this case, by strategic litigation and sweeping injunctions that bear little relation to the narrow harms asserted.

***6 ARGUMENT**

I. The Guidance Protects Longstanding Local Interests, and Enjoining the Guidance Imposes

Immediate Harms on Localities.

Amici's support for the enjoined guidance is based on decades of experience and. longstanding local efforts to protect our immigrant residents and families. As amici have emphasized at every stage of this litigation,[2] the guidance protects undocumented immigrants who are important contributors to our cities and towns.[3] By denying important humanitarian relief to millions of our residents, the injunction strikes at the heart of our ***7** communities. The injunction imposes immediate harms on all local residents by threatening public health and safety, destabilizing families, and harming the social and economic well-being of our communities as a whole.

1. Local governments have long recognized that promoting the integration of immigrant residents is essential to the success of local communities, and that lack of integration imposes significant local harm. The depth of local concern in this area is demonstrated by local governments' decades-long investment in both federal and local policies that advance immigrant integration. This investment reaches back to local support for the legalization provisions of the 1986 Immigration Relief and Control Act (IRCA), with the Los Angeles County supervisor testifying before Congress that legalization would promote integration and allow undocumented immigrants to become productive members of the community.[4] Local governments - although not required to do so - played a key role in ***8** implementing the IRCA legalization program, raising application rates in their communities.[5]

Following IRCA's passage, local leaders and representatives lobbied for deferred action policies, later enacted into law, to address the social and humanitarian cost of "split-eligibility families": families where some members had legal status and others lived under the threat of deportation.[6] In 1988, local pressure, prompted by humanitarian concerns, led to a change in regulations to allow undocumented immigrant children in foster care to qualify for legal status under IRCA.[7]

***9** 2. In the years surrounding IRCA, localities also responded to their residents' fears of political strife and persecution in their home countries by supporting other federal deferred action programs. For example, congressional representatives and local government leaders from Los Angeles and Miami - centers of immigration from Ethiopia and Haiti, respectively - supported deferred action programs in the 1980s and 1990s for those groups.[8] At least twelve municipalities officially gave their support to federal deferred action for Salvadoran and Guatemalan refugees in the 1980s.[9] More recently, deferred action programs have provided humanitarian relief to individuals affected by regional disasters in the United States, such as ***10** Hurricane Katrina and the September 11 terrorist attacks.[10]

3. Underscoring the strength of local interest in this area, localities have voluntarily embraced their role in federal relief programs for undocumented victims of crime. For example, the U and T visa programs, created in 2000, allow victims of crimes such as domestic violence and human trafficking to receive temporary status if they cooperate with law enforcement investigations.[11] These programs address local interests by encouraging victims to come forward and cooperate with law enforcement. In turn, to increase trust and collaboration between localities and immigrant communities, many local police departments, prosecutors' offices, family protective services, and other agencies have chosen to invest resources towards identifying potential ***11** applicants and providing them with documentation to bolster their applications for federal relief.[12]

4. Localities continued their frontline implementation role during the 2012 Deferred Action for Childhood

Arrivals (DACA) initiative. New York City budgeted $18 million for education, outreach, and legal service programs to encourage local residents to apply for relief.[13] School districts in cities including San Diego, California; Des Moines, Iowa; and Yakima, Washington added staff and offices and created new databases and systems to facilitate record requests.[14] Immigrant affairs offices held public application workshops, and in Los Angeles, the mayor re-established the dormant Office of Immigrant Affairs in part to assist applicants.[15] Mayors' offices across the country ***12** facilitated access to public documents that applicants would need; partnered with public libraries to hold outreach sessions: and ensured that residents were not misled by cracking down on unqualified individuals offering fraudulent legal services to immigrants.[16]

5. In addition to supporting federal immigration relief programs, localities have also implemented innovative local policies to promote immigrant integration. There are currently sixty-three offices promoting immigrant integration at the municipal level across the country, and those numbers are growing.[17] Starting in the 1980s, cities including New York, Chicago, Albuquerque, and Austin have mandated that local services be provided to residents regardless of immigration status, based on local leaders' experience that public welfare requires all residents to have access to education, health, and police protection services.[18] Policy ***13** innovations like municipal identification cards - established by at least seventeen localities, from Los Angeles to Milwaukee County, Wisconsin - further expand access to local services.[19] Other localities have launched health care programs for undocumented residents.[20] To build trust between law enforcement and immigrant communities, police departments from metropolitan centers and smaller cities have introduced immigration status confidentiality policies, special hotlines, and community education programs.[21] Local officials ***14** have also prosecuted employers who engage in wage theft and other abuses towards undocumented workers.[22]

6. The 2014 executive guidance protects these well-established local interests. The guidance extends humanitarian relief to the same category of "split-eligibility families" that local leaders had long sought relief for. And by offering deferred action relief to an estimated 3.8 million local residents, the guidance helps promote local governments' existing integration efforts.

Because the impact of the guidance is most immediate at the local level, local governments provided early and extensive support for its implementation. New York City has committed almost $8 million to prepare legal aid providers and ***15** community groups for implementation of the guidance.[23] Los Angeles raised $4 million for its 2015 campaign to help Los Angeles residents apply for deferred action.[24] From Houston to Indianapolis to Boston and beyond, localities have convened stakeholders to make plans, provide information to immigrant residents, and ensure access to quality legal services to help residents with their applications.[25] Indeed, weeks after the 2014 guidance was announced, a national coalition of mayors and county leaders came together to support the guidance and share best practices for implementation. This coalition now includes over 100 mayors and county leaders.[26]

7. Given the local interests at stake, local governments have also made an extraordinary ***16** effort to inform the courts below why a nationwide injunction should not issue. Amici have filed amicus briefs at every stage of this litigation explaining why a nationwide injunction blocking implementation of the guidance imposes immediate harms on amici's residents.

As amici have explained, the injunction harms local economies. Preventing residents from working legally

deprives localities of tax revenue, keeps families in poverty, and leaves undocumented residents vulnerable to employer exploitation and abuse. The guidance is estimated to increase the income of families with at least one eligible parent by about ten percent.[27] Nationwide, it is estimated that the 2012 and 2014 deferred-action initiatives would increase state and local tax contributions by $805 million per year - $59 million for Texas alone.[28] The injunction costs local governments hundreds of thousands of dollars each day it remains in effect.

Amici have also explained that the injunction imposes irreparable social harms. The enjoined guidance protects children and parents, ***17** undocumented immigrants with family connections to the United States and local communities.[29] Withholding deferred action places millions of families in our cities and counties at economic and personal risk - unable to legally support their families and afraid and reluctant to go to the police, seek health care, or take advantage of government services to aid themselves and their children, for fear of revealing the undocumented status of a family member. These harms extend beyond the potential applicants themselves: children of undocumented parents (including many children who are citizens of this country) suffer ongoing social and psychological harms due to fear of separation from parents, siblings, and other loved ones.[30] And the safety of all residents is threatened ***18** when community members are afraid to seek help from the police.[31]

Amici rely on the contribution of all residents, and harm to any significant portion of our residents and families affects the wider community. As a New York City official recognized almost thirty years ago: "If some New Yorkers are ill, poorly educated or easy victims of crime, all New Yorkers suffer. We cannot write off our undocumented aliens without great cost to ourselves."[32]

II. A Single Plaintiffs Claim of Future Administrative Costs Does Not Support Standing for a Nationwide Injunction that Inflicts Widespread Local Harms

The longstanding local interests implicated by deferred action relief inform the standing question before the Court. Standing requirements are not technical doctrines. One of their core purposes is to assure that plaintiffs are not using federal courts as instruments of partisan political battles, short- ***19** circuiting consideration of the public interest in enjoining government action. Here, the courts below failed to ensure that plaintiffs' proven standing injury justified an expansive nationwide injunction. That standing error had profound practical consequences for amici. It meant that no court below considered the harms to local communities and local residents before issuing an injunction binding in amici's home jurisdictions.

1. Here, although twenty-six states filed suit, the district court concluded that plaintiffs had established only one concrete form of injury:[33] that Texas would allegedly incur "several million dollars" in future administrative costs, processing driver's license applications from residents who might qualify for deferred action under the guidance (Pet. App. 21a).[34]

***20** But this Court has made clear that "standing is not dispensed in gross," and, as a result, any injunctive relief must be tailored to "the injury in fact that the plaintiff has established." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 (2006) (citation and quotation marks omitted). To justify the scope of the preliminary injunction, plaintiffs had to establish injury sufficient to enjoin the guidance *nationwide*. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 185 (2000) (parties must

establish standing for each form of relief sought, including standing to obtain an injunction).

2. Close attention to standing in the injunction context protects third parties, such as amici and their residents, *before* a broad injunction is imposed that harms absent parties. This Court has warned that courts must weigh competing claims of injury and protect the public interest before issuing an injunction. *See, e.g., Winter,* 555 U.S. at 20; *Weinberger,* 456 U.S. at 313. If these duties are not followed, there is a serious risk that overbroad injunctions will serve as "instrument[s] of wrong." *Salazar v. Buono,* 559 U.S. 700, 714-15, (2010) (citation and quotation marks omitted); *see also Weinberger,* 456 U.S. at 312 (warning courts to "pay ***21** particular regard for the public consequences in employing the extraordinary remedy of injunction"). Standing is the starting point for these threshold inquiries. Courts cannot coherently tailor injunctions to avoid public harms unless the scope of relief a plaintiff is entitled to is clear from the outset.

At every stage of this litigation, amici local governments have endeavored to explain the extensive harms imposed and crucial benefits lost by enjoining the guidance in thousands of local communities across the nation. The theory of standing accepted by the lower courts, however, improperly ignored those interests - accepting a discrete and narrow claim of "injury" to a single plaintiff - as conferring standing to enjoin the guidance everywhere, regardless of harmful local impact. But the standing injury claimed does not match the expansive relief that was ordered.

Here, plaintiffs established only one form of alleged standing injury: that Texas may face additional administrative expenditures from increased driver's license applications if the 2014 guidance goes into effect. Plaintiffs did not even establish that the increased expenditures constituted "harm" or "injury" in the ordinary meaning of those terms. By granting work authorization and recognizing the economic contribution of longterm undocumented residents, the guidance provides hundreds of millions of dollars in economic benefits to states and ***22** localities.[35] Plaintiffs did not disprove these benefits; they only claimed that the benefits were irrelevant even if Texas and other plaintiffs are net economic and fiscal beneficiaries under the guidance.

3. This concept of standing not only overlooks the lack of concrete financial injury to Texas, it also ignores the harms that a nationwide injunction imposes on localities. The courts below never evaluated why Texas's claim of increased administrative costs (solely in Texas) warranted enjoining the guidance across the United States. Failure to adhere to threshold standing requirements meant in effect that the real world concerns of millions of local residents were overlooked.

In contrast to Texas's narrow claim, of injury from future expenditures, blocking implementation of the guidance imposes extensive local harms - all of which the courts below disregarded because they accepted that Texas had standing to enjoin the guidance nationwide:
• *Local harms within Texas.* Local governments within plaintiff states will suffer harm if the guidance is delayed. The ***23** 2012 and 2014 deferred-action initiatives would likely lead to millions of increased local tax contributions - one estimate is that the state of Texas and its local governments could receive $59 million a year from the initiatives.[36] In fact, amici from Texas, representing 6.7 million Texas residents, oppose the preliminary injunction and confirm that the injunction will harm their residents, communities, and local governments.

• Local harms outside Texas. Likewise, while plaintiffs proved no harm *outside* of Texas, local governments and millions of local residents in other states are harmed by the preliminary injunction. As amici have explained, even if confined to financial impact alone, the financial harm to local governments in other states far exceeds Texas's claim of injury. New York City alone loses an estimated $35 million in tax revenue funds because the guidance is blocked for ***24** New York City residents.[37] In Los Angeles County, undocumented immigrants eligible for deferred action to could see wage growth of a combined $1.6 billion during the life of the guidance, leading to an estimated $1.1 billion in new tax revenue between personal, sales, and business taxes.[38]

• *Irreparable non-financial harms.* Even more important, plaintiffs' standing theory rests on future financial expenditure alone. But monetary expenditure (particularly when offset by compensating economic benefits) generally does not qualify as irreparable harm. By contrast, amici have explained how the nationwide injunction imposes daily harms to amici's law enforcement and public safety efforts and how the threat of deportation and lack of legal status harms ***25** family stability and injures children. Those harms truly are irreparable; they cannot be undone even if the injunction is later lifted.

4. While the lower courts relied on *Massachusetts v. EPA*, 549 U.S. 497 (2007), that case did not address a nationwide injunction and does not bless plaintiffs' standing theory here. In *Massachusetts*, the only question was whether plaintiff states had standing to seek judicial review of a petition for agency rulemaking. The requested rulemaking did not impose any harm on absent individuals or local governments. Moreover, the asserted injury was loss of state territorial lands through climate change, a form of irreparable injury specific to states as sovereign entities.[39]

This case presents the opposite scenario: plaintiffs sought and obtained a nationwide injunction that imposes widespread harms on absent parties, including local governments and their residents. And the standing "injury" asserted, increased future expenditures, is neither unique to ***26** states in their sovereign capacity nor clearly irreparable in scope.

5. The lower courts' analysis highlights the overbreadth in plaintiffs' standing theory. Like almost all government actions, the executive guidance balances short-term costs and long-term benefits - here, the benefits to local communities by allowing certain law-abiding and longstanding residents to apply for deferred action relief. It would be almost impossible to implement any beneficial government action, particularly action that aids and protects a large number of individuals, without *some party* having to make *some* future administrative expenditures.

The type of administrative costs that Texas asserts are common to any number of parties, including non-governmental parties like insurance companies, employers, and other businesses that might have to process additional applications or paperwork as a result of a challenged government guidance or action. It makes little sense to issue nationwide injunctions to parties who claim standing based on anticipated administrative costs without considering the public benefits associated with the challenged government action and without considering whether the plaintiff even suffers a net monetary loss.

The breadth of the standing theory in this case is compounded by the circuit majority's rationale for a nationwide injunction. The two-judge majority ***27** justified a nationwide injunction by presuming that a geographically limited injunction would be ineffective because eligible beneficiaries of the executive

guidance could potentially relocate to Texas from other areas (Pet. App. 89a). But freedom of travel is a basic fact of life in the United States. The potential for individuals to move to a particular location from other areas exists in almost any case.

If that potential alone authorized standing to obtain a nationwide injunction[40] notwithstanding widespread local harms elsewhere, local governments would be faced with an unworkable standing rule that placed the interests of their residents at risk. A fundamental trait of American life - unrestricted travel - would authorize nationwide injunctions as a matter of course in litigation challenging federal actions. The "migration" theory of nationwide injunctions also disregards the immediate effects of such injunctions on millions of individuals in their current communities. It disserves the public ***28** interest to issue expansive relief based on the theoretical possibility of individuals relocating at some future point, while ignoring present-day harms to millions of local residents in the cities and counties where they reside *right now*.

6. Accepting such a broad standing theory also threatens to move generalized political disputes into federal courts, giving plaintiffs with narrow and confined injuries a mechanism to obtain nationwide injunctions. The most politically controversial subjects are also those most likely to affect the daily lives of individuals. Local governments are especially vulnerable because they provide frontline services arid directly experience the impact when residents are deprived of essential services, protections, and remedies because of a judicial injunction.

Again, the core components of plaintiffs' claimed standing - projected future administrative costs plus the possibility of individuals traveling - could be asserted by a wide array of parties both public and private. Giving a single state (or a single party) standing to effectively veto federal action nationwide on such narrow proof of injury goes far beyond the existing standing principles recognized by this Court.[41]

***29** 7. Finally, if standing to obtain a nationwide injunction is upheld based on projected administrative expenditures plus the possibility of individuals traveling, a huge swath of federal actions with critical effects on local residents would be subject to sweeping injunctive challenges in almost any district court in the nation. From a practical perspective, in order to protect municipal interests, local authorities would have to track lawsuits around the country and seek to file amicus briefs, or even intervene, to ward off harmful injunctions in their home jurisdictions.[42]

City and county attorneys accustomed to practicing only in their local courts would have to appear in faraway federal courts and attempt to present evidence of local harms in litigation involving other parties. Very few municipal law offices have these capabilities, particularly for preliminary injunction proceedings as in this case, ***30** which take place on an expedited timeframe. For all these reasons, devoting scarce resources to stave off overbroad injunctions in far-flung jurisdictions is impractical, if not impossible, for the vast majority of the amici cities and counties.

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In this case, no court below considered the harm to millions of people across thousands of local jurisdictions before issuing a nationwide injunction blocking the guidance. This Court should vacate the injunction because plaintiffs failed to establish standing to justify the scope of the injunction, or prove that the injunction served the public interest and was necessary to remedy cognizable harm to Texas.

***31 CONCLUSION**

The judgment of the Court of Appeals should be reversed.

Footnotes

[*] Counsel of Record.

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this briefs preparation or submission. All counsel of record provided blanket consent for the filing of amicus briefs or received timely notice and consented to the filing of this brief.

[2] See Br. for Amici Curiae the Mayors of New York, Los Angeles, Atlanta, and Eighty-One Additional Mayors *et al.* in Support of Petition for a Writ of Certiorari at 6-18 (No. 15-674); Br. for Amici Curiae the Mayors of New York and Los Angeles and Seventy-One Additional Mayors *et al.* in Support of Appellants at 10-28, No. 15-40238 (5th Cir. Apr. 6, 2015); Br. for Amici Curiae the Mayors of New York and Los Angeles and Thirty-One Additional Mayors *et al.* ir. Opposition to Plaintiffs' Motion for Preliminary Injunction at 6-15, No. 14-cv-254 (S.D. Tex. Jan. 27, 2015), ECF No. 121.

[3] In New York State alone, undocumented immigrants pay an estimated $1.1 billion in state and local taxes per year - supporting public services for all residents regardless of their immigration status. *See* Lisa Christensen Gee *et al., Undocumented Immigrants' State & Local Tax Contributions,* The Inst, of Taxation & Economic Policy, 3 (Feb. 24, 2016), http://bit.ly/21rPuAd.

[4] *Immigration Reform and Control Act of 1982: Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the S. Comm. on the Judiciary,* 97th Cong. 438 (1982) (statement of Deane Dana, Supervisor, Los Angeles County).

[5] *See* Pew Charitable Trusts, *Immigration and Legalization: Roles and Responsibilities of States and Localities,* 12 (Apr. 2014), http://bit.ly/1TvNKVX.

[6] *Implementation of Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary,* 100th Cong. 190 (1988) (statement of Edward I. Koch, Mayor, City of New York); *Continuing Oversight of the Immigration Reform and Control Act of 1986: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law, H. Comm. on the Judiciary,* 100th Cong. 111-115 (1987) (statements of Rep. Hamilton Fish, Jr.. and Rep. Howard L. Berman, Members, Subcomm. on Immigration, Refugees, and Int'l Law).

[7] Marvine Howe, *I.N.S. Ruling Benefits Illegal Immigrant Children,* N.Y. Times, Mar. 26, 1988; *see*

also Amendments to the Immigration Reform and Control Act of 1986: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, 101st Cong. 146-159 (1989) (Statements of John E. Oppenheim, Asst. Dir. for Finance and Administration, Dep't of Social Services, Santa Clara County, and Carlos M. Sosa, Asst. Dir., Dep't of Children's Services of Los Angeles County).

[8] Bernard Weinraub, *State Dept. Reverses Policy on Ethiopian Exiles in U.S.*, N.Y. Times, July 7, 1982; Eric Schmitt, *Clinton Expected to Spare Haitians from Deportation*, N.Y. Times, Dec. 17, 1997; *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 79-81 (1989) (Statement of Barbara Carey, Commissioner, Dade County, Miami).

[9] Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 Pepp. L. Rev. 297, 311 (1989).

[10] USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005), http://1.usa.gov/1TvO0Eq; USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361.

[11] Department of Homeland Security, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies*, 4, 9 (Jan. 4, 2016), http://1.usa.gov/21Nu5Sm.

[12] *Id.* at 3; Press Release, New York City Office of the Mayor, Mayor de Blasio Announces NYC Commission of Human Rights First Such Agency in Major U.S. City to Issue U and T Visa Certifications (Feb. 9, 2016), http://on.nyc.gov/1Qqptwy.

[13] Press Release, The Council of the City of New York, Speaker Quinn, New York City Council Members, Bloomberg Administration and Advocates Announce Funding to Provide New Yorkers Immigration Relief (July 17, 2013), http://on.nyc.gov/1L7mWIE.

[14] Pew Charitable Trusts, *supra* note 5 at 15.

[15] Audrey Singer *et al.*, *Metropolitan Policy Program at Brookings, Local Insights From DACA for Implementing Future Programs for Unauthorized Immigrants* 10, 14 (June 2015), http://brook.gs/1nlvK1O.

[16] Rebecca S. Carson, *Ready or Not? Gauging Midwest Preparations for Executive Action on Immigration*, The Chicago Council on Global Affairs, 8 (Mar. 2015), http://bit.ly/1p4Q61c.

[17] *Opening Minds, Opening Doors, Opening Communities: Cities Leading for Immigrant Integration*, USC Dornsife Center for the Study of Immigrant Integration, 5 (Dec. 15, 2015), http://bit.ly/1Qy7diq.

[18] City of Chicago, Office of New Americans, *Chicago New Americans Plan: Building a Thriving and*

Welcoming City, 33 (Dec. 2012), http://bit.ly/1OVg5gf; New York City Exec. Order No. 124 (Aug. 7, 1989); New York City Exec. Order No. 34 (May 13, 2003); City of Albuquerque Resolution No. 2004-070 (June 7, 2004); City of Austin Resolution (Jan. 30, 1997).

19 Nat'l Immigration Law Center, *Immigration-inclusive State and Local Policies Move Ahead in 2014-15*, Nat'l Immigration Law Center, 14-15 (Dec. 2015), http://bit.ly/1QXSRh0.

20 *Id.* at 13 (describing programs in California counties that provide health services to undocumented immigrants and a pilot program in New York City to use public and private funds to insure a mostly undocumented group).

21 *See, e.g.*, *Opening Minds, Opening Doors, Opening Communities*, *supra* note 17 at 28 (describing strategies to build trust between police and immigrant communities in Tucson, Arizona; Boston, Massachusetts; and Norcross, Georgia); Marie Price, *Cities Welcoming Immigrants: Local Strategies to Attract and Retain Immigrants in U.S. Metropolitan Areas*, International Organization for Migration, 13 (Dec. 2014), http://bit.ly/1QXT5EV (describing New York City Police Department's multilingual outreach program); Austin Police Department, *Robbery Prevention & Immigrant Outreach (Hispanic)*, http://bit.ly/1RMGlza (last visited Mar. 4, 2016); New Orleans Police Department, Operations Manual, *Chapter 41.6.1, Immigration Status* (effective Feb. 28, 2016), available at: http://bit.ly/1p4QJrA.

22 *See* Ruth Milkman *et al.*, *Wage Theft and Workplace Violations in Los Angeles*, UCLA Institute for Research on Labor and Employment, 58 (2014), http://bit.Jy/1p4R65F. For example, in 2014, the Los Angeles City Attorney's Office prosecuted employers for failing to pay more than 50 employees approximately $250,000 in wages and overtime. As a result of this suit, Los Angeles created a hotline to assist residents victimized by wage theft. *See* Los Angeles City Attorney, *Fighting Wage Theft*, http://bit.ly/21bTAe0 (last visited Mar. 4, 2016).

23 Liz Robbins, *New York to Aid Immigrants Amid Stalled National Reforms*, N.Y. Times, Dec. 14, 2015.

24 Press Release, Mayor of Los Angeles, Mayor Garcetti Announces Nationwide Actions as Court Hearings Proceed on Obama's Immigration Reforms (Apr. 17, 2015), http://bit.ly/1p4Rp0a.

25 Houston Immigrant Legal Services Collaborative, http://www.citizenshipcorner.org (last visited Mar. 4, 2016); Carson, *supra* note 16 at 8; City of Boston, Mayor's Office of New Bostonians, http://bit.ly/1Gfh22A (last visited Mar. 4, 2016).

26 Cities for Action, http://bit.ly/1QyRqzY (last visited Mar. 4, 2016).

27 Randy Capps *et al.*, *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, Migration Policy Institute, 17 (Feb. 2016), http://bit.ly/1UNIHQR.

28 Gee, *supra* note 3 at 5.

[29] Capps, *supra* note 27 at 5, 7 (noting that more than two-thirds of parents potentially eligible for relief under the guidance have lived in the United States for at least ten years, and eighty-five percent of their minor children are U.S. citizens).

[30] *See* Max Ehrenfruend, *How having an undocumented parent hurts American children,* Wash. Post, Mar. 4, 2015; Joanna Dreby, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities,* Center for American Progress, 9 (Aug. 2012), http://ampr.gs/1nlxCrC; Capps, *supra* note 27 at 19-20.

[31] *See Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims, Hearing Before the S. Comm. on the Judiciary,* 114th Cong. (July 21, 2015) (statement of Tom Manger, Major Cities Chiefs Association), available at http://bit.ly/1LESmpB.

[32] Marvine Howe, *The Region: Under the New Law, Illegal Aliens Suffer Much in Silence,* N.Y. Times, Nov. 27, 1988.

[33] The district court did not credit the other conclusory allegations of injury made by plaintiffs. Many of plaintiffs' alleged "injuries" in fact rested on unproven claims about increased *local* fiscal burden (Respondents' Br. in Opp. to Petition for a Writ of Certiorari at 12, 17 (No. 15-674)). But plaintiffs do not purport to represent local governments in their jurisdictions, and cannot "seek to enjoin" the 2014 guidance "on the ground that it might cause harm to other parties." *See Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 163 (2010).

[34] The United States notes that Texas is claiming harm from a voluntary state subsidy because Texas could shift the cost of processing license applications to applicants (Pet'rs' Br. at 26). Amici raise standing objections that would apply independently of any voluntary subsidy hurdle.

[35] Gee, *supra* note 3 at 5.

[36] *Id.*

[37] *See* Br. for Amici Curiae the Mayors of New York, Los Angeles, Atlanta, *et al.* in Support of the Petition for a Writ of Certiorari at 15-18.

[38] Raul Hinojosa-Ojeda, *The Economic Benefits of Expanding the Dream: DAPA and DACA Impacts on Los Angeles and California,* UCLA North American Integration & Development Center, 1 (Jan. 26, 2015), http://bit.ly/1TeIxRL.

[39] This Court acknowledged "special solicitude" for states in assessing standing in this context only; nothing in the Court's decisions authorizes lower federal courts to *disregard* the interests of other parties, including other states and local governments, merely because a state acts as plaintiff. *Massachusetts,* 549 U.S. at 520.

40 Although this Court has required that threatened injury be "real, immediate, and direct" as well as "certainly impending" to support standing, *Davis v. FEC*, 554 U.S. 724, 734 (2008); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), plaintiffs never proved that theorized migration into Texas was real and imminent, or even likely to increase the number of future driver's license applications, given the potential for simultaneous migration of individuals and families out of Texas.

41 Standing theories that readily allow single-court nationwide injunctions also place crucial public issues in the hands of one judge - countermanding this Court's caution that when government action is at stake, courts should not "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

42 By divorcing the scope of the injunction from proven injury, the standing theory in this case encourages plaintiffs to strategically forum shop and to deliberately choose courts in forums where the harms of a broad injunction will not be obvious or apparent, and where it will be difficult for adversely affected parties, like local governments, to appear.

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